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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE 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.

APPENDIX
VOLUME IV

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge
Appellate Case No. 2014-000764

THE STATE,

Respondent,

vs.

STEPHANIE IRENE GREENE,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Direct evidence and substantial circumstantial evidence established that Appellant's infant died from respiratory failure caused by morphine intoxication and that the morphine came from Appellant's breast milk.

II.

The trial court did not err in denying the motion for directed verdict where evidence supports that Appellant's infant died under circumstances manifesting an extreme indifference to human life because the dangers of controlled substances are well-known, and Appellant's actions indicated knowledge and a conscious disregard of those dangers.

III.

No double jeopardy violation occurred and the trial court was not required to instruct the jury to choose between multiple charges where neither unlawful neglect of a child nor involuntary manslaughter are lesser included offenses of homicide by child abuse.

IV.

The trial court did not err in following the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts, and following the established procedure is not a due process violation. The allegation of a due process violation is so conclusory as to constitute abandonment on appeal and any purported error is harmless under the facts of this case.

STATEMENT OF THE CASE

Appellant Greene was indicted by the Spartanburg County grand jury for homicide by child abuse, involuntary manslaughter, and unlawful conduct towards a child. Greene was tried by jury on March 31 through April 3, 2014, and found guilty as charged. On April 4, 2014, the Honorable J. Derham Cole, Sr., sentenced Greene to concurrent sentences of twenty years' imprisonment for homicide by child abuse and five years' imprisonment for both unlawful conduct towards a child and involuntary manslaughter.

STATEMENT OF FACTS

On November 13, 2010, Appellant Greene's infant child, Alexis, was already dead when officers and medical personnel responded at approximately 6:00 a.m. The death was the result of intoxication by morphine in combination with other medications. Evidence indicates the morphine and other substances were ingested by Alexis through Greene's breast milk. Due to Greene's efforts to conceal information from her treating physicians, the doctor prescribing the extended release morphine, known as MS Contin, was unaware that Greene was breastfeeding.

The first witness for the State was Terri Carter, an investigator for the Spartanburg County Coroner's Office. Carter and fellow investigator Ellen Holmes responded to a call to Greene's residence concerning the death of an infant on November 13, 2010. By the time Carter arrived at Greene's residence at around six a.m., Greene's infant child, Alexis, was already in the ambulance laying in a stretcher. ROA. p. 29.

Holmes interviewed Greene while Carter inspected the house. Carter noticed Greene was stumbling, slurred her words, spilled her coffee, her eyes were not focused, and she seemed cognitively unsound. Her husband was also present during the interview and needed to tell Greene to sit up. However, as the interview progressed over time, Greene became more alert and focused. Then at a later point in the interview, Greene left the room to use the restroom. Shortly after she returned, Greene's speech became slurred again, and she was clumsy once more. ROA. pp. 29-32.

Walking into the master bedroom, Carter observed numerous pill bottles covering the dresser. Carter published some of the warnings on the labels of these pill bottles that warned about taking the pills while pregnant or breastfeeding. ROA. pp. 36-39. Carter

photographed the bottles, including the front and back of the bottles. Carter cataloged the medications found on the dresser and checked to see the number of pills remaining in each bottle, the dates the prescriptions were made available, and the dosage instructions found on the bottles. These tabulations were memorialized in a pill chart that was admitted into evidence. ROA. pp. 36-42; State's Exhibit No. 60.

Notably, the label for the morphine pills indicated it originally contained 90 pills and the instructions allowed for one pill every eight hours. The prescription was filled on October 20, 2010. Accordingly, eighteen pills should have been left in the bottle, but only twelve remained. The morphine pill bottle was six pills short. ROA. p. 45, p. 51, State's Exhibit Nos. 7, 8, 60.

Even more hydrocodone pills were missing. The prescription was filled November 4, 2010, with ninety pills and was to be taken three times a day. Nine days later, only twenty-seven pills should have been missing, but instead there were forty-eight missing. State's Exhibit No. 60, ROA. pp. 45-46. The pill count was short for Baclofen and Gabapentin as well. ROA. pp. 49-50.

The 911 tape was admitted into evidence. It documents Greene's attempts under the direction of the operator to administer CPR to her daughter. She had trouble remembering how to administer CPR, which is surprising given she is a former nurse. The operator directed her to administer thirty compressions at a time, counting out loud. At times, Greene fails to count out loud and her voice trails off, usually when reaching the mid and upper teens in the count. State's Exhibit No. 33.

Ellen Holmes was the investigator from the Coroner's Office who interviewed Greene and her husband at their home the day Alexis was found dead. She testified she

responded at 6:16 a.m, November 13, 2010. Alexis was already in the back of the EMS vehicle. The baby was dressed in an oversized red turtle neck shirt and wore a wet diaper. Alexis was only six-and-a-half weeks old. Alexis was "extremely" pale and cold to the touch. Mild lividity had set in on her back. ROA. pp. 72-73. Holmes noticed Greene "had a very flat affect, slurred speech, almost incomprehensible at times. Her eyes were very heavy and glassy. . . . [W]hen she walked it was a very unsteady gait." ROA. p. 73, lines 19-22. Holmes testified that Greene seemed intoxicated, but when Holmes asked Greene if she had taken any medications that morning, Greene claimed she had not. ROA. pp. 73-74.

Greene told Holmes that on Wednesday (Alexis died on Friday night/Saturday morning), Alexis was congested, and the doctor's office recommended a vaporizer and baby rub. Alexis was not running a temperature. According to Greene, she woke up at 4:30 a.m. (her husband said 5:00 a.m.) Saturday to find Alexis unresponsive. ROA. pp. 75-76. Greene admitted to Holmes that she used to be a nurse. She told Holmes about breastfeeding times. ROA. p. 76.

The interview was recorded. ROA. p. 74; State's Exhibit No. 34. During the interview, Greene's speech was markedly slurred evidencing her intoxicated state. She explained she called Alexis' physician, Dr. Bridges, on Thursday night about Alexis' upper respiratory system. Dr. Bridges said she did not need to bring Alexis in for a visit. State's Exhibit No. 34 (00:15 – 1:00). After following Dr. Bridges' recommendations to use a vaporizer and baby rub, Alexis seemed to do better. Greene and her husband described Alexis as bright-eyed, and Thursday night, she nursed all night long. Greene told Holmes that Alexis was attached to Greene's breast the whole night, feeding when

needed. State's Exhibit No. 34 (2:00 – 3:30; 9:20 – 9:45). Friday, she remained bright-eyed and they did not notice anything out of the ordinary. Greene breastfed Alexis that evening. State's Exhibit No. 34 (4:45 – 6:15). Greene told Holmes she started supplementing breastfeeding with formula for the last week because Greene's blood pressure spiked and she started taking blood pressure medication. **Greene was concerned about the blood pressure medication affecting Alexis** and she claimed she spoke with the lactation expert about the blood pressure medication and her other medications. State's Exhibit No. 34 (13:45 – 14:30).

This prompted Holmes to ask about the other medications, and Greene slowly and deliberately listed several medications, but MS Contin was not one of them. State's Exhibit No. 34 (15:00 – 17:30). Greene told Holmes she was taking Amlodipine, Baclofen, Vicoprofen, Pristiq, Keppra, and Klonopin. The other medications found, which Greene did not tell Holmes about, were Requip, Durotan, Savella, Soma, alert tabs, and Morphine. ROA. p. 77.

On the extended form provided by Holmes for Greene to fill out, Greene was asked to list medications she took during her pregnancy. Greene listed MS Contin. However, Greene did not tell Holmes that she took MS Contin while breastfeeding. Greene was asked several times about her prescriptions. ROA. pp. 77-78.

RN Elaine Olsen worked at Piedmont Women's Healthcare. She testified that on March 25, 2010, she received a call from Greene informing Nurse Olsen that Greene took a home pregnancy test on March 20, 2010, that tested positive. An appointment was scheduled for April 12, 2010, but Greene never came to the appointment. ROA. pp. 102-103. An ultrasound was also scheduled for March 26, 2010, but Greene did not show up

for that appointment either. ROA. p. 109. Prior to that, Greene was last seen in August 2009. ROA. p. 104.

Vera Andrus is an LPN for Carolina OBGYN. She took down the initial information from Greene on May 10, 2010. This was after Greene took a pregnancy test during a visit to Dr. Nichols on May 7, 2010. Nurse Andrus testified that she asked Greene about the medications Greene was taking. ROA. pp. 83-84, p. 86. Nurse Andrus explained the reason why it was important to ask patients about their medications as follows:

> It's important to know that because we want to know anything that the baby has been exposed to during pregnancy. And if those medications shouldn't be taken during pregnancy, then we need to advise the patient, you know, to have her stop or to stop or to wean off them.

ROA. p. 84, lines 15-19. Nurse Andrus testified that each time a patient comes in, the patient is asked if there are any changes to their medications. ROA. p. 84, lines 20-23.

Nurse Andrus testified she asked Greene for a list of medications she was currently taking or had taken since her last period. Greene told her Soma, Vicoprofen, Clonazepam, Keppra, Lortab, Neurontin, Claritin, Benadryl, Savella, and a prenatal vitamin. ROA. p. 85, lines 6-11. Greene did not tell Nurse Andrus she was taking morphine or MS Contin. Greene also did not tell Nurse Andrus she was taking morphine or MS Contin when she came in for a follow up visit. ROA. p. 85, lines 15-25.

Emile Marks Horne is a labor and delivery nurse who testified for the State. She testified that on September 27, 2010, Greene complained during triage about headaches and intermittent contractions. Greene was treated and then admitted into the hospital. Nurse Horne testified that Greene reported she was taking some medications, but she did

not mention that she took MS Contin, Vicoprofen, or Neurontin. Greene delivered Alexis the next day. She was given Nubain for headaches and Motrin and Percocet at discharge. ROA. pp. 95-98.

SLED forensic toxicologist Quintus Leon Young, II, testified that he performed an initial screen from Alexis' blood and it tested positive for benzodiazepines, cocaine metabolite, opiates and salicylates. ROA. p 127 This prompted Young to perform a more comprehensive screen which indicated Alexis' blood contained .52 mg/liter of morphine. Young testified this was within lethal levels. Young's testing also indicated the blood sample contained .19 mg/liter of acetaminophen, .03 mg/Liter Methorphan, .03 mg/liter Benadryl, .04 mg/L Metherphanan, and .01 mg/L Clonezepam. ROA. pp. 127-130. This prompted further testing. Young received and tested samples of Alexis' brain and liver tissue. These tests further confirmed the lethal ranges of morphine in Alexis' body. The sample from the brain tested at .54 mg/liter, and the liver sample indicated a morphine level of .56 mg/liter. ROA. p. 130; pp. 133-134. Young confirmed that the combination of morphine and other medications could have a synergistic effect on each other. ROA. p. 134.

Dr. Suzanne Kovacs, Greene's primary physician, testified she treated Greene from November 2007 into 2010. Dr. Kovacs testified she never knew Greene was pregnant or had a child and was breastfeeding. Dr. Kovacs adjusted Greene's medications during an April 30, 2010 visit, changing the prescription from a Duragesic patch to a prescription for MS contin. The Duragesic patch was originally prescribed for pain on March 11, 2010. This was based on Greene reporting that the patch was falling off or not working. Dr. Kovacs referred Greene to a gynecologist to have a contraceptive

device known as a Mirena removed. Greene never told Dr. Kovacs that she was pregnant when changing medications. At the time of the April 30 visit, Greene had minimal weight gain from the previous visit: she weighed 133.9 pounds compared to 131 pounds the previous visit. ROA. pp. 149-154.

Dr. Kovacs gave Greene further prescriptions for MS Contin on May 27, 2010, June 28, 2010, July 27, 2010, August 26, 2010, and October 15, 2010. On October 29, 2010, Greene was given a new prescription for Klonopin. ROA. pp. 154-155; p. 157, lines 4-8; p. 160, lines 10-13.

Dr. Kovacs testified she was unaware of any prescriptions that her other doctors, Dr. Kooistra or Dr. Bridges, gave Greene. Dr. Kovacs testified that Greene was supposed to be off the prescriptions from Dr. Kooistra at that point in time. Greene never told Dr. Kovacs about the other doctors' prescriptions. ROA. pp. 156-157. Dr. Kovacs did not know about Dr. Kooistra's prescription for Klonopin from July 3, 2010. Dr. Kovacs also did not know about the August 5, 2010 prescriptions from Dr. Kooistra for Vicophen and Klonopin. ROA. p. 157. Likewise, Dr. Kovacs did not know that Dr. Bridges had prescribed Darvocet on June 30, 2010, July 23, 2010, and August 23, 2010. ROA. pp. 159-160.

Dr. Kovacs testified she would not have prescribed morphine or any pain medication during pregnancy had she known Greene was pregnant. She would have let the gynecologist or obstetrician issue any prescriptions. ROA. p. 157, lines 20-24; p. 162.

Dr. Kovacs did not know Greene was breastfeeding. Dr. Kovacs was unaware that Dr. Kooistra gave Greene a prescription for Baclofen, Vicoprofen, Neuroton, and

Klonopin on November 4, 2010. Dr. Kovacs testified she would not have gave Greene a prescription for Klonopin on October 29, 2010, if she had known that Dr. Kooistra gave Greene another prescription for Klonopin five days later. ROA. pp. 158-159.

Dr. Kovacs did not know Greene was pregnant, had a child, and lost the child until Dr. Kovacs was visited by law enforcement in 2011. ROA. pp. 160-162. Greene did not even tell Dr. Kovacs during visits subsequent to Alexis' death. ROA. p. 161, lines 4-6.

Dr. Kovacs confirmed that in 1998 Greene suffered a car accident and suffered from pelvic pain. She also suffered a skull fracture in the accident and suffered from seizures. ROA. pp. 163-164.

Dr. Carol Kooistra, a neurologist, testified she first saw Greene in 2006 when Greene was pregnant. Greene was referred to her for a seizure disorder. Dr. Kooistra did not prescribe any narcotics during Greene's 2006 pregnancy. She testified she tries to avoid prescribing medications of any sort during pregnancy. She did not prescribe any pain medication during the pregnancy, only medicine for the seizure disorder (Levetiracetam, aka Keppra). ROA. pp. 195-196. Greene signed a narcotic pain medication contract with Dr. Kooistra's office on January 5, 2006. ROA. p. 195, lines 20-25; p. 197, lines 4-7; State's Exhibit No. 59. One of the contract terms is as follows:

> I will not request or accept controlled substance medication from any other physician or individual while I am receiving such medication from my physician at Carolina Neurology. Besides being illegal to do so, it may endanger my health. The only exception is if it is prescribed while I am admitted in the hospital.

ROA. p. 198, lines 4-9; State's Exhibit No. 59. The second page of the contract contains

the relevant laws on the matter – S.C. Code sections 44-53-390 and 395. ROA. p. 198, lines 20-25; State's Exhibit No. 59, page 2. The contract further reads as follows:

> I understand that if I violate any of the above conditions my controlled substance prescriptions and/or treatment at Carolina Neurology may be ended immediately. If the violation involved obtaining controlled substances from another individual as described above or the concomitant use of nonprescription or illicit or illegal drugs I may also be reported to my physician, medical facilities and other appropriate authorities.

ROA. p. 199, lines 8-15, State's Exhibit No. 59. In the contract, Greene indicated she had a college degree and a Bachelor of Science in nursing. ROA. p. 199, lines 16-21.

Dr. Kooistra saw Greene on February 16, 2010, and did not see her again until November 4, 2010. There were two scheduled appointments in between that were no-shows: May 13, 2010, and August 25, 2010. Instead, Greene requested her prescriptions by phone. Dr. Kooistra testified she was willing to issue the prescription on August 5, 2010, anticipating Greene would make her August 25, 2010 appointment. Greene requested a prescription by phone for Soma on October 28, 2010. Dr. Kooistra declined the request since she had not seen Greene since February. Subsequently, Greene came to her November 4, 2010 appointment. At that appointment, Greene did not tell Dr. Kooistra that between visits she became pregnant and gave birth or that she was currently breastfeeding. ROA. pp. 199-201.

When Dr. Kooistra asked why she had not made any of her appointments since February, Greene claimed "she had been in a severe depression and had been unable to leave her house." ROA. p. 201, lines 14-16.

Greene never told Dr. Kooistra she was pregnant in March 2010. However,

Greene continued to receive prescriptions for Vicoprofen, Soma, Klonopin, and Gabapentin. ROA. pp. 201-202. Dr. Kooistra did not know Greene was seeing an OBGYN and did not know that Dr. Kovacs was prescribing MS Contin. ROA. p. 202.

On November 4, 2010, Dr. Kooistra prescribed Klonopin, unaware that Dr. Kovacs wrote a prescription for Klonopin on October 29, 2010. ROA. pp. 205-206. She was unaware Dr. Bridges was also prescribing medicines. ROA. p. 206. On redirect, Dr. Kooistra published the medication guide for MS Contin that advises the following:

> Pregnant or planning to become pregnant. MS Contin may harm your baby, unborn baby. Tell your healthcare provider if you are breastfeeding. MS Contin passes into breast milk and may harm your baby. Tell your healthcare provider if you are taking prescription or over-the-counter medicines, vitamins or herbal supplements.

ROA. p. 221, lines 4-9.

On cross-examination, when Dr. Kooistra was asked: "And the American Academy of Pediatric finds nothing wrong with taking morphine while breastfeeding?" Dr. Kooistra answered, "So I've read." However, Dr. Kooistra clarified that she has not researched the issue closely. ROA. pp. 217-218.

Doctor Kelly Ann Bridges is a doctor with Carolina OBGYN and treated Greene. When she saw Greene for the first time on June 30, 2010, Greene was twenty-six weeks pregnant. Greene advised her she was taking Vicoprofen. She changed Greene's medication to Darvocet because Vicoprofen is dangerous during pregnancy. Greene did not tell Dr. Bridges that she was taking morphine during that visit or the other two visits in August and September 2010. Dr. Bridges testified her office asks what medications the patient is taking at every visit. Greene was given additional prescriptions for

Darvocet on July 23 and August 23, 2010. Dr. Bridges gave prescriptions for Motrin and Percocet on September 29, 2010. ROA. pp. 222-227. Dr. Bridges testified she would not have prescribed Darvocet if she knew Greene was taking morphine and other drugs, "[b]ecause you could potentially overdose on narcotics if you're combining those medications. It could be dangerous." ROA. p. 228, lines 5-11.

Reviewing the office records, Dr. Bridges testified the last time Greene visited Carolina OBGYN was November 4, 2010, for a six week postpartum exam with Dr. John Nichols. Nothing in the records of that visit indicated Greene informed Dr. Nichols that she was taking morphine. ROA. pp. 228-229.

Wendy Bell, an expert in forensic toxicology involving drugs and alcohol, testified for the State. She reviewed SLED toxicologist Quintus Young's report. She testified that every phase of testing in the laboratory is triple-checked to ensure correct results. ROA. p. 239. Bell testified as follows on the accuracy of her laboratory:

> Our laboratory is an accredited laboratory, and as such we have to go into rigorous testing. We have outside agencies come in and look at our protocols and make sure that we're performing them properly and that they're scientifically valid.
>
> We also participate in . . . proficiency testing programs where they send us samples every year and we have to accurately report them. And if not, then we're cited. We have to undergo corrective action to find out why. And we haven't had any of those . . . particularly for opiates. We've been highly reliable in our opiate results.

ROA. p. 252, lines 12-22.

The results of the testing were as follows:

Acetaminophen: .19 mg/Liter;

Diphenhydramine (antihistamine): .03 mg/Liter;

Chlorpheniramine (antihistamine): .06 mg/Liter;

Methorphan DM: .03 mg/Liter;

Methorphanan: .04 mg/Liter;

Morphine: .52 mg/Liter;

Clonazepam (benzodiazepine): .01 mg/Liter.

ROA. pp. 243-245 (emphasis added).

Bell noted there is limited pediatric information on the type of medications involved. ROA. p. 246. Bell testified the effects of drugs like Klonopin with morphine will act together synergistically. She explained the medications "are central nervous system depressants, which means it's going to slow the respiratory system, the breathing, the heart rate. And they can act together synergistically to have affects on each other." ROA. p. 246, lines 8-12.

Bell testified "a lot of these drugs aren't prescribed for children because their livers have not fully developed yet. So it's very, very difficult for them to metabolize this type of medication." ROA. p. 246, lines 19-22. Bell noted, "Children under ten months old cannot tolerate high levels of narcotics" and noted a lot of literature supports that proposition. ROA. p. 247, lines 10-15.

Investigator William Robert Gary testified he responded to Greene's house on the day of the incident. Alexis was in the ambulance parked in front of the house. Investigator Gary passed Greene sitting on the porch, unaware she was the victim's mother. Greene "was sitting there smoking a cigarette, drinking coffee." ROA. p. 272, lines 11-19.

Investigator Gary checked on the victim. When he returned inside the house, the

investigators with the coroner's office had already begun the interview. Investigator Gary noted Greene was slow in her speech. "Everything she was doing was slow." ROA. p. 273, lines 20-22. Investigator Gary testified Greene appeared to be under the influence of something. Greene denied taking any medications since she found Alexis. ROA. pp. 273-274.

Investigator Gary interviewed Greene on June 24, 2011. Investigator Gary spoke with Greene about her omitting information from her doctors about either her pregnancy or the drugs she was taking, Greene claimed they were covering themselves by not documenting it. Greene claimed her sister dropped some medication and claimed one of children could have picked up the pills and given it to the baby. Later in the interview, Investigator Gary inquired if the reason she did not tell doctors about being pregnant and breastfeeding was because of her morphine addiction and the awareness that the doctors would not give her the medication if they knew. Her response was the only time she showed emotion during the interview, and she answered "that was part of it." ROA. pp. 279-280; p. 288 (direct quote, ROA. p. 280, lines 22-23).

Greene claimed she was not taking the pills while she was pregnant, but filled the prescriptions because her insurance covered it. She claimed her husband locked up the medication and gave her three days' worth of medication at a time. Of course, Investigator Gary was skeptical about this since he had seen the pill bottles sitting on the dresser. In response, Greene said that by that point, her husband trusted her enough to leave them out, but still kept some locked up. ROA. p. 281.

Investigator Gary testified as follows about his conversation with her about breastfeeding Alexis:

> She said she supplemented a good bit with formula and that she didn't breastfeed a lot, you know, which hearing her talk about before with her talk about that there'd be nights that Alexis would just – she'd lay in the bed and she'd stay latched on all night and feed as she wanted to, to me that's not – it was – if you're doing that, I don't know how you're not breastfeeding a lot.

ROA. p. 283, lines 14-20. Investigator Gary testified the investigators confronted Greene about how she filled out the lists of medications she was on at the doctors' offices and omitted morphine, contradicting her claim that they removed or omitted records themselves. Toward the end of the interview, Greene broke down crying and admitted they would stop prescribing morphine to her if they knew about her pregnancy or other medications. ROA. pp. 285-286. Greene admitted to Investigator Gary that she and her husband discussed the possibility that Alexis' death could be from the drugs. Greene admitted the morphine levels in the coroner's report were high. ROA. pp. 286-287.

On cross-examination, Investigator Gary agreed that Greene claimed she spoke with a lactation nurse at the hospital, however, there were no notes in the hospital records. Greene also claimed to have researched the issue online on her computer. ROA. p. 289.

Kaushik Kotecha, who at the time of Alexis' death was employed by the State Bureau of Drug Control, part of the Department of Health and Environmental Control (DHEC), testified. Without objection, he was qualified as an expert in the field of pharmacy. Following time as a uniformed police officer, Kotecha went to pharmacy school and has been a licensed pharmacist for twenty-five years. His duties with DHEC included both law enforcement and regulatory enforcement of drug control laws. ROA. pp. 293-296.

Kotecha testified as follows about morphine: "The problem with morphine of course you have – I usually when I was practicing pharmacy, I would tell them that this is very strong drug. . . . Sometimes you'd be unstable on your feet." ROA. p. 301, lines 10-15. Kotecha testified that MS Contin is a continuous release form of morphine. ROA. p. 302. Looking at State's Exhibit No. 7, the bottle for morphine sulfate ER, Kotecha testified that it is an extended release morphine. When asked if he would recommend morphine sulfate ER for someone who was breastfeeding, Kotecha responded, "I certainly would have had additional questions and I would want to talk to the doctor if I knew they were breastfeeding." ROA. p. 303, lines 17-19. Likewise, Kotecha indicated that if he was aware someone was being prescribed medication containing Hydrocodone while breast feeding, he would double check with the prescribing physician. ROA. pp. 303-304.

Kotecha published to the jury the warnings contained on the pill bottle photographed in State's Exhibit Nos. 9 and 10, which advise: "DO NOT TAKE MEDICATION IN 3RD TRIMESTER OF PREGNANCY." ROA. p. 304. The warnings for Clonezapam advise in part as follows: "Do not use if pregnant or suspect you are pregnant or breastfeeding." ROA. p. 304, lines 20-23; State's Exhibit No. 12. The warnings on a bottle of Keppra pills likewise warns about discussing use with a doctor if pregnant. ROA. p. 305; State's Exhibit No. 14. Another drug found was Ropinirole, used for restless leg syndrome. It likewise warns that breastfeeding is not recommended while using the drug. ROA. p. 306, State's Exhibit No. 20.

Kotecha explained about how substances may have a synergistic effect on each other. Kotecha testified that the combination of all these drugs together could cause a

baby to stop breathing. Kotecha noted that the hydrocodone pills were originally prescribed for 90 pills on November 4, 2010, and on November 13, 2010, there were only 42 remaining. ROA. p. 310.

Referring to the pill chart prepared by the Coroner's investigators, he noted that if she took the appropriate doses of morphine since the prescription was filled on October 20, 2010, only seventy-two pills should have been taken. However, only twelve pills remained. ROA. pp. 309-310. Eighteen pills should have been remaining, so six pills were missing.

Kotecha was present during the June 2011 interview. During the interview, Greene admitted she was addicted to pain killers. She admitted she lied to doctors to avoid losing her prescriptions. Greene was upset and wanted to know what was going to happen to her. ROA. pp. 311-312.

On cross-examination, Kotecha admitted that with the exception of one prescription, all the prescriptions were from one pharmacy, the Inman CVS. ROA. pp. 315-316. On redirect examination, Kotecha noted that Greene used two different names to fill her prescriptions, Stephanie Greene and Stephanie Neet. ROA. p. 326. Greene said she used Rite-Aid once because it had a drive-thru. That prescription was the October 20, 2010 prescription for MS Contin. ROA. pp. 326-327.

Dr. David Eagerton testified as an expert in forensic toxicology and pharmacology. Dr. Eagerton is an assistant professor at the Presbyterian College School of Pharmacy. Dr. Eagerton received a Ph.D. in pharmacology in 1992. Dr. Eagerton was the chief forensic toxicologist with SLED for approximately twelve years until he retired in 2009 and became a professor. Dr. Eagerton had testified as a forensic toxicologist and

pharmacologist between eighty and a hundred times by the time of trial. Dr. Eagerton was qualified as an expert without objection. ROA. pp. 329-331.

Dr. Eagerton testified that Alexis had toxic levels of morphine. He also noted Clonazepam or Klonopin is a benzodiazepine that is very potent. Dr. Eagerton testified these medicines can have a synergistic effect on each other. ROA. pp. 332-336.

Dr. Eagerton published FDA warnings about MS Contin from the Medication Guide, approved by the U.S. Food and Drug Administration, which provides the following warnings:

> **Tell your healthcare provider if you are:**
> - **pregnant or planning to become pregnant.** MS Contin may harm your unborn baby.
> - **breastfeeding.** MS Contin passes into the breast milk and may harm your baby.

States Exhibit No. 67; ROA. p. 340, line 20 – p. 341, line 1 (emphasis in original).

Dr. Eagerton noted that while studies indicated treatment with morphine for short periods of time for acute pain might not be dangerous, the studies, even prior to 2010-2011, did not recommend use of the sustained release morphine products. ROA. pp. 343-344. Specifically, Dr. Eagerton noted:

> [I]f you look at the fine print they – they talk about sustained release and . . . continued use of these products. It . . . drops it down to an . . . uncertain level or an unsafe level, and they don't . . . recommend it even prior to these studies.

ROA. p. 344, lines 6-10.

Dr. Eagerton noted that infants livers are not fully developed, specifying on cross-examination that they do not reach adult level liver function until towards six months of

age. ROA. pp. 346-347; p. 386.

Dr. Eagerton testified that "the lethargy, maybe trouble breathing. . . . I don't know how to interpret that exactly, but . . . there were some symptoms that were conveyed that were consistent with morphine toxicity." ROA. p. 347, lines 15-18. "[I]f you can't metabolize it, then the drug may build up in your body and you become – you have a toxic dose whenever you wouldn't normally have a [toxic] dose." ROA. p. 347, line 2 – p. 348, line 2.

Dr. Eagerton agreed on cross-examination that a 2000 article listed morphine as safe to take while breastfeeding. ROA. p. 361, lines 4-7. Dr. Eagerton testified as follows on cross-examination:

> Q: Okay. But you don't have any basis for saying that it came through breast milk.
>
> A: Had to get into the baby somehow.
>
> Q: That's not my question. You have no basis for saying that number came into the baby through breast milk.
>
> A: I don't know that I'd say I have no basis. I'd say the basis is the mother is taking MS Contin, which is morphine. She is breastfeeding. We know that based on the literature we've already talked about that at least small amounts certainly do pass through into the breast milk. . . .

ROA. p. 369, line 16 – p. 370, line 2. Counsel conceded "some of it." ROA. p. 370, line 3. Commenting on the amount of morphine necessary to kill someone, Dr. Eagerton testified as follows:

> [W]e in forensic toxicology aren't concerned with the amount that people can survive on. We're – we're concerned with the amount it takes to kill one person. . . . And people can die at much lower levels, and people can survive. I can't really predict that. I can only say as a

> forensic toxicologist that this is a lethal level or this is consistent with a lethal level, this is consistent with a toxic level. I can't tell you specifically what levels somebody's going to survive with and what level's going to kill somebody.

ROA. p. 371, lines 8-19.

Dr. Eagerton talked about the blood-brain barrier on cross-examination, agreeing with defense counsel that it keeps some drugs from getting to the brain. Dr. Eagerton agreed with defense counsel that heroin and oxycontin pass through the blood-brain barrier quicker than morphine, but noted that morphine passes through the blood-brain barrier in a pretty good concentration. ROA. pp. 379-380.

Dr. Eagerton noted that taking morphine **acutely** while breastfeeding may be perceived as acceptable because "you don't get that good penetration into this, into the brain." ROA. p. 382, lines 2-10. But "[o]nce it gets in the brain it – there are receptors there. These – these opioid receptors there that are responsible for the actions of the drug are going to bind to it, and it's going to stay there longer than just regular blood." ROA. p. 382, lines 11-15. Speaking further on the significance of morphine levels in the brain, Dr. Eagerton commented as follows:

> So the other thing is whenever you take a . . . portion of brain, obviously, from a dead person, you can measure levels of drugs throughout different areas of the brain. You're going to get different levels.
>
> So the levels of the drug in the brain are not that impressive to me. Specifically to me my interpretation of those is that they're just consistent with a large amount of morphine being in that – this little baby's body. . . . So that's consistent with that high overdose level, lethal level, of morphine.

ROA. p. 382, line 21 – p. 383, line 5.

Dr. Eagerton was asked to consider other modes of delivery than breast milk for explaining the morphine level in Alexis. Dr. Eagerton noted the lack of needle marks on Alexis and discounted the possibility of morphine being injected. Dr. Eagerton also discounted the possibility that the baby swallowed the pill, agreeing there would likely be pill remnants in her stomach. Although the pill could be crushed up, Dr. Eagerton opined this would have killed the baby in thirty to sixty minutes. Instead, Dr. Eagerton opined: "I think what we see here is – is more of a chronic type exposure, which is more consistent with through the breast milk. Or it could be some combination of both. I don't know." ROA. pp. 384-385 (direct quote, p. 385, lines 8-11). Defense counsel claimed in his question posed to Dr. Eagerton that no literature supported his opinion. Dr. Eagerton disagreed, explaining the following:

> I believe that if we take the reports that we have where it comes through in small levels that means if it – if you're getting a small dose of it you gotta to take it longer over a period of time.
>
> If we've got evidence that the – these little babies, this six-and-a-half-week-old – probably can't metabolize and get rid of the morphine as fast, so therefore it's going to build up in its body. So that would suggest the more chronic type exposure. And I believe that's what the literature that we've already gone over – in my opinion that's what it points to.
>
> Does it come out and out and say that? No. I don't believe I've seen any literature that says that. But for everything there's got to be a first.

ROA. p. 385, line 16 – p. 386, line 4.

On redirect, Dr. Eagerton published a portion of LactMed pertaining to the use of morphine, as follows:

> Epidural morphine given to mothers for postcesarean section analgesia results in trivial amount of

> morphine in their colostrum and milk. Intravenous or oral doses of maternal morphine in the immediate postpartum period results in higher milk levels than with epidural morphine. . . . Maternal use of oral narcotics during breastfeeding can cause infant drowsiness, central nervous system depression and even death.

ROA. p. 390, line 18 – p. 391, line 1.

Dr. John David Wren was admitted as an expert in forensic pathology. He performed the autopsy on Alexis. At the time of the autopsy, he observed that Alexis was normally developed and of normal weight. Some rigor mortis and liver mortis had set in. Dr. Wren found no evidence of trauma. Dr. Wren testified that Alexis did not have any of the tell-tale signs of SIDS. He observed her lung was congested. Dr. Wren observed nothing physically wrong with Alexis. ROA. pp. 401-415.

Dr. Wren testified about the drug levels in Alexis' blood. Acetaminophen levels were .19 mg/Liter, which was in the high end of therapeutic levels. ROA. pp. 412-414. Chlorpheniramine levels were .06 mg/Liter. Dr. Wren testified that therapeutic levels are .01 to .04 mg/Liter. So the Chlorpheniramine level was above therapeutic levels and needed to be taken into account. ROA. p. 417. The dextromethorphan metabolite was .04 mg/Liter and therapeutic levels are .007 to .021 mg/Liter, indicating Alexis had elevated levels of this drug. As to morphine, the level was .52 mg/Liter. Dr. Wren testified therapeutic levels were .001 to .200 mg/Liter according to his references. Toxic levels would be from .30 to 2.5 mg/Liter. Lethal levels are from as low as .20 mg/Liter to 7.2 mg/Liter. ROA. p. 418. Dr. Wren testified there are reported deaths with levels as low as .20 mg/Liter. ROA. p. 418.

Dr. Wren confirmed, "It's well known that infants and children do react

differently to medications than adults, and it takes some – infants are much more susceptible to any drugs than others. . . . They don't need as much and they're more susceptible to effects of them." ROA. p. 420, lines 14-20.

Dr. Wren concluded that Alexis died as a result of respiratory insufficiency secondary to synergistic drug intoxication. Dr. Wren explained, "I could just as easily have said morphine intoxication, lawyers like to split hairs, and so I included them all." ROA. p. 419, lines 18-22. Dr. Wren noted "all of these drugs essentially lead to respiratory depression." ROA. p 419, lines 15-16.

Dr. Wren also concluded the morphine was administered orally, as there were no signs of injection. ROA. pp. 420-421. As to the determination of blood levels, Dr. Wren noted lethal levels were found in the blood, brain, and liver, and he noted the level and sort of testing employed by SLED was "kind of hard to mess up [by] an experienced operator." ROA. p. 422, lines 6-8.

The defense presented Dr. Steven Bernard Karch as an expert in the effect of drugs on the human body. He claims to have written over a hundred peer reviewed articles, but he has not performed an autopsy in forty-five years. He earned an undergraduate degree from Brown University, then studied at Stanford, but left before earning any degree to go to medical school at Tulane. After getting his M.D., he did a fellowship at the Royal London Hospital in neuropathology. From there he worked at the only heart transplant lab in the world during the 1980's and 1990's. Dr. Karch then worked one day a week for the San Francisco Medical Examiner for roughly a decade. Dr. Karch authored the "Pathology of Drug Abuse, Fourth Edition." ROA. pp. 471-478.

Dr. Karch disagreed that a lethal amount of morphine could pass through breast

milk, although he agreed a toxic level sufficient to make a child sick could be achieved. He testified that he thought it has happened. Dr. Karch claimed the American Academy of Pediatrics did not even list morphine as being dangerous for women who are breastfeeding. ROA. pp. 478-480. In contrast to other witnesses, Dr. Karch claimed a one-month-old baby would already have developed an 80% normal metabolism rate.[1] ROA. p. 483.

However, Dr. Karch noted the American Academy of Pediatrics recommended starting with nonsteroidal medications like aspirin or ibuprofen and not starting with morphine. ROA. p. 480, lines 5-10. **Dr. Karch admitted a baby could have achieved a morphine level as high as .52 mg/Liter from breast milk,** noting a case where a baby had a blood level of 84 nanograms from a mother on morphine. That baby did not happen to die. ROA. pp. 490-491.

Dr. Karch confirmed "the mode of death for morphine is to stop respiration." ROA. p. 496, lines 20-21. Dr. Karch testified as follows on the cause of death:

> Q: All right. Yet you said in this case where 52 mg – nanograms of morphine – you would believe that that could have been a cause of death if that number is accurate.
>
> A: If the number is accurate and if the baby was intolerant. I don't – I have no way of proving what the mother's drug usage was or was not during that period.

ROA. p. 497, lines 5-10.

Dr. Karch testified he did not know of any medical group that advises against

[1] See The Transfer of Drugs and Therapeutics Into Human Breast Milk: An Update on Selected Topics, 132, PEDIATRICS, Official Journal of the American Academy of Pediatrics, e796, e801 (September 2013) ("Clearance of morphine is decreased in infants younger than 1 month and approaches 80% of adult values by 6 months of age.").

taking morphine while breastfeeding because of dangers to the child. ROA. p. 499, lines 22-25. Dr. Karch testified as follows on what physical traits a baby would develop if the baby was slowly building up morphine in their system:

> The baby would start to go south. It wouldn't nurse. It would be lethargic. Its color might not be too good.
>
> The best example I know of – and even though it's codeine and not morphine, or initially, but codeine turned into morphine – was the baby went off its feed and the mother was concerned that the baby just wouldn't take the breast milk.

ROA. p. 501, lines 17-23. In that case, the child was being purely breastfed. The child would not gain weight and was taken to the doctors. ROA. p. 502. Based on that case, Dr. Karch testified that if a baby was on morphine, he would expect the baby would not gain weight. ROA. p. 505, lines 8-19.

Holmes was recalled as a reply witness for the State. She testified that the medical records indicated Alexis was 7 lbs., 2 oz. when born. In her second week, Alexis weighed 7 lbs., 11 oz. At the time of death, Alexis only weighed 7 lbs., 6 oz. So Alexis lost five ounces since her two week check-up. Holmes also testified that when she saw Alexis the day she died, she was "extremely pale, very pale, all over." ROA. p. 511, lines 11-15.

The weight loss is confirmed by Greene's interview with the Coroner's Office where she admits that she had noticed Alexis had lost a lot of weight and was going to ask the doctor to weigh Alexis at an upcoming visit. State's Exhibit No. 34 (circa 11:30).

ARGUMENT

I.

Direct evidence and substantial circumstantial evidence established that Appellant's infant died from respiratory insufficiency caused by morphine intoxication and that the morphine came from Appellant's breast milk.

Greene argues that the trial court should have granted a directed verdict on all three charges because there was insufficient evidence that a lethal dose of morphine (and other narcotics) passed through Greene's breast milk and killed Alexis. Direct evidence establishes Greene was taking morphine and other drugs likely to have a synergistic effect in concert with MS Contin. Direct evidence establishes Greene was breastfeeding Alexis. Direct evidence also establishes Alexis had a lethal dose of morphine in her system when she died. Scientific evidence establishes that morphine can pass through breast milk and that infants lack the capacity to process morphine in their system. Greene's expert, Dr. Karch, agreed that levels of morphine as high as .52 mg/Liter, the amount found in Alexis, could pass through breastmilk. Further, to the extent it may be argued that cause and effect is not supported by direct evidence, abundant circumstantial evidence supports the verdicts on all three charges.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to

the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001). The appellate court may reverse the trial court's denial of a motion for a directed verdict only if there is **no** evidence to support the trial court's ruling. State v. Lindsey, 355 S.C. 15, 20, 583 S.E.2d 740, 742 (2003) (emphasis added).

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

The United States Supreme Court noted the following:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Jackson, at 319 (emphasis in original).

"Direct evidence is based on personal knowledge or observation and . . . , *if true* proves a fact without inference or presumption." State v. Phillips, 411 S.C. 124, 133, 767 S.E.2d 444, 448 (Ct. App. 2014) (citation and internal quotation marks omitted, emphasis in original). In the instant case, Greene admitted to investigators she was addicted to pain killers, including morphine, and she was breastfeeding Alexis. A bottle of nearly empty MS Contin prescribed for her was found on her dresser. Dr. Kovacs testified she gave

Greene this prescription (under false pretenses). Forensic testing established Alexis had toxic levels of morphine in her system when she died. These facts are all clearly established by direct evidence and when considered with unrefuted scientific evidence that morphine will pass through breast milk, the evidence sufficiently establishes cause of death. So contrary to Greene's arguments, this is not a purely circumstantial evidence case. Id. (noting "the existence of 'any direct evidence' proving the defendant's guilt requires the denial of a directed verdict motion.").

In any event, the circumstantial evidence itself is substantial, and in conjunction with the aforementioned direct evidence, easily provides sufficient evidence for the court to deny directed verdict. "Circumstantial evidence . . . is proof of a chain of facts and circumstances from which the existence of a separate fact may be inferred." Id. The United States Supreme Court made the following observation concerning circumstantial evidence:

> Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1954) *cited with approval in* Jackson, at 317 n.9.

Our Supreme Court recently articulated the following concerning the standard of review for purely circumstantial evidence cases:

> The trial court should grant the directed verdict motion

> when the evidence merely raises a suspicion that the accused is guilty as suspicion implies a belief or opinion as to the guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (quoting State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004) (citations and internal quotations omitted)); see also State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

In the instant case, direct and circumstantial evidence reasonably indicates Greene was addicted to morphine and other pain killers. She was taking numerous medications, keeping all her doctors in the dark about the full extent of her medications. She was breastfeeding Alexis. Medical testimony establishes that morphine and other medications pass through breast milk. Alexis was found with not only lethal amounts of morphine in her system, but also varying amounts of several other medications that Greene was taking. The presence of numerous other substances in Alexis is strong substantial circumstantial evidence establishing that the lethal levels of morphine passed through Greene's breast milk to Alexis rather than some already difficult to believe theory of accidental ingestion or forced ingestion.

The State presented expert testimony establishing that a child of Alexis' age will have difficulty metabolizing morphine because the liver will not be fully developed yet. Dr. Eagerton testified that some of the respiratory issues reported were consistent with morphine toxicity. Dr. Eagerton opined that the evidence was most consistent with a

chronic exposure to morphine. Dr. Wren concluded the death was the result of respiratory insufficiency secondary to synergistic drug intoxication, and noted "all of these drugs essentially lead to respiratory depression." ROA. p. 419 (direct quote, ROA. p. 419, lines 15-16). Greene's own expert, Dr. Karch, testified he would expect an infant to not nurse and have difficulty gaining weight if the infant was slowly building up morphine in her system. This was consistent with the weight loss reported by Greene and confirmed by evidence establishing that Alexis lost five ounces since her second-week checkup. Dr. Karch also admitted that the levels of morphine as high as .52 mg/Liter can be passed through to a child through breast milk.

Accordingly, abundant direct and circumstantial evidence establishes the cause of death was morphine and other substances which passed through Greene's breast milk to Alexis, who died of respiratory insufficiency due to chronic, lethal levels of morphine in conjunction with other narcotics. The trial court did not err in denying the motions for directed verdict.

Note that unlawful conduct towards a child does not require the death of a child. Under the offense of unlawful conduct towards a child, the following is proscribed:

> (A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
>
> (1) Place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety; or
>
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
>
> (3) wilfully abandon the child.

S.C. Code Ann. § 63-5-70. In the instant case, evidence proves that her ingestion of numerous pain killers, including MS Contin, without informed supervision by a physician constituted unlawful conduct towards a child as it exposed Alexis by breastmilk to an unreasonable risk of harm to her health, and as events proved, to her life. The danger could have been avoided by disclosure of her medications and appropriate preventive steps by the trained physicians; or Greene could have used formula to feed Alexis while Greene fed her addiction. Accordingly, even if this Court were to determine causation was not proved despite the aforementioned direct and substantial circumstantial evidence presented, evidence supports the unlawful conduct charge so as to deny directed verdict on that charge.

II.

The trial court did not err in denying the motion for directed verdict where evidence supports that Appellant's infant died under circumstances manifesting an extreme indifference to human life because the dangers of controlled substances are well-known, and where Appellant's actions demonstrated knowledge of the dangers and a conscious disregard of those dangers.

Largely depending on her own view of the evidence, Greene argues that the trial court erred in denying directed verdict because there was no evidence her infant's death occurred under circumstances manifesting an extreme indifference to human life. However, the record is replete with instances of Greene actively avoiding informed supervision by physicians – she obtained several pain killers, especially morphine, without her prescribing physicians being aware she was pregnant and later breastfeeding. The dangers inherent in using controlled substances without supervision of a physician are well-known and the potential to harm a breastfeeding child when the mother is using medications is also well-known. Evidence supports the trial court's denial of directed verdict.

A person is guilty of homicide by child abuse if (1) the person causes the death of a child while committing child abuse or neglect; and (2) the death occurs "under circumstances manifesting an extreme indifference to human life." S.C. Code Ann. §16-3-85(A)(1). "Child abuse or neglect" is defined under the homicide by child abuse statute as "an act or omission by any person which causes harm to the child's physical health or welfare[.]" S.C. Code Ann. § 16-3-85(B)(1).

"To prove a defendant guilty of homicide by child abuse, the State must

demonstrate 'the death occur[red] under circumstances manifesting an extreme indifference to human life.'" State v. Phillips, 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014) (quoting section 16-3-85). "Extreme indifference is in the nature of a culpable mental state and therefore is akin to intent." State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002) (citation, ellipses, and internal quotation marks omitted). "In this state, indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care." Id. 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 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)).

In the instant case, Greene went to great lengths to maintain her prescriptions to narcotics, including morphine, during her pregnancy and while she was breastfeeding because, as she confessed, she was afraid she would lose these prescriptions. During the interview the day Alexis died, Greene disclosed only some of her medications and critically omitted mentioning morphine, indicating an awareness of wrongdoing. Greene also admitted that after Alexis' death she and her husband discussed whether breastfeeding Alexis while on morphine could have caused the death. While Greene attempts to minimize her conduct by claiming she was not doctor shopping because she mainly used only one pharmacy, she kept each doctor in the dark about either her

pregnancy or breastfeeding, and about the prescriptions from the other doctors. She used two different names to pick up her prescriptions. Greene cancelled medical appointments so Dr. Kovacs and Dr. Kooistra would not learn she was pregnant. She omitted morphine from the list of medications she provided to nurses and never made Dr. Bridges aware she was taking morphine and other pain medications while she was pregnant or at her post-partum appointment. Greene was aware of the dangers of medication during breastfeeding generally – she claims the reason she used formula was to minimize the possible danger to Alexis from Greene's blood pressure medicine. In this same interview, she omits mentioning she was taking morphine, although she lists several other medications. "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." State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976).

Greene also misses the mark in claiming medical experts have not found it dangerous for mothers breastfeeding their children while taking morphine. Dr. Eagerton noted the distinction Greene fails to acknowledge in her brief between short term use of morphine for acute treatment of pain and long term use of sustained release morphine.[2] Dr. Eagerton testified that even prior to 2010-2011, long term use of morphine during breastfeeding was not recommended and was viewed as unsafe or uncertain. ROA. p. 344, lines 6-10.

The risks of using morphine, or more precisely, multiple pain killers and other controlled substances while breastfeeding without informed supervision by physicians is

[2] Bell noted mothers dosed with MS Contin and had their breast milk tested in studies were not chronic users, meaning they did not fit with the profile of Greene, an obvious chronic user. ROA. p. 257, lines 7-19.

obvious to a layperson. Phillips observed the following: "Federal law requires a patient to obtain a prescription for medication that cannot be bought over-the-counter because these medications are 'not safe for use except under the supervision of a practitioner licensed by law to administer such drug[s].'" Phillips, 411 S.C. at 136, 767 S.E.2d at 450 (quoting 21 U.S.C. § 353(b)(1)(A) (2013)). "By any standard the delivery of a controlled substance to a child, not under the direction of a physician in regard to dosage, is an act that is inherently dangerous." State v. Taylor, 626 A.2d 201, 202 (R.I. 1993).

Further, Greene's self-serving claims to interviewers that she researched the risks of her medications helps prove rather than diminish her reckless mental state. Avoiding the supervision of a physician and relying on her own rationale in the haze of addiction does not remove her mental culpability leading to her own infant's death. Further, evidence strongly suggests that Greene was taking more than the prescribed amount of morphine and other narcotics that contributed towards Alexis' death. See 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)).

"A parent has a specific and undelegable duty to serve the best interests of her child and should make every effort not to knowingly place her child in harm's way." Jarrell, 350 S.C. at 99, 564 S.E.2d at 367. Even if the effects of the use of controlled substances by a breast-feeding mother on her child may not be precisely known, their potential harm is something to which the public is well aware. See Whitner v. State, 328

S.C. 1, 10, 492 S.E.2d 777, 782 (1997) ("Although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child."). This is why the law-abiding population, conscious of their duty to their children, would not take medications while breastfeeding without supervision from their physicians. Here, Greene took numerous medications based on prescriptions obtained under false pretenses, and she used more than the significant prescribed amounts, all while breastfeeding her child. She was aware of the dangers of controlled substances to Alexis; if believed, it was her concern about blood pressure medication that caused her to resort to formula (Apparently, it was not Alexis' disquieting loss of weight).

Just as the public is aware of the danger of a mother's crack use to an unborn child, the general public is also certainly aware that taking medications while breastfeeding poses the risk of harm to a child. In the instant case, the record is replete with actions and admissions by Greene that shows she attempted to use morphine and other pain killers without informed supervision by doctors and pharmacists in disregard of the very obvious dangers resulting from a lack of supervision. Her past experience as a nurse makes her actions even more egregious, as she should have been on notice of the significant risk she put Alexis in due to her unsupervised intake of multiple pain killers. This is sufficient proof of extreme indifference to survive a motion for directed verdict. 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)). Accordingly, the trial court did not err.

III.

No double jeopardy violation occurred, and the trial court was not required to instruct the jury to choose between multiple charges where neither unlawful neglect of a child nor involuntary manslaughter are lesser included offenses of homicide by child abuse.

Greene alleges the jury should have been instructed that it could only convict on one of the three charges because in Greene's view, the three charges constitute double jeopardy. Contrary to Greene's position, the familiar "same elements" test is the proper test and conviction for the three charges did not constitute double jeopardy.

"The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense." State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). The proper manner of determining if two charges constitutes the same offense is application of the "same elements" test under Blockburger v. United States, 284 U.S. 299 (1932).

Our United States Supreme Court has declared:

> If the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. In subsequent applications of the [Blockburger] test, we have often concluded that two different statutes define the same offense, typically because one is a lesser included offense of the other.

Rutledge v. United States, 517 U.S. 292, 298 (1996) (internal quotation marks and citations omitted); see also State v. Norton, 286 S.C. 95, 332 S.E.2d 531 (1985) (noting that when a single act combines requisite elements of two distinct offenses, the defendant may be indicted and punished for each offense). Ultimately, the existence of double

jeopardy depends on whether the legislature intended to create one crime or more than one. Missouri v. Hunter, 459 U.S. 359, 365-68 (1983).

Greene asserts that Blockburger is controlling, but interprets the United States Supreme Court decisions to be more than the simple "same elements" test. Instead, Greene claims the test is whether the multiple offenses are proved by the same evidence. Greene relies heavily on Rutledge to advance this assertion, but contrary to Greene's analysis, Rutledge does not depart from the same elements test.

In Rutledge, the court was determining whether conspiracy to distribute a controlled substance was a lesser included offense of the continuing criminal enterprise offense (CCE). The Rutledge court noted that conspiracy required an agreement while CCE required the charged to act "in concert" with five or more individuals in a supervisory position within the enterprise. Id. at 298. The Rutledge court noted the Government's argument, that "in concert" was a different element than the agreement required to prove conspiracy, was previously rejected in a plurality opinion in Jeffers v. United States, 432 U.S. 137 (1977). Id. at 298-99. Deciding to resolve any lingering doubt, the Rutledge court declared as follows: "For the reasons set forth in Jeffers, and particularly because the plain meaning of the phrase 'in concert' signifies mutual agreement in a common plan or enterprise, we hold that **this element of the CCE offense requires proof of a conspiracy** that would also violate [the conspiracy statute]." Id. at 300. In other words, the greater offense, CCE, required proof of an agreement, same as the lesser offense of conspiracy. Therefore, Rutledge did apply the same elements test.

It seems that in reality, Greene wants to apply what amounts to the "same conduct" test abandoned in Grady v. Corbin, 495 U.S. 508 (1990) that was overruled by

United States v. Dixon, 509 U.S. 688 (1993). This Court should decline to do so.

Applying the same elements test, our Supreme Court found that involuntary manslaughter is not a lesser included offense of homicide by child abuse. McKnight v. State, 378 S.C. 33, 51-52, 661 S.E.2d 354, 363 (2008).

Further, unlawful conduct towards a child is not a lesser included offense of homicide by child abuse. A person commits homicide by child abuse, as a principle, 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." S.C. Code §16-3-85.

For purposes of the statute, the following definitions are set out:

> (1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;
>
> (2) "harm" 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 physical injury or condition resulting in death; or
>
> (c) abandons the child resulting in the child's death.

Under the offense of unlawful conduct towards a child, the following is proscribed:

> (A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:

(4) Place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety; or

(5) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or

(6) wilfully abandon the child.

S.C. Code Ann. § 63-5-70.

Greene does not assert that one offense is a lesser included offenses of the other, and it is clear that they each require elements the other does not. Homicide by child abuse occurs only when a child dies, while unlawful conduct towards a child does not require physical harm at all to the child. On the other hand, unlawful conduct towards a child is only committed by a person who has a parental or custodial type of authority over the child, or is responsible for the child under S.C. Code Ann. § 63-7-20. Indeed, S.C. Code Ann. § 63-7-20(16), in its definition of "Person responsible for a child's welfare," excludes specifically "[a] person whose only role is as a caregiver and whose contact is only incidental with a child, such as a babysitter or a person who has only incidental contact but may not be a caretaker, . . ." Homicide by child abuse is not limited in this fashion. Indeed a babysitter could be guilty of homicide by child abuse, unlike the unlawful conduct statute. Accordingly, neither charge is a lesser included offense of the other.

Likewise, involuntary manslaughter requires the death of a person without regards to the age of the victim, while unlawful conduct towards a child requires no physical harm towards the child, but requires the victim be a child. See State v. Northcutt, 372 S.C. 207, 215, 641 S.E.2d 873, 877 (2007) (finding homicide by child abuse is not a

lesser included offense of murder where the element of death of a child under eleven years of age is not a required element of murder).

"The lesser offense is included in the greater only if each of its elements is always a necessary element of the greater offense." Easler, 327 S.C. at 134, 489 S.E.2d at 624 (internal quotation marks and citations omitted). In the instant case, each of the three offenses includes elements not required by the other two offenses. None of the three are lesser included offenses of the other, and no double jeopardy violation occurred.

IV.

The trial court did not err in following the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts, and following the established procedure is not a due process violation. The allegation of a due process violation is so conclusory as to constitute abandonment on appeal, and any purported error is harmless under the facts of this case.

Greene claims the trial judge should have required the State to open on the law and the facts and be allowed to only offer a reply argument after Greene's closing argument. Greene in her statement of issues claims the current, established practice violates the due process clause of the South Carolina Constitution and the Fourteenth Amendment of the federal constitution.[3] However, Greene does not make this assertion in the body of the brief and fails to argue at all how this practice violates due process. Greene cites no authority for the proposition that the due process clause is implicated. See State v. Tyndall, 336 S.C. 8, 16-17, 518 S.E.2d 278, 282-83 (Ct. App. 1999) (argument was deemed abandoned where a single conclusory statement in the appellant's brief left un-argued the purported error being raised); State v. Porter, 389 S.C. 27, 35, 698 S.E.2d 237, 241 (Ct. App. 2010) (requiring an appellant to cite authority in "specific support of his assertion").

Further, due process is not implicated, and the procedure is reasonable and does not require alteration. Historically, the right to the final closing argument has followed

[3] Below, defense counsel requested that the State open in full on the law and the facts, the defense would argue, and then the State be restricted to merely replying to the defense's argument. Defense counsel argued that by following the established practice, the State would get to "sandbag" the defense, and defense counsel would be unable to know before he argued what was the State's theory of the facts. ROA. pp. 519-522.

the party with the burden of proof. Stein Closing Arguments § 1:6: Right to open and close; order of argument (2011-2012 ed.) ("Generally, the right to make opening and closing follows the person having the burden of proof."); Nicole Velasco, Taking the "Sandwich" Off of the Menu: Should Florida Depart from Over 150 years of Its Criminal Procedure and Let Prosecutors Have the Last Word?, 29 Nova L.Rev. 99, 112 (2004) ("At common law, the widely accepted rule in the United States is that the party with the burden of proof has the right to open and conclude final argument before the jury.").

In criminal trials in South Carolina, a solicitor is entitled to open and close the closing arguments to the jury unless the defendant has not offered any evidence. State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977). The initial closing argument must include a discussion of the law if demanded by the defendant; however, the solicitor is not required to open his initial closing with any argument on the facts although he may do so as a matter of discretion. State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971) *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (S.C. Oct 12, 2009); Rodgers, 269 S.C. at 25, 235 S.E.2d at 809.

However, unlike the vast majority of jurisdictions, current South Carolina practice sets the order of closing arguments in criminal cases according to the evidence received at trial. See State v. Brisbane, 2 Bay 451 (S.C. 1802) (As a matter of practice, when a criminal defendant calls no witnesses, he has "the **privilege** of concluding to the jury.") (emphasis added); see also State v. Gellis, 158 S.C. 471, 155 S.E. 849, 855 (1930) ("It is evident from the more recent decisions of this court that the rule is that if a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments."); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379, 384

(1972) (same); State v. Mouzon, 321 S.C. 27, 467 S.E.2d 122, 125 (Ct. App. 1995) (same).

In this case, Greene chose to present three defense witnesses. Therefore, under longstanding state procedure, Greene was not entitled to have last closing argument to the jury nor was he entitled to require the solicitor to open on both the facts and the law. Greene asserts the trial judge's adherence to the longstanding practice in South Carolina violated due process, although there is no explanation for this claim, beyond a vague allegation of the opportunity for sandbagging.

In rejecting an equal protection challenge, the Florida Supreme Court explained the rationale of their rule that is similar to the practice in South Carolina:

> In all criminal proceedings, the prosecution takes the offensive at the outset, building through its witnesses a "case" for defendant's guilt. In most instances, defense counsel is limited to the defensive tactic of cross-examination to show the weakness of the State's evidence, and to create a reasonable doubt in the minds of the jury. Occasionally the defense will be in a position to take the offensive itself by calling witnesses to build its own case for innocence. In those instances where such an offensive tactic is possible, the defense receives a more balanced exposure before the jury, and is more adequately able to offset the impression created in the minds of the jurors by the prosecution's presentation. But what of those situations where the circumstances do not give the defendant the option of presenting his own case? In our judgment it was precisely to counterbalance the weight of the State's offensive in such cases that the Legislature, and later this Court, created an exception to the common law rule that the party with the burden of proof is entitled to the concluding argument before the jury. As we view the Rule, it is intended as an aid to those defendants entitled to avail themselves of it, rather than as a limitation upon those desiring to call defense witnesses.

Preston v. State, 260 So.2d 501, 504 (Fla. 1972).[4]

Totally denying a criminal defendant the opportunity for closing argument constitutes a denial of the defendant's basic right to make his defense. Herring v. New York, 422 U.S. 853, 858-859 (1975). While the right to make a closing argument cannot be circumvented, the order of argument is vastly different, particularly since argument is not evidence. See, e.g., Ex parte Morris, 367 S.C. 56, 624 S.E.2d 649, 653 (2006), *quoting* S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 590 S.E.2d 511, 513 (Ct. App. 2003) ("'[a]rguments made by counsel are not evidence'"); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22, 24 (1987) ("the solicitor's closing argument is not evidence"). There is no constitutional **right** to a certain order or scope of argument.

The order of closing arguments is a matter of state procedural rule or practice rather than substantive law. State v. Huckie, 22 S.C. 298, 299 (1885) (alleged error in denying defendant final closing argument was "not a matter of error as to express law, but of practice"). The United States Supreme Court has consistently held the States are free to shape their own rules of procedure. See, e.g., United States v. Scheffer, 523 U.S. 303, 316 (1998), *quoting* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("we thus stressed that the ruling did not 'signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.'").

Significantly, Greene did not lose her right to make a closing argument; rather,

[4] In 2007, Florida changed its rules to eliminate a defendant's right to make a final closing argument. See In re Amendments to the Florida Rules of Criminal Procedure–Final Arguments, 957 So.2d 1164 (Fla. 2007). Florida's new rule provides, in pertinent part, as follows: "In all criminal trials, excluding the sentencing phase of a capital case, at the close of all the evidence, the prosecuting attorney shall be entitled to an initial closing argument and a rebuttal closing argument before the jury or the court sitting without a jury." Id. at 1167.

she merely chose to forfeit the opportunity to present her argument last. See Herring, 422 U.S. at 857-64 (a *total denial* of the opportunity to present a closing argument to the trier of fact is a denial of the basic right of the accused to make his defense).

The order of closing arguments is a matter of state procedural preference which does not offend equal protection or any other constitutional right. Sheffer. The trial judge and the parties below had the right to rely on well-established precedent and longstanding practice – a practice that never deprives any defendant of the opportunity to present a closing argument. That practice was followed in Greene's case. There was no error.

In any event, even if the order of argument in Greene's case is deemed error, the error was harmless under the facts of Greene's case. Our Supreme Court has previously concluded that denial of the right to last closing argument "is not the kind of error that would affect the entire conduct of the trial from beginning to end" and is subject to harmless error analysis. State v. Mouzon, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997). In Mouzon, the Supreme Court concluded that pursuant to state procedure the defendant was entitled to the right to last closing because he in fact did not present evidence. Further, the court concluded the error was not harmless as Mouzon concentrated "on the murder charge and was acquitted of murder; he did not focus on the conspiracy charge and was convicted." Id. at 205, 485 S.E.2d at 922. The court noted the prosecution "devoted a significant amount of attention to the issues of drug dealing and conspiracy. If Mouzon had been allowed to argue last, then he could have more adequately addressed the issue of conspiracy to distribute crack cocaine." Id.

Greene's case is distinguishable from Mouzon. First, according to well-settled

state procedural practice, Greene lost the opportunity to present the last argument when she introduced evidence in the form of three defense witnesses. Second, the focus in Greene's case remained on one event – the death of Alexis based on toxic levels of morphine in her body and brain. The State's theory was clearly that death resulted from Greene's breast milk, which contained morphine. Third, and perhaps most significantly, defense counsel failed to proffer a proposed "rebuttal" argument to illustrate how his closing argument would have been different had the solicitor opened in full prior to the defense argument. Indeed, Greene failed to show the trial court how she might have been "sandbagged" as she claims.

In sum, Greene failed to demonstrate prejudice even assuming the trial judge erred. See State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947) ("It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him."); see also Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007) (finding errors in closing argument "do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.").

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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July 7, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

THE STATE, Respondent,

v.

STEPHANIE IRENE GREENE, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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July 7, 2015

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Honorable Joseph Derham Cole, Circuit Court Judge

Appellate Case No. 2014-000764

The State, ... Respondent,

vs

Stephanie Irene Greene, ... Appellant.

FINAL BRIEF OF APPELLANT

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Statement of Issues on Appeal

Question I: Did the trial court err in failing to direct a verdict when the State failed to prove through competent medical evidence or otherwise that the morphine in the deceased child came from the mother through breast-feeding?

Question II: Did the trial court err in failing to direct a verdict or grant a new trial when the State failed to prove Stephanie Greene acted with extreme indifference as required by South Carolina Code § 16-3-85?

Question III: Did the trial court err in failing to instruct the jury they could convict on only one of the charges as a conviction of more than one charge would violate the double jeopardy provisions of Article I, § 12 of the Constitution of the State of South Carolina and Fifth Amendment to the Constitution of the United States of America as the same fact was used to prove the cause of death in each case?

Question IV: Did the trial court err in failing to require the state to open fully on the law and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the constitution of the United States of America by her counsel not being able to respond to new arguments made by the state in its closing argument?

Procedural History

The State indicted Stephanie Irene Greene on September 15, 2011 on charges of homicide by child abuse, involuntary manslaughter, and unlawful conduct toward a child and homicide by child abuse. On March 31-April 4, 2014 she was tried before the Honorable J. Derham Cole, Sr. and a jury. On April 3, 2014 the jury convicted Mrs. Greene of all the charges. On April 4, 2014 Judge Cole sentenced her to five years on the charges of involuntary manslaughter, unlawful conduct toward a child and 20 years for homicide by child abuse. All sentences are concurrent. On April 14, 2014 Mrs. Greene filed her Notice of Intent to Appeal.

Factual History

In the early morning hours of November 13, 2010 Spartanbug County 911 received a call from the residence of Randy and Stephanie Greene about their child, Alexis, who was not responsive. Rec. on App. at 69, ll 2-19. The coroner's office was called and they arrived at about 6:16 a.m. Rec. on App. at 72, ll 1-8. The child was dead at the scene. Rec. on App. at 73, ll 1-11. Pursuant to their protocol Ellen Holmes conducted an interview with Mrs. Greene at the scene. Rec. on App. at 74, 6-20; 52, ll 2-6. The interview lasted about three hours. Rec. on App. at 89, ll 6-11. In this interview Ms Holmes obtained a medical history of the child and the activities of the child for the previous several days. She stated that in her opinion Mrs. Greene appeared to be under the influence. Rec. on App. at 73, ll 18-24.

As no immediate cause of death could be determined, blood and tissue samples were taken to be analyzed. When these results were returned Dr. John David Wrenn, the pathologist, issued his report on January 28, 2011 stating the cause of death was a result of respiratory insufficiency secondary to synergistic drug intoxication. Rec. on App. at 419, ll 18-

20. Mrs. Greene was then arrested on June 24, 2011 for homicide by child abuse.

Alexis Greene was born on September 28, 2010. At the time of the birth of their daughter, Mrs. Greene was being prescribed numerous pain medications for injuries she had sustained in an automobile accident years before and other physical complications. Rec. on App. at 163, ll 3-25 to 164, ll 1-11. Testimony from Dr. Carol A. Koistra confirmed that Mrs. Greene was totally disabled. Rec. on App. at 211, ll 3-25 to 214, ll 1-25. Dr. Koistra was primarily prescribing vicoprofen, a schedule III drug and several other drugs from schedule III and higher. Rec. on App. at 209 ll 4-9. Dr. Susan Kovacs, over a period of several years, prescribed various schedule II drugs to Mrs. Greene. Rec. On App. 150, ll 23-25 to 151, ll 1-10.

Both doctors testified that they did not know Mrs. Greene was pregnant and they would not have prescribed the opioids had they known she was pregnant. Rec. on App. at 162, ll 18-23; 151, ll 8-13; 201, ll 6-11; 203, ll 3-10. Dr. Kooistra was unsure if she referred Mrs. Greene to Dr. Kovacs, but she did send Dr. Kovacs a copy of her report of November 4, 2010 which included a complete list of the prescriptions she was prescribing for Mrs. Greene. Rec. on App. at 207, ll 21-25 to 208, 1-16. Dr. Kovacs testified she did not know that Dr. Kooistra was prescribing vicoprofen. Rec. on App. at 152, ll 5-7. On cross examination she admitted that she had signed two documents in her office acknowledging that Mrs. Greene was in fact receiving vicoprofen through November of 2009. Rec. on App. at 169, ll 16-25 to 171, ll 1-17. The doctors also admitted that vicoprofen and morphine are frequently prescribed together. Rec. on App. at 165, ll 12-25 to 166, ll 1-6; 219, ll 1-10. Dr. Kooistra further admitted that the American Academy of Pediatric found nothing wrong with prescribing morphine while a woman is breast-feeding. Rec. on App. at 217, ll 19-25 to 218, ll 1-4.

Dr. Kovacs, who was prescribing schedule II narcotics, admitted that she did not personally see Mrs. Greene but four times over a 23 month period ending in November of 2010. Rec. on App. at 185, ll 13-23. On one occasion Dr. Kovacs mailed the prescription to Mrs. Greene. Rec. on App. at 186, ll 3-9. Dr. Kovacs also referred Mrs. Greene to Carolina O.B.G.Y.N. Apparently the O.B.Y.G.N never told Dr. Kovacs, the referring doctor, that Mrs. Greene was in fact pregnant. Rec. on App. at 189, ll 4-25.

Kaushik Kotecha, employed by the South Carolina Department of Health and Environmental Control, was the primary investigator of the medicines prescribed by the various doctors. He testified that DHEC had a prescription monitoring system that all doctors in the state have had access to since 2007. Rec. on App. at 325, ll 3-15. He further stated that all the prescriptions except one were filled at a single pharmacy in Inman. Rec. on App. at 315, ll 8-21. He testified that when dealing with different medications a prudent patient would use the same pharmacy. Rec. on App. at 317, ll 11-16. He further stated that two prescriptions that had a warning against taking while breast-feeding were not found in the toxicology report. Rec. on App. at 319, 13-25 to 320, ll 1-4. The only drug found in the toxicology report that contained a warning against taking while breast-feeding was Clonazepam. Rec. on App. at 321, ll 9-25 to 322, ll 1-20.

The State called as experts in this matter Dr. David Eagerton and Dr. John David Wrenn. Neither testified that the morphine in the child was obtained though breast milk. When asked about the source of the morphine Dr, Wrenn stated "It's not my opinion that it was from milk or anything else. I just know that it was there." Rec. on App. at 421, ll 22-24. Dr. Eagerton testified when asked he could not say how the morphine got into the child other than "Had to get

into the baby somehow." Rec. on App. at 369, ll 12-18. Dr. Eagleton further admitted that no peer reviewed article involving morphine discusses a child being in a hospital from a toxic level of morphine obtained through breast milk. Rec. on App. at 351, ll 19-22. He also knew of no study that shows a child can obtain a toxic level of morphine through breast milk from a mother taking MS Contin, the morphine being taken by Mrs. Greene. Rec. on App. at 357, ll 18-21. He further admitted that the American Academy of Pediatrics listed morphine as safe to take while breast feeding. Rec. on App. at 361, ll 4-7. He also admitted that the Clinical Toxicology Journal reported that scant evidence existed that opioid toxicity could occur in breast-fed infants. Rec. on App. at 367, ll 12-25 to 369, ll 1-11. Nether Dr. Eaglerton nor Dr. Wrenn produced any medical or other scientific research that supported the proposition that an infant can receive a lethal level of morphine through breast milk.

Argument

Question I

Did the trial court err in failing to direct a verdict when the State failed to prove through competent medical evidence or otherwise that the morphine in the deceased child came from the mother through breast-feeding?

At the trial below the only theory the State had as to how the child obtained a lethal dose of morphine was through the breast-milk of the child's mother, Stephanie Irene Greene. The trial court charged the jury "[T]he State's allegation and theory in the case is, that the child died as a result of consumption of a controlled substance through the mother's breast milk." Rec. on App. at 579, ll 5-7. The State, however, never produced any medical or scientific evidence that a mother could give a nursing infant a lethal dose of morphine through breast-milk. If the State fails in this proof, then the State fails in its proof of guilt against Stephanie Irene Greene.

South Carolina has long recognized "the rule that when the testimony of medical experts is relied upon to establish causal connection between an accident and subsequent disability or death, in order to establish such, the opinion of the experts must be at least that the disability or death 'most probably' resulted from the accidental injury." *Cross v. Concrete Materials*, 236 S.C. 440, 442, 114 S.E.2d 828, 829 (1960). *See, also, Armstrong v. Weiland*, 267 S.C. 12, 225 S.E.2d 851 (1976)(applying the rule in a medical malpractice case). In the present case the ability to transfer different drugs through breast milk is not something that is within the common knowledge of lay people. This can be established only through expert testimony.

In an attempt to establish its case the State called Dr. David Wren and Dr. David

H. Eagleton as medical experts who opined concerning breast-milk and the morphine found in the minor child. No other witness gave any testimony as to whether lethal levels of morphine can be supplied through breast-milk. Neither expert called by the State testified to a reasonable degree of medical certainly that the most likely cause of the morphine levels in the minor child was through breast-milk. In fact neither testified that even a toxic level of morphine in the child through breast milk was possible.

On cross-examination Dr. Eagerton states:

> Q (By Mr. Wise) Well, I hand you - - look here at the highlighted portion about the LactMed website and see if that refreshes your memory?
> A (By Dr. Eagerton) Yes, sir.
> Q The National Institute of Health
> A Yes, sir.
> Q Did you access that website in preparation for your testimony here today?
> A I did
> Q And which article on the National Institute of Health website did you find that says a mother who breastfeeds can give her child a toxic level of morphine?
> A I don't recall
> Q Because it doesn't exist.
> A May not
> Q Do you think if it existed you would have found it?
> A I would hope so.
> Rec. on App. at 365, ll 6-24

He further testified:

> Q Look there if you would on this highlighted portion on the right hand side where the little star is.
> A. Ok
> Q. Read that to us.
> A. "The medical literature describes scant evidence of opioid toxicity in breastfed infants."
> Q. Do you have any evidence that's contrary to that?
> A. No, sir that's - -

Q. That's true
A. That's true, yes sir.
Q. So there's scant evidence
A. That's correct
Q. Which is pretty close to none
A. Yes, sir.
Q. Right?
A. That's right
Q. So you're in no position to say then that that number came through breast milk.
A. Had to get into the baby somehow.
Rec. on App. at 368, ll 20-25 to 369, ll 1-18.

* * *

Q. So you're not able to tell this jury how this morphine got into this child.
A. It had to - - most commonly it had to get there by the oral route.
Rec. on App. at 383, ll 15-18.

Dr. David Wrenn, the pathologist, was likewise no more helpful to the State. He speculated as to a theory and then said "It's not up to - - in my opinion it's not up to me to find out exactly everything that happened because this is not a research project." Rec. on App. at 429, ll 7-10. He later stated "I don't know how it got there. It's unquestionably there. And you can - - you can argue any mechanism you want, but it's there, period." Rec. on App. at 430, ll 9-11.

Neither expert ever cited any research project, study, or report of any mother giving her child even a toxic level of morphine from taking MS Contin. Dr. Eagleton admitted on cross-examination that morphine was approved for use by breast feeding mothers. Rec. on App. at 361, ll 4-8; *See also, The Transfer of Drugs and Therepeutics Into Human Breast Milk: An Update on Selected Topics,* 132, PEDIATRICS, Official Journal of the American Academy of Pediatrics, e796, e801(September 2013) ("For these reasons, when narcotic agents are needed to treat pain in the breastfeeding mother, agents other than codeine (eg, butotphanol, morphine, or

hydromorphine) are preferred."); *The Transfer of Drugs and Other Chemicals Into Human Milk,* 108 PEDIATRICS, Official Journal of the American Academy of Pediatrics, 776, 781 (September 2001) (listing no sign or symptom in infant of mother taking morphine other than measurable blood concentration for morphine); *Postpartum maternal codeine therapy and the risk of adverse neonatal outcomes: A retrospective cohort study,* 50 Clinical Toxicology, 390, 394 (2012)("In summary, despite a recent report of neonatal death associated with maternal use of codeine, we found no evidence that prescription of codeine to women following delivery was associated with several measures of neonatal harm in large population studied over a 10-year period.")[1]

This Court and the South Carolina Supreme Court have said that a circumstantial evidence case must be based on substantial circumstantial evidence. "If there is any direct evidence or any *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." *State v. Cherry*, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004)(emphasis added); *See, also, Jackson v. Virginia,* 443 U.S. 307 (1979); *State v. James*, 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004); *State v. Odems,* 395 S.C. 582, 720 S.E.2d 48 (2011); *State v. Lollis,* 343 S.C. 580, 541 S.E.2d 254 (2001); *State v. Martin*, 343 S.C. 580, 541 S.E.2d 254 (2000); *State v. Gilliand,* 402 S.C. 389, 741 S.E.2d 521 (Ct. App. 2012); *State v. Meggett,* 398 S.C. 516, 728 S.E.2d 492 (Ct. App.

[1] These articles and others were referred to during the trial and acknowledged by the State's experts to be authoritative. Codeine is converted by the human body to morphine.

2012).[2] The standard of review is not is there *some* circumstantial evidence that could be interpreted to be evidence of guilt. Nor is it so if one interpretation of the facts is consistent with guilt the verdict is to be sustained. To say a theory of guilt is possible is not substantial circumstantial evidence nor proof beyond a reasonable doubt. Concerning a review of a circumstantial evidence case, the Arkansas Supreme Court said "In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial evidence, direct or circumstantial. Substantial evidence is that evidence which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture." *Campbell v. State*, 2009 Ark. 540, ___, 354 S.W.3d 41, 44 (2009).

As to circumstantial evidence the South Carolina Supreme Court has said "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001). The Court has further said circumstantial evidence is sufficient to convict when " the circumstances proven are consistent with each other, and when taken together, point conclusively to the guilt of Appellant to the exclusion of every other reasonable hypothesis." *State v. Daniels*, 401 S.C. 251,

[2] The South Carolina Court of Appeals in *State v. Cherry*, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001) discussed whether courts in applying the "substantial circumstantial evidence" standard are engaging in the weighing of evidence, which appellate courts are forbidden to do. The United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979) specifically rejected the "any evidence" standard in criminal cases. The Court said "But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.* at 320. To the extent that any appellate court determines whether the circumstantial evidence is "substantial" or if the evidence is more than a "modicum" an appellate court will, to some extent, weigh the evidence, notwithstanding the frequent protestations to the contrary.

___, 737 S.E.2d 473 (2012). Further the court said "It is not sufficient that they create a probability, though a strong one . . . ." *State v. Schrock,* 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984)[3]. When no expert ever opined to a reasonable degree of medical certainly that the morphine most probably was administered through breast milk, the state has simply failed in its proof. This is especially true when all the authoritative sources concerning the taking of morphine while breast feeding say exactly to the contrary. When Dr. Wrenn, the expert for the State, can only conclude "So there's first time for everything." (Rec. on App. at 437, ll 17-18), that is hardly substantial circumstantial evidence as to how the child received the morphine. As the evidence in this case raises at best only a suspicion that the morphine came from her breast-milk, all the convictions of Stephanie I. Greene should be reversed.

Question II

Did the trial court err in failing to direct a verdict or grant a new trial when the state failed to prove Stephanie Greene acted with extreme indifference as required by South Carolina Code § 16-3-85?

Under South Carolina Code § 16-3-85 a person commits homicide by child abuse when " the death occurs under circumstances manifesting an extreme indifference to human life." The statute is not violated if the person is negligent or even grossly negligent or reckless. The action must show an extreme indifference to human life and not an extreme indifference to the consequence of ones actions. As the South Carolina Supreme Court has said "'extreme

[3] While the evidence in this case does not meet the "most probable" standard, the *Schrock* case could also stand for the proposition that the "most probable" standard is not sufficient in a criminal case where the burden is beyond a reasonable doubt.

indifference' has been defined as 'a mental state akin to intent characterized by a deliberate act culminating in death.'" *McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008). Thus, the state is required to prove that Mrs. Greene acted not negligently but with an intent to disregard the consequences of her actions which she knew could result in the death of her child. The act which the State contends that Mrs. Greene committed which was done with extreme indifference was breast feeding her child while taking prescription drugs. The State must prove Mrs. Greene had reason to know that this act could result in the death of her child and that she did the act with extreme indifference as to the consequences. The record simply does not support this conclusion.

The South Carolina Supreme Court has said "[I]t is common knowledge that use of cocaine during pregnancy can harm the viable unborn child. Given these facts, we do not see how Whitner can claim she lacked fair notice that her behavior constituted child endangerment as proscribed in section 20–7–50." *Whitner v. State*, 328 S.C. 1, 16, 492 S.E.2d 777, 785 (1997). If "common knowledge," and not published medical studies, is sufficient to put one on notices about the consequences of cocaine, then numerous published medical studies ought to be sufficient to tell a woman that breast feeding while taking morphine is safe. As noted at the trial, scientific studies from numerous reputable organizations tell women that breast feeding while taking morphine is safe. Doing what these studies say is safe cannot lead one to conclude that breast feeding while taking morphine is acting with extreme indifference as to the consequences. But the record here provides more evidence that Mrs. Greene did not act with extreme indifference.

Kaushik Kotecha, a licensed pharmacist employed by DHEC, testifying for the

state said:

> Q. (By Mr. Wise) People are encouraged to use the same pharmacy, aren't they?
> A. Yes, sir.
> Q. And why is that?
> A. So you can kind of monitor the side effects of drugs. You know, you may be getting one drug that may counter the effect of another drug or, you know, you may have a drug that's synergistic effect, so yes.
> Rec. on App. at 314, ll 13-20.
>
> * * *
>
> Q. (By Mr. Wise) But she had been going to the same pharmacy as far back as you've got records.
> A. Yes, sir.
> Q. Which is a good practice
> A. Absolutely
> Q. A smart practice
> A. Yes, sir.
> Q. And there's not a person in the world you would encourage to do anything differently.
> A. No, sir.
> Q. Because it's important for your health to know what - - how drugs inter-react.
> A. Right, right
> Q. And pharmacist in many cases know better about that than the doctors who prescribe the drugs.
> A. Well, I don't want to say that because I might upset a lot of doctors here, sir.
> Q. But sometimes they do because the physicians don't know of the drugs a person is getting?
> A. That is correct.
> Q. Through either inadvertence or whatever.
> A. Right
> Q. And so the pharmacist is the one that can catch all of that.
> A. Right.
> Rec. on App. at 324, ll 1-125.

The record has scant evidence as to any abuse of the drugs by Mrs. Greene. She did not "doctor shop' and obtain prescriptions from various doctors. She only saw her regular

doctors and doctors to whom she was referred by them. None of her doctors testified she ever had a problem calling in for a refill because of a "lost" prescription. No testimony from any pharmacist ever testified that they believed the drugs being prescribed for Mrs. Greene were unusual or cause to be suspicious. Pharmacists are trained to report suspicious prescriptions. Rec. on App. at 313, ll 17-19. One reason for not having any report from a pharmacist may be that Mr. Kotecha, who worked for DHEC drug control and is a registered pharmacist, testified that he would not tell a woman not to take morphine while breast feeding. Rec. on App. at 322, 19-21.

The worse that can be said is that Mrs. Greene did not tell her two primary physicians that she was pregnant and was later breast feeding. While they did testify they probably would not have prescribed the morphine and vicoprofen had they known, the testimony at trial does establish that both are safe to take while pregnant and breast-feeding.

In addition to the above, three of the prescriptions provided to her contained a specific warning about taking the drug while breast-feeding. The MS Contin prescription, which contained the morphine, did not contain such a warning. Of the three that contained the warning, only one - Clonazepam - was found in the child.

With this background, there is simply no evidence that Mrs. Greene acted with extreme indifference in taking the morphine and continuing to breast-feed her child. The testimony at trial was that she did in fact research the drugs she was taking. Rec. on App. at 289, ll 6-20. What fact did the State establish that was the equivalent of "common knowledge" in the *Whitner* case that would put Mrs. Greene on notice that her taking morphine would in fact cause the death of her child through breast-feeding? Without this notice, there is simply no "extreme

indifference" as defined by the court.

Question III

Did the trial court err in failing to instruct the jury they could convict on only one of the charges as a conviction of more than one charge would violate the double jeopardy provisions of Article I, § 12 of the Constitution of the State of South Carolina and Fifth Amendment to the Constitution of the United States of America as the same fact was used to prove the cause of death in each case?

At trial, defense counsel objected to the jury being permitted to return a verdict on each separate charge as such would be a violation of double jeopardy. Rec. on App. at 579, ll 13-18. To understand the double jeopardy argument in this case, one need look no further than *Blockburger v. United States*, 284 U.S. 299 (1932). In *Blockburger* the United States Supreme Court in conducting an analysis as to double jeopardy said "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. The same fact used to prove involuntary manslaughter was used to prove the unlawful conduct toward a child and homicide by child abuse. The common fact was the child obtaining the morphine through breast feeding. No charge contained a different means of the child dying and therefore no fact was different.

In *Harris v. Oklahoma*, 433 U.S. 682 (1977) the United States Supreme Court recognized that when a greater crime includes all the elements of the lesser crime, double jeopardy precludes the prosecution for the second offense. As the court in *Harris* said "When, as here, conviction of a greater crime, murder, cannot be had without the conviction of the lesser

crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one." *Id.* at 682. Arguably under the facts of this case unlawful conduct toward a child is a lesser included of involuntary manslaughter which in turn is a lesser incldued of homicide by child abuse. The only real difference being the degree of culpability.

The same principle was applied by the United States Supreme Court in *Ex parte Nielsen*, 131 U.S. 176 (1889). In *Neilsen*, the defendant pled guilty to a charge of unlawful cohabitation. The facts were that he was living with Anna Lavinia and Caroline Nielsen, claiming both to be his wife. He was subsequently charged with adultery by living with and cohabiting "with one Caroline Neilsen, he being a married man and having a lawful wife, and not being married to Caroline." *Id.* at 177. In ruling that the conviction of the crime of cohabitation was a bar to the charge of adultery, the United States Supreme Court said "[I]t seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *Id.* at 188.

The same principles apply in this case. A conviction or acquittal of involuntary manslaughter precludes the conviction of another charge arising under the same act when it is used to prove homicide by child abuse or unlawful conduct toward a child. This was the basic holding of *Harris*

While the "same conduct" test of *Grady v. Corbin*, 495 U.S. 508 (1990) was rejected in *United States. v. Dixon*, 509 U.S. 688 (1993), a proper reading of *Dixon* supports the position of Mrs. Greene. *Dixon* rejected the "same conduct," analysis but it did not reject a "same evidence" analysis. Indeed it could not reject such an analysis because *Blockburger* itself

uses a "same facts" analysis.[4] In *Dixon*, Justice Scalia made reference to an older English case that permitted a second trial of a defendant. His first trial for breaking and entering and stealing goods was stopped when it was discovered that no goods had in fact been stolen. The second trial was for breaking and entering with intent to steal. Justice Scalia then quoted with approval the following from the English case. "[T]hese two offense are so distinct in their nature, that *evidence* of one of them will not support an indictment for the other." *Dixon*, at 710 (emphasis added).

Dixon was charged with the violation of a court order that prohibited him, as a condition of his bond, from committing any criminal act. While on bond he was found in possession of drugs. Based upon that factual finding the trial judge found him to possess the drugs with intent to distribute and held him in criminal contempt. When he was subsequently tried for possession of the same drugs with intent to distribute, he contended that the prosecution violated double jeopardy. The United States Supreme Court held that the conviction did violate double jeopardy. Technically the same elements were not present as one involved the possession of drugs and the other involved a violation of a court order. But the Court found that the "elements" of the contempt charge included the "elements" of the drug charge.[5]

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[4] *Blockburger*, notwithstanding frequent pronouncements to the contrary, is not a "same elements" test. "Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. This is the only time the word "element" appears in *Blockburger*. As shown in the quote, "elements" is used in the sense of "facts."

[5] Surely the United States Supreme Court does not mean "elements" in the strict sense. If they do, then the protections afforded by the Double Jeopardy Clause can be defeated by an imaginative legislature that could find different "elements" for the same facts and therefore

The statutes involved in this case have no indication that the legislature intended for separate punishment to be provided for a conviction on each crime. Thus, there is no basis for contending in this case that the legislature intended successive punishment for a violation of the statutes.[6]

This case should be controlled by *Rutledge v. United States*, 517 U.S. 292 (1996), which was decided three years after *Dixon*. In *Rutledge*, the defendant was convicted of violating 21 U.S.C. § 846 (conspiracy to distribute controlled substances) and 21 U.S.C. § 848 (conducting a continuing criminal enterprise). "The 'in concert' element of his CCE offense was based on the same agreement as the § 846 conspiracy." *Id.* at 294. The United States Supreme Court, in holding that the two convictions violated the Double jeopardy clause, said:

> In this case it is perfectly clear that the CCE offense requires proof of a number of elements that need not be established in a conspiracy case. The *Blockburger* test requires us to consider whether the converse is also true - whether the § 846 conspiracy offense requires proof of any element that is not a part of the CCE offense. *Id.* at 298.

The Court ruled that the "in concert" portion of the CCE offense was the same facts as the "conspiracy" portion of the conspiracy count. The Court then held the two convictions violated the Double Jeopardy Clause of the Fifth Amendment to the Constitution of

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subject a defendant to multiple punishments. As originally used in *Blockburger*, the focus should be on the facts to be proven, if double jeopardy is to afford a citizen any protection from an overly zealous and overly imaginative legislature.

[6] The theory that if the legislature intended successive punishment, there is no double jeopardy violation but if they did not intend successive punishment there is a double jeopardy violation is questionable at best. Surely the United States Supreme Court did not mean that if the legislature intended to violate double jeopardy there is no violation but if they did not intend to violate the provision, there is a violation.

the United States of America. The Court focused upon the facts that were necessary to prove the elements of the crime and not what the elements had been named by congress.

Under the principle set forth in *Blockburger, Dixon, Harris,* and *Rutledge,* the state cannot convict Mrs. Greene for homicide by child abuse for giving her child a lethal dose of morphine through breast milk and involuntary manslaughter for the exact same act and then for unlawful neglect of a child for the exact same act. The act of giving a child a lethal dose of morphine through breast milk may be given different names by the various statutes. But different names does not mean that the State did not use the same facts to prove each case. Whether the crime is called homicide by child abuse, involuntary manslaughter or unlawful conduct toward a child, the exact same facts were used to prove each separate crime.

Question IV

Did the trial court err in failing to require the State to open fully on the law and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the constitution of the United States of America by her counsel not being able to respond to new arguments made by the state in its closing argument?

Trial counsel requested that the state be required to open fully on the law and the facts and then reply only to matter raised by defense counsel in his closing argument. Rec. on App. at 519, ll 20-25 to 522, ll 1-15. The trial judge denied this request.

In South Carolina no Rule of Criminal Procedure addresses the question of the order of argument to the jury. The practice of the State opening only on the law and then closing

fully on the facts after the defendant has given the closing argument is long on tradition but short on law to support that tradition. The early practice in South Carolina was for the state to open fully on the law and the facts. In *State v. Atterberry,* 129 S.C. 464, 124 S.C. 648 (1924) the Supreme Court held that the failure to require the State to open fully on the law and facts was reversible error. At that time Circuit Court Rule 59 provided "The party having the opening in argument shall disclose his entire case and on his closing shall be confined strictly to a reply to the points made, and authorities cited by the opposite party."[7] In reversing the conviction of the defendant the Court said "The defendant moved the court to require the solicitor to make the opening speech to the jury before the defendant's attorney's were required to make their arguments. This was refused. This was error." *Atterberry*, 129 S.C. at ___, 124 S.E. at 651. In his concurring opinion Acting Associate Justice Aycock stated the principle best when he said "It is but fair that the party who has the advantage of the last address to a jury should be required to open and apprise the opposing party of his views as to his entire case." *Id.* at ___, 124 S.E. at 651. As a matter of legal history, the State in South Carolina was required to open fully on the law and the facts.

The more recent practice developed when the Circuit Court Rules were changed. This change was noted in *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971). Again the defense counsel requested that the State be required to open fully on the law and the facts. This request was denied by the trial judge. The Court noted that since the decision in *Atterberry,* Rule 59 of

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[7] Rule 59 in 1924 was part of the Code of Civil Procedure. The concurring opinion by Acting Associate Justice Aycock makes reference to the fact that nothing in the Code of Civil Procedure limits the application to civil cases. Rule 1 of the South Carolina Rules of Civil Procedure today does limit their application to civil cases.

the Circuit Court Rules had been changed to Rule 58 and the rule then read "The party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party." The Court in *Lee* concluded that "It follows that the trial judge, under the changed rule, was correct in holding that a solicitor is no longer required to make an opening argument to the jury on issues of fact." [8] *Lee,* at 318, 178 S.E.2d at 656. Thus began the more recent, but incorrect, practice of requiring the State to open only on the law and not the facts.

Today Rule 43 (j) of the South Carolina Rules of Civil Procedure controls the order of argument in civil cases. This rule now provides that the plaintiff shall have the right to open and close at the trial of the case. The rule then concludes "The party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter." With Rule 43(j) of the South Carolina Rules of Civil Procedure, the long practice in civil cases of plaintiff's lawyers "sandbagging" and saving their real argument for their last argument, came to an end. But the practice, without any support in the law, continues in the general sessions courts not based upon the law or logic, but upon misapplication of the civil rules.

The practice of "sandbagging" in a closing argument was a basis for reversal of a criminal conviction in Delaware. In *Bailey v. State*, 440 A.2d 997 (Del. 1982) the court noted that "Closing argument is 'an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment.'" *Id.* at 1004 (internal citations omitted). The court further held "Application of these authorities to the facts at hand compels us to reverse and remand the case

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[8] Again this was a change in the Code of Civil Procedure which the court had no problem applying to a criminal case.

for a new trial on the ground that the Trial Court abused its discretion in permitting the State to utilize the inherently prejudicial "sandbagging" trial strategy." *Id.* In South Carolina "sandbagging" by a prosecutor is not only approved but is actually legalized.

The majority of states and the federal courts require the prosecutor to open fully on the law and the facts. *See, e.g.* Fed. Rul Cr. Proc. 29.1; ARK. CODE ANN. 16-89-123; GA. CODE ANN. § 17-8-71; NEV. REV. STAT. ANN 175.141; TENN. RULES OF CRIM. PROC. Rule 29.1; In Re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE-FINAL ARGUMENTS, 957 So.2d 1164 (Fla. 2007) *but see, Degadillo v. State*, 262 S.W.3d 371 (Tex. Ct. App. (2008). The treatise writers also support the requirement that the state open fully on the law and evidence. *See*, JACOB STEIN, CLOSING ARGUMENTS 2d, § 1:6 (2010) and 75A AM. JUR. 2D *Trial* § 448 (2010). In revising its rules as to closing argument the Florida Supreme Court noted "The statute provides that in accord with the common law, the prosecuting attorney shall open the closing arguments, defendant or his or her attorney may reply, and the prosecuting attorney may reply in rebuttal." *In re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE--FINAL ARGUMENTS*, 957 So.2d at 1166.[9]

South Carolina should break with a practice that has no support in logic or the law and require that the State be required to open fully on the law and the facts. The current procedure in South Carolina simply permits the State to legally "sandbag" its argument and not afford the defense the opportunity to reply to new arguments that the State used in its closing. The inherent logic of this position has been acknowledged by this court concerning reply briefs and oral argument. "An appellant may not use either oral argument or the reply brief as a vehicle

[9] The Florida Supreme Court also noted that forty-seven states follow the common law.

to argue issues not argued in the appellant's brief." *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989). The reason of this rule in the appellate court is a party should have a fair chance to respond to matters raised by counsel in their briefs. The rule should also be applied to arguments before a jury.

CONCLUSION

For the reasons set forth in Question I, this matter should be reversed and the charges dismissed against Stephanie I. Greene. For the reasons set forth in Question II, the charge of homicide by child abuse should be reversed and dismissed against Mrs. Greene. For the reasons set forth in Question III, the matter should be remanded for a new trial with the state being required to elect upon which charge they desire to proceed or the jury being instructed to return only a verdict on one charge. For the reasons set forth in Question IV, this matter should be reversed and remanded for a new trial.

July 15th, 2015

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Honorable Joseph Derham Cole, Circuit Court Judge

Appellate Case No. 2014-000764

The State, ... Respondent,

vs

Stephanie Irene Greene, ... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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Question I

Did the trial court err in failing to direct a verdict when the state failed to prove through competent medical evidence or otherwise that the morphine in the deceased child came from the mother through breast-feeding?

Reasonable degree of medical certainty

The State has failed to argue against the position of Stephanie Greene that the State is required to prove to a reasonable degree of medical certainty that the morphine that killed Alexis Greene came from the breast milk of Stephanie Greene. No expert ever stated that such a fact was true to a reasonable degree of medical certainty. One reason that the experts for the State were unable to state such a medical fact is that the medical literature does not support such a position..

As noted in the opening brief the conclusion of Dr. David H. Eagerton that the morphine "Had to get into the baby somehow." (Rec. on App. at 369, ll 18), "It had to - - most commonly it had to get there by the oral route." (Rec. on App. at 383, ll 17-18) and "I think what we see is - - is more of a chronic type of exposure, which is consistent with through breast milk. Or it could be some combination of both. I don't know." is hardly proof to a reasonable degree of medical certainly that the breast milk of Stephanie Greene carried a lethal amount of morphine.

The only time Dr. Eagerton opined as to a reasonable degree of medical certainty was when he said the following:

> Q. (By Mr. Wise) So you - - we - - you cannot make a conclusion today as to how that morphine got into the baby.
> A. (By Dr. Eagerton) No, sir. I think I can make a conclusion as to

how. Like I said, at least some of it I believe within a reasonable degree of scientific and medical certainly had to come through the breast milk.
Rec. on App. at 384, ll 16-21.

Dr. Eagerton in his testimony following that statement was never able to say how much morphine can be obtained through beast milk. He further acknowledged that the medical literature in this area referred to a very small amount. The small amount was in the range of .04 mg per liter. He also had no studies that said that that level can be fatal to a child. He had previously acknowledged that the literature contains scant evidence of even a toxic level of morphine in breast fed infants. Rec. on App. at 367, ll 9-25 to 369, ll 1-18.[1]

Suppose Randy Greene were to bring a wrongful death case against the manufacturer of the morphine for the failure to warn the mother that the child could die from breast-feeding while taking morphine. If the same experts for the state in this case testified on behalf of Mr. Greene, the case would not go to the jury. The reason is simple - the civil court would required that Mr. Greene prove to a reasonable degree of medical certainty that the morphine in the child came through breast-milk. Under the testimony presented in this case, that burden would not have been met.

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[1] In the argument on the motion for directed verdict, the prosecuting attorney argued "And I remember specifically when Mr. Wise was asking him that question and through his testimony his opinion that this baby died from breast feeding - - from the morphine through breast milk." Rec. on App. at 456, ll 5-8.

What Dr. Eagerton actually said was:
Q. So you're in no position to say then that number came through breast milk?
A. I don't believe I've been asked one way or the other.
Q. Okay. But you don't have any basis for saying that it came through breast milk.
A. Had to get there somehow. Rec. on App. at 369, ll 12-18.
He later qualified his answer by saying "So, I don't think I have a basis to say it didn't, or at least some of it." Rec. on App. at 369, l 25 to 370, ll 1-2.

As noted in the opening brief, "the rule that when the testimony of medical experts is relied upon to establish causal connection between an accident and subsequent disability or death, in order to establish such, the opinion of the experts must be at least that the disability or death 'most probably' resulted from the accidental injury." *Cross v. Concrete Materials*, 236 S.C. 440, 442, 114 S.E.2d 828, 829 (1960). *See, also, Armstrong v. Weiland*, 267 S.C. 12, 225 S.E.2d 851 (1976)(applying the rule in a medical malpractice case). In the present case the ability to transfer different drugs through breast milk is not something that is within the common knowledge of lay people. This fact only can be established through expert testimony. The State in its brief never contended that any medical expert had testified to a reasonable degree of medical certainty that the morphine in the minor child came through breast-milk.

The State never produced any medical testimony that concluded to a reasonable degree of medical certainty that the level of morphine in the minor child could have come through breast milk. Nor did any expert testify to any language that would be the equivalent of such language. While the cause of death may have been established beyond a reasonable doubt, the criminal means of causing that death was not established beyond a reasonable doubt. *Commonwealth v. Embry*, 441 Pa. 183, 272 A.2d 178 (1971). Unless there is to be one standard of review in a civil case involving medical testimony and another in a criminal case, this Court should reverse the convictions in this case.

Substantial Circumstantial Evidence

As both this Court and our Supreme Court has held on several occasions, in a circumstantial evidence case, the State must produce substantial circumstance to sustain a conviction. *See, State v. Hernandez,* 382 S.C. 620, 677 S.E.2d 603 (2009) and *State v. Rogers*,

405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). All contested factual issues against the appellant are resolved in favor of the State. In this case, resolving those contested issues in favor of the State, no substantial circumstantial evidence exists that morphine through breast milk caused the death of the minor child.

The State misstates the testimony of Dr. Steve Karsch. While Dr. Karch did testify that he had seen a report of a child with 84 nanograms in its blood level, that amount is substantially less than the .52 miligrams found in the minor child's blood. Compare Rec. on App. at 490, ll 23-24 to 418, l 3-4. The amount reported in the minor child was 520 nanograms per milliliter. To compare the two values it would be .52 mg/L and .084 mg/L or 520 nanogram per milliliter and 84 nanograms per milliliter. Thus, the amount reported by Dr. Karch was substantially less than the amount found in the minor child.

Regardless of the mathematical calculation, the record does not contain substantial circumstantial evidence that morphine through breast milk caused the death of the minor child. As noted above, and contrary to the position asserted by the State in its brief at page 28, the criteria for reviewing evidence in a circumstantial evidence case is whether there is substantial circumstantial evidence to sustain the conviction.

The State has argued that this is not a purely circumstantial evidence case. Br. of Resp. at 29. What direct evidence is there that the morphine level in the breast milk was of such a sufficiently high level that enough would have passed to the minor child? The State never tested the breast milk of Stephanie Greene. Without that test, the level in breast milk is speculative at best. Without knowing that level, the evidence is purely circumstantial as to the manner of delivery of the morphine.

The State has argued that "The presence of numerous other substances in Alexis is strong circumstantial evidence establishing that the lethal levels of morphine passed through Greene's breast milk to Alexis rather than some already difficult to believe theory of accidental ingestion or forced ingestion." Br. of Resp. at 30. But how does the presence of other drugs establish that lethal levels of morphine, which the literature shows had not occurred before, suddenly pass through breast milk in this case? No such testimony exists in this case. No one has disputed that an amount of some drugs will pass through breast milk. No one has even suggested that the presence of another drug enables morphine to more readily pass through breast milk.[2]

While the State has attempted to bolster its case by contending that Mrs. Greene did not inform her doctors she was pregnant or nursing, such testimony is not relevant as to whether the circumstantial evidence in this case supports the conviction. Morphine does not react differently if it is prescribed with full disclosure or not. While Dr. Eagerton did discuss a cumulative affect, he did not testify as to an elimination rate in a minor child.[3] He did not testify as to how much would have been passed to the minor child if Mrs. Greene took the medicine as prescribed or even if she were abusing it. His theory was complete speculation.[4]

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[2] Dr. Wrenn, based upon a study, opined that about 3% of the morphine level in the mother would pass to the child through breast milk. Rec. on App. at 427, ll 4-8. If this is correct, and the level in the minor child was .52 mgL, the level in Mrs. Greene would have been 17.333 mg/L. She would have died long before reaching that level.

[3] Apparently Dr. Eagleton's cumulative affect theory applied only to morphine. No other drugs were found in an abnormal amount and thus were not cumulative.

[4] The State also argues that cocaine metabolite was found in the minor child. Br. of Resp. at 8. The testimony from Quintus Young, II was that while the initial test was positive, the confirmatory test was negative for cocaine. Rec. on App. at 129, ll 24-25

While the proof for the State in this case may have been difficult, difficultly in proof cannot be interpreted as being proof. The State could have conducted additional tests in its investigation in this case. They could have tested the stomach content of the minor child. They did not. They could have tested the hair of Mrs. Greene, they did not. They could have tested the breast milk of Mrs. Greene. Again, they did not.[5]

A finding by this Court that the State has not proven the morphine was administered to the child by breast milk would in fact require a reversal of all charges. If the passing of some drugs to an infant through breast milk is deemed to be unlawful conduct to a minor child, then no nursing mother would be safe from prosecution.

As noted in the opening brief of Mrs. Greene, "It is not sufficient that they create a probability, though a strong one . . . ." *State v. Schrock,* 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984). The evidence in this case is well below the probability standard of *Schrock.* If substantial circumstantial evidence has any meaning it certainly means the State must prove the case beyond a 50/50 probability.

Question II

Did the trial court err in failing to direct a verdict or grant a new trial when the State failed to prove Stephanie Greene acted with extreme indifference as required by South Carolina Code § 16-3-85?

As this Court has held "[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.

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[5] If a drug test were performed on the minor child at birth, the result was never entered into evidence.

State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). Furthermore, our Supreme Court has said "Similarly, in reckless homicide cases, we have held that reckless disregard for the safety of others signifies an indifference to the consequences of one's acts. It denotes 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." *State v. McKnight*, 352 S.C. 635, 645, 576 S.E.2d 168, 173 (2003). Thus, extreme indifference in the context of the homicide by child abuse act is more than mere recklessness.

The State correctly quotes Dr. Eaglerton as saying that the American Academy of Pediatrics had not recommended morphine for chronic pain while breast feeding, on cross-examination he was unable to produce a single article that supported his position. He testified that he had an article from the American Academy of Pediatrics that recommended that doctors not prescribe MS-Contin (morphine). Rec. on App. at 355, ll 2-13. At that point a break was taken so Dr. Eagleton could retrieve the article to which he was referring.

Upon Dr. Eagleton returning to the stand, he admitted the article did not exist. Rec. on App. at 357, ll 3-7. He then admitted:

> Q. (By Mr. Wise) Does that peer reviewed article talk about MS Contin being potentially dangerous creating a toxic level of morphine through breast milk?
> A. (By Dr. Eagerton) I don't believe I've seen one those of those, no sir.
> Rec. on App. at 371, ll 21

While Dr. Eagerton may have had an opinion concerning MS-Contin, he was unable to back up his opinion with any research or article. In all his research he was only able to

refer to a study that involved the level of morphine in a mother's breast milk. Rec. on App. at 358, ll 9-22. The levels in breast milk varied from 10 nanograms per milliliter to 100 nanograms per milliliter. Both of these levels are considerably below the 520 nanograms per milliliter found in this case.

The State further argues that because Mrs. Greene was taking a variety of drugs she had extreme indifference. The other opioid pain medicine she had been prescribed was oxycodone. This drug was not found in the minor child's system therefore there is no proof she was taking the drug while breast feeding the minor child. The published literature recommended against taking this drug while breast feeding. Rec. on App. at 363, ll 10-25 to 373, ll 1-20; 319, ll 16-25 to 320, ll 1-17.

What is the fact to which Mrs. Greene showed extreme indifference? When all the medical literature says taking morphine while breast feeding is safe, she could not have been acting with extreme indifference in regards to morphine. When she had all of her prescription filled at one pharmacy, she could not have been acting with extreme indifference in regards to the interaction of drugs. When the evidence shows through written documents that her primary doctors knew of each other, she could not be accused of doctor shopping and hiding prescriptions she was receiving. Rec. on App. at 169, ll 11-25 to 173, ll 1-20. In fact, the testimony shows that Drs Carol Kooistra and Susan Kovacs communicated with each other about Mrs. Greene. Rec. on App. 208, ll 1-13. Thus, the record does not establish an extreme indifference with her hiding the fact she was seeing another doctor.

The State contends "Even if the effects of the use of controlled substances by a breast-feeding mother on her child may not be precisely known, their potential harm is something

to which the public is well aware." Br. of Resp. at 36. No evidence of the common knowledge of the public was introduced at the trial. The State appears to be arguing that this Court can take judicial notices of a key element of the case against Mrs. Greene - the potential harm to her nursing child. When the published literature in the medical field fails to recognize such harm no court can take judicial notice of such a fact. The State never introduced any study that the medicine taken by Mrs. Greene in combination would cause any harm to her child.

Again the State argues through some "common knowledge" theory of proof that "Just as the public is aware of the danger of a mother's crack use to an unborn child, the general public is also certainly aware that taking medications while breast feeding poses the risk of harm to a child." Br. of Resp. at 37. First "common knowledge" was not proven at the trial below and cannot be used by this court as a fact to sustain the conviction. Furthermore., when the medical literature does not support this broad statement, how can such knowledge be "common knowledge" to the general public? Mrs. Greene never used morphine without medical supervision. The State argues that Mrs. Greene's action were especially egregious because she was a nurse. The testimony was she researched the drugs. The research would have shown that taking morphine while breast-feeding was safe.

While the question of intent is generally for the jury to decide, the State must produce at least some evidence from which the jury could conclude that Mrs. Greene acted not carelessly or recklessly, but with extreme indifference to the consequences of her actions. She took the precaution of having her prescriptions filled at the same pharmacy. Except for one, they were all filled in her current married name. The one that was not was in her prior name. No one ever testified that they would not have issued or filled that prescription because it was in the

"wrong" name. Neither this court nor the jury can speculate as to any intent from that one prescription.

Question III

Did the trial court err in failing to instruct the jury they could convict on only one of the charges as a conviction of more than one charge would violate the double jeopardy provisions of Article I, § 12 of the Constitution of the State of South Carolina and Fifth Amendment to the Constitution of the United States of America as the same fact was used to prove the cause of death in each case?

The unlawful conduct toward a child was premised upon the fact that Mrs. Greene took drugs that passed through her system into her infant child through breast milk. The involuntary manslaughter charge is premised upon the fact that Mrs. Greene took drugs that passed through her system into her infant child through breast milk. The homicide by child abuse is premised upon the fact that Mrs. Greene took drugs that passed through her system into her infant child through breast milk. The same basic fact is proven in each case.

Another way of examining the double jeopardy argument is to assume that the State had elected to prosecute Mrs. Greene in three separate actions. If the jury had acquitted Mrs. Greene on the charge of homicide by child abuse, could the State have then tried her for unlawful conduct toward a child? And if acquitted in that action could they have then tried her for involuntary manslaughter? The simple answer is no. If the State's concept of double jeopardy is correct, the protection is non existent because the legislature could always define different elements to the same facts and have multiple prosecutions.

What fact is different in an involuntary manslaughter case that is not present in the homicide by child abuse case? This is the key question as stated in *Blockberger v. United States.* Is the reckless conduct required by involuntary manslaughter always the extreme indifference of homicide by child abuse? As noted in the opening brief the only difference is the degree of culpability. Extreme indifference is a greater degree of culpability than the recklessness of involuntary manslaughter. While homicide by child abuse always requires the death of a child, that is not a fact different from involuntary manslaughter which may include a child.

Our Supreme Court has held "[C]hild abuse could never be defined as an unlawful activity 'not tending to cause death or great bodily harm,' and for this reason, the elements of involuntary manslaughter will never be included in the greater offense of homicide by child abuse." *McKnight v. State*, 378 S.C. 33, 52, 661 S.E.2d 354, 363 (2008). The State ignores in its brief that the difference between the two is the degree of culpability. But if the elements are not the same, then an abnormality occurs. By convicting on both, the jury has found simultaneously that Mrs. Greene committed child abuse resulting in death and committed an act which was not likely to cause death. The same act could not satisfy both.

As to unlawful conduct toward a child, the same facts are required for homicide by child abuse. While unlawful conduct toward a child does include the requirement that there be a relationship between the child and the defendant, under the facts of this case that relationship was established and as such unlawful conduct would be a lesser included offense. As this Court has said "A trial judge must charge a lesser included offense if there is any evidence from which it can be inferred that the defendant committed the lesser included of the crime charged. *State v. White*, 353 S.C. 566, 571, 578 S.E.2d 728, 731 (Ct. App. 2003) aff'd as

modified, 361 S.C. 407, 605 S.E.2d 540 (2004)(citations omitted). Here the facts would support a conviction of unlawful conduct toward a child and therefore the charge under the facts of this case would be a lesser included. Uniawful conduct toward a child would not be a lesser included if the defendant did not have relationship with the child that was within the meaning of the statute. But if that relationship had not been proven, then there would also be no basis to submit the case to the jury.

Under the State's theory of double jeopardy the legislature could pass many laws giving different names to the same elements or requiring slightly different factual proofs for the exact same act and a defendant would not have any protection from double jeopardy. In the context of a search and seizure Justice Cothran warned "To hold that the citizen shall enjoy such immunity, and yet when it is flagrantly violated his person shall be subjected to punishment and his property confiscated, upon the strength of evidence thus unlawfully obtained, is but to 'keep the promise to the ear and break it to the hope.'" *State v. Prescott*, 125 S.C. 22, 117 S.E. 637, 638 (1923)(dissenting). *See also*, *Sandel v. State*, 126 S.C. 1, 119 S.E. 776 (1922). The same principle applies to double jeopardy protections.

Question IV

Did the trial court err in failing to require the state to open fully on the law and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the constitution of the United States of America by her counsel not being able to respond to new arguments made by the state in its closing argument?

The order of closing arguments and the content of those closing arguments are subject to a due process analysis. As the Delaware Supreme Court has said "For a time, courts were adamant in confining the scope of a plaintiff's rebuttal strictly to a response to points raised in defense counsel's closing summation. . . . The rule is rooted in the concepts of due process and fundamental fairness. Simply put, it is unfair and often highly prejudicial for plaintiff's or State's counsel to avoid treatment of certain issues in the opening summation so as to deprive defense counsel of the opportunity to reply. *Bailey v. State*, 440 A.2d 997, 1002 (Del. 1982)(internal citation omitted). This simple statement sums up the position of the appellant.[6] This case was cited in the opening brief of Mrs. Greene.

Contrary to what the State appears to argue in its brief, Mrs. Greene is not contending that she was entitled to the last argument. Mrs, Greene acknowledges that this is not available to a defendant who presents evidence as she did. What Mrs. Greene contends is that the State should be required to open fully on the law and the facts and then reply only to new issues raised by the defense argument. This is not asking too much and is of course fndamentally fair.

In his closing the solicitor strongly suggested that Dr. Bridges told her not to take morphine. Rec. on App. at 547, ll 21-23. Dr. Bridges only told Mrs. Greene not to take vicoprofen because it is dangerous in the third trimester of her pregnancy. Rec. on App. at 224, ll 21-25 to 225, ll 1-9. Because the State was not required to open fully defense counsel did not have an opportunity to correct this incorrect impression. He further states that Dr. Wren had

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[6] Recently the South Carolina Supreme Court has proposed a change to rule ___ to meet the objection of the appellant in this case.

testified the minor child died from morphine exposure through breast milk. Rec. on App. at 554, ll 8-10. Dr. Wren testified he did not know how the minor child obtained the morphine level. As he stated "I don't know how it got there." Rec. on App. at 430, ll 9. He further argued that "This baby should not have been exposed to vicoprofen." Rec. on App. at 546, ll 22-23. The testimony at trial was that no hydrocodone, the active ingredient in vicoprofen, was not present in the minor child's blood. Rec. on App. at 320, ll 13-17. Had defense counsel had a fair opportunity to refute these allegations, the jury would have had a fairer understanding of the evidence in this case.

Not requiring the State to open fully on the law and the facts deprives defense counsel of the right to fully respond to the theory of the State in prosecuting the case and is inherently unfair. The State, however, has the advantage of hearing the complete theory of defense counsel before he makes a closing argument. Such a procedure is unfair.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the opening brief, the judgment in this matter should be reversed.

July 15th, 2015

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The Supreme Court of South Carolina

The State, Respondent,

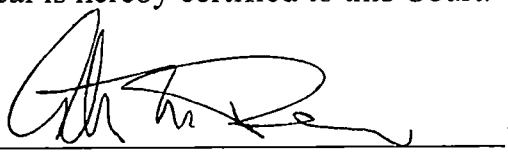
v.

Stephanie Irene Greene, Appellant.

Appellate Case No. 2016-000813

ORDER

Pursuant to Rule 204(b), SCACR, this appeal is hereby certified to this Court.



C.J.

FOR THE COURT
Hearn, J., not participating

Columbia, South Carolina

May 5, 2016

cc:
The Honorable Jenny Abbott Kitchings
Clarence Rauch Wise, Esquire
Barry Joe Barnette, Esquire
Alan McCrory Wilson, Esquire
David A. Spencer, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Stephanie Irene Greene, Appellant.

Appellate Case No. 2014-000764

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 27802
Heard February 15, 2018 – Filed May 23, 2018

AFFIRMED IN PART, VACATED IN PART

C. Rauch Wise, of Greenwood, for Appellant.

Attorney General Alan Wilson and Senior Assistant Attorney General David Spencer, both of Columbia, and Seventh Judicial Circuit Solicitor Barry J. Barnette, of Spartanburg, for Respondent.

JUSTICE KITTREDGE: Appellant Stephanie Irene Greene appeals her convictions and sentences for homicide by child abuse, involuntary manslaughter, and unlawful conduct toward a child for the death of her infant daughter, Alexis. Appellant was sentenced to prison for twenty years for homicide by child abuse, five years concurrent for involuntary manslaughter, and five years concurrent for unlawful conduct toward a child. We affirm the homicide by child abuse and

unlawful conduct toward a child convictions and sentences, but we vacate the involuntary manslaughter conviction and sentence.

I.

Appellant was Alexis's mother; she was Alexis's caretaker during her brief life. Alexis died from morphine poisoning when she was forty-six days old. Appellant, a former nurse, was addicted to many drugs. The State contended that Appellant's morphine addiction (as well as dependence on other drugs) caused Alexis's drug poisoning through breastfeeding. The jury convicted Appellant on all charges.

This appeal followed. Appellant has raised four issues: (1) whether the trial court erred in denying her motion for a directed verdict on all charges due to the State's failure to prove causation; (2) whether the trial court erred in denying her motion for a directed verdict on the homicide by child abuse charge due to the State's failure to prove she acted with extreme indifference; (3) whether the trial court erred in failing to instruct the jury that it could only return a guilty verdict on one charge; and (4) whether the trial court erred in failing to require the State to open fully on the law and the facts of the case. We address each of these issues in turn.

II.

Appellant's first assignment of error is the trial court's failure to grant a directed verdict on all charges because the State allegedly failed to produce any evidence that the morphine found in Alexis came from Appellant's breast milk. Appellant ignores the "synergistic effect" of the morphine poisoning when considered along with Appellant's abuse of other drugs. We have carefully reviewed the evidence and, when viewed in a light most favorable to the State as our standard of review mandates, we find sufficient evidence to present all charges to the jury. *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) (noting that when reviewing the denial of a directed verdict the Court must not weigh the evidence but must view it in the light most favorable to the State, for the Court is concerned only with the existence or nonexistence of evidence) (citations omitted).

The State's causation theory was Appellant consumed excessive amounts of central nervous system depressants, principally morphine,[1] while breastfeeding Alexis and these drugs passed through Appellant's breast milk, resulting in Alexis's death.

[1] While the State focused mainly on Alexis's morphine poisoning, the other central nervous system depressant abused by Appellant was Clonazepam.

The evidence at trial revealed that Appellant continuously took morphine—MS Contin—and other drugs while pregnant with Alexis and while breastfeeding her. Moreover, the evidence showed that Appellant took more morphine than her doctors prescribed. In addition, Appellant exclusively breastfed Alexis until approximately one week before her death. Appellant told investigators that she began supplementing with formula due to her new blood pressure medication; however, Appellant also told investigators that she breastfed Alexis extensively during the two nights immediately preceding Alexis's death. Thus, sufficient evidence was shown that Appellant took many drugs, including morphine, and breastfed Alexis.

In addition, the evidence presented at trial was sufficient to show that the morphine and Clonazepam found in Alexis came from Appellant's breast milk. Appellant contends there is no evidence to support a finding that Alexis's drug poisoning was the result of ingesting morphine through Appellant's breast milk. We disagree, for we find the evidence, when considered in its entirety, provides a substantial basis from which a reasonable juror could conclude Appellant's breast milk was the source of the morphine that killed Alexis. The record includes extensive scientific evidence on morphine and the synergistic effect when combined with other central nervous system depressants. This evidence included the varying rates of metabolism in adults, the absence of metabolism in infants, the transferability of morphine from a mother to her baby through breast milk, and the risks of infants ingesting morphine (and other drugs) from their mothers' breast milk.

Dr. David H. Eagerton, an assistant professor of pharmacology and founding faculty member at the Presbyterian College School of Pharmacy and the former chief toxicologist at the South Carolina Law Enforcement Division, provided considerable testimony. Part of that evidence included the warning accompanying MS Contin, which provides that morphine "passes into the breast milk":

> **Dr. Eagerton**: "Before taking MS Contin tell your healthcare provider if you have a history of it." It gives several histories. And then in bold again it says, "Tell your healthcare provider if you are pregnant or planning to become pregnant. MS Contin may harm your unborn baby. *If you're breastfeeding MS Contin passes into the breast milk and may harm your baby*."

(emphasis added).

Much of the scientific evidence addressed an infant's inability to absorb and process a drug like morphine:

The State: And obviously the child died. Obviously, it is consistent with that. Through the breastfeeding and everything a child—can it metabolize drugs like an adult does?

Dr. Eagerton: No, they don't.

The State: If you would, tell the jury about that, especially a six-week-[]old.

Dr. Eagerton: Okay. Typically, whenever—just to kind of back up a little bit how—you have to understand what drugs do in your body.

Once—once you take them they don't stay there forever. They go through a cycle. And in pharmacology we use the acronym ADME absorption. You have to get the drug into your system. So how do you get it in there? There's—there's lots of different ways. You can—most things we're talking about now is you think of it orally. But you can give it, you know, as a shot either just under your skin, in your muscle. You can give it [in an] IV directly in your veins. You can absorb some drugs through the skin, different things like that. So you have different routes of administration depending on what you're trying to do and what the drug is.

Once you absorb it it's going to distribute throughout your body based on its chemical and physical properties, that is whether it likes water or whether it likes fat, or it distributes into one of those two areas in the body primarily.

Certain tissues may pick up drugs preferentially, things like that. So it's going to distribute throughout your body.

Then the next step is metabolism, which is more correctly termed biotransformation. Basically, your liver is responsible for that, and it has enzymes that develop over time that basically take these foreign compounds that you're taking and make it usually more

water [soluble], and the idea is to make it either less toxic or more readily excreted. But the idea i[s] to make it more readily—more water [soluble] typically so that it could be more readily excreted from your body. And that's the last stage[] of elimination. And it's eliminated—it's eliminated—most drugs are going to be once they're—especially once they've been metabolized and made more water [soluble] they're going to be eliminated throughout the water in your body—urine, feces, sweat, saliva, tears, things like that is how it's going to be eliminated primarily. There are other ways too.

The State: Does a six-week-[]old child metabolize at all?

Dr. Eagerton: No, not typically because it take[s] time[] for your liver to develop. It takes time for these—the genes that code for these enzymes to turn on and be expressed. And you don't—even a child doesn't metabolize things the same as an adult.

Usually you don't—whenever you go through puberty is whenever most of the things that are going to turn on for an adult is going to turn on.

And, in fact, it even goes the other way. As you get old, become aged, some of these genes can become nonfunctional. Some—you may not have the same metabolic capacity.

Your kidneys may not work as well, things like that. So you have to take into consideration age certainly whenever you're looking at the effects of drugs and how long they're going to stay in your body.

The State: Obviously, the baby Alexis showed signs of this before the death.

Dr. Eagerton: Right. The—the lethargy, maybe trouble breathing. I—I don't know how to interpret that exactly, but there [were] some—there were some symptoms that were conveyed that were consistent with morphine toxicity.

The State: And basically if she was continuously breastfeeding and things like that could she reach a level, especially if she didn't metabolize it nearly as fast as the mother, for example, could it reach the levels of toxicology—toxicity of the level [sic]?

Dr. Eagerton: Yes. And that's one of the things that if you can't metabolize it, then the drug may build up in your body and you become—you have a toxic dose whenever you wouldn't normally have a tox[ic] dose.

Dr. Eagerton's testimony further included the warning on morphine from LactMed[2]:

Dr. Eagerton: "Epidural morphine given to mothers for post[-] cesarean section analgesia results in trivial amounts of morphine in their colostrum and milk. Intravenous or oral doses of maternal morphine in the immediate postpartum period result in higher milk levels than with epidural morphine. Labor pain medication may delay the onset of lactation. *Maternal use of oral narcotics during breastfeeding can cause infant drowsiness, central nervous system depression and even death.*"

(emphasis added).

Dr. Eagerton: "[A]t least some of [the morphine] I believe within a reasonable degree of scientific and medical certainty had to come through the breast milk."

Accepting this evidence as true—as we must under the standard of review—one may reasonably deduce that morphine ingested through breastfeeding "can cause . . . death." The evidence, scientific and otherwise, further allows a reasonable juror to conclude that Appellant's breast milk was the source of the morphine found in Alexis's body. Thus, the testimony of Dr. Eagerton provides evidence that, if believed, is sufficient to survive Appellant's directed verdict motion. The State presented additional evidence.

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[2] LactMed is a database that provides information and warnings on drugs to which breastfeeding mothers may be exposed. It is part of TOXNET, a database operated by the National Institute of Health.

Dr. John D. Wren, a pathologist, performed the autopsy on Alexis. Dr. Wren is an experienced pathologist, having performed more than four thousand autopsies. Early in Dr. Wren's testimony, the State established that Alexis's body had no needle marks. Dr. Wren stated that "the only way this child could have gotten that much [morphine] would be orally, because I saw no injection sites. . . . The route of administration had to have been orally." And as Dr. Wren explained, the level of morphine in Alexis was lethal:

> **Dr. Wren**: Then you come to morphine. The level was .52 mg per liter, therapeutic level was .10 to .30 mg per liter. And from my references therapeutics [sic] .001 to .200. Toxic is .3 to 2.5. And lethal is .2 to 7.2.
>
> Now, you'll notice that some of these overlap. It really depends on how the—how accustomed the body is to that drug.[3]

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[3] This is consistent with Dr. Eagerton's testimony that the line dividing toxic and lethal levels is not an exact demarcation but rather falls within "a range."

Thus, the dissent's misconceptions are twofold. First, the dissent fails to appreciate that the ranges for toxic and lethal levels of morphine are overlapping and that Alexis's level fell within the overlapping area. According to the expert testimony in this case, the level of morphine found in Alexis (.52 mg) could have been classified in either the toxic level (.3 to 2.5 mg) or lethal level (.2 to 7.2 mg); it is simply lethal because it caused her death. Therefore, the dissent's attempt to draw an artificial distinction that there was only evidence showing enough morphine could pass through the breast milk to be "toxic" but not "lethal" is unavailing.

Second, the dissent fails to recognize the expert testimony that a baby is unable to metabolize this type of drug and chronic exposure can lead to a higher level of morphine building up within the body, which can logically result in a lethal level of morphine. It was not necessary to show Alexis received a lethal level of morphine from one dose of breast milk in order to prove the State's causation theory: "the child died as a result of consumption of a controlled substance through the mother's breast milk." The State provided evidence that Appellant was taking morphine and breastfeeding Alexis continuously, morphine can pass from a mother to a baby through breast milk, the level of morphine can build up in a baby due to the inability to process it, and Alexis died from a lethal level of morphine. Contrary to the dissent's assertion, nothing more was required for the jury to make a logical deduction.

. . .

And then in pieds [sic]—I put this in because I had found this later—that the levels that produce surgical analgesia in pediatrics is .046 to .083, which is 46 to 83. Once again, the level reported [in Alexis] is 520. And then of course there's a caveat there. Lethal levels may be higher in individuals under chronic opioid treatment.

If you have a person that's under chronic opioid treatment they're taking in a lot—a lot often and they're—over a long period of time they adjust to the—their body physiology adjusts to that, and they can sustain higher levels without it having an effect on them.

So you have to take into account where the person has a history of that—and of course nobody that comes to the morgue is going to tell you they're taking morphine, and sometimes the family don't tell you either. So we have to take it if they don't have a prescription that they're getting it illegal[ly] or they're taking something else.

So based on all of that *all of these drugs essentially lead to respiratory depression*. And so I said based on the history and autopsy findings—and I should have put in including toxicology results—*it was my opinion that this child died as a result of respiratory insufficiency secondary to synergistic drug intoxication. I could just as easily have said morphine intoxication, but lawyers like to split hairs, and so I included them all.*

(emphasis added).

Dr. Wren's testimony continued:

The State: And, Doctor, let me ask you this. Obviously, being a young child, six-and-a-half weeks, her metab—the ability to metabolize drugs, is it much less than an adult?

Dr. Wren: That's—that's correct. It builds up.

The State: So it will build up over a period of time if it—if it keeps getting the drugs.

Dr. Wren: Yeah. If they can't metabolize it'd have to go somewhere. And there's something called intrahepatic circulation. If it's excreted into the bile or whatever, it gets into the GI tract, and it's reabsorbed and goes back in[,] it just recirculates. It's just not eliminated unless she's—has affluent diarrhea or—or urinating all of the time.

The State: So, and the—the mother was taking morphine in this situation and breastfeeding. Obviously, the baby was getting morphine though the—taking MS Contin actually.

Dr. Wren: At least some, yeah.

The State: Yeah. From there. So the baby would get the morphine from the mother.

Dr. Wren: That's correct.

The State: And could then metabolize it as fast as it, you know—in a fast way or was constantly getting it from the breast milk, could it build up in that body?

Dr. Wren: That's right. I did a couple of calculations. I'm not as good in my head as I used to be, but I think I might be correct or at least close. I have one reference here if I can find it.

The State: Yes, sir. Take your time.

Dr. Wren: It's from toxnet.

The State: Yes, sir.

Dr. Wren: It says—this is a caveat. "Newborn infants tend to be particularly sensitive to the effects of even small doses of analgesics. Once the mother's milk come in—comes in it's best to provide pain control with a nonnarcotic analgesic and limit maternal intake of morphine to a few days at a low dosage with

close infant monitoring. And then if the baby shows signs of increased sleepiness more than usual, difficulty breastfeeding, breathing difficulties, a physician should be contacted immediately."

It goes further to say there's a study here of one mother who was 21 days postpartum, which is about half this one, [who] received oral morphine, 10 mg every six hours, and for four doses. That's 40 mg. And then five [milligrams] every six hours for two doses. So that's actually 50 mg total she got in a 24-hour period.

She had a peak morphine of a hundred micrograms per liter after one hour, and four and a half hours after her first milligram, 5 mg dose.

Using the peak level from this study an exclusively best—breastfed infant would receive 15 micrograms per [] daily[,] equal to about three percent of the maternal daily dose assuming a daily maternal oral morphine dose of 40 mg.

Okay. So I took 40 mg and took three percent of that. That comes out to be 1.2 mg.

The baby weighed 3,345 grams, which is 3.345 mg [sic]. And I was doing this in my head, so I got—took three times 1.2. That's—well, actually I didn't even do that. I took 1.2 mg and divided that by the volume of blood in a child that age. The rule of thumb is 75 to 80 milliliters per kilogram.

Okay. This child weighed, again, 3.345 kilograms, so 3.345 times 75 or 80 comes out to be about .285 liters. 285 milliliters is all the blood that child had in her body, and that has to go into the tissues everywhere in the body. So the—the blood—you'll have to take my word for it. It is hard to get 10 ccs of blood out of a child, an infant. It is really hard. The younger they are, the harder it is.

And we—a lot of places that do blood toxicology, they want 21 milliliters. They want three 7-milliliter tubes of blood. We can't get that. So we have to send them small amounts.

But, at any rate, if you take the 1.2 mg and divide it by two—.285 you get about 4 mg per liter, which is 4,000 micrograms per liter. So that's—that's a good bit of—when we're talking about micrograms and milligrams, that's a good bit.

Then I found another place in the same article where it says that an exclusively breastfed infant receives—tells what it receives. But it also says the peak morphine in—they did seven women who had preterm deliveries, and they—they gave them 60 mg of morphine in 24 hours cumulative. And they found out that the peak milk morphine varied, was 48 on the average mic—micrograms per liter. And the peak six glucuronide metabolite was 1,084 mg or micrograms per liter, which is also secreted in breast milk.

And it's thought that that—that active drug, the six—the six isomer is actually secreted in the milk too. And in the infant's digestive system it's converted back to morphine, and that is another source of morphine.

Dr. Wren also re-read portions of the LactMed warning on morphine:

Dr. Wren: "Maternal use of oral narcotics during breastfeeding can cause infant drowsiness, central nervous system depression[,] and even death. Newborn instant—infants seem to be particularly sensitive to the effects of even small do[s]es of narcotic analgesics and limited maternal intake of morphine to a few—to a few days at a low dosage with close infant monitoring is best to provide pain control and limited maternal intake to a few days at low dosage."

The defense stressed the lack of studies and peer-reviewed articles linking drug-related infant deaths to breastfeeding. Dr. Wren provided a common sense explanation:

Dr. Wren: I don't—I don't think anybody in here would subject [a] child to an ongoing test like that.

In sum, the State presented evidence that Appellant continuously ingested substantial doses of morphine and other drugs while pregnant and breastfeeding;

that morphine and other drugs can and do pass from a nursing mother to a breastfeeding child through breast milk; that infants cannot metabolize morphine and other drugs effectively; that Alexis exhibited symptoms consistent with morphine toxicity; and that Alexis's death was caused by respiratory failure secondary to synergistic drug intoxication.

As noted, we are mandated when reviewing the denial of a directed verdict motion to view the evidence in a light most favorable to the State. When examined through the proper lens, the State presented ample evidence that would permit the jury to logically and reasonably conclude that Appellant's morphine consumption while breastfeeding "place[d] the child at unreasonable risk of harm," S.C. Code Ann. § 63-5-70(A)(1) (2010), and constituted "an act or omission by any person which causes harm to the child's physical health or welfare" resulting in the child's death, S.C. Code Ann. § 16-3-85 (2015). *See State v. McKnight*, 352 S.C. 635, 643–44, 576 S.E.2d 168, 172 (2003) (affirming the denial of a directed verdict motion in a homicide by child abuse action despite an expert's inability to identify "the exact mechanism" through which the cocaine affected the infant's body).[4]

[4] We, of course, agree with the dissent that the "State must prove every element of the crime charged." We are convinced the State has done so in this case, sufficient to survive a directed verdict motion. With respect for the dissent, we disagree with its reliance on the law concerning a jury's consideration of circumstantial evidence. It is here that the dissent introduces its view that "additional reasoning" is needed. While the dissent's desired framework may apply to a jury's consideration of circumstantial evidence, it has no place at the directed verdict stage. The reliance on *McCormick on Evidence* section 185 is misplaced, for this section "clarifies the meaning of relevance[,]" not a trial court's consideration of circumstantial evidence at the directed verdict stage. Similarly, the case of *State v. Logan*, cited by the dissent, addressed a challenge to a circumstantial evidence jury charge. 405 S.C. 83, 747 S.E.2d 444 (2013). *Logan* does not remotely touch upon a trial court's consideration of circumstantial evidence at the directed verdict stage. The dissent conflates the standards that apply to a trial court's consideration of circumstantial evidence at a directed verdict motion and a jury's consideration of circumstantial evidence. This conflation of different standards was addressed in *Bennett*, as the Court concluded that "the lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." *State v. Bennett*, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2016). Paradoxically, the dissent does acknowledge that "the State presented substantial circumstantial evidence to support its theory that Alexis died as a result

III.

Appellant argues that, even if causation was shown, the trial court erred in failing to direct a verdict on the homicide by child abuse charge because the State did not prove she acted with extreme indifference.

"A person is guilty of homicide by child abuse if the 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) (2015). For purposes of this statute, we have previously defined "extreme indifference" as "a mental state akin to intent characterized by a deliberate act culminating in death." *McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting *State v. Jarrell*, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002)).

In this case, sufficient evidence was presented to show that Appellant was addicted to prescription drugs—including morphine—and Appellant knew she should use caution in taking morphine while pregnant or breastfeeding but elected to take it in excessive amounts without a doctor's supervision ensuring Alexis's safety.[5]

The testimony at trial revealed that Appellant began receiving prescription drugs due to injuries sustained in a car accident in 1998. In January 2006, Appellant was pregnant and began seeing Dr. Kooistra to treat a seizure disorder. Notably, Dr. Kooistra did not prescribe any pain medications for Appellant while she was pregnant and tried "to avoid prescribing medications of any sort during pregnancy." In November 2007, Appellant began seeing Dr. Kovacs and receiving

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of ingesting morphine from [Appellant's] breast milk." The dissent circumvents this undeniable finding by parsing selected portions of the testimony favorable to Appellant and recasting that evidence as the "proper lens." The State must present evidence from which a jury can fairly and logically deduce that the defendant committed the offense charged, and at the directed verdict stage, the evidence must be viewed in a light most favorable to the State, not the defendant.

[5] In addition, the toxicology report revealed that Alexis tested positive for Klonopin (Clonazepam), for which Appellant had a prescription. The pill bottle for this drug, found in Appellant's room on the morning of Alexis's death, specifically instructed, "Do not use if pregnant or suspect you are pregnant or are breastfeeding."

prescriptions for various narcotics. Unbeknownst to Dr. Kovacs, Appellant continued to receive other pain prescriptions from Dr. Kooistra. In March 2010, when Appellant realized that she was pregnant with Alexis, she did not notify either prescribing doctor. In April 2010, Appellant requested to switch her prescription patch—Duragesic—to MS Contin pills, which Dr. Kovacs prescribed as she was unaware that Appellant was pregnant. Dr. Kovacs testified that she would not have prescribed morphine to Appellant had she known of the pregnancy. In addition, Dr. Bridges, Appellant's O.B.G.Y.N. physician, testified that she and her colleagues were unaware that Appellant was taking morphine prior to the birth, during delivery, and postpartum.

Throughout her pregnancy, Appellant failed to disclose that she was pregnant to the doctors prescribing morphine to her and failed to disclose that she was taking morphine to her prenatal doctors. In addition, she routinely omitted the fact that she was taking morphine from the paperwork that she submitted to her doctors. The testimony at trial was that, at the very least, the drug should only be taken under a doctor's supervision so the baby's health could be monitored. Nevertheless, Appellant failed to disclose this important information to any of her doctors.

The morphine addiction and concealment continued after Alexis's birth. In October 2010, Appellant told Dr. Kovacs that she had missed her appointments since receiving the MS Contin prescription in April because she had been so depressed that she could not leave the house—her pregnancy and Alexis's recent birth were never mentioned. One of the State's experts, Dr. Eagerton, testified that the use of morphine during lactation is not recommended. Moreover, in response to whether "the doctors definitely need to know about this," Dr. Eagerton stated, "Absolutely." Again, Dr. Kovacs testified that she would not have given Appellant the medication had she known about the pregnancy and Dr. Bridges testified that no mention of morphine was made during Appellant's postpartum visit. Due to her nondisclosure, the record reveals that Appellant received an additional prescription for MS Contin and continued to breastfeed Alexis.

The morning of Alexis's death, Appellant omitted morphine from the list of her current prescriptions that she provided to the investigators, despite their specific inquiry upon finding the pill bottle in her bedroom. At that time, Appellant only admitted to taking morphine while pregnant with Alexis. When initially questioned by law enforcement, Appellant lied about her morphine addiction. It was only after the autopsy and toxicology reports were finalized and Appellant was interviewed again by Investigator Gary that she told the truth and acknowledged

her addiction. Specifically, Investigator Gary testified that Appellant "finally admitted she just didn't tell [the doctors] because she was afraid they'd take off [sic] her off the morphine."

Thus, viewing the evidence in the light most favorable to the State, the jury could conclude Appellant acted with extreme indifference in taking the morphine and breastfeeding her child, resulting in Alexis's death.

IV.

Appellant argues alternatively that if the homicide by child abuse conviction stands, the multiple convictions and sentences for the remaining offenses cannot stand and should be vacated. Concerning the involuntary manslaughter conviction and sentence, we agree. As explained below, we find nothing in South Carolina's homicide statutes or law that reflects a legislative intent to deviate from the overwhelmingly prevailing view that the homicide of one person by one defendant is limited to one homicide punishment—one homicide, one homicide punishment. Concerning the unlawful conduct toward a child charge, we reject Appellant's challenge and affirm, for that entirely separate offense was complete prior to Alexis's death.

A.

Multiple offenses, including multiple homicide offenses, may be prosecuted in a single trial, but principles inherent in double jeopardy and due process preclude multiple punishments for the same offense.[6] *See, e.g.*, *State v. Cavers*, 236 S.C. 305, 311–12, 114 S.E.2d 401, 404 (1960) ("It was within the province of the jury to find whether appellant's conduct was negligent or reckless, or neither; if negligent, it would have supported a verdict of guilty of manslaughter, the court having eliminated murder and voluntary manslaughter; if reckless, it sustains the verdict of guilty of reckless homicide, and that finding by the jury is implicit in the verdict. The jury were instructed that they could not find appellant guilty on both

[6] U.S. Const. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."); U.S. Const. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law"); S.C. Const. art. I, § 3 ("[N]or shall any person be deprived of life, liberty, or property without due process of law . . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . .").

counts. To sustain this point of appellant would require the court, instead of the jury, to determine whether his conduct was negligent or reckless, if either, which, under the evidence in this case, would be an invasion by the court of the province of the jury. The State cannot be required to elect between counts in an indictment when they charge offenses of the same character and refer to the same transaction, whether or not one charges a common law offense and another a statutory offense." (citations omitted)); *see also Ball v. United States*, 470 U.S. 856, 859, 861 (1985) ("It is clear that a convicted felon may be prosecuted simultaneously for violations of §§ 922(h) and 1202(a) involving the same firearm. This Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case. . . . To say that a convicted felon may be prosecuted simultaneously for violation of §§ 922(h) and 1202(a), however, is not to say that he may be convicted and punished for two offenses. Congress can be read as allowing charges under two different statutes with conviction and sentence confined to one. Indeed, '[a]ll guides to legislative intent,' *United States v. Woodward*, 469 U.S. 105, 109, 105 S. Ct. 611-613, 83 L.Ed.2d 518 (1985), show that Congress intended a felon in [the defendant's] position to be convicted and punished for only one of the two offenses." (citations omitted)).

While the South Carolina legislature has manifestly authorized multiple homicide charges for a single homicide, we find no expression of legislative intent authorizing multiple homicide *punishments* for a single homicide committed by a single defendant. As a result, absent legislative intent to the contrary, we follow the prevailing rule—one homicide is limited to one homicide punishment per defendant. *See Ervin v. State*, 991 S.W.2d 804 (Tex. Crim. App. 1999) (collecting cases from various jurisdictions supporting that one person causing one death should result in one murder or homicide conviction); *see also People v. Lowe*, 660 P.2d 1261, 1271 n.11 (Colo. 1983), *abrogated on other grounds by Callis v. People*, 692 P.2d 1045 (Colo. 1984) (collecting "[c]ases holding that a person may be convicted of only one homicide offense for the killing of one person"). "It would be a strange system of justice that would permit the defendant to be sentenced to two . . . sentences for the killing of one person." *People v. Hickam*, 684 P.2d 228, 231 (Colo. 1984) (quoting *Lowe*, 660 P.2d at 1270–71). "[C]onviction of both charges, arising from the slaying of the same person amounts to piling punishment upon punishment. Fundamental fairness precludes such a practice." *Loscomb v. State*, 45 Md. App. 598, 613, 416 A.2d 1276, 1285 (1980).

B.

Homicide by Child Abuse and Involuntary Manslaughter

Appellant was indicted on both homicide by child abuse and involuntary manslaughter charges as a result of Alexis's death.

The homicide by child abuse statute reflects the legislature's intent to define and target a specific societal problem—child abuse resulting in death, which further explains why multiple homicide offenses may be *prosecuted* in a single trial. The statute defines in detail the elements of homicide by child abuse: "caus[ing] the death of a child under the age of eleven while committing child abuse or neglect" where "the death occurs under circumstances manifesting an extreme indifference to human life." S.C. Code Ann. § 16-3-85(A)(1) (2015). Conversely, the now codified common law offense of involuntary manslaughter is defined in broad terms, covering 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. *See, e.g.*, *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014) ("Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others."); S.C. Code Ann. § 16-3-60 (2015).

In *McKnight v. State*, 378 S.C. 33, 51–52, 661 S.E.2d 354, 363 (2008), we applied the *Blockburger* "same-elements" test and held that involuntary manslaughter is not a lesser included offense of homicide by child abuse. *See Blockburger v. United States*, 284 U.S. 299 (1932). In *McKnight*, we stated a defendant charged with homicide by child abuse was not entitled to a jury charge on involuntary manslaughter because "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. The lawful-conduct-in-a-criminally-negligent-manner prong could not apply because child abuse is not lawful. *Id.* at 51–52, 661 S.E.2d at 363. Further, the unlawful-conduct version of involuntary manslaughter could not apply because "child abuse could never be defined as an unlawful activity not tending to cause death or great bodily harm." *Id.* at 52, 661 S.E.2d at 363 (internal quotation marks omitted).

This issue is presented to us in an unusual posture. While both homicide charges were properly presented to the jury, the jury was not instructed in accordance with Appellant's proper request—Appellant could not be found guilty of both homicide by child abuse and involuntary manslaughter. In this situation, the jury should have been instructed that, depending on their view of the evidence, they could find Appellant not guilty of both homicide offenses, guilty of homicide by child abuse, or guilty of involuntary manslaughter—but may not find Appellant guilty of both homicide charges. The State erroneously contends both homicide convictions and punishments should stand.

The flaw in the State's argument on appeal is best understood by reviewing its theory of criminal liability as the trial unfolded. After indicting Appellant on varying homicide charges (which as a matter of law could not be premised on one theory of liability), the State ultimately elected to pursue a single theory of liability—Alexis's death from morphine poisoning was caused by the morphine in Appellant's breast milk—and the trial court instructed the jury, "That applies to each of the separate charges." The jury could have accepted Appellant's view of the evidence and found Appellant not guilty of homicide by child abuse. Specifically, the jury could have concluded the State failed to prove Appellant "committed a deliberate or intentional act under circumstances revealing an extreme indifference to human life."[7] In that scenario, the jury may have nevertheless found Appellant guilty of involuntary manslaughter.[8] But the jury's guilty verdict on Count One in the indictment—homicide by child abuse—precluded a guilty verdict on the charged offense of involuntary manslaughter in

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[7] This language is from the trial court's jury charge on homicide by child abuse.

[8] The trial court's charge on involuntary manslaughter included the instruction, "Unintentional means that the defendant did not intend to kill the child nor did the defendant intend to inflict serious bodily harm or injury to the deceased child." A finding that Appellant's conduct satisfied this standard would be consistent with Appellant's argument that it is safe for breastfeeding mothers to take morphine. However, it would be inconsistent with a finding that Appellant "committed a deliberate or intentional act under circumstances revealing an extreme indifference to human life."

Count Two. Thus, under these circumstances, a conviction and sentence for each homicide charge cannot stand.[9]

The situation here should be contrasted with a homicide that would properly fall within multiple homicide statutes. In that situation, a jury may properly return a guilty verdict on more than one homicide charge. In *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997), this Court affirmed convictions and sentences for two homicide charges—felony driving under the influence causing death and reckless homicide—arising out of a motor vehicle accident that killed one person and seriously injured another. The evidence and theory of criminal liability satisfied the elements of both homicide statutes. *Easler*, however, went further and affirmed multiple punishments for the single homicide committed by one defendant, and this was error. We overrule *Easler* to the extent it authorizes multiple homicide punishments involving only one homicide.

It is because of this rule—one homicide, one homicide punishment—that even were we to accept the State's argument that the involuntary manslaughter guilty verdict should stand, an additional sentence for Alexis's death could not stand. The fact that Appellant received a concurrent five-year sentence for involuntary manslaughter does not change the result. The concurrent sentence likely reflects the learned trial judge's inherent understanding that a consecutive sentence could not be imposed. Yet the conviction itself is considered a punishment and that, too, must be vacated. *Ball v. United States*, 470 U.S. 856, 864–65 (1985) ("The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. . . . Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.").

V.

Appellant's final challenge is the claim of error in the trial court's refusal to "require the State to open fully on the law and the facts of the case [in closing argument] and replying only to new arguments of defense counsel." We affirm pursuant to Rule 220, SCACR, and the following authority: *State v. Beaty*, Op.

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[9] This is the very argument made by defense counsel to the trial court, as he argued, "it's very inconsistent for the jury to have found that, one, [Appellant] was simply negligent, or, two, grossly negligent, or, three, extreme indifference, because there are different standards requiring different—different things."

No. 27693 (S.C. Sup. Ct. filed Apr. 25, 2018) (Shearouse 2018 Adv. Sh. No. 17 at 57).

VI.

In sum, the homicide by child abuse and unlawful conduct toward a child convictions and sentences are affirmed; the involuntary manslaughter conviction and sentence is vacated; and we find no error in the order and manner of closing arguments.

AFFIRMED IN PART, VACATED IN PART.

BEATTY, C.J., HEARN and JAMES, JJ., concur. FEW, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE FEW: I concur in sections III, IV, and V of the majority opinion. I also concur with the conclusion the majority reaches in section II that Greene's conviction for unlawful conduct toward a child must be affirmed. I disagree, however, that we may affirm Greene's homicide convictions. On this point, for the reasons I will explain, I dissent.

I.

The State argues it is not required to prove scientific facts with expert testimony as we require civil plaintiffs to do. The State is mistaken. The State must prove every element of the crime charged, *State v. Attardo*, 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975), and when establishing any one element requires the State to prove a fact that is beyond the common understanding of lay people, the State must prove that fact by expert testimony, *see Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 80, 735 S.E.2d 650, 659 (2012) ("In some design defect cases, expert testimony is required . . . because the claims are too complex to be within the ken of the ordinary lay juror."); *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) (stating "expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge"); *see also Green v. Lilliewood*, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978) (holding that unless the subject is a matter of common knowledge, expert testimony is required to establish that a defendant failed to conform to a required standard of care in a medical malpractice case); *Kemmerlin v. Wingate*, 274 S.C. 62, 65, 261 S.E.2d 50, 51 (1979) (holding in a public accounting malpractice action: "Since this is an area beyond the realm of ordinary lay knowledge, expert testimony usually will be necessary to establish both the standard of care and the defendant's departure therefrom.").

II.

The State's theory of how Greene caused Alexis's death was narrow:[10] Greene took morphine and other medications while breastfeeding, the morphine passed through

[10] In all prosecutions for homicide, the State must prove the defendant caused the death of the victim. *See State v. McIver*, 238 S.C. 401, 406, 120 S.E.2d 393, 395 (1961) ("In a homicide case, the corpus delicti consists of two elements—the death of the person killed, and its causation by the criminal act of another."). *McIver* was a manslaughter case, 238 S.C. at 403, 120 S.E.2d at 393, and the causation element

Greene's breast milk, and Alexis died as a result of morphine intoxication.[11] The trial court charged the jury,

> The State has the burden of proving these crimes, but it involves the ingestion of the controlled substance by the child through the child's mother's breast milk. That's the State's allegation and theory in the case, that the child died as a result of consumption of a controlled substance through the mother's breast milk. That applies to each of the separate charges.

The State had no difficulty proving Greene was taking morphine while breastfeeding, and that Alexis died from morphine intoxication. The issue, therefore, is whether the State proved the morphine that killed Alexis came from Greene's breast milk.

A. Circumstantial Evidence of Causation

On this point, as the majority has explained in detail, the State presented substantial circumstantial evidence, which we view in the light most favorable to the State. *State v. Pearson*, 415 S.C. 463, 470, 783 S.E.2d 802, 806 (2016). The majority has recited the strongest circumstantial evidence in the record that supports the State's theory of causation, but to be fair, there is even more than what the majority has included. In fact, the circumstantial evidence that Alexis died from ingesting morphine through Greene's breast milk appears overwhelming, until we pose the scientific question of whether it is even possible for enough morphine to pass through breast milk to kill a child.

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is specifically included in the statute governing homicide by child abuse, S.C. Code Ann. § 16-3-85(A) (2015).

[11] The State began the trial with alternative theories of causation. The first theory was that Greene administered morphine directly to Alexis. At the conclusion of all evidence, however, the State elected not to proceed on the basis of a direct transfer of morphine, and the trial court directed a verdict for Greene on that theory.

B. Circumstantial Evidence Cases

The use of circumstantial evidence to prove guilt in criminal trials contemplates that "even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion." Kenneth S. Broun et al., *McCormick on Evidence* § 185, at 397 (Hornbook Series, 7th ed. 2014). In *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013), we described the "evaluation of circumstantial evidence" and stated it "requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded—a process not required when evaluating direct evidence." 405 S.C. at 97, 747 S.E.2d at 451; *see also* 405 S.C. at 97-98, 747 S.E.2d at 451 ("Analysis of circumstantial evidence is plainly a more intellectual process."). In every circumstantial evidence case in which this Court affirmed the sufficiency of the evidence, the "additional reasoning" required to "connect[] collateral facts in order to prove the proposition propounded" was such that a lay juror could readily conduct the reasoning and make the connection. In those cases, the "intellectual process" through which the jury could reasonably infer the guilt of the defendant from the circumstances proven by the State involved a chain of inferences that lay jurors were fully capable of navigating.

In *Pearson*, for example, the State proved the following circumstances: the suspects fled the victim's home in the victim's stolen El Camino, and Pearson's fingerprint was found in the truck's bed where the victim saw one of the suspects sitting; Pearson lied about ever having been to the victim's house when he had previously done considerable landscaping work there; and Pearson lied about knowing the co-defendant whose DNA was found on the duct tape on the victim's head. 415 S.C. at 465-69, 473-74, 783 S.E.2d at 803-05, 808. From those circumstances, a lay juror could readily conclude through a chain of non-scientific inferences that Pearson was one of the people who robbed and beat the victim. We found "the evidence could induce a reasonable juror to find Pearson guilty." 415 S.C. at 474, 783 S.E.2d at 808.

In *State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016), the State proved the following circumstances: Bennett's blood was found on the floor directly beneath the spot from which a television was stolen from a public building; his fingerprint was found on another television the suspects had attempted to steal from the "community room" of the building; and though Bennett "was known to frequent" the room in which his blood was found, "[t]estimony suggested Bennett would have no reason to be in the community room." 415 S.C. at 234-35, 237, 781 S.E.2d at 353, 354. From those circumstances, a lay juror could readily conclude

through a chain of non-scientific inferences that Bennett committed the burglary, malicious injury, and larceny. We found "the evidence could induce a reasonable juror to find Bennett guilty." 415 S.C. at 237, 781 S.E.2d at 354.

In *Pearson*, *Bennett*, and every other case in which this Court found the State's presentation of purely circumstantial evidence sufficient to survive a motion for directed verdict, a jury was fully capable of performing the "additional reasoning . . . required to reach the desired conclusion" by using its common knowledge, experience, and understanding.[12] In each of those cases, therefore, we focused only on the State's proof of collateral facts or circumstances—not on the inferences to be drawn from those facts or circumstances—and we found the State's proof of the circumstances sufficient to support the fact inferred.

C. The Circumstantial Evidence Standard

In *Bennett*, we reiterated that when reviewing the sufficiency of circumstantial evidence, "The Court's review is limited to considering the existence or nonexistence of evidence, not its weight." 415 S.C. at 235, 781 S.E.2d at 353 (citing *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478-79 (2004)). We criticized the court of appeals in *Bennett* for considering a "plausible alternative theory" because doing so is "contrary to our jurisprudence and misapprehends the court's role" compared to the role of the jury. 415 S.C. at 236, 781 S.E.2d at 354. We held "the trial court . . . must submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" 415 S.C. at 236-37, 781 S.E.2d at 354 (quoting *State v. Littlejohn*, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955)).

In this case, the State presented substantial circumstantial evidence to support its theory that Alexis died as a result of ingesting morphine from Greene's breast milk, and abandoned any alternative theory of causation. Therefore, under *Bennett* and the long line of cases upon which it relies, our task is limited to the second step in the *Bennett/Littlejohn* analysis. The question before us under that second step is

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[12] *See generally Holland v. Georgia Hardwood Lumber Co.*, 214 S.C. 195, 204, 51 S.E.2d 744, 749 (1949) (discussing circumstantial evidence in a workers' compensation case, and stating, "The facts and circumstances shown should be reckoned with in the light of ordinary experience, and such conclusions deduced therefrom as common sense dictates.").

whether a reasonable jury could "fairly and logically" conclude from the circumstances proven that the State established the causation element under its theory. This, in turn, requires us to determine if the chain of inferences the jury must follow to reach this conclusion may be completed by the jury using its common knowledge, experience, and understanding, or whether expert testimony should be required.

Greene argues the jury could not fairly and logically complete this second step because, in the course of its analysis, the jury would necessarily consider whether it is even possible that a breastfeeding mother can transmit morphine through her breast milk in sufficient concentration to cause the death of a child. Green argues the means of answering this question are beyond the common knowledge, experience, and understanding of a lay juror. Therefore, Greene argues, expert testimony was required to establish the causal connection between morphine in the mother's breast milk and Alexis's death. Specifically, Greene argues the State was required to present an expert opinion that morphine—by itself or synergistically with other drugs—passed through her breast milk to kill Alexis.

I agree with Greene. In reaching this conclusion, I find it particularly important that the State's own expert witnesses refused to state the morphine that killed Alexis came from Greene's breast milk, or even whether that was possible. The reader may repeatedly scour the majority's outstanding recitation of the State's expert testimony—or the record from which it came—but will not find any testimony that comes close to such a statement. In fact, as I will explain, the State's two experts openly avoided answering this question. In addition, the circumstances proven at trial, considered in the light most favorable to the State, include the fact that reliable medical organizations and journals have stated it can be "safe" to take morphine while breastfeeding a child. Finally, the record in this case does not include even one instance documented in medical literature of a lethal level of morphine in a child that resulted from a breastfeeding mother taking morphine.

D. Expert Testimony on Causation

The State presented the testimony of two experts. David H. Eagerton, Ph.D., is an assistant professor of pharmacology and founding faculty member at the Presbyterian College School of Pharmacy and the former chief toxicologist at the South Carolina Law Enforcement Division. His doctoral degree is in pharmacology, and he is board certified in forensic toxicology. Dr. Eagerton gave an extensive explanation of the numerous drugs found in Alexis's body after her

death, including what he considered to be a lethal level of morphine, and how the combination of those drugs can work synergistically to increase the toxic effects of the drugs in the blood. He explained how drugs are absorbed into the body and that infants do not metabolize quickly because their liver has not yet developed. At one point, Dr. Eagerton testified a six-week old child like Alexis typically does not metabolize "at all."

The State then asked, "If she was continuously breastfeeding . . . could [Alexis] reach a level, especially if she didn't metabolize it nearly as fast as the mother, could it reach the levels of toxicology -- toxicity of the level?" Dr. Eagerton answered, "Yes." Dr. Eagerton went on to explain Alexis showed symptoms that were "consistent with morphine toxicity." He testified morphine may build up in a child's body to become "toxic." But Dr. Eagerton distinguished "toxic" from "lethal." Toxic means it will make you sick; lethal means it will kill you. There was never any dispute that morphine in breast milk could make a child sick. In fact, the label on the package states morphine "passes into the breast milk and may harm your baby."

On cross-examination, Dr. Eagerton acknowledged several articles in the medical literature that list morphine as "safe to take while breastfeeding," and conceded "based upon [his] research" he was not aware of any documentation in the medical literature "that ever says a mother taking morphine can create a toxic level of morphine in the child through breast milk." Counsel showed Dr. Eagerton a 2012 article from the journal *Clinical Toxicology* entitled, "Is Maternal Opioid Use Hazardous to Breastfed Infants," and the following dialogue took place,

> Q: Look on page six of this journal. And this is a peer-reviewed journal, correct?
>
> A: That's right.
>
> . . . .
>
> Q: Look there if you would on this highlighted portion . . . [and] read that to us.
>
> A: "The medical literature describes scant evidence of opioid toxicity in breastfed infants."
>
> Q: Do you have any evidence that's contrary to that?

A: No, sir. . . .

. . . .

Q: So there is scant evidence?

A: That is correct.

Q: Which is pretty close to none.

A: Yes, sir.

. . . .

Q: *So you are in no position to say then that that number*[13] *came through breast milk?*

A: *I don't believe I've said one way or the other. Nobody's asked me.*

Q: But you don't have any basis for saying that it came through breast milk?

A: Had to get into the baby somehow.

Q: That's not my question. You have no basis for saying that number came into the baby through breast milk?

A: I don't know that I'd say I have no basis. I'd say the basis is the mother is taking . . . morphine. She is breastfeeding. We know that based on the literature we've already talked about that at least small amounts certainly do pass through into the

[13] The question refers to the number 0.52 mg/L, the concentration of morphine measured in Alexis's blood after her death. Dr. Eagerton testified he considered that a lethal level of morphine.

> breast milk. So I don't think I have a basis to say that it didn't, or at least some of it.

The strongest testimony Dr. Eagerton gave on the causation question came when he read from the LactMed database[14] on the TOXNET internet site maintained by the National Institutes of Health in its National Library of Medicine. He testified, "Maternal use of oral narcotics during breastfeeding can cause infant drowsiness, central nervous system depression and even death." However, Dr. Eagerton was careful never to say that the morphine that came from Greene's breast milk killed Alexis—that it was "lethal." In fact, he was specifically asked, "So, you cannot make a conclusion today as to how that morphine got into the baby?" He replied, "No, sir. I think I can make a conclusion . . . at least some of it . . . had to come through the breast milk." When pressed as to whether morphine could get to a specific toxicity level from breastfeeding, however, he stated, "Like I said earlier, I can't quantitate how much."

The State's other expert was John David Wren, M.D., the pathologist who performed the autopsy. Dr. Wren testified Alexis had lethal levels of morphine, "It's lethal in the brain, it's lethal in the liver, it's lethal in the blood." He explained, "it was my opinion that this child died as a result of respiratory insufficiency secondary to synergistic drug intoxication. I could just as easily have said morphine intoxication." However, Dr. Wren testified, "*It's not my opinion that it was from milk or anything else.* I just know that it was there." On cross-examination, Dr. Wren testified, "*I don't know how it got there.* It's unquestionably there. And you can argue any mechanism you want, but it's there, period."

E. The "Proper Lens"[15]

This case is different from *Logan*, *Bennett*, and every other circumstantial evidence case this Court has decided. The majority's suggestion that I have "conflated" the roles of judge and jury ignores that difference. None of those previous cases involved scientific questions, so the lay jury was fully capable of making all the necessary inferences on its own, "fairly and logically." *Bennett*, 415 S.C. at 237, 781 S.E.2d at 354. The issue before the Court in those cases, therefore, arose only

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[14] The LactMed database contains information on drugs and other chemicals to which breastfeeding mothers may be exposed.

[15] The term "proper lens" is taken from the majority opinion, slip op. at 12.

under the first step of the *Bennett/Littlejohn* analysis—whether the circumstantial evidence met the "any substantial evidence" standard. That is not the issue we face in this case. As I have stated, the circumstantial evidence in this case that Alexis died from ingesting morphine through Greene's breast milk appears overwhelming.

The issue in this case arises under the second step of the *Bennett/Littlejohn* analysis—whether the "additional reasoning" required to infer from the circumstances proven that the morphine that killed Alexis came from Greene's breast milk required the jury to answer a scientific question beyond its common knowledge, experience, or understanding. It is the same question we addressed in *Graves*, *Watson*, *Green*, and *Kemmerlin*. Although *Watson*, *Green*, and *Kemmerlin* were not circumstantial evidence cases, *Graves* was a circumstantial evidence case. In this respect, this case is identical to *Graves*. We said in *Graves*—just like I say here—this case is not about the State's proof of sufficient circumstances, or "what quantum of circumstantial evidence . . . is necessary" to present a jury question. 401 S.C. at 80, 735 S.E.2d at 658.

In *Graves*, we first found the plaintiffs failed to present admissible testimony of an expert on the existence of a defect in a products liability case. 401 S.C. at 75-78, 735 S.E.2d at 656-57. We then turned to whether the plaintiffs nevertheless presented sufficient circumstantial evidence to reach a jury. We stated "the Graves have no direct evidence," and "[t]hus, the question is whether the record contains sufficient circumstantial evidence of a defect required to survive summary judgment." 401 S.C. at 79, 735 S.E.2d at 658. Focusing on the second part of the *Bennett/Littlejohn* analysis for circumstantial evidence, we stated "we need not determine what quantum of circumstantial evidence of a design defect is necessary to withstand summary judgment because the lack of expert testimony is . . . dispositive." 401 S.C. at 80, 735 S.E.2d at 658. "In some design defect cases," we held, "expert testimony is required . . . because the claims are too complex to be within the ken of the ordinary lay juror." 401 S.C. at 80, 735 S.E.2d at 659 (citing *Watson*, 389 S.C. at 445, 699 S.E.2d at 175).

Thus, as in *Graves*, the "proper lens" invoked by the majority forces us to examine whether the State has satisfied the second prong of the *Bennett/Littlejohn* analysis. Through this lens we must determine whether a lay juror can comprehend the scientific possibility that morphine—even acting synergistically with other drugs—may pass through a mother's breast milk in sufficient quantity to kill a child. Greene's counsel repeatedly pressed both Dr. Eagerton and Dr. Wren as to whether there is any scientific documentation supporting the theory that this is even possible. At one point, Dr. Eagerton responded, "I don't believe I've seen any

literature that says that. But for everything there's got to be a first." Dr. Wren responded, "No. But, . . . there is a first time for everything."

These answers demonstrate the narrow point upon which I would reverse Greene's homicide convictions. If medical and scientific professionals have nothing more definitive to say as to whether the factual premise of the State's theory is even possible, then we should not permit a lay jury to base a verdict in a criminal trial on the premise. One day there may be a "first" who says morphine can do what the State argues it did here, but it should be a medical or scientific professional, not a jury in a criminal case.

III.

I agree with the majority that Greene's conviction for unlawful conduct toward a child must be affirmed, and that under any circumstance both convictions for homicide cannot stand. However, I would find the trial court erred in not directing a verdict on the homicide charges because the State failed to present evidence of causation "sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *Bennett*, 415 S.C. at 237, 781 S.E.2d at 354.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Stephanie Irene Greene, Appellant

Appellate Case № 2014-000764

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion № 27802
Heard February 15, 2018 - Filed May 23, 2018

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Rules of Appellate Practice, Stephanie Irene Greene respectfully requests that this Court rehear this matter to correct the following errors and omissions:

1. This Court made conflicting findings when it concluded "Alexis died from morphine poisoning when she was forty-six days old." *State v. Greene*, S.C.Sup.Ct. Order dated May 23, 2018 (Shearhouse Adv.Sh. № 21) at 19. This Court also stated "The evidence, scientific and otherwise, further allows a reasonable juror to conclude that Appellant's breast milk was the source of morphine found in Alixis's body." *Id.* at 23. "Alexis's death from morphine poisoning was caused by the morphine in Appellant's breast milk . . . ." *Id.* at 35. This Court also found "Appellant ignores the 'synergistic effect' of the morphine poisoning along with

Appellant's abuse of other drugs." *Id* at 19. If Alexis died from morphine poisoning, the consideration of any other drugs in her system as to the "synergistic effect" was simply not relevant or probative. In making these findings, this Court has confused the issue as to whether the State has proven that morphine alone caused the death of Alexis or if the "synergistic effect" caused the death. The opinion suggests this Court found only the "synergistic effect" caused the death as this Court discusses at length the drugs Stephanie I. Greene was taking. By discussing at length the "synergistic effect" this Court has implied the State has failed to prove that morphine alone killed the minor child, contrary to the instructions of the judge as discussed subsequently.

2. This Court erred in finding that "Moreover, the evidence showed that Appellant took more morphine than her doctors prescribed." On page 156, l 11-15, of the transcript, Dr. Susan Kovacs testified the morphine was also prescribed on a PRN basis. This means she could take the morphine as she needed the medication and was not limited to a certain number per day.

3. In the opinion this Court stated "In addition, the evidence presented at trial was sufficient to show that the morphine and Clonazepam found in Alexis came from Allellant's breast milk." *Id.* at 20. The record does establish that some morphine and Clonazepam could be transferred through breast milk. The record in this case establishes as a matter of fact that the .52 level found in Alexis could not have come through breast milk. The testimony of all the experts was that there was no reported cases of even a toxic level of morphine had ever been transferred to a minor child from a mother who was breast feeding while taking MS Contin. A toxic level as found by this court could be as low as .2. *Id.* at 24, n. 3. A jury cannot convict based upon a scientific fact to which there is no scientific testimony supporting that fact.

4. This Court erred in concluding that the "synergistic effect" or morphine with other

drugs caused the death of Alexis. In this case no expert ever testified as to how the different drug interacted with each other or even if they in fact do. No expert ever testified that a non-lethal level of Clonazepam combined with a non-lethal dose of morphine had ever combined together to cause a death of any person, much less a child receiving small doses of each through breast milk. What this Court has done is to accept the testimony of an expert who arguably said a "synergistic effect" could cause the death of Alexis and equate that with his saying in this case it did cause the death. The State, in a circumstantial evidence case depending upon expert testimony, must prove the combination of drugs could cause the death and in fact did cause the death. In a typical circumstantial evidence case involving lay testimony, the jury applying, their common sense, can make the connection between what could have happened and what did happen. Here, the average juror is not able to make the connection between a theory of the cause of death and the actual cause of death without some scientific testimony to support the connection. Had the jury received testimony from experts for the state as to how much of each drug an infant could receive through breast milk and that a combination of those drugs could be fatal, then the jury would have been supplied with the "did cause" proof needed by the State in this case. "But the courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science, it does not lead it." *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996).

This Court failed to consider that even Dr. David H. Eagerton was ambivalent at best as to whether this "synergistic effect" caused the death of Alexis. When specifically asked if Alexis died from a "synergistic effect" of the drugs, he stated "Well, it's - - it's really hard you know. In toxicology they ask us a lot, you know. It's - - it's hard to exactly pin down, you know, a cause

of death, especially with a drug like morphine in an adult, because you can have some tolerance if you're taking morphine for a long period of time." Rec. on App. at 351, ll 15-20. His answer continues uninterrupted for another page and a half, but it is no more enlightening. If the expert for the state says "it's hard to pin down" then the jury in this case was asked to engage in "scientific guesswork." Such is not proof by any standard much less beyond a reasonable doubt.

A further problem with the "synergistic effect" discussion is the Court is not clear as to what exactly it means. Does this mean the level in Alexis was in fact .52 but it was not lethal but combine with Clonazepam was lethal? If so, there is no testimony advocating that proposition. Or does this Court mean that the level did not have to be .52 but if the morphine at whatever level is combine with Clonazepam the two would be lethal. If so, there is no evidence in the record to support this conclusion. The record is void of any testimony that morphine at .01, .10 or .25 when combine with Clonazepam could cause death.

In addition the trial judge in this case limited the jury to one controlled substance. As the judge instructed the jury "And the term harm to the child's physical health or welfare in the context of this case refers to the infliction of physical injury or harm to a child resulting from the child's ingestion of a schedule II controlled substance." Rec. on App. at 567, ll 15-19. The testimony in this case is that Clonazepam is a Schedule IV drug. Rec. on App. at 304, ll 14-17. The charge limited the consideration of the jury to a single Schedule II controlled substance. Even if the use of the singular in the charge is deemed by this Court to include the plural, it clearly cannot include a drug other than a Schedule II. As the charge of the trial court provided no basis for the jury to consider the "synergistic effect" this Court erred in affirming the conviction on this basis.

5. This Court erroneously assumed the warning read by Dr. Eagerton was applicable to this case. The record on this case shows the warning was published in July of 2012, some 18 months after the death of the child in this case. Rec. on App. at 341, ll 19-23. In addition this Court failed to consider that the 2012 insert only warned of harm and not death. This Court further failed to consider that the word "harm" as used in the insert, does not include death. If death is even a potential result, the warning must mention that fact. 21 CFR § 201.57 (b)(1) and (6) 5. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 48, 777 S.E.2d 176, 183 (2015)("Specifically, FDA regulations require drug labels to include, inter alia: (1) "black box" warnings about serious risks that may lead to death or serious injury.") The warning in this case was not a "black box" warning the death of a child through breast milk containing morphine is even a potential possibility. Thus, this Court cannot as a matter of law or fact conclude "harm" would include the death of Alxis.

6. This Court erred in relying upon a summary in the LactMed article that ended by saying "Maternal use of oral narcotics during breast feeding can cause infant drowsiness, central nervous system depression and even death." *Greene*, at 23. The error in this conclusion is that the article itself reported no such finding. Dr. Eagerton admitted on cross -examination that the article specifically found that infants who were breast fed by mothers taking morphine were more alert and oriented than other infants. Rec. on App. at 393, ll 4-24. This Court further failed to consider that the article made no reference to any case where an infant died or is alleged to have died. Rec. on App. at 394, ll 2-19. The alleged death simply did not exist. A conviction cannot stand based upon one mythical death not discussed in the article. That is hardly any type of scientific study or conclusion nor is it support for the jury verdict in this case.

7. This Court erred in excusing the lack of scientific tests on infants who are being breast fed by mother's taking morphine. The Court quoted Dr. Wrenn's statement "I don't - I don't think anybody in here would subject [a] child to an ongoing test like that." *Id* at 28. The State elected to prove the means of delivery of the morphine, and any other drugs found, was through breast milk. The fact that the State elected a difficult, if not an impossible, fact to prove should not lessen the burden on the State to prove the case beyond a reasonable doubt. Besides, this Court ignored that there have in fact been numerous studies where breast feeding mothers are given morphine in hospitals and the mother and infant have been monitored. Even Dr. Wrenn made reference to one such study when be concluded that an infant, even with a less than fully functioning liver, would receive about 3% of the morphine in the mother who is breast feeding. If that were applied to this case, where the level in the infant was .52, Ms. Greene would have been required to have a morphine level of 17.333. This number is 2.407 times greater than the highest lethal dose testified to at this trial. When such scientific impossibility is affirmatively established in this case, no substantial circumstantial evidence exists to support the verdict of the jury.

In addition, every expert who testified stated they knew of no reports of even a toxic level of morphine being passed through breast milk. While certainly not a controlled scientific experiment, the total lack of even one reported toxic level of morphine being passed through breast milk should be cause for concern for this Court to conclude that somehow a level of .52, toxic by some estimates and lethal by others, was passed through breast milk in this one case and this one time.

8. This Court erred in concluding that there was scientific evidence in this record to

support a finding an infant does not have the ability to metabolize drugs effectively. Even assuming this is correct for a 46 day old child, this is not something the lay jury would be aware of and would require some scientific evidence to establish that not being able to metabolize morphine was in fact the cause of death in this case. This finding cannot be left to speculation and conjecture. This Court failed to consider that Dr. Eagerton testified he did not know at what rate a 46 day old infant would metabolize morphine. He testified as follows:

> Q. So if the function - - if the liver on a child is functioning at 33 per cent you don't know if that's enough to clear morphine or not.
> A. Well, that's a different question. You said the function. Obviously, the - - the function means to live. If you're talking about to clear a specific drugs, that's a different question. I don't know the answer to that either, but it's a different question.
> Q. Okay. But you don't if - - if a young six-week old infant has 50 percent liver function you don't know how much morphine would be cleared with that.
> A. Not precisely, no. Rec. on App. at 395, ll 8-20

Dr. Wren fairs no better. He testified:

> Q. All right. So when you - - do you know at what rate a six-week-old child's liver will metabolize anything or metabolize substance?
> A. Counselor, I tried to explain that at the start. We are chemical Everybody is different. I tried to - - to tell the jury that even with alcohol we don't do the same thing. So I can't tell you rates.
> I don't think there's ever been any studies about how well they do, but it is well known. It's - - I tried to explain from the drug levels that they give infants, and children too, they don't do as well with the same levels we do.
> Q. Children - - or mothers are frequently given morphine and breastfeed the child with no problem.
> A. I don't know.
> Q. You don't know.
> A. No. I'm not a clinician.
> Q. Okay. Or a toxicologist.
> A. No, I'm not a toxicologist either. Rec. on App. at 438, l 12 to 439, l 5.

If neither of the experts does not know the rate at which any drug will metabolize and does not know if a child is harmed or not when breast fed by a morphine taking mother, they are hardly sources that any jury may rely upon to conclude the failure to metabolize drugs is reason for the morphine level in this case. If neither expert knew how much morphine could be cleared, a jury of lay people could not know, unless this Court can conclude the jury collectively, with no scientific testimony to support it, knew more than the experts. If the State's theory of drugs building up in infants is correct, then no heroine addict or morphine addict would be able to deliver a live child. The theory of the failure to metabolize is just that - theory. Simply because a doctor testifies it could, does not mean the State has met its burden of proving it did. A jury is not permitted to speculate.

9. The majority opinion is critical of the dissent for allegedly misinterpretating the standard of review by a trial judge in directing a verdict and that of a jury in drawing inferences from those facts. Once issue of credibility are resolved, a trial judge and an appellate court are in equal position with a jury to draw reasonable inferences from the facts. "Here, however, the jury was not called upon to make credibility determinations, as almost all of the relevant facts adduced at trial were undisputed. Instead, the jury was asked to make inferences based on the evidence, a task that we are no less qualified to undertake." *People v. Carter,* 158 A.D.3d 1105, 1112, 70 N.Y.S.3d 661 (N.Y. App. Div. 2018).

The standard of appellate review in a circumstantial evidence case determines if the review is designed to assure the conviction of the guilty at the price of some innocent defendants having their cases affirmed or to exonerate the innocent at the price of also freeing some guilty defendants. "Because, as discussed, courts should err on the side of ensuring innocent persons

are not convicted, rather than ensuring that the guilty are, they should employ a review mechanism that strives to reverse all unjust convictions, even if such a standard means reversing some proper convictions. The reasonable hypothesis of innocence standard is one such method." Julie Schmidt Chauvin, Comment, *"For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOYOLA L. REV. 217, 245 (2007). *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) ("This heightened scrutiny requires us to consider 'whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt.'") The standard of review is not is there *some* circumstantial evidence that could be interpreted to be evidence of guilt. Nor is it so say that if one interpretation of the facts is consistent with guilt the verdict is to be sustained. To say a theory of guilt is possible is not substantial circumstantial evidence nor proof beyond a reasonable doubt.

In affirming the conviction in this case, the majority contends there is substantial circumstantial evidence to sustain the conviction. But there is no evidence, substantial or otherwise, the .52 level of morphine could be obtained through breast milk. There is no evidence, substantial or otherwise, to support the theory that morphine received through breast milk can build up in a 46 day old child so that it reaches toxic or lethal levels.

This Court in this opinion, or any other opinion, has never defined "substantial circumstantial evidence." Without a definition telling Ms. Greene what is substantial circumstantial evidence, this Court denies due process rights granted to her under the Fourteenth Amendment to the Constitution of the United States of America and Article I, § 3 of the Constitution of the State of South Carolina. The term certainly has to mean more than a theory

or a possible cause. To say, as this Court appears to do, that a possible cause of death is substantial circumstantial evidence is to ignore the requirement of *Jackson v. Virginia,* 443 U.S. 307 (1979). The state is not permitted simply to produce some evidence by which the conviction could be possible. It must do more. The civil rule that if there is a scintilla of evidence the case must be submitted to the jury, is, after *Jackson*, not applicable to a criminal case. In *Jackson*, the United States Supreme Court specifically held that a modicum of evidence was not sufficient to convict in a criminal case. A modicum would be evidence that permits a jury to convict under a mere possibility that the state proved the case. This would also violate the due process clauses mentioned above. The substantial circumstantial evidence must make the guilt of the accused more probable than not, and not merely possible. A fifty-fifty chance of being guilty is not proof beyond a reasonable doubt.

This Court has said in this opinion, and in numerous others, the obligation of this Court in a circumstantial evidence case is not to weigh the evidence, but to determine if there is substantial circumstantial evidence to sustain the verdict which is more than a modicum some weighing of evidence is required. No court can perform this task without to some extent weighing the evidence. The majority of this Court listed several theories by which the morphine could have reached Alexis through breast milk. The State, however failed in its proof that this did in fact happen in this case. In keeping with the burden of proving its case, the State is not permitted to ask the jury to leap from could it happen to the result the state desires without proving that it in fact did happen. What this Court has approved in this case is for a jury to conclude that a mother taking morphine while breast feeding can give her child a level of .52 through breast milk when no scientific study or expert supports such a conclusion and all the

scientific evidence is that it is impossible. To permit a jury to make such a scientific conclusion without some scientific evidence to support that conclusion violates the "some evidence" requirement of *Jackson* and violates the due process clauses of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America.

10. This Court failed to recognize the State failed to prove Stephanie Greene acted with reckless indifference to the consequences of her action. This Court has said concerning extreme indifference "Similarly, in reckless homicide cases, we have held that reckless disregard for the safety of others signifies an indifference to the consequences of one's acts. It denotes 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." *State v. McKnight*, 352 S.C. 635, 645, 576 S.E.2d 168, 173 (2003). The record in this case does not contain facts where such extreme indifference can be found. The record establishes that except for one prescription, Ms. Greene filled all of her prescriptions at the same pharmacy. Rec. on App. at 313, l 17 to 316, l 13. This is the recommenced procedure. This does not show extreme indifference or recklessness.

If a woman were to actively look for information on the taking of morphine while breast feeding, she would have learned it is safe to do so. All the experts agreed on this. Taking morphine while breast feeding is not a reckless act. With no reported case of even a toxic level being found in a child, the act could only be negligent at worst. The fact that Ms. Greene hid her morphine prescriptions from some doctors does not change the way morphine acts within the human body. As noted earlier there is no black box warning about the use of morphine while breast feeding. Simply put, there is no evidence in this case that would have told Ms. Greene that

taking morphine while breast feeding had the potential of causing the death of her child. To have a doctor say that she would not have prescribed morphine had she known Ms. Greene was breast feeding, does change all the medical evidence that morphine is safe to take while breast feeding. No study published by any medical authority would have warned Ms. Greene that she was in fact creating a substantial risk of death for her minor child by taking morphine while she was breast feeding.

The focus of the opinion on the conduct of Ms. Greene to hide her morphine usage while she was pregnant and breast feeding is simply not relevant to the issue of did Ms. Greene have any reason to know that breast feeding while taking morphine created a high risk of the death of her child. The reason it is not relevant is, as noted earlier, no study and no expert says there is such a risk. Ms. Greene cannot be expected to have more knowledge than that which is known in the medical community or the medical experts in this case.

CONCLUSION

For the foregoing reasons this Court should rehear this matter and issue an opinion reversinng the conviction for the reasons set forth in this Petition.

June 5, 2018

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge
Appellate Case No. 2014-000764

THE STATE,

Respondent,

vs.

STEPHANIE IRENE GREENE,

Appellant.

RETURN TO PETITON FOR REHEARING

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ATTORNEYS FOR RESPONDENT

ARGUMENT

The Respondent now makes this return in opposition to Petitioner Stephanie Greene's petition for rehearing. Respondent respectfully submits the following:

1. Greene complains about this Court's observation that evidence supported the cause of death as the result of a synergistic effect of morphine and other prescription drugs. Of course, Alexis' blood level of morphine was well within the lethal levels and the evidence established the only source was through breastmilk. Evidence supports that morphine caused the death.

However, this Court also rightly observed that Greene ignored evidence of the synergistic effects morphine would have with other drugs Greene consumed. The record is replete with this evidence. Dr. Wren concluded the death was the result of respiratory insufficiency secondary to synergistic drug intoxication, and noted "all of these drugs essentially lead to respiratory depression." ROA. p. 419, lines 15-16. Wendy Bell, an expert in forensic toxicology involving drugs and alcohol, explained medications like morphine and Klonopin "are central nervous system depressants, which means it's going to slow the respiratory system, the breathing, the heart rate. And they can act together synergistically to have effects on each other." ROA. p. 246, lines 8-12. Kaushik Kotecha, qualified as an expert in pharmacy, confirmed that the medications taken together may create a detrimental synergistic effect that would cause a child to stop breathing. ROA. p. 308. SLED forensic toxicologist Quintus Young also confirmed that the combination of morphine and other medications could have a synergistic effect on each other. ROA. p. 134. Dr. Eagerton testified Alexis had toxic levels of morphine. He also noted Clonazepam or Klonopin is a benzodiazepine that is very potent. Dr. Eagerton testified these medicines can have a synergistic effect on each other.

ROA. pp. 332-336. Dr. Wren concluded that Alexis died as a result of respiratory insufficiency secondary to synergistic drug intoxication. Dr. Wren explained, "I could just as easily have said morphine intoxication, lawyers like to split hairs, and so I included them all." ROA. p. 419, lines 18-22. Dr. Wren noted "all of these drugs essentially lead to respiratory depression." ROA. p 419, lines 15-16.

Greene's response to this Court's observation of evidence supporting the synergistic effect is to claim it somehow contradicts evidence that morphine led to Alexis' death. The bottom line is morphine levels were sufficiently high for the jury to find Alexis' death was the result of Greene's illicit morphine consumption, but the synergistic effect of morphine with other drugs exasperated the respiratory failure ending Alexis' short life. These are not contrary theories.

2. Greene claims she was not abusing morphine because Dr. Kovacs testified the prescription allowed the morphine to be taken "as needed." The actual testimony was the medicine could be take "every eight hours or **just** as needed," implying the patient may take less than three a day, but the ceiling is three a day. ROA. p. 169, lines 9-11. However, because Greene received the prescription by hiding her pregnancy and by hiding that she was breastfeeding a child, Greene was subjecting Alexis to morphine without supervision of a doctor. ROA. p. 164, lines 16-19; p. 165, lines 6-13; ROA. p. 174. Therefore, the "as needed" clause does not counter the evidence she caused the death of her child or alters the considerable evidence of her intent to be taking the numerous medications while breastfeeding in total disregard of the safety of her child. "By any standard the delivery of a controlled substance to a child, not under the direction of a physician in regard to dosage, is an act that is inherently dangerous." State v. Taylor, 626 A.2d 201, 202 (R.I. 1993).

3. Greene complains, "The record in this case establishes as a matter of fact that the .52 level found in Alexis could not have come through breast milk." Pet. p. 2. Greene's own expert, Dr. Karch, admitted that a baby could achieve a morphine level as high as .52mg/Liter from breast milk. ROA. pp. 490-91. The jury was not required to disbelieve Greene's own expert and therefore, a rational juror could find that the blood level was achieved from morphine passed through Greene's breastmilk.

Alexis died with lethal levels of morphine in her system. As Dr. Wren noted, no needle marks appeared on Alexis. State v. Stephanie Greene, Op. No. 27802 (filed May 23, 2018). Dr. Eagerton refuted the possibility the morphine pills were ingested orally, either in whole or crushed up. ROA. pp. 384-85. Scientific evidence established, as Greene admits, that morphine and other opioids do pass through breastmilk. Greene consumed a considerable amount of morphine and other opioids which may result in a synergistic effect combined together. As Dr. Wren explained, an infant cannot metabolize as efficiently as an adult and the morphine has to go somewhere. Without objection, Dr. Wren testified as to calculations showing the feasibility that levels of morphine as high as found in Alexis were possible, as noted by this Court. Dr. Eagerton described in detail, as quoted by this Court, testimony establishing that an infant lacks the ability to metabolize and excrete morphine. ROA. pp. 344-47. Greene ignores that her own expert witness, **Dr. Karch, admitted that a baby could achieve a morphine level as high as .52mg/Liter from breast milk.** ROA. pp. 490-91. Dr. Karch confirmed the mode of death from morphine is to stop respiration. ROA. p. 496, lines 20-21. For a chronic accumulation, Dr. Karch testified he would expect the child to be unable to gain weight. ROA. p. 505, lines 8-19. In fact, at the time of death, Alexis lost five ounces since

her two week check-up. ROA. p. 511, lines 11-15.

So the morphine would just build up, day after day, until it is simply too much and respiratory failure set in. A reasonable juror could conclude beyond a reasonable doubt, based on the evidence, that this exactly what happened. This evidence is sufficient alone for a reasonable juror to conclude that Alexis' death was caused by her consumption of morphine through breastfeeding.

4. As discussed in the first section, several witnesses testified about the synergistic effect of drugs, including Dr. Wren, who testified as to the cause of death. "After the trial court properly has determined a witness is competent, the resolution of the credibility of the witness is within the province of the jury." State v. Needs, 333 S.C. 134, 144, 508 S.E.2d 857, 862 (1998). While Greene's reference to Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996) offers surface appeal in light of Alexis' unique death, the law did not lead science, science explained how morphine passes through breast milk and accumulates in an infant whose metabolism rates are lower than adults. Science explained Alexis died of respiratory failure and predicted the weight loss that would accompany that cause of death. Granted, controlled tests of morphine consumed by breastfeeding mothers involved smaller, more acute doses of morphine. But Dr. Wren was able to show how large amounts of morphine would accumulate with consumption of morphine in a chronic treatment setting.

5. Greene complains that State's exhibit 67, the warning published by Dr. Eagerton, was published in July 2012. However, it is evidence supporting the cause of death and was therefore relevant. The relevance of State's exhibit 67 was not challenged on appeal. It is an example of science leading the law. Dr. Eagerton noted studies giving qualified approbation to the use of

morphine for breastfeeding mothers were addressing the use of short-term acute treatment with morphine and that studies did not recommend the use of sustained release morphine products. ROA. pp. 343-44. Regardless of the warning, plenty of other evidence supports morphine and other drugs as the cause of death. Greene continues to ignore the significant distinctions between use of morphine for acute treatment versus extended long-term use of slow release morphine products at higher doses.

6. Greene complains about a reference to a LactMed article warning that use of oral narcotics may cause "infant drowsiness, central nervous system depression and even death." Greene, at 23. This again is a weight issue, but shows that the scientific community recognized the dangers of infant ingestion of narcotics.

Dr. Eagerton published a portion of LactMed pertaining to the use of morphine, as follows:

> Epidural morphine given to mothers for postcesarean section analgesia results in trivial amount of morphine in their colostrum and milk. Intravenous or oral doses of maternal morphine in the immediate postpartum period results in higher milk levels than with epidural morphine. . . . Maternal use of oral narcotics during breastfeeding can cause infant drowsiness, central nervous system depression and even death.

ROA. p. 390, line 18 – p. 391, line 1. This Court is concerned with the existence of evidence and this evidence shows the medical and scientific community was well aware that a mother's ingestion of morphine could endanger a breast-fed child. The possibility of death was not mythical, it was predicted. This is what killed Alexis as a rational juror could find. In this case twelve rational jurors concluded morphine passing through breastmilk killed Alexis.

Dr. Eagerton acknowledged studies concerning acute treatment of breastfeeding mothers with

morphine, but noted those same studies did not recommend the use of sustained release morphine products. ROA. pp. 343-44. The amounts in those studies pale in comparison to Greene's consumption of morphine in the present case. Evidence shows Greene consumed 78 30 mg MS Contin pills in the last twenty-four days of Alexis' life. ROA. pp. 309-10. That amounts to **2,340 mg of morphine.** The subjects in the studies Greene references took cumulative amounts of 50 or 60 mg. ROA. pp. 441-42. **Greene continues to ignore the vast differences between the short-term low dose treatment in controlled studies and Greene's significant chronic use of slow-release morphine during Alexis' life span.** See 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)).

7. Incredibly, Greene complains the lack of scientific tests showing the effects of thousands of milligrams of morphine on a child over several weeks. Obviously no such tests would ever be conducted because it would be unethical. The test **Greene chose** to subject to Alexis to is unprecedented. A homicide is not excusable because it is unique.

8. In another challenge to the weight, rather than existence, of evidence, Greene complains that the State should have been able to provide specific testimony about Alexis' metabolism rate. This is simply absurd. As Dr. Wren explained, individuals metabolize drugs at different rates, but studies show infants and children do not metabolize narcotics as effectively as adults. ROA. pp. 438-39. Further, as Dr. Eagerton explained, forensic toxicology is not concerned with the amount of

morphine a person might survive on. People may survive on higher levels of morphine or die with less, and science does not predict that for adults any more than children. ROA. p. 371, lines 8-19. Alexis' blood level of morphine, .52mg, was well within the lethal levels, and the evidence established the only source of morphine was through breastmilk. ROA. pp. 383-85; pp. 420-21. At least as of yet, Greene has not contested that Alexis is dead. That is really the only evidence, along with the toxicology results, necessary for a jury to establish the cause of death.

9. Greene relies on a four-month old lower appellate court case from New York that pursuant to its state law, applies a standard of review completely different than federal law or our state law. People v. Carter, 158 A.D.3d 1105 (N.Y. App. Div. 2018). Relying on another jurisdiction's inapposite rules of criminal procedure, Greene argues this Court should step in and make the inferences that are within the jury's responsibilities as the fact finders. The United States Supreme Court noted the following:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to **the responsibility of the trier of fact** fairly to resolve conflicts in the testimony, to weigh the evidence, and **to draw reasonable inferences from basic facts to ultimate facts.**

Pearson, 415 S.C. at 471 n.2, 783 S.E.2d at 806 n.2 (quoting Jackson, at 319) (italics in the original, other emphasis added); see also State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

Review of the sufficiency of the evidence in New York is done under a state procedural rule,

alien to our own standard of review, allowing for a review of the weight of evidence on appeal. People v. Bleakely, 69 N.Y.2d 490, 493, 495, 506 N.E.2d 672 (N.Y. 1987) (Intermediate appellate courts in New York are empowered to review questions of law and questions of fact in civil and criminal cases. Even if evidence could lead a rational person to find a defendant guilty, the intermediate appellate court must then conduct its own review where it weighs the evidence like the trier of fact below). New York case law therefore is inappropriate in analysis of the present case. State v. Bennett, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) (the reviewing court must not weigh the evidence because the reviewing court is only concerned with the existence or nonexistence of evidence) (cited in Greene, supra). This Court should refrain from Greene's invitation to act as a thirteenth juror and usurp the jury's role in weighing the evidence.

Further, as discussed in the State's Brief of Respondent, the verdict is supported by direct as well as circumstantial evidence. However, the United States Supreme Court noted the efficacy of distinguishing between the two forms of evidence:

> Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1954) *cited with approval in* Jackson, at 317 n.9. The State submits this Court properly applied the correct standard in determining whether the evidence was sufficient to survive a directed verdict motion and disagrees with Greene's new argument that this Court's previous application of the directed verdict standard violates the due

process clause of the State or the federal constitution. In fact, the sage analysis in Bennett clarifies any potential misunderstanding of the applicable standard to apply in a directed verdict analysis.

10. Greene cherry-picks evidence in his favor and makes an argument better suited for a jury to challenge this Court's unanimous determination that the State proved she acted with extreme indifference. Greene claims that she would be unaware of the obvious dangers of breastfeeding while taking opioids without a doctor's supervision. Except for a reference to the standard in State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003), Greene does not cite any other legal authority in this claim.

Greene's claim a mother would be advised by medical professionals that use of morphine while breast feeding was safe is not true. Dr. Eagerton testified even prior to 2010-2011, **long term** use of morphine during breastfeeding was not recommended and was viewed as unsafe or uncertain. ROA. p. 344, lines 6-10. Bell noted the studies the defense relied on were for mothers who were not chronic users of morphine. ROA. p. 257, lines 7-19. Further, Greene avoided, rather than sought, proper medical supervision for the safety of her child. "By any standard the delivery of a controlled substance to a child, not under the direction of a physician in regard to dosage, is an act that is inherently dangerous." State v. Taylor, 626 A.2d 201, 202 (R.I. 1993).

Greene ignores the evidence that she was not just any mother, but also a former nurse. Further, she does not address evidence showing her consciousness of guilt. For instance, during the interview with the coroner's office, in which she neglected to mention she was taking morphine (State's Exhibit No. 34 (4:45-6:15), Greene told the interviewer she supplemented breastmilk with formula because she was concerned about her blood pressure medication affecting Alexis. State's

Exhibit No. 34 (13:45-14:30). A jury could reasonably conclude Greene was well-aware of the risks of breastfeeding while taking morphine and other medications and chose to disregard this risk.

As reflected by this Court's comments during oral argument, Greene's behavior was simply abhorrent and beyond the pale. "A parent has a specific and undelegable duty to serve the best interests of her child and should make every effort not to knowingly place her child in harm's way." State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002). For all Greene's complaints about the supposed lack of scientific evidence, Greene, a former nurse, chose to run an experiment on her child that was far too daring for the medical community, and she conducted it without the slightest consideration of the child's safety.

CONCLUSION

This Court should deny the petition for rehearing as Greene only cherry-picks, then disputes, inferences from evidence laying on the periphery of the abundant evidence supporting a rational juror's verdict. Greene also seeks to apply a wholly inappropriate standard of review.

Respectfully submitted,

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June 15, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 26 2018
S.C. SUPREME COURT

The State, Respondent,

v.

Stephanie Irene Greene, Appellant

Appellate Case Nº 2014-000764

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion Nº 27802
Heard February 15, 2018 - Filed May 23, 2018

Reply to Return to Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Rules of Appellate Practice, Stephanie Irene Greene respectfully submits this Reply to the Return to the Petition for Rehearing filed by the State:

1. The State incorrectly argues that Stephanie Greene ignores the difference "between use of morphine for acute treatment versus extended long-term use of slow release morphine at higher does." Return of State at 6, 7. Ms. Greene does not ignore these differences. The State ignores these differences as they produced no expert testimony as to the differences if any. To assume there is a difference is to speculate. Simply dismissing this lack of testimony by saying it is unethical to conduct such research ignores the fact that as the burden is on the state to prove its case, the State has to offer some type of expert testimony establish this principle. Lack of

proof is simply not proof.

2. The State argues that evidence in the record that Ms. Greene had "consumed 78 30 mg MS Contin pills in the last twenty-four days of Alexis life." Return of State at 7. The State then conducted a very simply mathematical calculation to show this was 2,340 mg of Morphine. This was a calculation that any reasonable juror could conduct. But such a calculation is not proof the reading from the child came from breast milk. The average juror does not have common knowledge that taking 2,340 mg of morphine over a twenty-four day period can cause a mother in give her child through breast milk a reading of .52 mg per liter or any other reading. "The law is realistic when it fashions rules of evidence for use in the search for truth. The cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony where the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that the wound was mortal in character." *State v. Minton*, 234 N.C. 716, 721, 68 S.E.2d 844, 848 (1952). The facts in evidence here are not such that the average jury could even guess as to whether a mother can give a lethal dose of morphine to a child through breast milk.

3. The State ignores that the testimony of the synergistic effect of the drugs is a theory with no proof. Mr. Wren did testify as to his theory of synergistic effect, but he had no proof to support this theory and all a jury could do was speculate. Such speculation is not sufficient proof to sustain the conviction. In describing the theory in the Return of the State uses words should as ": may create," "could have," and "can have." Return of State at 2. The State ignored that at no time did any expert ever say "to a reasonable degree of medical certainty those drugs combined together came through breast milk and caused the death of the child." They never even said it is

more likely than not the drug levels came through breast milk.

4. The issue in this case is that did the morphine that killed the child come through breast milk. The State in the Return deflects from that issue argues "The bottom line morphine levels were sufficiently high for the jury to find Alexis's death was the result of Greene's illicit morphine consumption." Return of State at 3. Under this broad theory the jury could have concluded the child received the morphine through Ms. Greene negligent or grossly negligent use of her morphine. To argue there are "no contrary theories" is to lessen or ignore the obligation of the state to prove with competent evidence the one theory they elected to use. Ms. Greene has no obligation to prove a contrary theory. This is especially true when the State has not proven its one theory.

6. The State in the Return argues that a child can receive .52 mg per liter through breast milk. Dr. Steven Karsch testified the highest level he had seen was 84 nanograms. Rec. on App. at 490, ll 23-24. This is the equivalent of ,084 mg per liter, considerably less than in this case.

5. In the Return of the State they simply did not respond to the fact that the trial judge limited the State's theory to a single schedule II drug.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Original Petition this Court should rehear this matter and reverse the homicide by child abuse conviction of Stephanie Greene.

June 20, 2018

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The Supreme Court of South Carolina

The State, Respondent,

v.

Stephanie Irene Greene, Appellant.

Appellate Case No. 2014-000764

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina
June 26, 2018

cc:
C. Rauch Wise, Esquire
Alan Wilson, Esquire
David Spencer, Esquire
Barry J. Barnette, Esquire

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2018

No. 18A287

STEPHANIE IRENE GREENE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the South Carolina Supreme Court apply the proper standard of review under *Jackson v. Virginia* when they affirmed the conviction of Stephanie Irene Greene even though the State failed to present any scientific testimony as to the means of delivery of the morphine and therefore permitted the jury to convict Ms. Greene on the conclusion of the jury that the lethal dose of morphine came through breast milk?

II

Did the South Carolina Supreme Court apply the proper standard of review under *Jackson v. Virginia* as to the required mens rea when the Court permitted the jury to infer the mens rea of reckless disregard for her child when the scientific evidence at trial established that morphine is safe to take while breast feeding and no reported case of even a toxic dose of morphine in a breast feeding child of a mother who is taking morphine?

LIST OF PARTIES AND CORPORATE DISCLOSURE

Stephanie Irene Greene is a natural person. The respondent is the State of South Carolina.

No corporations are involved in this petition.

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Stephanie Irene Greene respectfully petitions this Court for a writ of certiorari to review the judgment of the South Carolina Supreme Court.

OPINION BELOW

The South Carolina Supreme Court opinion affirming the conviction of Ms. Greene can be found at *State v. Greene*, 423 S.C. 263, 814 S.E.2d 496 (2018) and is reproduced here in the Appendix at 1a-30a. The South Carolina Supreme Court order denying the Petition for Rehearing can be found at 60A.

JURISDICTION

The South Carolina Supreme Court affirmed the conviction and sentence of Stephanie Irene Greene on May 23, 2018, App. 1A, and denied the timely petition for rehearing on June 26, 2018, App. 60A. On September 19, 2018 this Court granted a sixty day extension until November 23, 2018 to file the Petition for Writ of Certiorari. Jurisdiction for this Writ is pursuant to 18 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, applicable to the State through the Fourteenth Amendment, provides, "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the United States Constitution provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In the early morning hours of November 13, 2010 Spartanburg County 911 received a call from the residence of Randy and Stephanie Greene about their child, Alexis, who was not

responsive. Rec. on App. at 69, ll 2-19.[1] The coroner's office was called and they arrived at about 6:16 a.m. Rec. on App. at 72, ll 2-8. The child was dead at the scene. Rec. on App. at 87, ll 1-11. Pursuant to their protocol, Ellen Holmes conducted an interview with Mrs. Greene at the scene. Rec. on App. at 74, ll 6-20. The interview lasted about three hours. Rec. on App. at 75, ll 6-11. In this interview Ms Holmes obtained a medical history of the child and the activities of the child for the previous several days. She stated that in her opinion Mrs. Greene appeared to be under the influence. Rec. on App. at 73, ll 18-24.

As no immediate cause of death could be determined, blood and tissue samples were taken to be analyzed. When these results were returned, Dr. John David Wrenn, the pathologist, issued his report on January 28, 2011 stating the cause of death was a result of respiratory insufficiency secondary to synergistic drug intoxication. Rec. on App. at 419, ll 18-20. Mrs. Greene was arrested on June 24, 2011 for homicide by child abuse.

The child of Ms, Greene and her husband was born on September 28, 2010. At the time of the birth of their daughter, Mrs. Greene was being prescribed numerous pain medications for injuries she had sustained in an automobile accident years before and other physical complications. on App. at 163, l 3 to 164, l 11. Testimony from Dr. Carol A. Koistra confirmed that Mrs. Greene was totally disabled. Rec. on App. at 211, l 3 to 214, l 25. Dr. Koistra was primarily prescribing vicoprofen, a schedule III drug and several other drugs from schedule III and higher. Rec. on App. at 209, ll 4-9. Dr. Susan Kovacs, over a period of several years, prescribed various schedule II drugs to Mrs. Greene. Rec. on App. at 150, l 23 to 151, l 10.

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[1] The references are to the Record on Appeal filed with the South Carolina Supreme Court. The record can be accessed at https://ctrack.sccourts.org/public/caseView.do?csIID=56430

Both doctors testified that they did not know Mrs. Greene was pregnant and they would not have prescribed the opioids had they known she was pregnant. Rec. on App. at 176, ll 18-23; 165, ll 8-13; 215, ll 6-11; 217, ll 3-10. Dr. Kooistra was unsure if she referred Mrs. Greene to Dr. Kovacs, but she did send Dr. Kovacs a copy of her report of November 4, 2010 which included a complete list of the prescriptions she was prescribing for Mrs. Greene. Rec. on App. at 207, l 21 to 222, l 16. Dr. Kovacs testified she did not know that Dr. Kooistra was prescribing vicoprofen. Rec. on App. at 152, ll 5-7. On cross examination she admitted that she had signed two documents in her office acknowledging that Mrs. Greene was in fact receiving vicoprofen through November of 2009. Rec. on App. at 169, l 16 to 171, l 17. The doctors also admitted that vicoprofen and morphine are frequently prescribed together. Rec. on App. at 165, l 12 to 166, l 6; 2219, ll 1-10. Dr. Kooistra further admitted that the American Academy of Pediatric found nothing wrong with prescribing morphine while a woman is breast-feeding. Rec. on App. at 217, l 19 to 218, l 4.

Dr. Kovacs, who was prescribing schedule II narcotics, admitted that she did not personally see Mrs. Greene but four times over a 23 month period ending in November of 2010. Rec. on App. at 185, ll 13-23. On one occasion Dr. Kovacs mailed the prescription to Mrs. Greene. Rec. on App. at 186, ll 3-9. Dr. Kovacs also referred Mrs. Greene to Carolina O.B.G.Y.N. Apparently the O.B.Y.G.N never told Dr. Kovacs, the referring doctor, that Mrs. Greene was in fact pregnant. Rec. on App. at 189, ll 4-25.

Kaushik Kotecha, employed by the South Carolina Department of Health and Environmental Control, was the primary investigator of the medicines prescribed by the various doctors. He testified that DHEC had a prescription monitoring system that all doctors in the state have had access to since 2007. Rec. on App. at 325, ll 3-15. He further stated all the prescriptions for Ms.

Greene, except one, were filled at a single pharmacy in Inman, SC. Rec. on App. at 315, ll 8-21. He testified that when dealing with different medications a prudent patient would use the same pharmacy. Rec. on App. at 317, ll 11-16. He further stated that two prescriptions that had a warning against taking while breast-feeding were not found in the toxicology report. Rec. on App. at 319, l 13 to 320, l 4. The only drug found in the toxicology report that contained a warning against taking while breast-feeding was Clonazepam. Rec. on App. at 321, l 9 to 322, l 20.

The State called as experts in this matter Dr. David Eagerton and Dr. John David Wrenn. Neither testified that the morphine in the child was obtained through breast milk. When asked about the source of the morphine Dr, Wrenn stated "It's not my opinion that it was from milk or anything else. I just know that it was there." Rec. on App. at 421, ll 22-24. Dr. Eagerton testified he could not say how the morphine got into the child other than "Had to get into the baby somehow." Rec. on App. at 369, ll 12-18. Dr. Eagleton further admitted that no peer reviewed article involving morphine discusses a child being in a hospital from a toxic level of morphine obtained through breast milk. Rec. on App. at 351, ll 19-22. He also knew of no study that shows a child can obtain a toxic level of morphine through breast milk from a mother taking MS Contin, the morphine being taken by Mrs. Greene. Rec. on App. at 357, ll 18-21. He further admitted that the American Academy of Pediatrics listed morphine as safe to take while breast feeding. Rec. on App. at 361, ll 4-7. He also admitted that the Clinical Toxicology Journal reported scant evidence existed that opioid toxicity could occur in breast-fed infants. Rec. on App. at 367, ll 12-25 to 383, ll 1-11. Nether Dr. Eaglerton nor Dr. Wrenn produced any medical or other scientific research that supported the proposition that an infant can receive a lethal level of morphine through breast milk. The State also used the theory of the synergistic effects of drugs could have led to the death of the child. This was the theory upon

which the South Carolina Supreme Court relied in affirming the conviction. As the Court said. "The State's causation theory was Appellant consumed excessive amounts of central nervous system depressants, principally morphine, while breastfeeding Alexis and these drugs passed through Appellant's breast milk, resulting in Alexis's death." *State v. Greene*, 423 S.C. 263, 267, 814 S.E.2d 496, 498 (2018), reh'g denied (June 26, 2018).[2] While the Court below was correct that this was the theory of the State, at the trial no expert ever opined, to a reasonable degree of medical certainty, that the morphine in the minor child came from breast milk or that morphine in combination with other drugs caused the death of the minor child.

Ms. Greene was convicted of homicide by child abuse, involuntary manslaughter, and unlawful conduct to a child. She was sentenced to a mandatory minimum of 20 years imprisonment for the homicide by child abuse and two five year sentences on the involuntary manslaughter and unlawful conduct to a child. All sentences were to run concurrent. The lower court reversed the conviction of involuntary manslaughter on double jeopardy grounds.

WHY THE PETITION SHOULD BE GRANTED

I

Did the South Carolina Supreme Court apply the proper standard of review under *Jackson v. Virginia* when they affirmed the conviction of Stephanie Irene Greene even though the State failed to present any scientific testimony as to the means of delivery of the morphine

[2] This case was argued twice before the South Carolina Supreme Court. The first was on June 14, 2016 and the second on February 15, 2018. The two oral arguments may be viewed at http://media.sccourts.org/videos/2014-000764.mp4 and http://media.sccourts.org/videos/2014-000764-1.mp4.

and therefore permitted the jury to convict Ms. Greene on the conclusion of the jury that the lethal dose of morphine came through breast milk?

In the case below, Stephanie Greene called the attention of the South Carolina Supreme Court to the proper standard of review in criminal cases as set forth by this Court in *Jackson v. Virginia,* 443 U.S. 307 (1979)(Petition for Rehearing App. at 10A, 11A and Opening Brief at pages 9 and 10) As this Court noted in *Jackson*, "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. The South Carolina Supreme Court violated this principle established in *Jackson* . The Court affirmed the conviction on a scientific issue of the morphine being delivered to the child through breast milk. The State presented no expert testimony that opined that the theory of the state, to a reasonable degree of medical certainty, was the most likely or most probable means of of the minor child receiving the morphine. The South Carolina Supreme Court cited testimony at the trial that may consist of a modicum of evidence as to whether a lethal dose of drugs may have passed through breast milk, "[b]ut it could not be seriously argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.* at 320. In addition the judge instructed the jury "[T]he term harm to the child's physical health or welfare in the context of this case refers to the infliction of physical injury or harm to a child resulting from the child's ingestion of a schedule II controlled substance. And that should go on to say ingestion of a Schedule II control substance through the comsumpton of breast milk" Rec. on App. at 578, ll 15-20. The trial court also charged the jury "[T]he state's allegation and theory in the case, that the child died as a result of consumption of a controlled substance through the mother's breast milk." Rec. on App. at 579, ll 5-7. These charges limited the

jury to a determination of could the only schedule II drug involved, morphine, from breast milk have caused the death of the minor child.

The essential element the jury had to find in this case is the scientific conclusion that a lethal dose of morphine could pass through the breast milk of Stephanie Greene so as to cause the death of her child. No witness for the State ever testified to a reasonable degree of medical certainty that such was possible. The testimony at trial established that morphine is safe to take while breast feeding. Rec. on App. at 351, ll 6-24; 354, l 7 to 355, l 7; 357, ll 3 to 358, l 22. *See, also, Postpartum maternal codeine therapy and the risk of adverse neonatal outcomes: A retrospective cohort study,* 50 Clinical Toxicology, 390 (2012); *The Transfer of Drugs and Other Chemicals Into Human Milk,* 108 PEDIATRICS, Official Journal of the American Academy of Pediatrics, 776 (September 2001); *The Transfer of Drugs and Therapeutics Into Human Breast Milk: An Update on Selected Topics,* 132, PEDIATRICS, Official Journal of the American Academy of Pediatrics, e796 (September 2013).

The South Carolina Supreme Court permitted the jury to speculate, based upon a theory that the state had, as to the means of delivery of the morphine without any scientific proof of that theory. The Court, in essence, permitted the jury to become laboratory scientists and declare what is the correct scientific answer without any testimony from a scientist agreeing with their conclusion. What the lower Court did is to accept the testimony of an expert who at best said a "synergistic effect" could cause the death of Alexis and equate that with his saying in this case it did cause the death. They permitted this finding by a jury without an expert saying the combination of drugs at the level required to be lethal came through breast milk. This error is noted in the dissent when Judge John Few said "The State argues it is not required to prove scientific facts with expert testimony as we

require civil plaintiffs to do." *State v. Greene*, 423 S.C. 263, 287, 814 S.E.2d 496, 508 (2018)(J. Few, dissenting); App. at 21A.; *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996)("But the courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science, it does not lead it."). The proof in this case was to a reasonable degree of medical uncertainty.

The constitutional error, which this Court needs to address is whether the required evidentiary standard of proof of beyond a reasonable doubt, required by *Jackson*, can be satisfied in a case requiring a scientific conclusion without expert testimony as to that conclusion. As addressed by the dissent "In fact, the circumstantial evidence that Alexis died from ingesting morphine through breast milk appears overwhelming, until we pose the scientific question of whether it is even possible for enough morphine to pass through breast milk to kill a child." *Id.* at 286, 814 S.E.2d at 508. App. at 22A. The dissent noted that neither expert for the State concluded that the lethal level of morphine came from the breast milk of Ms. Greene. In making a proper analysis under the required standard of review, the dissent noted in conclusion "If medical and scientific professionals have nothing more definitive to say as to whether the factual premise of the State's theory is even possible, then we should not permit a lay jury to base a verdict in a criminal trial on the premise." *Id.* at 294, 814 S.E.2d at 512-513. App. at 30A. In a civil cases the courts in South Carolina have established a proper standard. The Court of Appeals has held "A plaintiff in a medical malpractice case must establish by expert testimony both the standard of care and the defendant's failure to conform to the required standard, unless the subject matter is of common knowledge or experience so that no special learning is needed to evaluate the defendant's conduct." *Martasin v. Hilton Head Health Sys.*, 364 S.C. 430, 438, 613 S.E.2d 795, 799 (Ct. App. 2005).

This Court should hold a conviction based upon a scientific principle is not constitutionally sufficient when no expert testifies to a reasonable degree of medical certainty the result reached by the jury is even scientifically possible. Simply put, the record in this case contains no evidence that would permit a reasonable juror to conclude beyond a reasonable doubt that a lethal dose of morphine can be given to a child through breast milk. In affirming the conviction in this case, the South Carolina Supreme Court improperly applied *Jackson.*

Some States do required that a scientific conclusion be based upon scientific evidence. In *Williams v. State*, 35 So. 3d 480, 486–87 (Miss. 2010) the Mississippi Supreme Court reversed a criminal conviction saying, "Although an expert need not use the exact phrase, 'reasonable degree of medical certainty,' this does not diminish the requirements for admissibility. . . . This physician couched his opinion in terms of suspicion of probability, which, standing alone, absent additional corroborating evidence, is insufficient in a criminal case." (Internal citations omitted); *Matter of Anthony M.*, 63 N.Y.2d 270, 280, 471 N.E.2d 447, 452 (1984)("An obscure or a merely probable connection between an assault and death will, as in every case of alleged crime, require acquittal of the charge of any degree of homicide")

Citing *Jackson, State v. Thompkins*, 78 Ohio St. 3d 380, 387, 678 N.E.2d 541, 546 (1997) held "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." The South Carolina Supreme Court did not apply such a standard of review. If applied to this case, the Court would have reversed the conviction. The verdict in this case was against the greater weight of the evidence

II

Did the South Carolina Supreme Court apply the proper standard of review under *Jackson v. Virginia* as to the required mens rea when the Court permitted the jury to infer the mens rea of reckless disregard for her child when the scientific evidence at trial established that morphine is safe to take while breast feeding and no reported case of even a toxicdose of morphine in a breast feeding child of a mother who is taking morphine?

While related to the previous issues, this question involves whether the State in the trial below proved the required men rea of extreme indifference, an element of the crime the State is required to prove. Stephenie Irene Greene contends the South Carolina Supreme Court failed to conduct a proper standard of review under *Jackson*. As noted above, *Jackson* holds "[A]fter viewing the evidence in the light most favorable to the prosecution, *any* rational tried of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. The required mens rea is certainly an essential element of the crime. *People v. Jackson*, 82 N.E.3d 194, 202 (Ill. App. 2017)("But Jackson challenges the sufficiency of the evidence under the *Jackson v. Virginia* standard, which requires us to examine the essential elements of the crime, and mens rea is undoubtedly essential."); *United States v. Davis*, 863 F.3d 894, 904 (D.C. Cir. 2017)("[T]he court concludes that the evidence of Andre's mens rea was, at most, equivocal and thus insufficient to sustain his convictions . . . .").

Based upon the testimony at this trial, a reasonable juror would not have sufficient information to conclude that Ms. Greene knew or even should have known that her taking morphine and breast feeding would in fact cause the death of her child. No expert testified to this fact and such a fact is not of common knowledge. As the South Carolina Supreme Court noted, the mens rea

required for homicide by child abuse is "[A] mental state akin to intent characterized by a deliberate act culminating in death." *Greene*, at 277, 814 S.E.2d at 503. App. at 13A The Court below placed emphasis upon the fact that Ms. Greene hid her pregnancy from her doctors as proof of the intent to harm her child. The connection between the two, given the undisputed testimony that the morphine is not harmful to an infant through breast milk, is simply non existent. If death is even a potential result of a drug, the warning with the drug must mention that fact. 21 CFR § 201.57 (b)(1) and (6) 5. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 48, 777 S.E.2d 176, 183 (2015)("Specifically, FDA regulations require drug labels to include, inter alia: (1) 'black box' warnings about serious risks that may lead to death or serious injury.") The morphine Ms. Greene was taking did not contain a "black box" warning. When no medical expert established that death is even possible from breast feeding, without at least a "black box" warning, no reasonable juror could conclude Ms. Greene had the required intent to do a deliberate act had that she knew could cause her child to die.

If parents refused to have their child vaccinated and the child died from a preventable disease, would a Court conclude that the parents acted with extreme indifference and sentence the parents to a mandatory minimum of 20 years? *See, In re Maria R.*, 81 Misc. 2d 286, 287, 366 N.Y.S.2d 309, 311 (Fam. Ct. 1975)('Since the R. family hold bona fide religious beliefs prohibiting vaccination and immunization the children should not be required to be vaccinated or immunized and this neglect petition is dismissed."). The benefits of vaccinations is more widely known than any alleged harm to a minor child whose mother is breast feeding and taking morphine.

The testimony in this trial establishes that there is no reported case of an infant ever receiving a toxic dose of morphine through breast milk. Rec. on App. at 365, ll 6-24. The question, therefore,

is did the State present evidence of extreme indifference, when there had never been a reported case of a lethal amount of morphine being transferred through breast milk? For any reasonable trier of fact to answer this question in the affirmative would required that the juror impute to Ms. Greene more knowledge than is known to the medical community. Had Ms. Greene extensively researched the issue, she would have found no reported study of even a toxic level of morphine being found in an infant through breast feeding. Such research would have hardly supported a mens rea of reckless indifference as defined by the South Carolina Supreme Court.

CONCLUSION

Stephanie Irene Greene respectfully requests this Court to grant this Petition for Writ of Certiorari to resolve the question of if a State relies upon a scientific principle to secure a conviction, then the state is required to establish expert testimony to support the scientific principle before such a conviction comports with the Due Process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

November 19, 2018

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This is a 56 page list of orders issued by the US Supreme Court on January 7, 2019. Saved in the paper file are the first page of the list; Page 4 which is the beginning of the list of certiorari denials; and page 17 where Stephanie Greene's case is listed.

(ORDER LIST: 586 U.S.)

MONDAY, JANUARY 7, 2019

CERTIORARI -- SUMMARY DISPOSITIONS

18-195 POFF, WILLIAM S. V. UNITED STATES

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Lagos* v. *United States*, 584 U. S. ___ (2018).

18-227 WOLFE, JUSTIN M. V. VIRGINIA

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme Court of Virginia for further consideration in light of *Class* v. *United States*, 583 U. S. ___ (2018).

ORDERS IN PENDING CASES

18A511 ZODHIATES, PHILIP V. UNITED STATES

The application for stay addressed to Justice Gorsuch and referred to the Court is denied.

18M76 FURMINGER, IAN V. UNITED STATES

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied. Justice Breyer took no part in the consideration or decision of this motion.

18M77 HIRAMANEK, RODA V. CLARK, L. MICHAEL, ET AL.

18M78 BARBER, KENNETH R. V. SHERMAN, WARDEN

18M79 WEBB-EL, KEITH B. V. KANE, THOMAS R., ET AL.

18M80 DRIVAS, GUSTAVE S. V. UNITED STATES

18M81 DOUGHERTY, ROBERT W. V. GILMORE, WARDEN

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

18M82 BUSH, JASON E. V. ARIZONA

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

18M83 DOE, JOHN V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record is granted.

18M84 WILSON, JOHN D. V. JONES, SEC., FL DOC

18M85 MARSHALL, RONALD V. ASH, ANN, ET AL.

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

18M86 WESTERNGECO LLC V. ION GEOPHYSICAL CORP.

The motion for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record is granted.

18M87 ABDUR-RAHIIM, MUHSIN H. V. UNITED STATES

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

148, ORIG. STATE OF MISSOURI, ET AL. V. STATE OF CALIFORNIA

149, ORIG. STATE OF INDIANA, ET AL. V. COMMONWEALTH OF MASSACHUSETTS

The motions for leave to file the bills of complaint are denied. Justice Thomas would grant the motions.

17-1672 UNITED STATES V. HAYMOND, ANDRE R.

The motion of petitioner to dispense with printing the joint appendix is granted.

17-8926 HARPER, DARRELL J. V. TEXAS, ET AL.

17-9269 IN RE OTIS L. RODGERS

17-9538 HARPER, DARRELL J. V. JIM CROW

The motions of petitioners for reconsideration of orders denying leave to proceed *in forma pauperis* are denied.

18-252 REAL ESTATE ALLIANCE LTD. V. MOVE, INC., ET AL.

The motion of Mark Tornetta for leave to intervene to file a petition for rehearing is denied.

18-415 HP INC. V. BERKHEIMER, STEVEN E.

18-575) YPF S.A. V. PETERSEN ENERGIA, ET AL.
)
18-581) ARGENTINE REPUBLIC V. PETERSEN ENERGIA, ET AL.

18-600 TEXAS ADVANCED OPTOELECTRONIC V. RENESAS ELECTRONICS AMERICA

The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

18-5863 JOHNSON, COREY E. V. BUTLER LAW FIRM

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

18-6410 McKINZY, MICHAEL V. GASTON, CARLETHA

18-6781 FARR, JOAN E. V. CIR

18-6792 FILLMORE, CHRISTOPHER W. V. IN BELL TELEPHONE CO.

18-6813 GHOSH, RASH B. V. BERKELEY, CA

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until January 28, 2019, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

18-6949 KLEIN, ERIC A. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma*

pauperis is denied. Petitioner is allowed until January 28, 2019, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court. Justice Sotomayor and Justice Kagan took no part in the consideration or decision of this motion.

18-7063 IN RE CHARLES A. DREAD

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until January 28, 2019, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI DENIED

17-936 GILEAD SCIENCES, INC. V. U.S., EX REL. CAMPIE, ET AL.

17-1149 UNITED STATES, EX REL. HARMAN V. TRINITY INDUSTRIES, INC., ET AL.

17-1285 ASSN. DES ELEVEURS, ET AL. V. BECERRA, ATT'Y GEN. OF CA

17-1301 HARVEY, RYAN, ET AL. V. UTE INDIAN TRIBE, ET AL.

17-1404 GORDON, JIMMIE V. LAFLER, WARDEN

17-1704 KERR, HOPE V. BERRYHILL, NANCY A.

17-7517 SMITH, MICHAEL V. UNITED STATES

17-8160 KHOURY, MICHAEL J. V. UNITED STATES

17-8282 NEBINGER, JASON J. V. UNITED STATES

17-9259 COLLINS, CHASE L. V. CALIFORNIA

18-16 ELIJAH, LARONE F. V. UNITED STATES

18-36 BRICE, GREGORY V. UNITED STATES

18-98 COOK, JERRARD T. V. MISSISSIPPI

18-110 BURNINGHAM, ANDREW, ET AL. V. RAINES, JOHN M.

18-122 SINEGAL, MICHAEL V. POLK, DAWN

18-127 AMGEN INC., ET AL. V. SANOFI, ET AL.

18-168 NICHOLS, BILL G. V. CHESAPEAKE OPERATING, ET AL.

18-177 DAWSON, KENNETH J. V. BD. OF CTY. COMM'R, ET AL.

18-185 CONNECTICUT V. SKAKEL, MICHAEL

18-203 CHANDLER, JOEY M. V. MISSISSIPPI

18-229 CURRY, RALPH V. UNITED STATES

18-238 SOUTH CAROLINA V. SAMUEL, LAMONT A.

18-261 CEBREROS, JOSE G. V. UNITED STATES

18-273 WILLIAMS, RAMON A. V. WHITAKER, ACTING ATT'Y GEN.

18-274 STEWART, MICHAEL J. V. UNITED STATES

18-288 MEARING, PHILIP A. V. UNITED STATES

18-308 BETHEA, ANTHONY R. V. NORTH CAROLINA

18-311 EXXON MOBIL CORP. V. HEALEY, ATT'Y GEN. OF MA

18-331 PABON ORTEGA, RAFAEL V. LLOMPART ZENO, ISABEL, ET AL.

18-333 OLD DOMINION ELECTRIC V. FERC

18-337 COUNTY OF ORANGE, CA, ET AL. V. GORDON, MARY

18-339 HARPER, JUNE V. LEAHY, ARTHUR, ET AL.

18-348 WEISLER, ROBERT V. JEFFERSON PARISH SHERIFF, ET AL.

18-355 PRISON LEGAL NEWS V. JONES, SEC., FL DOC

18-359 ST. BERNARD PARISH, ET AL. V. UNITED STATES

18-373 ROSE, FLOYD V. UNITED STATES

18-374 CASTILLO, WUILSON E. L. V. UNITED STATES

18-375 ALEXANDER, DANIEL H. V. BAYVIEW LOAN SERVICING, LLC

18-378 MERCK & CO., INC., ET AL. V. GILEAD SCIENCES, INC.

18-386 VASQUEZ, JOSHUA, ET AL. V. FOXX, KIMBERLY M.

18-418 U. S., EX REL. HARPER, ET AL. V. MUSKINGUM WATERSHED CONSERVANCY

18-445 RAMIREZ, TANYA V. TEXAS

18-453 DE HAVILLAND, OLIVIA V. FX NETWORKS, LLC, ET AL.

18-458 PELLEGRINI, LILLIAN V. FRESNO COUNTY, CA, ET AL.

18-470 STOKES, BRANDI K. V. CORSBIE, CHRISTOPHER L., ET AL.

18-473 DAVIS, JOHN V. DEUTSCHE BANK NAT. TRUST, ET AL.

18-474 LYON, LeFLORIS V. CANADIAN NAT. RAILWAY, ET AL.

18-476 COWLITZ COUNTY, WA, ET AL. V. CROWELL, JULE, ET AL.

18-477 MARTIN, HUGH, ET AL. V. UNITED STATES

18-478 MALNES, BRIAN E. V. FLAGSTAFF, AZ, ET AL.

18-479 SCHENKEL, MARC V. XYNGULAR CORPORATION, ET AL.

18-482 HILL, PAUL V. ACCOUNTS RECEIVABLE SERVICES

18-487 D. A. V. D. P.

18-490 WATTS, JAEL V. ALLEN, MICHAEL K.

18-491 RAY, CAMERON H. V. OKLAHOMA

18-493 SPANO, ROSE J. V. FLORIDA BAR

18-495 MORRIS & ASSOCIATES, INC. V. JOHN BEAN TECHNOLOGIES CORP.

18-502 KINNEY, WILLIAM, ET UX. V. ANDERSON LUMBER CO., INC.

18-504 KINNEY, CHARLES G. V. BOREN, ROGER, ET AL.

18-507 McDONALD, JESSIE D. V. USDC MD TN

18-508 KINNEY, CHARLES G. V. TAKEUCHI, TYSON, ET AL.

18-510 KINNEY, CHARLES G. V. CLARK, MICHELE R., ET AL.

18-511 GATES, AUSTIN V. KHOKHAR, HASSAN, ET AL.

18-512 SIMMONS, LEE V. SMITH, PAUL D., ET AL.

18-514 DRAKE, OLA L., ET VIR V. DEUTSCHE BANK NATIONAL TRUST CO.

18-515 KINNEY, CHARLES G. V. CLARK, MICHELE R., ET AL.

18-516 KINNEY, CHARLES G. V. GUTIERREZ, PHILIP, ET AL.

18-517 KINNEY, CHARLES G. V. GUTIERREZ, PHILIP

18-518 KINNEY, CHARLES G. V. CLERK, COURT OF APPEAL OF CA

18-519 JENNINGS, JOSEPH A. V. JENNINGS, SUSAN W.

18-520 WeCONNECT, INC. V. GOPLIN, BROOKS

18-521 JUAN, SIMPSON V. JNESO DISTRICT COUNCIL 1, ET AL.

18-523 GRIFFIN, W. A. V. VERIZON COMMUNICATIONS, ET AL.

18-526 CHOIZILME, WALING V. WHITAKER, ACTING ATT'Y GEN.

18-527 STRAUB, FRANK V. SPOKANE, WA, ET AL.

18-528 KIFLE, ELIAS, ET AL. V. AHMED, JEMAL

18-529 LUO, JENN-CHING V. OWEN J. ROBERTS SCHOOL, ET AL.

18-536 TAYLOR, HARMON L. V. TEXAS

18-537 JAMES, BOOTH V. MONTGOMERY REG. AIRPORT, ET AL.

18-549 VOTER VERIFIED, INC. V. ELECTION SYSTEMS & SOFTWARE LLC

18-550 STOKES, BRANDI K. V. CORSBIE, CHRISTOPHER L.

18-558 GUTIERREZ, MIRIAM V. WHITAKER, ACTING ATT'Y GEN.

18-559 NEGATU, METEKU V. WELLS FARGO BANK, N.A.

18-564 DECOSIMO, ROSEMARY L. V. TENNESSEE

18-567 SNAPP, DANNY V. BURLINGTON NO. & SANTA FE R. CO.

18-569 SHAO, LINDA V. WANG, TSAN-KUEN

18-570 TUNAC, FELISA V. UNITED STATES

18-571 WILLIAMS, JAMES L. V. UNITED STATES

18-577 NETZER, DAVID V. SHELL OIL CO., ET AL.

18-582 YAGMAN, STEPHEN V. COLELLO, MICHAEL J.

18-583 MAYLE, KENNETH V. UNITED STATES, ET AL.

18-584 HORNE, ANGELA E. V. WTVR, LLC

18-586 KOCH, JACK R. V. ESTRELLA, A., ET AL.

18-590 CAVE CONSULTING GROUP, LLC V. OPTUMINSIGHT, INC.

18-591 DRESSLER, GARY V. RICE, BRADFORD, ET AL.

18-592 FERGUSON FLORISSANT SCHOOL DIST. V. MO CONFERENCE OF NAACP, ET AL.

18-594 SNYDER, ROBERT R. V. CALIFORNIA

18-595 TATTEN, JAMES P. V. DENVER, CO, ET AL.

18-598 CHIEN, ANDREW V. CLARK, ANDREW K., ET AL.

18-599 WI-FI ONE, LLC V. BROADCOM CORP., ET AL.

18-602 SMITH, JODI A. V. LAKEWOOD RANCH GYMNASTICS LLC

18-603 SIEGEL, MARTIN, ET AL. V. DELTA AIR LINES, INC., ET AL.

18-605 STEIN, MITCHELL J. V. CALIFORNIA

18-611 TATAR, JOHN J. V. UNITED STATES

18-613 GRIFFIN, W. A. V. AETNA HEALTH INC., ET AL.

18-616 NEPAL, ROGER V. UNITED STATES

18-619 HUSSEIN, GAMADA A. V. WHITAKER, ACTING ATT'Y GEN.

18-623 WALKER, KATRINA V. WEATHERSPOON, CARL, ET AL.

18-624 RASKO, JINAE V. NY ADMIN. FOR CHILDREN'S SERV.

18-627 STARRETT, WILLIAM H. V. LOCKHEED MARTIN CORP., ET AL.

18-629) CODY, JACK V. CALIFORNIA AIR RESOURCES BOARD
)
18-666) ALLIANCE FOR CALIFORNIA BUSINESS V. CALIFORNIA AIR RESOURCES BOARD

18-632 LeROUX, SHERILYN J. V. NCL

18-633 BYRD, GARY J. V. UNITED STATES

18-637 MARRO, DONALD C. V. CAESAR'S ENTERTAINMENT

18-639 BISZCZANIK, MAREK V. NATIONSTAR MORTGAGE, LLC, ET AL.

18-667 WILLIAMS, LONNIE C. V. TEXAS

18-675 WEST, LISA M. V. MISSOURI

18-683 STARK, BRADLEY C. V. UNITED STATES

18-685 ROBINSON, LYNN, ET AL. V. AMERICAN AIRLINES, INC., ET AL.

18-688 MANN, MARK V. UNITED STATES

18-698 REYNOLDS, CLEMENT V. MARYLAND

18-702 YADAV, RAJESHWAR S., ET UX. V. NJ DEPT. OF ENVTL. PROTECTION

18-706 KIOBEL, ESTHER V. CRAVATH, SWAINE & MOORE LLP

18-708 BERTRAM, ROBERT L., ET AL. V. UNITED STATES

18-714 LIM, CHHAY V. UNITED STATES

18-737 AIME, GREGORY, ET AL. V. JTH TAX, INC., ET AL.

18-5008 CANADATE, AUTREY V. UNITED STATES

18-5090 MASON, QUONSHA D. V. BURTON, WARDEN

18-5118 FLOYD, SHANE K. V. UNITED STATES

18-5147 WING, EDWARD N. V. UNITED STATES

18-5209 BARRETT, MICHAEL V. UNITED STATES

18-5251 DAMBELLY, SARJO V. UNITED STATES

18-5314 SMITH, SHANNON D. V. UNITED STATES

18-5398 PRUTTING, KENNETH F. V. UNITED STATES

18-5418 GREEN, KENNETH V. COLORADO

18-5464 BENITEZ, JOSE V. UNITED STATES

18-5504 POSEY, WILLIAM L. V. UNITED STATES

18-5505 MORRIS, FARRIS G. V. MAYS, WARDEN

18-5549 KENNER, PHILLIP A. V. UNITED STATES

18-5594 WASHINGTON, CORY D. V. UNITED STATES

18-5626 WISHNEFSKY, BRUCE V. SALAMEH, JAWAD, ET AL.

18-5634 KINKEL, KIPLAND P. V. LANEY, SUPT., OR

18-5655 FOSTER, CORY D. V. UNITED STATES

18-5664 CHEESEBORO, CHAN V. LITTLE RICHIE BUS SERVICE, INC.

18-5691 BAKER, DARRYL J. V. CHEATHAM, WARDEN

18-5730 DENMARK, TERRENCE V. UNITED STATES

18-5762 GARCIA, PEDRO V. UNITED STATES

18-5770 ROUSE, JOHN D. V. UNITED STATES

18-5771 QUALLS, JIM W. V. UNITED STATES

18-5821 FARMER, THOMAS L. V. UNITED STATES

18-5853 BINNS, DOROTHY V. MARIETTA, GA

18-5880 CAUDILL, VIRGINIA S. V. CONOVER, WARDEN

18-5898 VALERIO, ARMANDO C. V. UNITED STATES

18-5923 SANCHEZ, BRENT V. UNITED STATES

18-5939 ALLEN, GARY M. V. UNITED STATES

18-5945	CHIDDO, DAVID V. UNITED STATES
18-5960	GHARIB, KENNETH V. CASEY, THOMAS H.
18-5980	JONES, SHELTON D. V. DAVIS, DIR., TX DCJ
18-6005	WILLIAMS, TRAYON L. V. UNITED STATES
18-6013	WYATT, RICHARD C. V. UNITED STATES
18-6044	BEASLEY, RICHARD J. V. OHIO
18-6070	CORNWELL, CARLOS V. TENNESSEE
18-6071	NAYSHTUT, SERGE V. COMERCIALIZADORA TRAVEL, ET AL.
18-6137	BURTON, STEVEN D. V. UNITED STATES
18-6160	CARMODY, KEVIN R. V. BD. OF TRUSTEES, ET AL.
18-6174	LANG, EDWARD V. BOBBY, WARDEN
18-6214	SANDERS, RICARDO R. V. DAVIS, WARDEN
18-6233	SCHUERMANN, STEPHAN V. ANQUI, JUBILIE
18-6236	SWAN, THOMAS L, V. DAVIS, DIR., TX DCJ
18-6239	REILLY, SEAN P. V. HERRERA, GUELSY M., ET AL.
18-6243	JACKSON, CHRISTOPHER V. FLORIDA
18-6244	MARTIN, DENNIS V. OKLAHOMA, ET AL.
18-6245	KIRKLAND, JOHNNY V. PROGRESSIVE INS. CO., ET AL.
18-6247	PARKER, ROY V. CAIN, WARDEN
18-6261	VARGAS, ILICH V. McMAHON, JOHN
18-6263	VARGAS, ILICH V. McMAHON, JOHN, ET AL.
18-6264	REQUENA, ADRIAN M. V. ROBERTS, RAY, ET AL.
18-6272	STESHENKO, GREGORY V. McKAY, THOMAS, ET AL.
18-6274	KLEIN, ROBERT V. CRAMRA
18-6276	TERRELL, MARCUS A. V. BERRY, WARDEN
18-6278	MARTIN, JOHN V. DAVIS, DIR, TX DCJ
18-6287	CRUTSINGER, BILLY J. V. DAVIS, DIR., TX DCJ
18-6290	SOLGADO, DAMON J. V. BRAUN, WARDEN

18-6294 WALCOTT, STEVEN A. V. TERREBONNE PARISH JAIL, ET AL.

18-6296 JACOME, ALEXANDER R. V. CALIFORNIA

18-6298 FRATTA, ROBERT A. V. DAVIS, DIR., TX DCJ

18-6307 LATIMER, LORENZO M. V. MACOMBER, WARDEN

18-6311 WALTERS, WINSTON R. V. OKLAHOMA

18-6315 IVY, DAVID V. TENNESSEE

18-6318 WARE, JEFFREY A. V. JONES, SEC., FL DOC, ET AL.

18-6323 HUNTER, ASHLEY K. V. NORTH DAKOTA

18-6332 STROBLE, RICKY L. V. DAVIS, DIR. TX DCJ

18-6334 WIGGINS, AKHEEM V. TANNER, WARDEN

18-6340 WILLIAMS, KEVIN V. SAFIRE, ERIC, ET AL.

18-6344 LACY, BRANDON E. V. ARKANSAS

18-6354 JOSSIE, CHERYL L. V. CVS PHARMACY

18-6356 REYES, EARL V. ARTUS, DALE

18-6365 BARTLETT, ANGEL V. MICHIGAN, ET AL.

18-6367 CARTER, JOEL V. AYALA, JAMIE, ET AL.

18-6368 CALHOUN, DEAN E. V. TEXAS

18-6382 CHAVEZ, KELLY J. V. BERRYHILL, NANCY A.

18-6383 KULICK, ROBERT J. V. REIN, STEVEN

18-6384 LANTERI, MICHAEL A. V. CONNECTICUT

18-6388 BLACKMON, RUBY V. EATON CORPORATION

18-6390 WHITE, VALIANT V. MICHIGAN

18-6392 KHOSHMOOD, MOHSEN V. EASTERN MARKET

18-6402 ROBINSON, ELROY W. V. CALIFORNIA

18-6403 STARNES, CHESTER L. V. JACKSON, WARDEN

18-6407 VUE, ONG V. HENKE, FRANK X., ET AL.

18-6412 BEY, JAIYANAH V. ELMWOOD POLICE DEPT., ET AL.

18-6418 WILSON, DENVER I. V. FLORIDA

18-6419 WHIPPLE, WILLIAM L. V. FL DOC

18-6420 NESSELRODE, GREGORY P. V. DeVOS, SEC. OF EDUCATION

18-6426 BRUNSON, JONATHAN E. V. NORTH CAROLINA, ET AL.

18-6427 VALLE, JESUS V. ROGERS, RUSTY, ET AL.

18-6428 DELACRUZ, ROBERTO G. V. DAVIS, DIR., TXDCJ

18-6433 SMITHBACK, ROBERT N. V. TEXAS

18-6435 ROGERS, JOHN V. VANNOY, WARDEN

18-6437 HOLDER, COREY V. SEPANEK, WARDEN

18-6438 MORENO, OSCAR K. V. BUTLER, ALANA

18-6439 ORTEGA LARA, JUAN V. MADDEN, WARDEN

18-6440 MEEKS, DANNY R. V. TN DOC

18-6441 McKISSICK, RODERICK V. DEAL, GOV. OF GA, ET AL.

18-6442 MERRITT, PHILLIP T. V. ILLINOIS

18-6443 ADAMS, BOBBIE L. V. NETFLIX, INC.

18-6446 FAIRLEY, JULIETTE V. PM MANAGEMENT

18-6452 BARTLETT, ALAN V. STATE BAR OF CA, ET AL.

18-6454 NASH, CHARLES V. PHILLIPS, WARDEN

18-6455 McGEE, RONNIE V. BONDI, ATT'Y GEN. OF FL

18-6458 WILLIAMS, EDDIE V. TENNESSEE

18-6465 YANEZ, JOSE R. V. DIAZ, ACTING SEC., CA DOC

18-6466 ORTEGA, WILSON C. V. DIAZ, ACTING SEC., CA DOC

18-6467 PULLEY, TYRONE V. CALIFORNIA

18-6469 MORANT, TYRONE D. V. LEWIS, SUPT., SOUTHEAST

18-6476 WHITE, JOSEPH V. DETROIT E. COM. MENTAL, ET AL.

18-6477 ACKELS, DELMER M. V. OLSEN, RANDY M., ET AL.

18-6485 CAIN, RICHARD E. V. WASHINGTON

18-6487 HOWELL, ALICE V. NuCAR CONNECTION, INC.

18-6488 COLEMAN, ALONZO D. V. HAKALA, MICHAEL C., ET AL.

18-6489 FIKROU, GUETATCHEW V. MONTGOMERY COUNTY, ET AL.

18-6490 HOPKINS, LYMAN S. V. LANGUAGE TESTING INTERNATIONAL

18-6492 RENTAS, PASCUAL V. JONES, SEC., FL DOC

18-6493 BURKE, STEVEN D. V. TURNER, WARDEN

18-6501 ROBERTSON, CARL A. V. INTERACTIVE COLLEGE OF TECH.

18-6506 BOUDREAUX, GUY V. HOOPER, WARDEN

18-6507 BROWN, ALICE V. DEL NORTE COUNTY, CA, ET AL.

18-6508 WILLIAMS, DUAN L. V. VIRGINIA

18-6509 TEDESCO, JOHN V. MONROE COUNTY, PA, ET AL.

18-6510 PRUITT, FRANK V. NEW YORK

18-6513 CHINCHILLA, BYRON C. V. LEWIS, WARDEN

18-6516 TRAN, LINH T. V. HAPPY VALLEY MUNICIPAL CT.

18-6517 BROWN, ARETHA D. V. ELITE MODELING AGENCY

18-6520 ARNETT, JESUS L. V. COVELLO, ACTING WARDEN

18-6521 PORTO, LEONARD V. LAGUNA BEACH, CA, ET AL.

18-6522 PRUNTY, ROBERT V. DeSOTO COUNTY SCHOOL BD., ET AL.

18-6527 JEDEDIAH C. V. WEST VIRGINIA

18-6528 CABBAGESTALK, SHAHEEN V. STERLING, BRYAN P., ET AL.

18-6529 KOZICH, DON V. DEIBERT, ANN, ET AL.

18-6532 MYERS, AUSTIN V. OHIO

18-6535 WILLIAMS, RODNEY V. MICHIGAN

18-6538 SYDNOR, STEVEN B. V. HAMPTON, WARDEN

18-6539 RENCOUNTRE, ALLAN W. V. BRAUN, WARDEN

18-6540 RAYAN, MAHA Z. V. GEORGIA

18-6541 STOLLER, MICHAEL V. WILMINGTON TRUST

18-6543 KORESKO, JOHN J. V. ACOSTA, SEC. OF LABOR

18-6544 McNEMAR, ROBERT J. V. TERRY, ACTING WARDEN

18-6545 LOPEZ, FRANKIE C. V. CALIFORNIA

18-6555 BARNETT, LESTER V. GASTONIA, NC

18-6556 McALISTER, DAVID V. WISCONSIN

18-6558 MERRICK, ANTHONY J. V. ARIZONA

18-6562 PIERCE, JASON V. GEORGIA

18-6568 POMPEE, HAROLD V. JONES, SEC., FL DOC, ET AL.

18-6571 JERVIS, MARK V. BROWN, WARDEN

18-6572 THOMPSON, DOUGLAS W. V. MO BD. OF PROBATION AND PAROLE

18-6575 STOKES, FINESS E. V. DAVIS, DIR., TX DCJ

18-6577 GODOY, ERNESTO W. V. CLARKE, DIR., VA DOC

18-6578 FOX, ELEBERT V. ILLINOIS

18-6580 FITTS, WILIIAM S. V. GOODRICH, WARDEN, ET AL.

18-6590 MOHAMED, SALAH V. UNITED STATES

18-6592 PAVON, ANDRES V. JONES, SEC., FL DOC

18-6594 SAFFORD, WILLIE V. FLORIDA

18-6595 SMITH, JOHN V. FL DOC

18-6603 JOHNSON, DAVID V. INDIANA

18-6607 PETERS, SCOTT V. BALDWIN, JOHN

18-6609 LAMPON-PAZ, MANUEL V. OPM

18-6610 JOHNSON, MARK V. ILLINOIS

18-6613 DeJESUS, HECTOR R. V. GODINEZ, SALVADOR A., ET AL.

18-6614 ROSE, WILLIE V. HORTON, WARDEN

18-6619 ROBINSON, DOMINIC C. V. MISSISSIPPI

18-6620 ARMENTA, JOE L. V. DIAZ, ACTING SEC., CA DOC

18-6623 COSME, CARLOS V. UNITED STATES

18-6627 CURRY, DAVID T. V. FLORIDA

18-6628 CLEMONS, CORNELIUS V. KASICH, GOV. OF OH

18-6629 HARLOFF, WILLIAM R. V. KOENIG, WARDEN

18-6637 GRIST, HAROLD E. V. CARLIN, WARDEN

18-6639 DIZAK, STUART V. SMITH, SUPT., MID-STATE

18-6642 IBEABUCHI, IKEMEFULA C. V. ARIZONA

18-6647 SHARMA, KIRAN V. UNITED STATES

18-6652 LOWE, MICHAEL C. V. ROY, COMM'R, MN DOC

18-6653 CALDERIN, ROLANDO V. ILLINOIS

18-6659 RODWELL, JAMES V. MASSACHUSETTS

18-6660 ARIF, MUSTAFA H. V. UNITED STATES

18-6661 SAMUEL, BRYAN C. V. UNITED STATES

18-6664 GARZA, DANIEL D. V. UNITED STATES

18-6665 SMITH, MAURICE T. V. UNITED STATES

18-6666 SOSA, OSCAR V. UNITED STATES

18-6673 VICK, TRACY L. V. TENNESSEE

18-6676 WILMORE, HERVE V. UNITED STATES

18-6677 MARSHALL, CLARENCE D. V. UNITED STATES

18-6678 WHITE, JERMEAL V. BRACY, WARDEN, ET AL.

18-6681 RIOS, MARK A., ET AL. V. UNITED STATES

18-6683 SAKOMAN, CODY V. CALIFORNIA

18-6687 KENNEDY, HILDA T. V. POLLOCK, FREDERIC A.

18-6689 SANCHEZ, ISRAEL V. PFEIFFER, WARDEN

18-6691 McCURTIS, DELILAH V. BURKE, WARDEN

18-6692 WATERSON, RICHARD D. V. UNITED STATES

18-6693 MANGUAL-ROSADO, VICTOR M. V. UNITED STATES

18-6694 WEAKLEY, TIMOTHY V. EAGLE LOGISTICS, ET AL.

18-6695 MEHMOOD, ZAFAR V. UNITED STATES

18-6697 BELLINGER, KEVIN M. V. UNITED STATES

18-6700 DePIETRO, MICHAEL V. ALLSTATE INSURANCE CO., ET AL.

18-6703 TRIMBLE, DAVID R. V. VANNOY, WARDEN

18-6705 JILES, RICHARD A. V. UNITED STATES

18-6707	PROA-DOMINGUEZ, ALBERTO J. V. UNITED STATES
18-6711	COLON, RICARDO D. V. UNITED STATES
18-6712	GILSTRAP, BRYAN M. V. UNITED STATES
18-6714	PLASENCIA, MAIKEL S. V. UNITED STATES
18-6718	EDWARDS, TIMOTHY V. UNITED STATES
18-6719	WILLIAMSON, BOBBY K. V. LUTHER, SUPT., SMITHFIELD
18-6720	WITCHARD, JOSEPH V. ANTONELLI, WARDEN
18-6721	CULLENS, GAVIN V. CURTIN, WARDEN
18-6723	NOEL, ROBERT V. UNITED STATES
18-6725	BUSSELL, CHARLES W. V. KENTUCKY
18-6726	BRANTLEY, BILLY V. INDIANA
18-6729	SANTIAGO, JESUS V. UNITED STATES
18-6732	STEVENS, MYRON G. V. UNITED STATES
18-6733	SHAUGER, LAURA V. UNITED STATES
18-6737	LOPEZ-CASTILLO, JOSE V. UNITED STATES
18-6738	JOHNSON, JONATHONE J. V. UNITED STATES
18-6742	MATHIS, ALBERT U. V. NORTH CAROLINA
18-6746	HAYMORE, JOSEPH, ET AL. V. UNITED STATES
18-6748	GLASS, MALACHI M. V. UNITED STATES
18-6753	MENDEZ, JESSE V. SWARTHOUT, WARDEN, ET AL.
18-6757	NORMAN, RONALD R. V. UNITED STATES
18-6759	BROWN, GREGORY L. V. HATTON, WARDEN
18-6760	UPSHAW, DAVID J. V. UNITED STATES
18-6761	WILLIAMS, TELLIS T. V. UNITED STATES
18-6763	BONILLA, LUIS A. V. UNITED STATES
18-6764	BORDERS, KENNETH R. V. UNITED STATES
18-6765	BAGDIS, BERNARD J. V. UNITED STATES
18-6767	GALBREATH, BRENT V. UNITED STATES

18-6768	PEREZ, MICHAEL V. UNITED STATES
18-6770	NINO-FLORES, DAVID V. UNITED STATES
18-6775	KEHOE, EDWARD J. V. UNITED STATES
18-6778	HORN, DeANGELO V. JONES, SEC., FL DOC
18-6791	BLAND, BENJAMIN V. UNITED STATES
18-6793	BOOTH, DERRICK L. V. KELLEY, DIR., AR DOC
18-6795	BROWN, DARRELL V. UNITED STATES
18-6797	GREENE, STEPHANIE I. V. SOUTH CAROLINA
18-6798	HILL, ELVIN V. UNITED STATES
18-6800	POWELL, ROBERT R. V. UNITED STATES
18-6801	McDUFFY, VAN V. UNITED STATES
18-6804	ROACH, SHANE V. UNITED STATES
18-6806	SARMIENTO, ELIANA V. UNITED STATES
18-6808	SUAREZ, HARLEM V. UNITED STATES
18-6809	CAMP, DESMOND V. UNITED STATES
18-6810	HICKMAN-SMITH, TIMOTHY V. UNITED STATES
18-6811	FONSECA, DAMASO R. V. UNITED STATES
18-6812	FERRANTI, JACK V. UNITED STATES
18-6814	GERALD, PATRICIA A., ET AL. V. VIRGINIA
18-6816	GARCIA, VICENTE V. UNITED STATES
18-6817	FOCIA, MICHAEL A. V. UNITED STATES
18-6820	LANGLEY, ROBERT P. V. PREMO, SUPT., OR
18-6821	KELLEY, MICHAEL B. V. ALABAMA
18-6824	KEYS, MARTAVIOUS D. V. UNITED STATES
18-6827	WILLIAMS, ERIC V. NEW YORK
18-6828	THOMAS, GREGG V. MARYLAND
18-6829	FUENTES, JIMMY W. V. UNITED STATES
18-6830	HEREDIA-SILVA, FRANCISCO V. UNITED STATES

18-6833	ZUNIGA, JOSE R. V. UNITED STATES
18-6838	ROUNDTREE, ALVIN L. V. UNITED STATES
18-6839	ROBIN, BILLY A. V. UNITED STATES
18-6841	STEWART, ROBERT K. V. NORTH CAROLINA
18-6842	DAVIS, MATTHEW V. UNITED STATES
18-6844	KERR, CHRISTOPHER J. V. WISCONSIN
18-6846	PENA, LUIS A. V. MARYLAND
18-6847	HARO, SERGIO A. V. UNITED STATES
18-6851	GOMEZ, STEVEN V. UNITED STATES
18-6853	GARCIA-LIMA, NOE V. UNITED STATES
18-6855	PEREZ-MARTINEZ, ANTONIO D. V. UNITED STATES
18-6856	MILLS, GEARY M. V. UNITED STATES
18-6858	PRITCHETT, MICAH G. V. UNITED STATES
18-6861	WILBORN, JOHN V. RYAN, WARDEN
18-6862	THOMAS, JOHN V. UNITED STATES
18-6863	LEWIS, ANTRELL D. V. UNITED STATES
18-6864	WHITLOW, THOMAS V. UNITED STATES
18-6865	NINA, ADONY V. UNITED STATES
18-6867	SILVA-IBARRA, ALBERTO J. V. UNITED STATES
18-6871	CABELLO, ARCHIE V. USDC OR
18-6873	ARMENTA, ANGELA V. UNITED STATES
18-6875	THRIFT, KENDALL V. UNITED STATES
18-6879	HOGUE, DARREN V. CAIN, SUPT., SNAKE RIVER
18-6894	CROSBY, DAVID V. UNITED STATES
18-6895	CLARK, MICHAEL V. UNITED STATES
18-6896	WINGATE, JEFFREY S. V. UNITED STATES
18-6897	TAVIA, VICTOR S. V. UNITED STATES
18-6900	WATTERS, JACOB S. V. UNITED STATES

18-6910 MUSA, ELSEDDIG E. V. UNITED STATES

18-6911 PINEDA-OROZCO, ADRIAN V. UNITED STATES

18-6912 MONIE, BRYANT L. V. UNITED STATES

18-6917 PORTELA, RODOLFO V. UNITED STATES

18-6918 VELAZQUEZ, SAMANTHA C. V. UNITED STATES

18-6920 RETIZ, CLYDE V. UNITED STATES

18-6923 SARRAS, DONATOS V. UNKNOWN PARTY

18-6924 WALDEN, LARRY E. V. KELLY, DIR., AR DOC

18-6926 VALENTINE, JAMES V. UNITED STATES

18-6934 EVANS, BOBBY V. UNITED STATES

18-6935 EWING, JOSHUA D. V. UNITED STATES

18-6937 MORRILL, STEVEN A. V. UNITED STATES

18-6948 GAVIDIA, WILLIAM V. UNITED STATES

18-6951 COOPER, JAMAL V. UNITED STATES

18-6952 LICON, ORTINO G. V. UNITED STATES

18-6963 CAMRAN, MUHAMMED T. V. UNITED STATES

18-6964 WALLACE, HENRY L. V. UNITED STATES

18-6967 DANILOVICH, MICHAEL V. UNITED STATES

18-6969 BIVINS, BRANDON V. UNITED STATES

18-6974 McINTOSH, DANNYE T. V. UNITED STATES

18-6981 SURRATT, DEXTER L. V. NORTH CAROLINA

18-7028 SIMPSON, JAMEEL V. ERKERD, JAMES, ET AL.

The petitions for writs of certiorari are denied.

17-938 CIBOLO, TX V. GREEN VALLEY SPECIAL UTIL. DIST.

The motion of Guadalupe Valley Development Corporation, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied.

17-1165 DE CSEPEL, DAVID L., ET AL. V. REPUBLIC OF HUNGARY, ET AL.

The motion of Ambassador Stuart E. Eizenstat for leave to file a brief as *amicus curiae* is granted. The motion of AJC, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied. Justice Kavanaugh took no part in the consideration or decision of these motions and this petition.

17-1237 OSAGE WIND, LLC, ET AL. V. OSAGE MINERALS COUNCIL

The motion of American Wind Energy Association for leave to file a brief as *amicus curiae* is granted. The motion of Osage County Farm Bureau, Inc., et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied.

18-61 STAND UP FOR CALIFORNIA!, ET AL. V. DEPT. OF INTERIOR, ET AL.

The petition for a writ of certiorari is denied. Justice Kavanaugh took no part in the consideration or decision of this petition.

18-64 LUCIO-RAYOS, JUAN A. V. WHITAKER, ACTING ATT'Y GEN.

The petition for a writ of certiorari is denied. Justice Gorsuch took no part in the consideration or decision of this petition.

18-267 ELECTRONIC PRIVACY INFO. CENTER V. PRESIDENTIAL ADVISORY, ET AL.

The petition for a writ of certiorari is denied. Justice Kavanaugh took no part in the consideration or decision of this petition.

18-327 N. K. V. ABBOTT LABORATORIES

The petition for a writ of certiorari is denied. Justice Alito took no part in the consideration or decision of this

petition.

18-370 HAIGHT, MARLON V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Kavanaugh took no part in the consideration or decision of this petition.

18-398 FCA US LLC, ET AL. V. FLYNN, BRIAN, ET AL.

The motion of CTIA-The Wireless Association, et al. for leave to file a brief as *amici curiae* is granted. The motion of respondents for leave to file a brief in opposition under seal with redacted copies for the public record is granted. The petition for a writ of certiorari is denied.

18-480 RAGHAVENDRA, R. S. V. USDC SD NY

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

18-513 MULCAHY, LEE V. ASPEN PITKIN CTY. HOUSING AUTH.

The motion of petitioner to defer consideration of the petition for a writ of certiorari is denied. The petition for a writ of certiorari is denied.

18-544 CANUTO, TERESITA A. V. DEPT. OF DEFENSE, ET AL.

The petition for a writ of certiorari is denied. Justice Kavanaugh took no part in the consideration or decision of this petition.

18-6289 SMALL, BRUCE L. V. FLORIDA

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

18-6376 ALBRA, ADEM V. BD. OF TRUSTEES, ET AL.

The petition for a writ of certiorari is denied. Justice Kavanaugh took no part in the consideration or decision of this petition.

18-6380 BARTLETT, ALAN M. V. PINEDA, JUDGE, ETC., ET AL.

18-6460 BYNUM, WADDELL V. DeKALB COUNTY SANITATION

18-6491 REEVES, MICHAEL V. LASHBROOK, WARDEN

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8.

18-6502 EPPERSON, CHRIS J. V. USDC ND AL

The petition for a writ of certiorari before judgment is denied.

18-6503 RICHARD, THOMAS P. V. DIST. ATT'Y OF WESTMORELAND CTY.

18-6523 BELL, RENEE D. V. ORLANDO HEALTH, INC.

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8.

18-6717 YIN, LEI V. THERMO FISHER SCIENTIFIC

The petition for a writ of certiorari is denied. The Chief Justice took no part in the consideration or decision of this petition.

18-6783 SCOTT, GINO V. V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

18-6854 DURHAM, MATTHEW L. V. UNITED STATES

The petition for a writ of certiorari is denied. Justice

Gorsuch took no part in the consideration or decision of this petition.

18-6872 ABDUL-SALAAM, SEIFULLAH V. WETZEL, SEC., PA DOC, ET AL.

The petition for a writ of certiorari is denied. Justice Alito took no part in the consideration or decision of this petition.

18-6915 ROBINSON, CARLTON V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Sotomayor, with whom Justice Ginsburg joins, dissenting from the denial of certiorari: I dissent for the reasons set out in *Brown* v. *United States*, 586 U. S. ___ (2018) (Sotomayor, J., dissenting).

18-6922 SINGH, RAGHVENDRA V. WELLS FARGO BANK, N.A.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

HABEAS CORPUS DENIED

18-6579 IN RE PATRICIA A. McQUARRY

18-6784 IN RE SAMUEL RIVERA

18-6787 IN RE WILLIAM M. BAILEY

18-6961 IN RE MICHAEL D. JOHNSON

The petitions for writs of habeas corpus are denied.

MANDAMUS DENIED

18-488 IN RE PAMELA D. IDLETT

18-6357 IN RE RAJAMANI SENTHILNATHAN

18-6479 IN RE EVAN P. GALVAN

18-6526 IN RE MASAO YONAMINE

The petitions for writs of mandamus are denied.

18-6449 IN RE HAKEEM SULTAANA

18-6500 IN RE SANDRA RUMANEK

The petitions for writs of mandamus and/or prohibition are denied.

PROHIBITION DENIED

18-6478 IN RE INZEL GAITOR

The petition for a writ of prohibition is denied.

REHEARINGS DENIED

17-8502 AMBROSE, SAMUEL L. V. TRIERWEILER, WARDEN

17-8558 LONG, GILLMAN R. V. UNITED STATES

17-8688 ASSA'AD-FALTAS, MARIE-THERESE V. COLUMBIA, SC

17-8842 JACKSON, VALENTINO V. GEORGIA

17-8909 JARAMILLO, MIGUEL A. V. NEW YORK

17-9004 STURGES, DEANDRE A. V. CURTIN, WARDEN

17-9034 TAYLOR, ROBERT R. V. JONES, SEC., FL DOC

17-9292 STYLES, ARTHUR B. V. DEPT. OF VETERANS AFFAIRS

17-9306 TRINH, LAN TU V. TRINH, KATHLEEN LIEN

17-9363 McFARLIN, SHAWNDELL M. V. HARRIS, CLERK, USSC, ET AL.

17-9433 JUNOD, ERIC V. UNITED STATES

17-9461 BULOVIC, DANICA V. STOP & SHOP SUPERMARKET, ET AL.

18-79 KLEIN, TIBERIU, ET AL. V. O'BRIEN, DANIEL, ET AL.

18-209 MEHTA, RAM V. CALIFORNIA

18-220 CARRILLO, JAVIER A., ET AL. V. U.S. BANK NAT. ASSOC., ET AL.

18-233 INDIEZONE, INC., ET AL. V. ROOKE, TODD, ET AL.

18-239 RINALDO, ARICK J. V. MAHAN, BRYAN, ET AL.

18-271 TROST, ZACHARY N., ET UX. V. TROST, SHERRY

18-330 GREENE, DOUGLAS W. V. FROST BROWN TODD, LLC, ET AL.

18-382 RAB, RAJI V. SUPERIOR COURT OF CA, ET AL.

18-401	HOBSON, FAYE R. V. MATTIS, SEC. OF DEFENSE
18-427	BAMDAD, MASOUD V. UNITED STATES
18-5075	OKAFOR, FELIX A. V. UNITED STATES
18-5106	STEWART, SHIRLEY A. V. HOLDER, ERIC H., ET AL.
18-5139	RUNNELS, DONALD K. V. BORDELON, WARDEN
18-5161	WADDLETON, III, MARVIN V. DAVIS, DIR., TX DCJ
18-5325	LASHER, LENA V. UNITED STATES
18-5366	MARTIN, RONALD D. V. TRIERWEILER, WARDEN
18-5388	ROBERTS, ALBERT W. V. UNITED STATES
18-5403	DENNIS, LEROY D. V. OKLAHOMA
18-5413	LEWIS, CLARENCE D. V. HEDGEMON, JOHNNY, ET AL.
18-5452	REID, KENNETH R. V. USDC SC
18-5519	TEMPLETON, MARK V. AMSBERRY, SUPT., E. OR, ET AL.
18-5530	KALDAWI, VICTORIA E. V. KUWAIT, ET AL.
18-5599	CHI, ANSON V. UNITED STATES
18-5602	LEONARD, STEPHEN D. V. FLORIDA
18-5659	CAVALIERI, DAVID E. V. VIRGINIA
18-5689	BRIDGETTE, GEORGE V. ASUNCION, WARDEN, ET AL.
18-5719	BARTLETT, ALAN V. PINEDA, JUDGE, ETC., ET AL.
18-5720	BARTLETT, ALAN V. PINEDA, JUDGE, ETC., ET AL.
18-5732	LaCONTE, JAMES V. UNITED STATES
18-5782	COOK, MICHAEL L. V. RYAN, DIR., AZ DOC, ET AL.
18-5793	JOHNSTON, RAY L. V. FLORIDA
18-5802	DOE, JOHN V. KAWEAH DELTA HOSPITAL, ET AL.
18-5829	MATELYAN, ARIKA V. ATLANTIC RECORDS WMG, ET AL.
18-5885	SHANNON, KENNETH K. V. UNITED STATES
18-5887	MORTON, CECIL L. V. HAYNES, SUPT., STAFFORD CREEK
18-5903	JONES, RUFUS V. BERRYHILL, NANCY A., ET AL.

18-5977	RAFI, SYED K. V. YALE UNIVERSITY
18-6017	ROBEY, WILLIAM V. WASHINGTON
18-6074	KURI, CRYSTAL N. V. KS DEPT. OF LABOR
18-6166	RAFI, SYED K. V. BRIGHAM & WOMEN'S HOSP., ET AL.

The petitions for rehearing are denied.

Per Curiam

SUPREME COURT OF THE UNITED STATES

CITY OF ESCONDIDO, CALIFORNIA, ET AL. *v.* MARTY EMMONS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17–1660. Decided January 7, 2019

PER CURIAM.

The question in this qualified immunity case is whether two police officers violated clearly established law when they forcibly apprehended a man at the scene of a reported domestic violence incident.

The record, viewed in the light most favorable to the plaintiff, shows the following. In April 2013, Escondido police received a 911 call from Maggie Emmons about a domestic violence incident at her apartment. Emmons lived at the apartment with her husband, her two children, and a roommate, Ametria Douglas. Officer Jake Houchin responded to the scene and eventually helped take a domestic violence report from Emmons about injuries caused by her husband. The officers arrested her husband. He was later released.

A few weeks later, on May 27, 2013, at about 2:30 p.m., Escondido police received a 911 call about another possible domestic disturbance at Emmons' apartment. That 911 call came from Ametria Douglas' mother, Trina Douglas. Trina Douglas was not at the apartment, but she was on the phone with her daughter Ametria, who was at the apartment. Trina heard her daughter Ametria and Maggie Emmons yelling at each other and heard her daughter screaming for help. The call then disconnected, and Trina Douglas called 911.

Officer Houchin again responded, along with Officer Robert Craig. The dispatcher informed the officers that two children could be in the residence and that calls to the

apartment had gone unanswered.

Police body-camera video of the officers' actions at the apartment is in the record.

The officers knocked on the door of the apartment. No one answered. But a side window was open, and the officers spoke with Emmons through that window, attempting to convince her to open the door to the apartment so that they could conduct a welfare check. A man in the apartment also told Emmons to back away from the window, but the officers said they could not identify the man. At some point during this exchange, Sergeant Kevin Toth, Officer Joseph Leffingwell, and Officer Huy Quach arrived as backup.

A few minutes later, a man opened the apartment door and came outside. At that point, Officer Craig was standing alone just outside the door. Officer Craig told the man not to close the door, but the man closed the door and tried to brush past Officer Craig. Officer Craig stopped the man, took him quickly to the ground, and handcuffed him. Officer Craig did not hit the man or display any weapon. The video shows that the man was not in any visible or audible pain as a result of the takedown or while on the ground. Within a few minutes, officers helped the man up and arrested him for a misdemeanor offense of resisting and delaying a police officer.

The man turned out to be Maggie Emmons' father, Marty Emmons. Marty Emmons later sued Officer Craig and Sergeant Toth, among others, under Rev. Stat. §1979, 42 U. S. C. §1983. He raised several claims, including, as relevant here, a claim of excessive force in violation of the Fourth Amendment. The suit sought money damages for which Officer Craig and Sergeant Toth would be personally liable. The District Court held that the officers had probable cause to arrest Marty Emmons for the misdemeanor offense. The Ninth Circuit did not disturb that finding, and there is no claim presently before us that the officers

lacked probable cause to arrest Marty Emmons. The only claim before us is that the officers used excessive force in effectuating the arrest.

The District Court rejected the claim of excessive force. 168 F. Supp. 3d 1265, 1274 (SD Cal. 2016). The District Court stated that the "video shows that the officers acted professionally and respectfully in their encounter" at the apartment. *Id.*, at 1275. Because only Officer Craig used any force at all, the District Court granted summary judgment to Sergeant Toth on the excessive force claim.

Applying this Court's precedents on qualified immunity, the District Court also granted summary judgment to Officer Craig. According to the District Court, the law did not clearly establish that Officer Craig could not take down an arrestee in these circumstances. The court explained that the officers were responding to a domestic dispute, and that the encounter had escalated when the officers could not enter the apartment to conduct a welfare check. The District Court also noted that when Marty Emmons exited the apartment, none of the officers knew whether he was armed or dangerous, or whether he had injured any individuals inside the apartment.

The Court of Appeals reversed and remanded for trial on the excessive force claims against both Officer Craig and Sergeant Toth. 716 Fed. Appx. 724 (CA9 2018). The Ninth Circuit's entire relevant analysis of the qualified immunity question consisted of the following: "The right to be free of excessive force was clearly established at the time of the events in question. *Gravelet-Blondin* v. *Shelton*, 728 F. 3d 1086, 1093 (9th Cir. 2013)." *Id.*, at 726.

We reverse the judgment of the Court of Appeals as to Sergeant Toth, and vacate and remand as to Officer Craig.

With respect to Sergeant Toth, the Ninth Circuit offered no explanation for its decision. The court's unexplained reinstatement of the excessive force claim against Sergeant Toth was erroneous—and quite puzzling in light of

the District Court's conclusion that "only Defendant Craig was involved in the excessive force claim" and that Emmons "fail[ed] to identify contrary evidence." 168 F. Supp. 3d, at 1274, n. 4.

As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela* v. *Hughes*, 584 U. S. ___, ___ (2018) (*per curiam*) (slip op., at 4) (internal quotation marks omitted); see *District of Columbia* v. *Wesby*, 583 U. S. ___, ___–___ (2018); *White* v. *Pauly*, 580 U. S. ___, ___–___ (2017) (*per curiam*); *Mullenix* v. *Luna*, 577 U. S. ___, ___–___ (2015) (*per curiam*).

Under our cases, the clearly established right must be defined with specificity. "This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality." *Kisela*, 584 U. S., at ___ (slip op., at 4) (internal quotation marks omitted). That is particularly important in excessive force cases, as we have explained:

> "Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue. . . .
>
> "[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly estab-

> lished right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Id.*, at ___ (slip op., at 5) (quotation altered).

In this case, the Court of Appeals contravened those settled principles. The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the "right to be free of excessive force" was clearly established. With the right defined at that high level of generality, the Court of Appeals then denied qualified immunity to the officers and remanded the case for trial. 716 Fed. Appx., at 726.

Under our precedents, the Court of Appeals' formulation of the clearly established right was far too general. To be sure, the Court of Appeals cited the *Gravelet-Blondin* case from that Circuit, which described a right to be "free from the application of non-trivial force for engaging in mere passive resistance. . . ." 728 F. 3d, at 1093. Assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity, see *City and County of San Francisco* v. *Sheehan*, 575 U. S. ___, ___ (2015), the Ninth Circuit's *Gravelet-Blondin* case law involved police force against individuals engaged in *passive* resistance. The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case. That is a problem under our precedents:

> "[W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. . . . While there does not have to be a case directly on

> point, existing precedent must place the lawfulness of the particular [action] beyond debate. . . . Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. . . . But a body of relevant case law is usually necessary to clearly establish the answer . . . ." *Wesby*, 583 U. S., at ___ (slip op., at 15) (internal quotation marks omitted).

The Court of Appeals failed to properly analyze whether clearly established law barred Officer Craig from stopping and taking down Marty Emmons in this manner as Emmons exited the apartment. Therefore, we remand the case for the Court of Appeals to conduct the analysis required by our precedents with respect to whether Officer Craig is entitled to qualified immunity.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Per Curiam

SUPREME COURT OF THE UNITED STATES

TIM SHOOP, WARDEN *v.* DANNY HILL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18–56. Decided January 7, 2019

PER CURIAM.

The United States Court of Appeals for the Sixth Circuit held that respondent Danny Hill, who has been sentenced to death in Ohio, is entitled to habeas relief under 28 U. S. C. §2254(d)(1) because the decisions of the Ohio courts concluding that he is not intellectually disabled were contrary to Supreme Court precedent that was clearly established at the time in question. In reaching this decision, the Court of Appeals relied repeatedly and extensively on our decision in *Moore* v. *Texas*, 581 U. S. ___ (2017), which was not handed down until long after the state-court decisions.

The Court of Appeals' reliance on *Moore* was plainly improper under §2254(d)(1), and we therefore vacate that decision and remand so that Hill's claim regarding intellectual disability can be evaluated based solely on holdings of this Court that were clearly established at the relevant time.

I

In September 1985, 12-year old Raymond Fife set out on his bicycle for a friend's home. When he did not arrive, his parents launched a search, and that evening his father found Raymond—naked, beaten, and burned—in a wooded field. Although alive, he had sustained horrific injuries

that we will not describe. He died two days later.

In 1986, respondent Danny Hill was convicted for torturing, raping, and murdering Raymond, and he was sentenced to death. An intermediate appellate court affirmed his conviction and sentence, as did the Ohio Supreme Court. We denied certiorari. *Hill* v. *Ohio*, 507 U. S. 1007 (1993).

After unsuccessful efforts to obtain postconviction relief in state and federal court, Hill filed a new petition in the Ohio courts contending that his death sentence is illegal under *Atkins* v. *Virginia*, 536 U. S. 304 (2002), which held that the Eighth Amendment prohibits the imposition of a death sentence on a defendant who is "mentally retarded." In 2006, the Ohio trial court denied this claim, App. to Pet. for Cert. 381a–493a, and in 2008, the Ohio Court of Appeals affirmed, *State* v. *Hill*, 177 Ohio App. 3d 171, 2008-Ohio-3509, 894 N. E. 2d 108. In 2009, the Ohio Supreme Court denied review. *State* v. *Hill*, 122 Ohio St. 3d 1502, 2009-Ohio-4233, 912 N. E. 2d 107.

In 2010, Hill filed a new federal habeas petition under 28 U. S. C. §2254, seeking review of the denial of his *Atkins* claim. The District Court denied the petition, App. to Pet. for Cert. 77a–210a, but the Sixth Circuit reversed and granted habeas relief under §2254(d)(1), which applies when a state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." See *Hill* v. *Anderson*, 881 F. 3d 483 (2018). The Sixth Circuit found two alleged deficiencies in the Ohio courts' decisions: First, they "overemphasized Hill's adaptive strengths"; and second, they "relied too heavily on adaptive strengths that Hill exhibited in the controlled environment of his death-row prison cell." *Id.*, at 492. In reaching these conclusions, the court relied repeatedly on our decision in *Moore* v. *Texas*, 581 U. S. ___. See 881 F. 3d, at 486, 487, 488,

n. 4, 489, 491, 492, 493, 495, 496, 498, 500. The court acknowledged that "[o]rdinarily, Supreme Court decisions that post-date a state court's determination cannot be 'clearly established law' for the purposes of [the federal habeas statute]," but the court argued "that *Moore*'s holding regarding adaptive strengths [was] merely an application of what was clearly established by *Atkins*." *Id.,* at 487.

The State filed a petition for a writ of certiorari, contending that the Sixth Circuit violated §2254(d)(1) because a fundamental underpinning of its decision was *Moore*, a case decided by this Court well after the Ohio courts' decisions. Against this, Hill echoes the Court of Appeals' argument that *Moore* merely spelled out what was clearly established by *Atkins* regarding the assessment of adaptive skills.

II

The federal habeas statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposes important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases. The statute respects the authority and ability of state courts and their dedication to the protection of constitutional rights. Thus, under the statutory provision at issue here, 28 U. S. C. §2254(d)(1), habeas relief may be granted only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of," Supreme Court precedent that was "clearly established" at the time of the adjudication. *E.g., White* v. *Woodall*, 572 U. S. 415, 419–420 (2014); *Metrish* v. *Lancaster*, 569 U. S. 351, 357–358 (2013). This means that a state court's ruling must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 562 U. S. 86, 103

(2011). We therefore consider what was clearly established regarding the execution of the intellectually disabled in 2008, when the Ohio Court of Appeals rejected Hill's *Atkins* claim.

Of course, *Atkins* itself was on the books, but *Atkins* gave no comprehensive definition of "mental retardation" for Eighth Amendment purposes.[1] The opinion of the Court noted that the definitions of mental retardation adopted by the American Association on Mental Retardation and the American Psychiatric Association required both "subaverage intellectual functioning" and "significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." 536 U. S., at 318; see also *id.*, at 308, n. 3 (quoting definitions). The Court also noted that state statutory definitions of mental retardation at the time "[were] not identical, but generally conform[ed] to the[se] clinical definitions." *Id.*, at 317, n. 22. The Court then left "'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction'" that the Court adopted. *Id.*, at 317 (quoting *Ford* v. *Wainwright*, 477 U. S. 399, 416 (1986) (plurality opinion)).

More than a decade later, we expounded on the definition of intellectual disability in two cases. In *Hall* v. *Florida*, 572 U. S. 701 (2014), we considered a rule restricting *Atkins* to defendants with "an IQ test score of 70 or less." 572 U. S., at 704. We held that this rule violated the Eighth Amendment because it treated an IQ score higher than 70 as conclusively disqualifying and thus prevented consideration of other evidence of intellectual disability, such as evidence of "deficits in adaptive functioning over [the defendant's] lifetime." *Id.*, at 724.

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[1]The Court explained that it was "fair to say that a national consensus" had developed against the execution of "mentally retarded" offenders. *Atkins* v. *Virginia*, 536 U. S., 304, 316 (2002).

Three years later in *Moore*, we applied *Hall* and faulted the Texas Court of Criminal Appeals (CCA) for concluding that the petitioner's IQ scores, some of which were at or below 70, established that he was not intellectually disabled. *Moore*, 581 U. S., at ___–___. We also held that the CCA improperly evaluated the petitioner's adaptive functioning. It erred, we concluded, in "overemphasiz[ing] [petitioner's] perceived adaptive strengths," despite the medical community's focus on "adaptive *deficits*." *Id.*, at ___ (slip op., at 12). And we found that the CCA also went astray in "stress[ing] [petitioner's] improved behavior in prison," even though the medical community "caution[ed] against reliance on adaptive strengths developed in a controlled setting, as a prison surely is." *Id.*, at ___ (slip op., at 13) (internal quotation marks omitted).

III

In this case, no reader of the decision of the Court of Appeals can escape the conclusion that it is heavily based on *Moore*, which came years after the decisions of the Ohio courts. Indeed, the Court of Appeals, in finding an unreasonable application of clearly established law, drew almost word for word from the two statements in *Moore* quoted above. See 881 F. 3d, at 492 ("Contrary to *Atkins*, the Ohio courts overemphasized Hill's adaptive strengths and relied too heavily on adaptive strengths that Hill exhibited in the controlled environment of his death-row prison cell. In so doing, they unreasonably applied clearly established law"). Although the Court of Appeals asserted that the holding in *Moore* was "merely an application of what was clearly established by *Atkins*," 881 F. 3d, at 487, the court did not explain how the rule it applied can be teased out of the *Atkins* Court's brief comments about the meaning of what it termed "mental retardation." While *Atkins* noted that standard definitions of mental retardation included as a necessary element "significant limitations in adaptive

skills . . . that became manifest before age 18," 536 U. S., at 318, *Atkins* did not definitively resolve how that element was to be evaluated but instead left its application in the first instance to the States. *Id.*, at 317.

Moreover, the posture in which *Moore* reached this Court (it did not arise under AEDPA) and the *Moore* majority's primary reliance on medical literature that postdated the Ohio courts' decisions, 581 U. S., at ___, ___, provide additional reasons to question the Court of Appeals' analysis. Cf. *Cain* v. *Chappell*, 870 F. 3d 1003, 1024, n. 9 (CA9 2017) (because "*Moore* is not an AEDPA case" and was "decided just this spring," "*Moore* itself cannot serve as 'clearly established' law at the time the state court decided Cain's claim").

IV

The centrality of *Moore* in the Court of Appeals' analysis is reflected in the way in which the intellectual-disability issue was litigated below. The *Atkins* portion of Hill's habeas petition did not focus on §2254(d)(1), the provision on which the decision below is based.[2] Instead, it began and ended with appeals to a different provision of the habeas statute, §2254(d)(2), which supports relief based on a state court's "unreasonable determination of the facts." In particular, Hill opened with the claim that the Ohio courts' findings on "adaptive functioning" "were an unreasonable determination of the facts in light of the evidence," Amended Pet. for Habeas Corpus in No. 96–CV–795 (ND

[2]While Hill's petition argued at one point that certain unidentified "procedures" used by the state courts in making the relevant decisions "violated clearly established federal law of *Ford/Panetti/Atkins*," Amended Pet. for Habeas Corpus in No. 96–CV–795 (ND Ohio) (Doc. 94), p. 15, ¶45, the petition plainly did not encompass his current argument that the Ohio Court of Appeals unreasonably applied clearly established law under *Atkins* by overemphasizing adaptive strengths and improperly considering his prison behavior.

Ohio) (Doc. 94), p. 15, ¶44 (citing §2254(d)(2)), and he closed with the claim that the state trial court's assessment that he is "not mentally retarded" was based on "an unreasonable determination of the facts," *id.*, at 36–37, ¶101 (citing §2254(d)(2)). Indeed, Hill's reply to the State's answer to his petition explicitly "concur[red] . . . that it is proper to review [his *Atkins* claim] under §2254(d)(2)." Traverse in No. 96–CV–795 (ND Ohio) (Doc. 102), p. 47. And so, unsurprisingly, the District Court analyzed Hill's *Atkins* claim solely under §2254(d)(2), noting that "[a]s Hill concedes in his Traverse, his *Atkins* claim is more appropriately addressed as it relates to the Ohio appellate court's factual analysis under §2254(d)(2)." App. to Pet. for Cert. 121a.

Hill pressed the same §2254(d)(2) argument in his opening brief in the Sixth Circuit. There, he argued that the state courts' finding on "adaptive functioning . . . was an unreasonable determination of the facts." Brief for Petitioner–Appellant in No. 14–3718 (CA6), p. 34 (citing §2254(d)(2)); see also *id.*, at 65 ("As such, the state courts' findings of fact that [Hill] is not mentally retarded constitute an unreasonable determination of facts in light of the evidence presented. (§2254(d)(2))").

It appears that it was not until the Court of Appeals asked for supplemental briefing on *Moore* that Hill introduced the §2254(d)(1) argument that the Court of Appeals adopted. Although, as noted, the Court of Appeals ultimately disclaimed reliance on *Moore*, it explicitly asked the parties for supplemental briefing on how *Moore* "should be applied to this case." Because the reasoning of the Court of Appeals leans so heavily on *Moore*, its decision must be vacated. On remand, the court should determine whether its conclusions can be sustained based strictly on legal rules that were clearly established in the decisions of this Court at the relevant time.

Per Curiam

* * *

The petition for certiorari and Hill's motion for leave to proceed *in forma pauperis* are granted, the judgment of the United States Court of Appeals for the Sixth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

JOSHUA JOHN HESTER, ET AL. *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17–9082. Decided January 7, 2019

The petition for a writ of certiorari is denied.

JUSTICE ALITO, concurring in the denial of certiorari.

The argument that the Sixth Amendment, as originally understood, requires a jury to find the facts supporting an order of restitution depends upon the proposition that the Sixth Amendment requires a jury to find the facts on which a sentence of imprisonment is based. That latter proposition is supported by decisions of this Court, see *United States* v. *Booker*, 543 U. S. 220, 230–232 (2005); *Apprendi* v. *New Jersey*, 530 U. S. 466, 478 (2000), but it represents a questionable interpretation of the original meaning of the Sixth Amendment, *Gall* v. *United States*, 552 U. S. 38, 64–66 (2007) (ALITO, J., dissenting). Unless the Court is willing to reconsider that interpretation, fidelity to original meaning counsels against further extension of these suspect precedents.

SUPREME COURT OF THE UNITED STATES

JOSHUA JOHN HESTER, ET AL. *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17–9082. Decided January 7, 2019

JUSTICE GORSUCH, with whom JUSTICE SOTOMAYOR joins, dissenting from the denial of certiorari.

If you're charged with a crime, the Sixth Amendment guarantees you the right to a jury trial. From this, it follows that the prosecutor must prove to a jury all of the facts legally necessary to support your term of incarceration. *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). Neither is this rule limited to prison time. If a court orders you to pay a fine to the government, a jury must also find all the facts necessary to justify that punishment too. *Southern Union Co.* v. *United States*, 567 U. S. 343 (2012).

But what if instead the court orders you to pay restitution to victims? Must a jury find all the facts needed to justify a restitution order as well? That's the question presented in this case. After the defendants pleaded guilty to certain financial crimes, the district court held a hearing to determine their victims' losses. In the end and based on its own factual findings, the court ordered the defendants to pay $329,767 in restitution. The Ninth Circuit affirmed, agreeing with the government that the facts supporting a restitution order can be found by a judge rather than a jury.

Respectfully, I believe this case is worthy of our review. Restitution plays an increasing role in federal criminal sentencing today. Before the passage of the Victim and Witness Protection Act of 1982, 96 Stat. 1248, and the Mandatory Victims Restitution Act of 1996, 110 Stat. 1227, restitution orders were comparatively rare. But from 2014 to 2016 alone, federal courts sentenced 33,158

defendants to pay $33.9 billion in restitution. GAO, G. Goodwin, Federal Criminal Restitution 16 (GAO–18–203, 2018). And between 1996 and 2016, the amount of unpaid federal criminal restitution rose from less than $6 billion to more than $110 billion. GAO, G. Goodwin, Federal Criminal Restitution 14 (GAO–18–115, 2017); Dept. of Justice, C. DiBattiste, U. S. Attorneys Annual Statistical Report 79–80 (1996) (Tables 12A and 12B). The effects of restitution orders, too, can be profound. Failure or inability to pay restitution can result in suspension of the right to vote, continued court supervision, or even reincarceration. Lollar, What Is Criminal Restitution? 100 Iowa L. Rev. 93, 123–129 (2014).

The ruling before us is not only important, it seems doubtful. The Ninth Circuit itself has conceded that allowing judges, rather than juries, to decide the facts necessary to support restitution orders isn't "well-harmonized" with this Court's Sixth Amendment decisions. *United States* v. *Green*, 722 F. 3d 1146, 1151 (2013). Judges in other circuits have made the same point in similar cases. See *United States* v. *Leahy*, 438 F. 3d 328, 343–344 (CA3 2006) (en banc) (McKee, J., concurring in part and dissenting in part); *United States* v. *Carruth*, 418 F. 3d 900, 905–906 (CA8 2005) (Bye, J., dissenting).

Nor does the government's defense of the judgment below dispel these concerns. This Court has held that the Sixth Amendment requires a jury to find any fact that triggers an increase in a defendant's "statutory maximum" sentence. *Apprendi*, 530 U. S., at 490. Seizing on this language, the government argues that the Sixth Amendment doesn't apply to restitution orders because the amount of restitution is dictated only by the extent of the victim's loss and thus has no "statutory maximum." But the government's argument misunderstands the teaching of our cases. We've used the term "statutory maximum" to refer to the harshest sentence the law allows a court to

impose based on facts a jury has found or the defendant has admitted. *Blakely* v. *Washington*, 542 U. S. 296, 303 (2004). In that sense, the statutory maximum for restitution is usually *zero*, because a court can't award *any* restitution without finding additional facts about the victim's loss. And just as a jury must find any facts necessary to authorize a steeper prison sentence or fine, it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order.

The government is not without a backup argument, but it appears to bear problems of its own. The government suggests that the Sixth Amendment doesn't apply to restitution orders because restitution isn't a criminal penalty, only a civil remedy that "compensates victims for [their] economic losses." Brief in Opposition 8 (internal quotation marks omitted). But the Sixth Amendment's jury trial right expressly applies "[i]n all criminal prosecutions," and the government concedes that "restitution is imposed as part of a defendant's criminal conviction." *Ibid.* Federal statutes, too, describe restitution as a "penalty" imposed on the defendant as part of his criminal sentence, as do our cases. 18 U. S. C. §§3663(a)(1)(A), 3663A(a)(1), 3572(d)(1); see *Paroline* v. *United States*, 572 U. S. 434, 456 (2014); *Pasquantino* v. *United States*, 544 U. S. 349, 365 (2005). Besides, if restitution really fell beyond the reach of the Sixth Amendment's protections in *criminal* prosecutions, we would then have to consider the Seventh Amendment and its independent protection of the right to a jury trial in *civil* cases.

If the government's arguments appear less than convincing, maybe it's because they're difficult to reconcile with the Constitution's original meaning. The Sixth Amendment was understood as preserving the "'historical role of the jury at common law.'" *Southern Union*, 567 U. S., at 353. And as long ago as the time of Henry VIII, an English statute entitling victims to the restitution of

stolen goods allowed courts to order the return only of those goods mentioned in the indictment and found stolen by a jury. 1 J. Chitty, Criminal Law 817–820 (2d ed. 1816); 1 M. Hale, Pleas of the Crown 545 (1736). In America, too, courts held that in prosecutions for larceny, the jury usually had to find the value of the stolen property before restitution to the victim could be ordered. See, *e.g.*, *Schoonover* v. *State*, 17 Ohio St. 294 (1867); *Jones* v. *State*, 13 Ala. 153 (1848); *State* v. *Somerville*, 21 Me. 20 (1842); *Commonwealth* v. *Smith*, 1 Mass. 245 (1804). See also Barta, Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment, 51 Am. Crim. L. Rev. 463, 472–476 (2014). And it's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption.

Respectfully, I would grant the petition for review.

SUPREME COURT OF THE UNITED STATES

DONNIE CLEVELAND LANCE *v.* ERIC SELLERS, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 17–1382. Decided January 7, 2019

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE KAGAN join, dissenting from denial of certiorari.

Before deciding that petitioner Donnie Cleveland Lance should die as punishment for two murders he committed, a jury heard no evidence whatsoever to counterbalance the State's case for the death penalty. Lance's counsel bore responsibility for the one-sidedness of the sentencing proceedings; he inexcusably failed even to look into, much less to put on, a case for sparing Lance's life. And we have since learned that Lance suffers from significant cognitive impairments that the jury could have weighed in assessing his moral culpability. In other words, there is a meaningful case to be made for sparing Lance's life, but—because he lacked access to constitutionally adequate counsel—he has never had a chance to present it.

The Georgia Supreme Court concluded that this state of affairs was constitutionally tolerable because, in its view, Lance's untold story stood no chance of persuading even a single juror to favor life without parole over a death sentence. The U. S. Court of Appeals for the Eleventh Circuit held that its conclusion was not unreasonable. I cannot agree. Our precedents clearly establish that Lance was prejudiced by his inability to inform the jury about his impairments. I therefore would grant Lance's petition for review and summarily reverse.

I

A

The facts of Lance's crimes—murdering his ex-wife, Sabrina "Joy" Lance, and her boyfriend, Dwight "Butch" Wood, Jr., in 1997—admittedly inspire little sympathy. Lance went to Butch's home, kicked in the front door, shot Butch with a shotgun, then bludgeoned Joy to death with the gun. According to a fellow inmate, he later bragged about the killings. Lance also had an extensive prior history of domestic violence against Joy.[1]

Due to his counsel's ineffectiveness, however, those facts were all the jurors ever learned about Lance; they heard no evidence why his life was worth sparing. Lance was represented during both the guilt and penalty phases of his trial by a solo practitioner who became convinced of Lance's innocence—and his own ability to prove it—early in the representation. He thus prepared exclusively for the guilt-or-innocence phase of the trial. Counsel did not even broach the subject of possible penalty-phase evidence with Lance or his family, because he did not want them "thinking that [he] might be thinking in terms of losing the case." App. to Pet. for Cert. 232. So when the jury found Lance guilty and the question became whether Lance should be put to death,[2] Lance's counsel had no evidence whatsoever to present.

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[1]Lance previously had kidnapped Joy, electrocuted her, beaten her, strangled her, and threatened her with various other harms. He also repeatedly had threatened to kill her if she left him or became involved with Butch. Four years earlier, Lance and a friend took a shotgun to Butch's home and kicked in the door, but fled when a child inside spoke to them.

[2]The jury found that two aggravating circumstances supported Lance's eligibility for the death penalty: that he committed a double murder and that Joy's killing was "outrageously or wantonly vile, horrible, or inhuman." App. to Pet. for Cert. 74; *Lance* v. *State*, 275 Ga. 11, 23, 560 S. E. 2d 663, 677 (2002); see also Ga. Code Ann. §§17–10–30(b)(2), (b)(7) (Supp. 2018).

The State did. It called six witnesses, including the victims' relatives, to explain why Lance deserved to die. The State's closing argument emphasized Lance's history of violence against Joy, the brutality of her killing, and Lance's apparent lack of remorse. The State urged the jury to perceive Lance as "'cold and calculating'" and repeatedly asked "'what kind of person'" would do these things. 1 App. in No. 16–15008 (CA11), pt. 1, pp. 68, 75, 77. Lance's counsel, by contrast, made no opening statement and presented no mitigating evidence. By his own admission, he "had nothing to put on." App. to Pet. for Cert. 273. His closing argument merely urged the jury to consider Lance's family and to resist the temptation to exact vengeance. About Lance, counsel said only that he was "'kind of a quiet person and a country boy'" who "'doesn't talk a lot.'" 1 App. in No. 16–15008, pt. 1, at 85.

The jury sentenced Lance to death.

B

In 2003, Lance filed a petition for postconviction relief in state court, asserting that his trial counsel's failure to investigate or present any mitigating evidence was ineffective assistance of counsel. Essentially, he argued that there was a meaningful case to be made for sparing his life, and that his counsel had forfeited his chance to do so through inattention.

The evidence showed that counsel could have found possible cognitive problems had he looked into Lance's personal history. That history included repeated serious head traumas caused by multiple car crashes, alcoholism, and—most seriously—Lance's once being shot in the head by unknown assailants while lying on his couch.[3] In the

[3] In addition to the history discussed by the court, Lance also ingested gasoline as a small child, was trampled by a horse as a teenager, and once was overcome by fumes while working to clean the interior of an oil tanker truck. 1 App. in No. 16–15008, pt. 2, pp. 202–203.

aftermath of the shooting, Lance had "terrible headaches," "dizziness," "difficulty working," and "became even more quiet than he had before." App. to Pet. for Cert. 171–172. The court found that any reasonable defense attorney would have had Lance's mental health evaluated and, in so doing, uncovered "significant mitigating evidence for the jury to consider." *Id.*, at 174.

Four mental health professionals testified at an evidentiary hearing.[4] They agreed on many points. First, Lance had permanent damage to his brain's frontal lobe. Second, his IQ placed him in the borderline range for intellectual disability. Third, his symptoms warranted a diagnosis of clinical dementia. The experts differed somewhat, however, over the extent and practical consequences of Lance's brain damage. Primarily, the experts seemed to disagree about the extent to which Lance's brain damage affected his impulse control.[5]

The Superior Court granted Lance's habeas petition and vacated his death sentence, holding that trial counsel's failure to investigate and present evidence of Lance's mental condition was deficient performance, and that his failure prejudiced Lance. The missing evidence could have

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[4]Lance put on Thomas Hyde, an expert in behavioral neurology; Ricardo Weinstein, an expert in neuropsychology; and David Pickar, an expert in psychiatry and clinical neuroscience. The State called Daniel Martell, an expert in neuropsychology. (A fifth expert's unsworn report was ruled inadmissible by the Georgia Supreme Court. See *Hall* v. *Lance*, 286 Ga. 365, 371, n. 1, 687 S. E. 2d 809, 815, n. 1 (2010).)

[5]Hyde, Weinstein, and Pickar opined that the type and extent of damage reflected in Lance's test results would adversely affect his ability to suppress impulsive behavior. Weinstein and Hyde added that the damage could impair Lance's ability to conform his conduct to the law, and Hyde noted that the effects of Lance's impairments would be most acute in moments of emotional stress. Martell, in contrast, saw no direct evidence of impulse-control difficulties and opined that Lance's brain damage would not "'prevent him'" from conforming his conduct to the law. 1 App. in No. 16–15008, pt. 3, at 170.

prompted a different sentence, the court explained, because it went directly to the key issue before the jury: the assessment of Lance's character, culpability, and worth.

The Georgia Supreme Court, however, reversed and reinstated Lance's death sentence. *Hall* v. *Lance*, 286 Ga. 365, 687 S. E. 2d 809 (2010). It agreed that counsel's performance was deficient but held that Lance suffered no prejudice. As relevant here, it held that even if the jury had considered at trial all the neuropsychological evidence adduced at the postconviction hearing, there was no reasonable probability that Lance's sentence would have changed.[6] In the Georgia Supreme Court's view, the new evidence was only "somewhat mitigating" because it showed only "subtle neurological impairments," which would necessarily have been outweighed by Lance's prior threats and violence toward the victims, the nature of the crime, and Lance's statements and demeanor in its aftermath. *Id.*, at 373, 687 S. E. 2d, at 815–816.

C

Lance sought a federal writ of habeas corpus. The U. S. District Court for the Northern District of Georgia denied the petition but granted a certificate of appealability. Under the deferential review provisions of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U. S. C. §2254(d), the U. S. Court of Appeals for the Eleventh Circuit affirmed, holding that the Georgia Supreme Court's conclusion that the absence of the postconviction mental health evidence caused Lance no prejudice "was not unreasonable." *Lance* v. *Warden*, 706 Fed. Appx. 565, 573 (2017).

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[6]As an alternative ground for finding no prejudice, the Georgia Supreme Court also hypothesized that even an adequate investigation would not have uncovered the evidence that Lance presented at the postconviction hearing. That conclusion is not implicated by Lance's petition because the Court of Appeals did not address it.

II

To prevail on a Sixth Amendment ineffective-assistance-of-counsel claim, a defendant must show both that his counsel's performance was deficient and that his counsel's errors caused him prejudice. In assessing deficiency, a court asks whether defense "counsel's representation fell below an objective standard of reasonableness." *Strickland* v. *Washington*, 466 U. S. 668, 688 (1984). To establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. When, as here, a petitioner seeks federal habeas review of a state court's rejection of his ineffective-assistance-of-counsel claim, he can prevail only if the decision was "contrary to, or involved an unreasonable application of," *Strickland* and its progeny, or rested "on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. §2254(d).

Because the Supreme Court of Georgia mischaracterized or omitted key facts and improperly weighed the evidence, I agree with Lance that its decision was an objectively "unreasonable application of" our precedents. §2254(d)(1); see *Wiggins* v. *Smith*, 539 U. S. 510, 528 (2003). I would therefore grant the petition and summarily reverse.

A

With regard to *Strickland*'s performance prong, the Georgia Supreme Court determined that trial counsel's failure to investigate possible mitigation was deficient. See *Lance*, 286 Ga., at 368, 687 S. E. 2d, at 812–813. That is plainly correct. Counsel in a death penalty case has an obligation at the very least to consider possible penalty-phase defenses. See *Wiggins*, 539 U. S., at 521–522. By his own admission, counsel here did not. Without any inquiry into what penalty-phase evidence he might be

forgoing, he succumbed to tunnel vision—and as a consequence left Lance defenseless. Because nothing here "obviate[d] the need for defense counsel to conduct *some* sort of mitigation investigation," Lance has satisfied *Strickland*'s deficient-performance requirement. *Porter* v. *McCollum*, 558 U. S. 30, 40 (2009) (*per curiam*); see also *Rompilla* v. *Beard*, 545 U. S. 374, 381 (2005); *Wiggins*, 539 U. S., at 534.

B

Turning to the prejudice prong, the Court of Appeals was wrong to conclude that Lance suffered no clearly established prejudice from his inability to make his case. Georgia law permits a death sentence only upon a unanimous jury recommendation, so Lance needed only to show "a reasonable probability that at least one juror would have struck a different balance" between the aggravating and the mitigating factors had he or she considered the missing evidence. *Wiggins*, 539 U. S., at 537; see Ga. Code Ann. §§17–10–31(a), (c).[7] The trial court, upon hearing Lance's proffered mitigation evidence, concluded that it was "extremely important for the jury to consider" and thus that its absence was prejudicial. App. to Pet. for Cert. 174. Under any reasonable application of *Strickland* and its progeny, that conclusion was correct. See 28 U. S. C. §2254(d); *Wiggins*, 539 U. S., at 528.

To determine whether a defendant reasonably might have been spared a death sentence but for his counsel's deficiency, courts take into account "the totality of the

[7] In Georgia, "a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed." Ga. Code Ann. §17–10–31(a). "If the jury is unable to reach a unanimous verdict as to sentence, the judge shall dismiss the jury and shall impose a sentence of either life imprisonment or imprisonment for life without parole." §17–10–31(c).

available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding," then "reweigh it against the evidence in aggravation." *Williams* v. *Taylor*, 529 U. S. 362, 397–398 (2000). "We do not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding, but rather that he establish a probability sufficient to undermine confidence in that outcome." *Porter*, 558 U. S., at 44 (internal quotation marks and alteration omitted).

The jurors who sentenced Lance determined whether he would live or die "knowing hardly anything about him other than the facts of his crimes." *Id.*, at 33. They heard nothing "that would humanize [Lance] or allow them to accurately gauge his moral culpability." *Id.*, at 41. Yet if counsel had performed his duties, the jurors would have heard that Lance's brain endured physical trauma throughout his life, resulting in frontal lobe damage and dementia. The jury further would have heard that Lance's IQ placed him within the borderline range for intellectual disability. The jury also would have heard that Lance's cognitive deficits could affect his impulse control and capacity to conform his behavior to the law, especially at moments of emotional distress. Taken together, those facts—with their accompanying explanatory potential to humanize Lance, or at least to render less incomprehensible his conduct—were significant mitigating evidence. See *id.*, at 36, 42–43 (noting the potentially mitigating effect of evidence that the defendant "suffered from brain damage that could manifest in impulsive, violent behavior" and was "substantially impaired in his ability to conform his conduct to the law").

To be sure, the evidence before the jury—the brutality of Joy's death, Lance's past violence toward her, and Lance's conduct thereafter—could have supported a death sentence. See Ga. Code Ann. §§17–10–30(b), 17–10–31(a).

But there is a stark contrast between no mitigation evidence whatsoever and the significant neuropsychological evidence that adequate counsel could have introduced as a potential counterweight. Lance's unintroduced case for leniency, even if not airtight, "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Rompilla*, 545 U. S., at 393; see also *Williams*, 529 U. S., at 398. Our precedents thus clearly establish Lance's right to a new sentencing at which a jury can, for the first time, weigh the evidence both for and against death.

The Georgia Supreme Court reached its contrary conclusion only by unreasonably disregarding or minimizing Lance's evidence. The state court acknowledged that experts would testify that "'significant damage'" to Lance's frontal lobe compromised his ability "'to conform his conduct to the requirements of the law.'" *Lance*, 286 Ga., at 370–371, 687 S. E. 2d, at 814. It failed, however, to allow for the possibility that the jury might credit that evidence. This Court previously has cautioned against prematurely resolving disputes or unreasonably discounting mitigating evidence in this context. See *Porter*, 558 U. S., at 43 ("While the State's experts identified perceived problems with the tests [showing brain damage and cognitive defects] and the conclusions [the defense expert] drew from them, it was not reasonable to discount entirely the effect that [the defense expert's] testimony might have had on the jury"). We should do so again here.

Further, the Georgia Supreme Court relied on characterizations of Lance's evidence that cannot be squared with the record, which "further highlights the unreasonableness of" the Georgia Supreme Court's decision. *Wiggins*, 539 U. S., at 528; see 28 U. S. C. §2254(d)(2). With regard to Lance's frontal lobe damage, the Georgia Supreme Court appears to have credited the testimony of the State's expert over Lance's experts' testimony, treating as

definitive Martell's assertion that "Lance's symptoms were so subtle that a typical court-ordered evaluation might not have given any indication of problems." *Lance*, 286 Ga., at 372, 687 S. E. 2d, at 815; see also *id.*, at 373, 687 S. E. 2d, at 816. Yet the other experts concluded that Lance's impairments and resulting behavioral distortions were "serious" and "significant."[8] *E.g.*, 1 App. in No. 16–15008, pt. 3, at 92; 2 *id.*, at 10. The Georgia Supreme Court also unreasonably dismissed the experts' consensus that Lance was in the borderline range for intellectual disability,[9] and never mentioned—much less discussed the significance of—Lance's dementia diagnosis.

These errors, taken together, make clear that the Georgia Supreme Court applied our *Strickland* precedents in an objectively unreasonable manner. The mental impairment evidence reasonably could have affected at least one juror's assessment of whether Lance deserved to die for his crimes, and Lance should have been given a chance to make the case for his life. The Georgia Supreme Court's conclusion that it would be futile to allow him to do so was unreasonable.

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[8]Moreover, it is unclear even that Martell's milder characterizations genuinely contradicted the other experts' testimony. Unlike the other experts, Martell seems at least sometimes to have been characterizing Lance's impairments "relative to his overall borderline [intellectually disabled] baseline," 1 App. in No. 16–15008, pt. 3, at 151, not relative to the average person or to the level at which Lance might have functioned absent his head traumas. Compare 2 *id.*, at 34 (Weinstein: specific test results "vastly excee[d] the threshold for impairment" and "indicate significant organic impairment of the frontal lobe"), with 2 *id.*, at 152 (Martell: results on the same test were "at a level expected for [Lance's] IQ" or "showed mild impairment").

[9]See *Lance*, 286 Ga., at 372, 687 S. E. 2d, at 815 (describing Lance as merely "in the lower range of normal intelligence"). But see, *e.g.*, 1 App. in No. 16–15008, pt. 3, at 135 (Martell, describing Lance's intellectual functioning as "in the borderline range," which is "lower than low average").

III

Absent this Court's intervention, Lance may well be executed without any adequately informed jury having decided his fate. Because the Court's refusal to intervene permits an egregious breakdown of basic procedural safeguards to go unremedied, I respectfully dissent.