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**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 VIII**

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Canadian Pharmacists Journal/Revue des pharmaciens du Canada

Can Pharm J (Ott). 2021 Jan-Feb; 154(1): 7–8.

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Risks of maternal codeine intake in breast-fed infants: A Joint Statement of Retraction from the *Canadian Pharmacists Journal* and *Canadian Family Physician*

Ross T. Tsuyuki, BSc(Pharm), PharmD, MSc, FCSHP, FACC, FCAHS, ISHF and Nicholas Pimlott, MD, CCFP, FCFP

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This paper is jointly published in *Canadian Family Physician* and the *Canadian Pharmacists Journal*.

In late 2006 and early 2007, the *Canadian Pharmacists Journal* and *Canadian Family Physician* published columns from the same authors that described a case of infant mortality caused by opioid overdose from breast feeding attributed to the mother's status as a rapid metabolizer of codeine to the active morphine metabolite.^{1,2} The original version of this case report was published in 2006 in *the Lancet*.³ This case report has been cited over 600 times since its publication and its findings have had a significant effect on the way that postpartum analgesic medication is prescribed.⁴

In May 2020, Drs. Jonathan Zipursky and David Juurlink from the University of Toronto published a paper in the journal *Clinical Pharmacology and Therapeutics* calling into question that newborns can develop opioid toxicity from breastfeeding.⁵ In the paper they re-examined aspects of this case report and strongly argued why such an occurrence is highly implausible.⁵ They concluded that:

... this explanation is implausible based upon several factors: 1) the exceedingly small amount of opioids passed into breastmilk irrespective of maternal CYP genotype, 2) the observation that significant neonatal opioid accumulation can only occur in the setting of severely impaired renal function, and 3) the previously unreported finding of a markedly elevated codeine concentration in post-mortem blood. Finally, a review of the literature identifies a paucity of convincing reports of neonatal opioid toxicity during breast feeding, with no other confirmed cases of neonatal death despite the use of these drugs by millions of nursing mothers over the past two decades.

Around the time of the publication of this paper, Dr. Juurlink contacted us asking that our respective journals retract the columns based on the new evidence that he and Dr. Zipursky had brought to light. We reviewed the original *Lancet* case report, the columns and Drs. Zipursky and Juurlink's article and

together agreed that there were sufficient concerns about the validity of the case report findings that we invited Dr. Koren and his colleagues to respond to the concerns raised by Drs. Zipursky and Juurlink, which he did.

Given the complexity of the science, the significance of the case report and the serious implications of retraction, we sought an independent peer review of the columns and case report; the Zipursky and Juurlink paper; correspondence from the parent of the child; and the responses of Dr. Koren and colleagues to the concerns about the case report raised by Drs. Zipursky and Juurlink's paper.

We asked 2 international peer reviewers with expertise in pharmacology, pharmacokinetics and pharmacogenomics to advise us if the case reports met the Committee on Publication Ethics (COPE) criteria for retraction.⁶ We report here that the reviewers independently reached the conclusion that the *CPJ* and *CFP* papers met these criteria. Both reviewers concluded that these columns met the COPE retraction criterion of "... clear evidence that the findings are unreliable, either as a result of major error (e.g., miscalculation or experimental error). . .".⁶

One of the reviewers concluded that there were additional grounds for retraction based on ethical concerns that the patient and family could be identified in the report (i.e., that insufficient steps were taken to protect their identity).

We agree with the findings of the reviewers and therefore retract the papers:

Madadi P, Koren G, Cairns J, et al. Maternal codeine is not safe for all breast-fed infants. *Can Pharm J (Ott)* 2006;139(6):56-7.

Madadi, P, Koren G, Cairns J, et al. Safety of codeine during breastfeeding: fatal morphine poisoning in the breastfed neonate of a mother prescribed codeine. *Can Fam Physician* 2007;53:33-5.

References

1. Madadi P, Koren G, Cairns J, et al. Maternal codeine is not safe for all breast-fed infants. *Can Pharm J (Ott)* 2006;139(6):56-7. [[Google Scholar](#)]
2. Madadi P, Koren G, Cairns J, et al. Safety of codeine during breastfeeding: fatal morphine poisoning in the breastfed neonate of a mother prescribed codeine. *Can Fam Physician* 2007;53:33-5. [[PMC free article](#)] [[PubMed](#)] [[Google Scholar](#)]
3. Koren G, Cairns J, Chitayat D, et al. Pharmacogenetics of morphine poisoning in a breastfed neonate of a codeine-prescribed mother. *Lancet* 2006;368:704. [[PubMed](#)] [[Google Scholar](#)]
4. Badreldin N, Grobman WA, Chang KT, Yee LM. Opioid prescribing patterns among postpartum women. *Am J Obstet Gynecol* 2018;219(1):103.e1-103.e8. doi: 10.1016/j.ajog.2018.04.003 [[PMC free article](#)] [[PubMed](#)] [[CrossRef](#)] [[Google Scholar](#)]
5. Zipursky J, Juurlink DN. The implausibility of neonatal opioid toxicity from breastfeeding. *Clin Pharm Therapeutics* 2020; doi: 10.1002/CPT.1882. [[PubMed](#)] [[CrossRef](#)] [[Google Scholar](#)]
6. COPE Retraction Guidelines. Available: <https://publicationethics.org/files/retraction-guidelines.pdf> (accessed Aug. 31, 2020).

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Stephanie Irene Greene, # 359489,	)	Case Action No. 2019-CP-42-01605
	)	
Applicant,	)	
	)	
v.	)	<u>APPLICANT'S POST-TRIAL BRIEF</u>
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

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Stephanie Irene Greene, # 359489 ("Applicant"), through her undersigned counsel, respectfully submits this Post-Trial Brief. As detailed below, Applicant has met her burden of establishing by a preponderance of the evidence that counsel's representation was deficient and, but for that deficient representation, the outcome of her case would have been different. Moreover, Applicant has established that there is new evidence which independently meets the elements for granting a new trial. Accordingly, the Court should grant Applicant's petition for postconviction relief, vacate her convictions and sentences, and remand the matter to the trial court for a new trial.

Procedural History

This is a postconviction relief matter arising out of Applicant's convictions and sentences for homicide by child abuse and unlawful conduct toward a child.¹ Attorney C. Rauch Wise, Esq. ("Attorney Wise") represented Applicant both at trial and on appeal.

The underlying criminal matter concerned the death of Applicant's infant daughter ("L.G."). At trial, the State presented evidence and testimony that Applicant was consuming morphine while breastfeeding and her approximately seven-week-old daughter died from

¹ As detailed below, Applicant was also convicted and sentenced on a charge of involuntary manslaughter, which was later vacated on appeal.

morphine toxicity. The State's theory of the case was that the morphine Applicant consumed transmitted through her breast milk to her daughter in a sufficient level to cause her death. However, none of the State's expert witnesses testified to a reasonable degree of medical certainty that this was possible.

The State also presented expert testimony at trial that the morphine acted "synergistically" with other prescription and over the counter medications taken by Applicant in a manner that enhanced the effects of the morphine in L.G. Again, however, those opinions were not offered to a reasonable degree of medical certainty. Moreover, the State's ultimate theory of liability that it argued to the jury (consistent with the trial court's charge) was that L.G.'s death was caused solely by Applicant's consumption of morphine received through Applicant's breast milk.

Applicant's only expert witness was toxicologist Dr. Steven Karch. Dr. Karch hypothesized that L.G. either "got an overdose of morphine" or possibly had an unspecified "genetic defect" which "impacted her ability to metabolize morphine" like the defect impacting metabolization of codeine detailed in the Canadian case. (Trial Tr. 504:15-18.) He did not offer this opinion to a reasonable degree of medical certainty and did not further elaborate on the genetic defect theory. Critically, on direct examination by Attorney Wise, Dr. Karch conceded the State's premise that L.G. could have received the measured level of morphine from Applicant's breast milk and that this could have caused her death. (Trial Tr. 504:19-21, 511:5-10, 513:8-16.)

The trial court held a jury trial from March 27, 2014 and April 4, 2014, which concluded with the jury finding Applicant guilty on all charges. The court sentenced her to twenty years on the homicide by child abuse charge with five years concurrent on the unlawful conduct toward a child charge and five years concurrent on the involuntary manslaughter charge.

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Following her conviction, Applicant appealed. The matter was *sua sponte* transferred to the Supreme Court of South Carolina. After two oral arguments, the court affirmed Applicant's convictions and sentences for homicide by child abuse and unlawful conduct towards a child in a 4-1 decision. The court, however, vacated the involuntary manslaughter conviction and sentence, finding that Applicant could not be found guilty for both homicide by child abuse and involuntary manslaughter.

The Supreme Court of the United States denied Applicant's petition for a writ of certiorari.

Applicant timely filed a *pro se* petition for postconviction relief. After she secured counsel, Applicant amended her petition on three subsequent occasions. At the PCR hearing, Applicant presented evidence and testimony supporting grounds based on the following legal arguments: (1) ineffective assistance of counsel at the trial stage, (2) ineffective assistance of counsel at the appeal stage, and (3) new evidence supporting a new trial.

The Court held an evidentiary hearing on September 19 and 20, 2022. Applicant presented testimony from three witnesses: Dr. Anthony Scialli, Dr. Katherine Twombly, and C. Rauch Wise, Esq. The State did not call any witnesses and limited its presentation to cross-examination and argument of counsel.

Facts Established at the Evidentiary Hearing

I. Testimony of Dr. Scialli.

Applicant began her presentation with Dr. Anthony Scialli. Dr. Scialli specializes in reproductive and developmental toxicology and has extensive experience treating pregnant and breastfeeding women, particularly those with issues involving exposure to medication. (PCR Day I Tr. 8:20-23.) He was qualified without objection. (*Id.* at 20:15-22.)

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Dr. Scialli spent much of his career as a tenured professor at Georgetown University.² He was the director of the residency program for obstetrics and gynecology while also maintaining a robust clinical practice. (*Id.* at 11:15-12:4, 12:23-13:6, 15:13-24.) Dr. Scialli estimated that he had seen thousands of patients over the course of his career. (*Id.* at 16:3-8.) He would automatically be scheduled to see any patient that called the scheduling clerk with a concern about a medication to which they had been exposed. (*Id.* at 16:17-20.) As he explained, in his clinical practice around one third of his patients were breast-feeding, which amounted to hundreds over his career. (*Id.* at 35:7-15.)

Dr. Scialli has personally treated patients who were taking morphine and has prescribed it to pregnant and breastfeeding women. (*Id.* at 35:7-36:5.) As Dr. Scialli detailed, it is within the standard of care to do so where appropriate. (*Id.* at 36:1-37:4.) It is also within the standard of care to prescribe morphine to neonates and infants directly if the circumstances warrant it. (*Id.*) He opined that it was within the standard of care for Applicant's physicians to prescribe morphine to treat her fibromyalgia. (*Id.* at 37:5-24.)

Dr. Scialli has extensive experience with the precise area that was at issue in Applicant's criminal trial—how the morphine that Applicant consumed would be processed by her body, transmit through her breast milk, and be absorbed and processed by her daughter. He offered four critical opinions, which will be addressed in turn.

First, Dr. Scialli opined that the morphine concentration measured in L.G. could not have been explained due to breastfeeding alone. (*Id.* at 32:1-6.) As he reasoned, the amount of morphine reflected on the toxicology report "is too high to have been achieved through

² Dr. Scialli was a full-time faculty member at Georgetown University for twenty years and is currently an emeritus professor at George Washington University and an adjunct professor at Georgetown, both in obstetrics and gynecology. (*Id.* at 12:14-22.)

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breastfeeding alone without inhibition of the excretion of morphine and its metabolites.” (*Id.* at 41:4-8.) This opinion was based on his research of the medical literature and his professional experience and training and was offered to a reasonable degree of medical certainty. (*Id.* at 41:9-18, 57:7-9.)

Dr. Scialli also performed calculations about the amount of milk L.G. would have had to consume to achieve the measured morphine level. These calculations were based on the most reliable information he was able to find in the medical literature. As he explained, they were intended to illustrate his opinion and “give[] some flesh,” but were not the foundational underpinning. (*See id.* at 177:5-16.)

Dr. Scialli began by researching the medical literature to identify the volume of distribution of morphine in children (the amount of liquid in which a drug is dissolved, which varies by drug), which the research showed was 7.3 liters per kilogram. (*Id.* at 46:21-24.) Taking L.G.’s weight of 3.345 kilograms results in a 24.4 L volume of distribution for her body.

Dr. Scialli then looked at the level of morphine measured in L.G.’s blood (.52 milligrams per liter per the toxicology report) and sought to calculate what dose of morphine she had to receive to reach that level in her blood stream. He took the morphine level of .52 milligrams per liter and multiplied it by the volume of distribution of 24.4 liters, which amounted to 12.7 milligrams or, converting the units to micrograms, 12,700 micrograms. (*Id.* at 47:4-18.)

Next, Dr. Scialli reviewed the medical literature to identify the expected concentration of morphine in breast milk where the mother has consumed morphine orally. Based on that research, he used an estimated concentration of 65 micrograms per milliliter. (*Id.* at 45:3-16.) As Dr. Scialli explained, this was deferential to the State as he would expect the amount to be lower.

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micrograms. Even using that number, L.G. would have had to consume around 25 liters of milk daily, which is still 30 times the daily milk intake for a six-week-old infant.⁴ Dr. Scialli also prepared a demonstrative to explain this point:

Morphine Couldn't Have Come From Breastmilk

- Even in intravenous or intramuscular injection of morphine, milk concentration only reaches 500 µg/L¹
- To achieve 12,700 µg at 500 µg/L, Lexi would need to consume 25 L of milk
- 25 Liters is more than 6 gallons

**Daily breastmilk consumption
of a 6-week old infant**

840 mL = 0.22 gallons

**Amount of breastmilk needed to transmit 0.52 mg/L
of morphine taken orally by the mother**

- - - - -

25 liters = 6.6 gallons

¹ Feilberg

Much of the State's cross-examination of Dr. Scialli focused on these illustrative calculations. First, the State challenged Dr. Scialli's inability to use the actual amount of morphine in Applicant's milk. As Dr. Scialli explained, however, the only morphine level that the State measured was from L.G. (*See id.* at 103:6-21.) Thus, his calculations took that number and worked back to determine what amount of morphine L.G. had to have been exposed to, relying on his research to establish how much may have been present in Applicant's breast milk (and using the highest level he could find in deference to the State). (*See id.*) As Dr. Scialli explained, since the

⁴ The other elements of the formula remain the same: a concentration of 500 micrograms in the milk times 25 liters of milk would yield a dose of 12,700 micrograms (or 12.7 milligrams) of morphine.

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State did not measure the morphine level in Applicant or her breast milk, that was the only mechanism available to him. (*Id.* at 97:2-8, 103:13-24, 107:3-10.)

The State then extensively questioned Dr. Scialli about the fact that morphine's metabolites – morphine-6-glucuronide and morphine-3-glucuronide – were not addressed in the calculations. (*Id.* at 94:5-95:16, 102:23-103:8.) Dr. Scialli agreed that some amount of the active morphine-6-glucuronide, less than 5%, could *potentially* be converted back to morphine. (*Id.* at 103:6-8, 131:20-24.) However, since the metabolite levels were not measured, that was an unknown. (*Id.*) Although the State attempted to impugn Dr. Scialli's calculations by suggesting he overlooked something, as he noted, it was *the State's failure to measure the metabolites that led to this unknown*. (*Id.* at 115:9-116:19.) Regardless, Dr. Scialli explained that conversion of the morphine-6-glucuronide back to morphine is "energetically unfavorable," and he would be "surprised if it happen[ed] to any large extent." (*Id.* at 120:1-6.) Based on his research of the medical literature, he determined the amount of the morphine-6-glucuronide conversion back to morphine is less than 5%. (*Id.* at 131:20-132:5.) Even assuming the maximum theoretical 5% of the active morphine-6-glucuronide "back metabolized" to form a part of the .52 milligrams per liter of morphine found in L.G., at most it would reduce the needed amount of milk consumption by a corresponding 5%. (*Id.* at 176:2-14.) In other words, Dr. Scialli's conclusion that L.G. would have had to consume 232 times the average daily milk intake would be reduced to 220 times and, again, that was using an estimated value very generous to the State.

Second, Dr. Scialli opined that the morphine concentration measured in L.G. was most likely explained by the inhibition of excretion of morphine and its metabolites, almost certainly due to renal failure. (*Id.* at 52:3-18, 54:21-25, 56:15-25.) This opinion was also based on his review of the medical literature and premised on publications that were available at the time

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of Applicant's trial. (*Id.* at 54:2-4.) As he explained, renal failure was not something caused by Applicant's consumption of morphine and its transmission through her breast milk; rather, it was an independent problem suffered by the child. (*Id.* at 54:21-25, 56:15-25.) Dr. Scialli unequivocally stated that his opinion would have been the same at the time of Applicant's trial. (*Id.* at 57:4-6.) Moreover, he opined that the morphine level could not be explained by any "genetic defect" like what Dr. Karch speculated about at the underlying trial. (*Id.* at 174:16-19.)

Third, Dr. Scialli opined that the reliance of the State's witnesses on the Canadian case report was inappropriate because it concerned codeine, not morphine, and because the paper was unreliable even with respect to codeine, as a 2020 paper detailed. (*Id.* at 78:11-16.) At the underlying trial, Attorney Wise asked the State's toxicology expert Dr. Eagerton if he was aware of any peer reviewed article supporting morphine toxicity through breastfeeding, and he cited the Canadian case. (Trial Tr. 365:12-370:10.) This was, in fact, the only example cited by *any* witness at Applicant's criminal trial. As Dr. Scialli explained, however, this case study involved a woman whose baby died while she was nursing and taking *codeine*, which was not an appropriate comparison to this case since: (1) codeine must first be metabolized into morphine and people do so at different rates and (2) the case involved a genetic issue with the mother which caused her to excessively convert codeine to morphine. (PCR Day I Tr. 60:12-61:7.) These distinguishing points could have been raised at the time of Applicant's trial. Dr. Scialli noted that he was unaware of any other published literature or case reports of morphine toxicity through exposure from breast milk aside from the Canadian case. (*Id.* at 61:8-12.)

Dr. Scialli also testified regarding new research which directly refuted the Canadian case's conclusions. (See Applicant's Ex. 7, Zipursky & Juurlink, The Implausibility of Neonatal Opioid Withdrawal)

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Toxicity from Breastfeeding, Clinical Pharmacology & Therapeutics (May 2020).) As he explained, the Zipursky paper made several key findings:

1. "First, the belief that newborns can develop opioid toxicity from breastfeeding is supported by very little data, and converging lines of evidence indicate that neonatal opioid toxicity from breastfeeding is *exceedingly improbable*."
2. Second, the conclusion that the child in the Canadian case "died from opioid toxicity due to enhanced maternal conversion of codeine to morphine, which led to the passage of large amounts of morphine was unreliable. . . . Their review of the literature identifies a paucity of convincing reports of neonatal opioid toxicity during the breastfeeding, and *there are no other confirmed cases of neonatal death despite the use of these drugs by millions of nursing women over the past two decades*."
3. Finally, "neonatal opioid toxicity resulting from maternal codeine use during breastfeeding could arise only from a highly improbable combination of factors: A high maternal codeine milk intake and critically profoundly impaired neonatal opioid clearance." As Dr. Scialli explained, neonatal opioid clearance would mean clearance by the kidneys.

(PCR Day I Tr. 66:8-67:9.) Following publication of the Zipursky paper, two of the journals that published literature about the Canadian case issued a retraction. (*Id.* at 67:15-24; *see also* Applicant' Ex. 8, Pimlott & Tsuyuki, Risks of maternal codeine intake in breastfed infants: a joint statement of retraction from Canadian Family Physician and the Canadian Pharmacists Journal, Canadian Family Physician (November 2020).) As Dr. Scialli explained, this was a significant development. It is "very rare" and generally only done where a paper has presented "fraudulent data" or where its conclusions are "so erroneous that they represent a risk to the reading public." (*Id.* at 69:5-15.) Dr. Scialli agreed that it was fair to say the only study cited in Applicant's underlying trial in support of the State's breast milk theory had been disproven. (*Id.* at 69:12-15.)

Dr. Scialli's final opinion was that testimony of the State's expert witnesses regarding "synergy" was not appropriate because there is no literature support for synergy in this case.

(*Id.* at 78:11-16.) As Dr. Scialli explained, synergy is a concept in toxicology where two or more

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medications given together can have more than additive effects, meaning the effects are greater than one would expect based on their individual actions. (*Id.* at 73:5-13.) At Applicant's criminal trial, five of the State's expert witnesses testified that the medications consumed by Applicant had a synergistic effect, with several agreeing that the medications found in L.G. interacted in a "one plus one equals three" or "one plus one equals five" manner. (Trial Tr. 148, 259-61, 265, 322, 341, 349-53, 386-91, 430-34, 444.) Dr. Scialli opined, however, that *none* of the medications on the toxicology report for L.G. would have had a synergistic effect on the morphine. As he explained, to make such a statement there needs to be literature backing up the conclusion. (PCR Day I Tr. 73:21-74:1.) The State's witnesses did not cite *any* such supporting literature (nor were they asked to by Attorney Wise) and Dr. Scialli could not find any in his research. (*Id.* at 74:2-7.) Thus, he opined it was "misleading" to describe the interaction of the medications found in L.G. as "one plus one equals three" or "one plus one equals five." (*Id.* at 74:8-12.) He confirmed that his opinion would have been the same at the time of Applicant's criminal trial. (*Id.* at 77:15-20.)

II. Testimony of Dr. Twombly.

Applicant's second witness was Dr. Katherine Twombly. Dr. Twombly is a pediatric nephrologist at the Medical University of South Carolina ("MUSC") and was qualified without objection. (*Id.* at 81:24-185:2.) As she explained, pediatric nephrology is an area of medicine that specializes in treating children with all types of kidney disorders. (*Id.* at 185:14-17.) She has specific training and experience in treating renal failure. (*Id.* at 187:7-10.) Dr. Twombly is a tenured professor and is the director of the pediatric nephrology fellowship program, division chief of pediatric nephrology, and the medical director of the pediatric kidney transplant program and the dialysis units at MUSC. (*Id.* at 189:16-191:6.) She also maintains a clinical practice which accounts for around 50% of her time. (*See id.*) Dr. Twombly came to MUSC in 2012 and

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agreed that there have been competent pediatric nephrologists with experience in treating renal failure in the South Carolina area since that time. (*Id.* at 208:10-21.)

Dr. Twombly explained that renal failure is any scenario where the kidneys do not work. (*Id.* at 176:22-24.) Some of the more common causes of acute renal failure are from illness. (*Id.* at 186:25-187:6.) Where an infant is suffering from renal failure, it prevents the blood from being properly filtered and excretion of toxins from the body. (*Id.* at 197:15-21, 206:1-5.) It is not unusual for kidneys to look normal on an autopsy where acute renal failure has occurred, as abnormal kidneys would only be expected from chronic renal failure. (*Id.* at 230:4-16.)

Based on her review of the case materials, L.G.'s medical records, and her professional knowledge, skill, training, and experience, Dr. Twombly opined to a reasonable degree of medical certainty that *L.G. suffered from acute renal failure and this was the cause of her death.* (*Id.* at 198:12-17, 212:2-9.) She premised this conclusion on a couple of critical facts. First, L.G. had a normal well visit at two weeks of age and was completely fine until she developed an illness a few days before she passed. (*Id.* at 198:18-22.) Dr. Twombly noted that the two-week well visit was important because there were "absolutely no concerns by the pediatrician" and the child was "healthy." (*Id.* at 201:14-20.) Second, L.G.'s medical records note she had a cold on Wednesday, November 10th (around two days prior to her death) and was "congested, not eating well, and somewhat lethargic." (*Id.* at 203:2-15.) The nurse informed Applicant that if L.G. did not have a fever she did not need to come in. (*Id.*) Dr. Twombly explained that this was significant because:

When babies get congested, they don't feed as well. So babies eat by either breast milk or bottle, and when they have something in their mouth and they're eating, if they're congested they can't breathe well and so they don't typically take in the amount of formula or breast milk that they need when they get really congested.

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(*Id.* at 203:16-204:1.) The failure to take in the appropriate amount of milk or formula caused by illness can lead to dehydration, which is “*one of the most common causes of renal failure.*” (*Id.* at 205:3-23 (emphasis added).)

Based on these facts, Dr. Twombly concluded that renal failure was the likely cause of death and that, to a reasonable degree of medical certainty, L.G. would not have died absent renal failure. (*Id.* at 207:10-13.) As she explained, the morphine in L.G.’s system *was not* the cause of the renal failure. (*Id.* at 206:3-15.) Renal failure could cause morphine or other toxins to build up and rapidly (within 24 hours even). (*See id.* at 206:3-15, 213:3-11.) Dr. Twombly noted that even if no morphine had been present in L.G., potassium could have built up and caused her death. (*Id.* at 206:19-207:9.) Thus, renal failure could have caused her death regardless. (*Id.* at 234:15-21.) However, even if morphine toxicity was a factor, *it would not have occurred absent the renal failure.* (*Id.* at 234:10-5.) Dr. Twombly also opined that renal failure *would not have been reasonably foreseeable to Applicant.* (*Id.* at 207:14-20.)

Dr. Twombly agreed that Dr. Karch was not a pediatric nephrologist and did not mention the term renal failure at Applicant’s criminal trial. (*Id.* at 208:2-9.)

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

III. Testimony of Attorney Wise.

Applicant’s final witness was Attorney Wise. Applicant began by questioning Attorney Wise about the alternative cause of L.G.’s death—renal failure—advanced by Dr. Scialli and Dr. Twombly. Attorney Wise agreed he did not present this explanation and was not aware of it until

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contacted by PCR counsel. (PCR Day II Tr. 36:20-37:2.) He agreed that he did not consult with an expert in reproductive and developmental toxicology or pediatric nephrology at the time of the underlying trial. (*Id.* at 37:4-11.) He conceded it would have been possible to do so and, if he had, it would have "opened up . . . other avenues as to what actually happened in this case." (*Id.* at 37:12-17.)

Attorney Wise agreed that it was error to not present the alternative cause of renal failure. (*Id.* at 38:2-34:21.) As he explained, cause of death was a critical issue and if there had been an alternative explanation then it would have been "virtually impossible" for the State to argue morphine was the cause of death. (*See id.*) Renal failure would have "changed the dynamics of the case in that the State could no longer say the cause of death was a drug overdose. And unless and until they eliminate renal failure as a cause of death." (*Id.*) Attorney Wise testified that if he had presented this alternative cause, it would have raised a "*very serious question as to whether or not the case even goes to the jury*, unless the State came in with some testimony that it wasn't renal failure and have a good reason for it." (*Id.* at 40:16-23 (emphasis added).) He later reiterated that it was error to not present the renal failure issue because it was a "100% exoneration" rather than just something to "get to the jury and create controversy," and consulting with experts like Dr. Scialli and Dr. Twombly would have been invaluable. (*Id.* at 50:20-25.)

Critically, Attorney Wise acknowledged that he could have presented renal failure as an alternative cause and there was no strategy reason for not doing so. (*Id.* at 39:24-41:4.) Moreover, he agreed that this alternative cause of death could have changed the outcome of Applicant's trial. (*Id.* at 41:5-42:11.)

Attorney Wise also acknowledged that the Zipursky papers' representation of the Canadian case would have been extremely helpful since the State's case was not a "slam dunk." (*Id.* at

42:20-8.) Although he tried to distinguish the Canadian case, it was difficult to rebut because it "made it easier . . . for the jury to accept that if it happened in that case, it could have happened in this case." (*Id.* at 43:18-23.) He agreed it could have easily made a difference in the outcome if the State had not been permitted to refer to that case since it was "probably one of most significant facts." (*Id.* at 44:16-23.)

Attorney Wise also acknowledged there were several opportunities where he failed to attack evidence and testimony submitted by the State. For example, he did not object to Dr. Wren's statement that the morphine had to get into the baby somehow. (*Id.* at 45:1-12.) Attorney Wise also acknowledged that none of the State's witnesses testified to a reasonable degree of medical certainty that a lethal dose of morphine could pass through breast milk, and he did not challenge their testimony on this point. (*Id.* at 46:7-48:5.)

Next, Attorney Wise conceded that he failed to object to several leading questions posed by the State to their expert witnesses. *See infra* Section II.C. He noted that although he does object to leading questions frequently, here he "frankly do[es] not know why" he did not object to the State's questions, especially those beginning with words like "obviously." (*Id.* at 48:18-49:7.) He agreed that he could have objected to the leading questions and the failure to do so was not a strategy decision. (*Id.* at 52:7-12.)

Attorney Wise also acknowledged that he failed to object to the State's testimony about synergistic effect and, had he discussed the issue with someone like Dr. Scialli, he would have presented some testimony supporting that synergy cannot be presumed. (*Id.* at 49:12-50:7.)

Finally, regarding Dr. Karch, Attorney Wise conceded that he was not an expert in kidney failure in infants. (*Id.* at 112:4-15.) Dr. Karch never raised the possibility that renal failure was the cause of death either in his trial testimony or in his pretrial discussions with Attorney Wise.

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(*Id.*) Attorney Wise agreed that although Dr. Karch testified as to a genetic defect being a “possible factor,” he could not offer an opinion to a reasonable degree of medical certainty that it was the cause of L.G.’s death—contrasted with Dr. Twombly who could testify as such regarding renal failure. (*Id.* at 112:21-113:9.) Attorney Wise also agreed that he asked Dr. Karch at Applicant’s trial if L.G. could have gotten a morphine level as high as what was measured on the toxicology report from breast milk and Dr. Karch testified “yes.” (*Id.* at 111:17-25.)

The State did not call any rebuttal witnesses. After closing arguments, the Court requested that each side file post-trial briefs.

Standard of Review

I. *Strickland* standard.

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

Id. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

Id. (quoting *Strickland*, 466 U.S. at 694). For guilt or innocence issues, this means “whether there

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is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.” *Strickland*, 466 U.S. at 695.

II. Newly discovered evidence standard.

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

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

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

Argument

I. Attorney Wise rendered ineffective assistance of counsel at the trial level and this deficient performance prejudiced Applicant.

As the evidence and testimony from the PCR hearing established, this case distills down to the plain fact that Attorney Wise made several errors which severely prejudiced Applicant’s defense in an outcome determinative way. Postconviction relief exists precisely for such circumstances. Representation by counsel is not enough to satisfy the Sixth Amendment—rather, the assistance of counsel must be *effective*. No matter how experienced an attorney may be, the representation must satisfy prevailing professional norms in the specific case before the Court. Here, Attorney Wise started with the mistaken belief that this was a toxicology case, contacted one toxicology expert, and proceeded to develop a defense to the State’s evidence on the basis that he

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thought the State could not prove their case. These “blindness” prevented counsel from exploring other alternatives which would have shown that this was a renal failure case and a reproductive and developmental toxicology case, not just a standard toxicology case, and handed the defense a clear alternate cause of death. Additionally, Attorney Wise failed to utilize the toxicology expert that he did retain to adequately attack and rebut the State’s evidence. These errors individually and collectively had an outcome-determinative impact on Applicant’s case, as Attorney Wise acknowledged in his testimony at PCR. Therefore, the Court should grant postconviction relief.

A. Attorney Wise’s failure to sufficiently investigate and present renal failure as an alternative cause.

At trial, Applicant’s counsel did not rebut or otherwise object to the State’s evidence and testimony that a lethal level of morphine could be transmitted through breast milk (which no witness testified could occur to a reasonable degree of medical certainty). Moreover, Attorney Wise failed to present any testimony or evidence, expert or otherwise, providing a possible alternative explanation for the level of morphine found in L.G. other than transmission through breast milk. At trial, counsel called one expert witness, Dr. Steven Karch, who was qualified as an expert in pathology and toxicology. However, Dr. Karch did not opine that it was *impossible* for a lethal level of morphine to be transmitted through breast milk and, in fact, conceded that it *was* possible this could have occurred. Dr. Karch also speculated that L.G. could have had a “genetic defect” but offered no further explanation on what defect could have caused this outcome.

Attorney Wise was ineffective first because he failed to engage in a sufficient investigation. A criminal defense attorney has a duty to conduct “a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 336, 661 S.E.2d 354, 359-60 (2008) (quoting *Nance v. Ozmint*, 367 S.C. 547, 557 S.E.2d 354, 359-60 (2008)).

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n.8 (2006)); *see also* *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (“While the scope of a reasonable investigation depends upon a number of issues, ‘at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.’” (quoting *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986), *aff’d*, 828 F.2d 670 (11th Cir. 1987))). “*With the assistance of appropriate experts*, counsel should [] aggressively re-examine all of the government’s forensic evidence, and conduct appropriate analyses of all other available forensic evidence.” *Ard*, 372 S.C. at 332, 642 S.E.2d at 597; *see also* *Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (noting that in some criminal matters “the *only* reasonable and available defense strategy requires consultation with experts or introduction of expert evidence” (emphasis added)).

The American Bar Association’s Criminal Justice Defense Function Standards detail the professional standards for counsel’s investigation. *See* American Bar Association Criminal Justice Standards for the Defense Function (4th Ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/. Standard 4-4.1 provides that defense counsel’s “investigative efforts should commence promptly and should *explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter*.” *Id.* (emphasis added). Investigation will “vary depending on the circumstances” but should “always be shaped by what is in the client’s best interests.” *Id.* Counsel’s investigation should include “evaluation of the prosecution’s evidence . . . and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, *and other possible suspects and alternative theories that the evidence may raise*.” *Id.* (emphasis added). Standard 4-4.4 governs counsel’s relationship with expert witnesses and explains that defense counsel should “*evaluate all expert advice, opinions, and testimony*.” *Id.* (emphasis added).

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testimony independently, and not simply accept the opinion of an expert based on employer, affiliation or prominence alone.” *Id.* (emphasis added).

As detailed below, Attorney Wise’s investigation was not reasonable and failed to satisfy prevailing professional norms.

1. Attorney Wise’s failure to investigate the cause of L.G.’s death.

As detailed above, Attorney Wise framed this as a “toxicology” case (as did the State), but that was only accurate in the sense that Attorney Wise needed to ensure the numbers on the toxicology report were accurate and to determine how the medications reflected on the report would have affected L.G. In reality, the case was also a reproductive and developmental toxicology, obstetrics, and pediatric nephrology case as the PCR hearing established. Attorney Wise accepted the cause of death from the pathology report and the State’s experts’ opinions regarding the same and made no effort to investigate whether that was accurate and supported by the medical science. Instead, his investigation was focused solely on whether it was possible for the morphine to transmit through Applicant’s breast milk in a sufficient level to cause L.G.’s death. Although this was one piece of the puzzle, it failed to address two fundamental questions: (1) did the morphine kill L.G.? and (2) if so, how could that be explained if it was not due to her consumption of Applicant’s breast milk?

At the PCR hearing, Attorney Wise testified that when he took the case, he spoke with a friend in New York who works with pregnant mothers through National Advocates for Pregnant Women and she recommended Dr. Karch.⁵ (PCR Day II Tr. 55:9-15.) He spoke with Dr. Karch on the phone and then met with him in person for a consultation before retaining him. (PCR Day

⁵ Although his testimony at the PCR hearing did not touch on this, Attorney Wise was in the postconviction relief stage of *State v. McKnight*, 378 S.C. 33, 661 S.E.2d 354 (2008), which also involved Dr. Karch, and he had familiarity with Dr. Karch from that case as well.

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II Tr. 56:1-13.) Attorney Wise acknowledged that *he did not consult any other experts*. (*Id.* at 37:4-11, 70:21-23.) He did not give “serious thought” to doing so and solely relied on Dr. Karch to rebut the State’s case. (*Id.* at 70:24-71:2, 71:3-16.) Again, this was a significant problem because the case was not just a standard toxicology case.

Attorney Wise should have been on notice of the need to continue his investigation beyond consulting with Dr. Karch for at least two reasons. First, he knew that the cause of death and Applicant’s intent were the only elements in dispute. Second, he had prior experience with a drug overdose case and was aware of the importance of an alternate explanation as to cause of death. (*See id.* at 38:14-39:10.) Despite this knowledge, he only consulted with Dr. Karch. The purpose of relying on Dr. Karch was to undermine the State’s theory of the case, but Attorney Wise was aware that Dr. Karch could not provide any positive proof and he ultimately agreed with the State’s theory. Importantly, Attorney Wise did not offer any testimony at PCR that he was surprised by anything Dr. Karch said at trial. Thus, he either knew or reasonably should have known that Dr. Karch could not address all of the issues necessary for the defense. Under these circumstances, it was objectively unreasonable for trial counsel to not investigate further by consulting with other experts to determine whether there might be a different theory for the cause of death.

Attorney Wise was ineffective for failing to investigate beyond making one phone call to get in touch with Dr. Karch. He was also ineffective by relying entirely on his consultation with Dr. Karch without any further exploration of other potential experts or explanations for what happened with L.G. As he acknowledged at PCR, had he conducted a wider investigation, he could have identified experts such as Dr. Scialli or Dr. Twombly who would have been able to offer testimony regarding an alternative cause of death.

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2. Attorney Wise's failure to investigate whether Dr. Karch's testimony would assist the defense.

Attorney Wise also failed to sufficiently investigate whether Dr. Karch could offer testimony that was useful to the defense. As his testimony bore out at trial, all that Dr. Karch was ever capable of testifying to was that he did not *think* the morphine level could be explained from transmission through breast milk. However, as noted, *on direct examination* Attorney Wise asked Dr. Karch if he thought the morphine level could be explained by transmission through breast milk and he replied "yes," which *conceded the State's entire theory of the case*. (Trial Tr. 504:19-21, 511:5-10, 513:8-16.)

Moreover, although Dr. Karch testified that an unnamed "genetic defect" like the one in the Canadian case could possibly explain the morphine level, he was unable to testify to a reasonable degree of medical certainty regarding either a genetic defect or any other explanation. Thus, at the end of the day, Dr. Karch's testimony served no useful purpose beyond leveling criticism at the State for failure to test Applicant's breast milk or Applicant and/or L.G. for an unspecified genetic defect. None of his opinions were offered to a reasonable degree of medical certainty, he conceded the entire theory of the State's case, and he was unable to offer an alternative explanation for L.G.'s death. Attorney Wise was ineffective for failing to identify the deficiencies with Dr. Karch's opinions and investigate whether any other experts would be able to offer better, more effective testimony.

3. Applicant suffered prejudice due to Attorney Wise's errors.

A prejudice assessment looks at the totality of the circumstances and considers how the balance of evidence appeared at trial compared to how that balance would have been altered absent trial counsel's error. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 41 (2009); *see also Strickland*, 466 U.S. at 696 ("A conclusion only weakly supported by the record is more likely to have been

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affected by errors than one with overwhelming record support"). Here, the State's theory of the case was weak. It was based entirely on circumstantial evidence and questionable scientific claims. Nevertheless, Attorney Wise permitted the State to misleadingly suggest much stronger proof through the use of multiple experts who agreed with the State's unsupported claims that its theory "must be" correct. Attorney Wise attempted to "poke holes" in the State's theory, but these efforts were ineffective and left the jury with an essentially uncontested cause of death. If Attorney Wise had performed adequately by consulting with additional appropriate experts, the defense could have undermined the State's unscientific claims and proposed an alternative cause of death for the jury's consideration.

As Attorney Wise acknowledged at the PCR hearing, it was error for him to solely limit his investigation to Dr. Karch and, had he conducted a proper investigation, it could have led to witnesses such as Dr. Scialli and Dr. Twombly. If he had been able to offer an alternate explanation, it would have changed the entire case and had a significant impact on whether it would have even advanced past directed verdict. This Court appeared to agree with that assessment during closing argument. (PCR Day II Tr. 158:2-10.) However, even if the question had gone to the jury, presenting a viable alternative cause of death from experts like the ones offered at PCR would have rebutted the State's evidence on both intent and cause of death. They would have also been the *only* expert opinions at trial offered to a reasonable degree of medical certainty. Moreover, it would have required the State to disprove that cause in connection with their case and would have been very compelling to the jury when compared to the State's "res ipsa loquitur," "the morphine got there somehow" theory.

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Under these circumstances, there exists, *at a minimum*, a reasonable probability of a different outcome at trial absent trial counsel's deficient performance. Therefore, both prongs of *Strickland* are satisfied, and the Court should grant postconviction relief.

4. Analogous case law supports granting relief to Applicant.

Cases from similar contexts support the propriety of granting postconviction relief here. First, *McKnight v. State*, 378 S.C. 33, 44-46, 661 S.E.2d 354, 359-60 (2008) is instructive. In *McKnight*, the petitioner's daughter was stillborn. The autopsy report reflected cocaine byproducts in her system and concluded that the death was secondary to cocaine consumption. The petitioner was charged with homicide by child abuse. *Id.* at 39, 661 S.E.2d at 357. At the postconviction relief stage, the petitioner argued that her counsel was ineffective in preparing her defense. Two criminal trials were held and in the first trial the petitioner called two experts to testify as to possible alternative causes of death (including Dr. Karch, coincidentally). *Id.* at 41, 661 S.E.2d at 358. At the second trial, however, counsel did not call Dr. Karch and failed to question the other expert about a published study that was favorable to the petitioner's defense. *Id.* at 42-43, 661 S.E.2d at 358-59. Counsel also failed to call any expert to rebut or discredit medical studies cited by the State's experts and did not cross-examine the State's experts on the matter. *Id.*

In finding counsel ineffective, the Supreme Court explained that at PCR the petitioner showed that even if Dr. Karch was not available, another expert could have testified that the cocaine did not cause the stillbirth. *Id.* at 44-45, 661 S.E.2d at 359. The petitioner presented testimony from an experienced expert who "testified at the PCR hearing that she agreed with Dr. Karch's view of the evidence and would have testified on behalf of McKnight at the second trial had she been contacted by counsel." *Id.* at 44-45, 661 S.E.2d at 359-60. As the court explained, "strategic choices made by counsel after an incomplete investigation are reasonable

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extent that reasonable professional judgment supports the limitations on the investigation.” *Id.* at 45, 661 S.E.2d at 360 (emphasis added) (quoting *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)). The court reasoned that in light of counsel’s familiarity with the first trial “and the relative ease with which counsel could have procured favorable expert testimony at the second trial,” the failure to do so was unreasonable. *Id.* At PCR, trial counsel stated that the failure to rebut the State’s expert’s methodology and research was based on her belief that the one expert’s testimony was adequate and she did not have time to interview additional experts. *Id.* at 46, 661 S.E.2d at 360.

In another similarity to this case, the *McKnight* court found that there was a reasonable probability that this deficiency prejudiced the petitioner. The methodology of the only expert called by petitioner at the second trial “mimicked that of the State’s star expert” and served to “bolster the State’s theory of the case.” *Id.* at 643, 576 S.E.2d at 172. That is precisely what ended up happening with Dr. Karch’s testimony in Applicant’s trial. Moreover, the Court found that counsel’s failure to conduct a reasonable investigation resulted in a “substantially weaker defense.” *Id.* at 46, 661 S.E.2d at 360.

Williams v. Stirling, 914 F.3d 302, 307 (4th Cir. 2019) is also informative and supports granting postconviction relief in this case. *Williams* was a death penalty case where the defendant had well-qualified, experienced attorneys who assembled a team of experts for the penalty phase. They worked to investigate the defendant’s neurological issues and presented testimony about his troubled childhood, major depressive disorder, and OCD. *Id.* at 307-08. At PCR, however, counsel retained and elicited testimony from experts on fetal alcohol syndrome who detailed how it can cause severe functional impairment. *Id.* at 308. These experts testified that there were practitioners who had developed a framework for diagnosing and treating fetal alcohol syndrome.

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at the time of trial. *Id.* Like in this case, trial counsel testified at PCR that he could not recall any mitigation investigation into fetal alcohol syndrome or why such an investigation was not conducted. *Id.* at 307-08.

At the federal habeas level, the District of South Carolina found that trial counsel failed to satisfy the *Strickland* standard, which the Fourth Circuit affirmed. As the Fourth Circuit explained, a “well-defined norm” at the time of the applicant’s trial provided that “investigations into mitigating evidence ‘should comprise efforts to discover all reasonably available mitigating evidence.’” *Id.* at 307 (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)). Thus, “a reviewing court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” *Id.* at 313. The court reasoned that because trial counsel did not recognize a potential fetal alcohol syndrome diagnosis and did not further explore it as a mitigating factor, “*there was necessarily no opportunity for counsel to make a strategic decision* about whether or not to further develop the [fetal alcohol syndrome] evidence or present it in mitigation.” *Id.* at 314 (emphasis added). As the Fourth Circuit noted, in holding that counsel was not ineffective, the PCR court:

confused a strategic decision not to further develop [fetal alcohol syndrome] evidence after some investigation into its potential mitigating value—which could have complied with *Strickland*—with a complete failure to investigate the FAS evidence for any potential mitigating value, a failure that plainly falls below an objective standard of reasonableness.

Id. at 316. Thus, even if trial counsel would not have altered their chosen strategy of presenting other mitigating factors, “*counsel were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable.*” *Id.* (emphasis added) (quoting *Wiggins*, 539 U.S. at 536). This distinguished the case from precedents where habeas investigations into mitigating evidence were found to be reasonable. *Id.*

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Like in *McKnight* and *Williams*, here Attorney Wise could not have made a justifiable strategic choice since his investigation was unreasonable in the first instance. This greatly prejudiced Applicant, as detailed above. The Court should grant postconviction relief as a result.

B. Attorney Wise's failure to challenge the State's experts.

Attorney Wise was also ineffective for failing to challenge scientifically unreliable testimony from the State's experts. Attorney Wise did not file any pretrial motions to preclude the State's experts from testifying that the morphine level could be explained by transmission through the breast milk. This was despite having retained Dr. Karch who Attorney Wise expected to use to rebut the State's theory. As Applicant's trial bore out, *none* of the State's experts were able to testify in support of this theory to a reasonable degree of medical certainty. Attorney Wise should have moved for a *State v. Council* hearing pretrial to ascertain whether the State could actually support its theory of the case with reliable expert testimony to a reasonable degree of medical certainty. See 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (holding that the trial court must assess under Rule 702, SCRE whether evidence "will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable" (applying the *Jones* factors to determine reliability) and must determine if its probative value is outweighed by its prejudicial effect). Likewise, Attorney Wise should have filed a motion in limine seeking a ruling precluding the State's experts from offering such testimony. However, Attorney Wise made no such motions.

At the pretrial hearing, Attorney Wise stated that he intended to request a hearing if the State's witnesses offered testimony that morphine could be transmitted at a lethal level through breast milk:

I think that if he has an expert that can say a child can die from morphine through breast milk we may need a hearing to determine whether or not that's valid science, because I have -- like I say, I cannot find anything that substantiates that position as a matter of

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science, not as a -- you know, I mean, just I cannot find articles or scientists. And my expert tells me that's because there are none that say a child can die through breast milk. So if that's going to be his scientific position, I think that we need to have some sort of hearing to determine whether or not that's valid.

(Trial Tr. 19:11-21.) The trial court agreed to have such a hearing if necessary. (*Id.* at 20:2-3.)

Inexplicably, however, Attorney Wise never objected or requested a hearing despite several of the State's witnesses offering this exact testimony. (See Trial Tr. 358:17-359:4, 361:19-362:2, 439:6-446:5.) At the PCR hearing, Attorney Wise agreed that he did not make any pretrial motions or otherwise challenge or object to this testimony and there was not a strategic reason for doing so.

(Trial Tr. 19:11-21.) The only justification he offered was that the State never asked the witnesses if their testimony was to a reasonable degree of medical certainty. (*Id.*) However, if anything this made the failure to object *more problematic* since the jury heard speculative, unreliable expert testimony that should have been excluded in the first instance.

Attorney Wise's failure to seek to have this testimony excluded prejudiced Applicant because it permitted the State to present its scientifically unreliable theory to the jury—one which the jury agreed with in finding Applicant guilty, clearly demonstrating its outcome determinative effect. It also prejudiced Applicant by depriving her of a potential appellate ground if the trial court denied a motion to exclude or overruled Attorney Wise's objections. Therefore, the Court should grant postconviction relief.

C. Attorney Wise was ineffective for failing to object to improper leading questions by the State.

Attorney Wise also rendered ineffective assistance of counsel by failing to object to highly improper leading questions posed by the State on direct examination to the State's expert witnesses. In several instances, the State led questions to their experts by stating that the substance found in L.G. "obviously" came through Applicant's breast milk. This caused significant

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prejudice to Applicant because it gave the jury the impression that this was an undisputed fact and a well-established scientific principle which, as the testimony and evidence presented at PCR established, is not even close to accurate.

During the testimony of the State's forensic toxicology expert Dr. Wendy Bell, the following exchange occurred:

Q I know. *But obviously these drugs, they can pass through breast milk.*

A They can.

Q *And obviously -- and I believe I showed the doctor, and I'll be glad to show you. MS Contin, which is the morphine that was prescribed to the defendant, it was obviously found in the baby.*

A It was. If I may preface, at the time we found this we didn't have a history that the mother was even taking these medications. It was found without a history.

(Trial Tr. 262:11-20 (emphasis added).) Attorney Wise did not object to this questioning.⁶

A similar exchange occurred during the State's direct examination of pharmacology and forensic toxicology expert Dr. David H. Eagerton:

Q -- in this case. And obviously she was having problems I believe on November 10th if I remember right. She was lethargic, had breathing problems at that time. As a matter of fact, they even called the doctor's office about that.

A Right. They called the doctors about that, yeah.

Q And is that signs of possible overdose at that time?

⁶ Attorney Wise also failed to object to Dr. Bell testifying beyond the scope of her expertise. The State asked "would [sic] be appropriate to tell the doctors about when you're taking medications and letting them know about these medications that she's taking?" to which Dr. Bell responded "I would think so but I -- *that's a little out of my area of expertise.*" (Trial Tr. 262:4-8 (emphasis added).) Attorney Wise did not object despite Dr. Bell's concession that the subject was beyond her expertise.

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A It could be consistent with that, yes.

Q 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?

A No. They don't.

(Trial Tr. 358:17-359:4 (emphasis added).) Again, Attorney Wise did not object.

Finally, the State posed multiple improper leading questions to pathology expert Dr. John David Wren:

Q 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?

A That's -- that's correct. It builds up.

Q So it will build up over a period of time if it -- if it keeps getting the drugs.

A 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.

Q So, and the -- the mother was taking morphine in this situation and breastfeeding. Obviously, the baby was getting morphine through the -- taking MS Contin actually.

A At least some, yeah.

Q Yeah. From there, so the baby would get the morphine from the mother.

A That's correct.

(Trial Tr. 439:6-25 (emphasis added).) Later in the direct examination, the following occurred:

Q But obviously this child died from -- well, actually morphine plus the other drugs and synergetic [sic] effect from them.

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A That's my opinion, yes.

Q And from that -- and obviously the morphine could have come from the milk, breast milk, from the -- from the mother.

A 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.

Q Right. But, like I say, we have no needle punch. We don't have any evidence that there was fed or maybe -- obviously, it could have been crushed and put into the milk or whatever.

A No.

...

Q From there. But you saw no evidence. *Obviously, you knew she was breastfeeding, and obviously you knew the mother was taking morphine.*

A Pardon?

Q You obviously through the information you received from the coroner's office sharing -- but you're the one I guess actually contacted the coroner's office to tell them about you need to check into this.

A Yeah, yeah. I told them it looked like she had a morphine overdose.

(Trial Tr. 444:2-16, 445:21-446:5 (emphasis added).) This line of questioning was particularly egregious, yet Attorney Wise raised no objections.

The Solicitor also asked inappropriate leading questions regarding the supposed synergistic effect of the medications found in L.G. (which should never have been permitted in the first instance, as detailed below). The following exchange occurred during the testimony of Dr. Bell:

Q And the combination of all of these drugs, plus the Klonopin on the next page, they'd have a syntroitic [sic] effect on each other, I guess.

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A They could.

Q And obviously this could be the reason why she died.

A It could be, yes.

(Trial Tr. 265:16-21 (emphasis added).) Similarly, the following occurred during Dr. Eagerton's testimony:

Q But it could be like one-plus-one-equals-three type situation.

A It could be one plus one equals three, or it could be one plus one equals five. It could be one plus one equals something greater than that.

(Trial Tr. 351:3-11 (emphasis added).) Lastly, a similar question was posed to Dr. Wren:

Q But obviously this child died from — well, actually morphine plus the other drugs and synergetic [sic] effect from them.

A That's my opinion, yes.

(Trial Tr. 444:2-5 (emphasis added).) Again, no objections were raised to any of these leading questions.

At PCR, Applicant asked Attorney Wise if there was a strategic reason for failing to object to these questions and he unequivocally said there was none. (PCR Day II Tr. 52:7-12.) As the Supreme Court has found in the analogous context of failing to object to improper hearsay, where trial counsel fails to articulate a valid trial strategy for failing to object to clearly improper questions, his performance is deficient. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018); *cf. Watson v. State*, 370 S.C. 68, 73, 634 S.E.2d 642, 644 (2006), *abrogated by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (finding trial counsel was not deficient when his failure to object to inadmissible hearsay testimony *was* part of a valid trial strategy).

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Here, again, Applicant suffered significant prejudice due to this deficient performance because, as noted, it allowed the State to suggest to the jury that the concept that morphine can be transmitted in a lethal level through breast milk was “obviously” an established fact and sound scientific principle. Dr. Scialli’s testimony at PCR unequivocally showed this was not correct. Again, the only testimony that the jury was able to consider was this unrebutted and unobjected to testimony directly in support of the State’s theory of the case despite no expert being able to offer testimony to a reasonable degree of medical certainty. Therefore, this ground also supports granting postconviction relief to Applicant.

D. Attorney Wise was ineffective for failing to investigate and challenge the State’s experts’ opinions about “synergy” between the medications found on the toxicology report or present any evidence rebutting these statements.

Attorney Wise was on notice that the State intended to present testimony as to the “synergistic effect” of the medications on the toxicology report. At the pretrial hearing, Attorney Wise informed the trial court that the State appeared to have “tweaked” its case from just morphine to the theory that “not only morphine but the other drugs in the system could have helped kill the child.” (Trial Tr. at 24:4-7.) Attorney Wise acknowledged he had *never discussed* the “relevance of the other drugs” with Dr. Karch because they had been focusing on the morphine. (*Id.* at 24:11-12.) As the Solicitor pointed out, however, Dr. Wren’s report included the synergistic “force of the different other drugs, on the morphine” and described it as a “one-plus-one-equals-three theory.” (*Id.* at 24:18-22.) He noted this was “not a surprise to the defense” since it had been given in discovery and all of the State’s experts agreed that synergy would be a “factor of the morphine increasing the effects of the morphine on the child.” (*Id.* at 24:22-253.) The trial judge expressly told Attorney Wise that he would need to “have that conversation with your expert to determine if that creates an issue in this trial.” (*Id.* at 25:6-8.) The trial judge further stated that

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since the concept was in Dr. Wren's report, Dr. Karch "would therefore have contemplated [it] sufficiently," and the court was "satisfied he has an opinion in that regard." (*Id.* at 25:9-26:20.)

Despite this exchange and the trial judge's statements, Attorney Wise engaged in a series of unfortunate mistakes, each constituting a prejudicially deficient performance. First, *as he acknowledged on the record pretrial*, he failed to sufficiently explore and investigate the synergistic effect theory and assess whether it had merit before trial began. As the State and the court explained, however, Attorney Wise had long been on notice that Dr. Wren would offer this opinion, yet he failed to even discuss it with Dr. Karch. This prejudiced Applicant because Attorney Wise was unprepared to challenge this theory and, in fact, failed to do so either through objection or rebuttal testimony.

Similarly, Attorney Wise was deficient by failing to move to exclude any testimony about this unsupported, scientifically unreliable theory prior to trial. Dr. Karch was an expert in toxicology (as Attorney Wise phrased it at the PCR hearing, he "wrote the book" (PCR Day II Tr. 57:10-12)) and should have been able to assist Attorney Wise in understanding this concept and why it would not apply here. Inexplicably, Attorney Wise never asked Dr. Karch. As Applicant established at PCR, Attorney Wise could have consulted with an expert such as Dr. Scialli who would have been able to detail why synergy did not apply in this case and could offer such testimony to a reasonable degree of medical certainty. Had Attorney Wise properly investigated the issue and discussed it with Dr. Karch, he could have requested a *State v. Council* hearing and moved to exclude such testimony. Again, however, Attorney Wise neglected to do so because of his deficient investigation and preparation. This prejudiced Applicant because the jury heard this scientifically unreliable testimony multiple times throughout the trial—testimony that should never have been allowed in the first place had Attorney Wise mounted a proper challenge.

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Third, Attorney Wise failed to object when the State's witnesses offered this testimony. *Five expert witnesses for the State testified about the supposed "synergistic effect" of the medications found in L.G.* Toxicology expert Quintus Young testified "they could" when asked if the medications on the toxicology report could have an effect on each other. (Trial Tr. 148:19-22.) Second, after being asked about each of the medications individually, toxicology expert Dr. Wendy Bell testified as follows:

Q . . . If you would, tell the jury about the effects like the klonopin against the morphine. How would that affect? Would they have affect [sic] on each other?

A They would. All of these medications for the most part 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.*

We're mostly concerned of course by that high level of morphine because that's the one that stood out most. These are not drugs that we commonly see in a 6-week-old baby.

...

Q From what you know. And obviously this is a very high amount. Was this along with the other drugs? Was that the reason why this baby died?

A It certainly isn't a [sic] illegal level for an infant.

Q And the combination of all of these drugs, plus the Klonopin on the next page, they'd have a syntroitic [sic] effect on each other, I guess.

A They could.

Q And obviously this could be the reason why she died.

A It could be, yes.

(Trial Tr. 260:5-15, 265:12-21 (emphasis added).)

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Pharmacy expert Dr. Kaushik Kotecha was also asked about synergy and testified as follows:

Q If you could, tell the jury. What is synergistic effect?

A Synergistic effect is one plus one equals five, or one plus one equals three. You may be taking -- you know, like alcohol. when you mix alcohol with Benadryl it's -- you're going to be even more drowsy, you know, because if you took Benadryl you're going to be drowsy. But when you mix it with alcohol, then all of a sudden you're going to be even drowsy. So that's what synergistic effect is.

Q Could a combination of all of these drugs together cause a baby to stop breathing?

A Yes.

...

Q For morphine. Okay. And he asked about the toxicology report. In addition to morphine being found in the baby's system was Clonazepam also found?

A Yes, it was.

Q And would those drugs have a synergistic effect?

A Yes.

(Trial Tr. 322:2-13, 341:3-8 (emphasis added).)

Dr. Eagerton testified almost identically to Dr. Kotecha:

Q Okay. So based -- I think that's my next question from that standpoint.

In your opinion all of these drugs, would they have an effect on each other -- the morphine as well as the -- I guess those are the two main ones we'll look at, is the morphine and the cla -- Klonopin. I'm sorry.

A Well, they don't really have an effect so much on each other, or if they do I'm not really sure of the direct or physical interaction. *But the actions of one and the actions of the other are certainly like they can be synergistic or they are synergistic.*

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Therefore when you take them together they -- they can increase the effect of -- that you would expect from either one alone or even putting the two together. You would see a much greater effect.

It's hard to quantify exactly how great that effect is because that may vary from individual to individual.

Q But it could be like one-plus-one-equals-three type situation.

A It could be one plus one equals three, or it could be one plus one equals five. It could be one plus one equals something greater than that.

(Trial Tr. 350:11-351:7; *see also* Trial Tr. 386:21-25 (emphasis added).) Dr. Eagerton later agreed with the State that the synergistic effect here could be "one and one equals *three or five or ten or whatever?*" (Trial Tr. 390:10-13 (emphasis added).)

Finally, Dr. Wren specifically opined that *synergistic effect was the cause of death*. The State walked Dr. Wren through each of the medications on the toxicology report and the levels measured. (Trial Tr. 430:11-433:14.) Dr. Wren then stated:

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.

Q But obviously this child died from -- well, actually morphine plus the other drugs and synergetic [sic] effect from them.

A That's my opinion, yes.

(Trial Tr. 433:15-22, 444:2-5 (emphasis added).)

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Attorney Wise did not object to or otherwise challenge the testimony of these five expert witnesses. This was highly prejudicial to Applicant because, as Dr. Scialli's testimony established at the PCR hearing, there was no scientific basis for synergy as it is not supported by the medical literature. This was especially concerning since none of the State's experts testified that synergy applied to a reasonable degree of medical certainty or cited any supporting paper or treatise to justify their opinions (nor were they asked to do so by Attorney Wise).

For the same reasons, Attorney Wise was ineffective for failing to present any affirmative testimony detailing why synergy had no scientific basis in this case. Dr. Scialli emphatically testified that synergy was not applicable and would have been able to offer such testimony at the time of Applicant's trial to a reasonable degree of medical certainty. However, Attorney Wise did not investigate the synergy issue, did not consult with any expert who could help him rebut it, and did not present any testimony explaining why it did not apply. Standing alone any of these deficiencies constituted unreasonable performance.

At PCR, Attorney Wise suggested that this ultimately did not matter because the trial court charged the jury that it could only return a guilty verdict if it found that Applicant's consumption of Schedule II substances (of which only morphine qualified) caused L.G.'s death and, as a result, the State limited its closing argument to this question. (PCR Day II Tr. 49:12-21, 83:13-20.) If anything, however, this supports the exact opposite point—the reason this testimony was especially prejudicial is that it was *ultimately not even relevant to the question charged to the jury*. If the jury was not to consider the other medications, then Attorney Wise should have made every effort to have testimony and evidence about their impact excluded. Instead, the jury heard extensive testimony about all of the medications that were found in L.G., with witness after witness explaining how they acted synergistically. There is a reasonable probability that but for counsel's

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deficiencies in failing to keep this testimony out, the outcome would have been different.

Therefore, the Court should grant postconviction relief for this reason as well.

II. Attorney Wise rendered ineffective assistance of counsel at the appellate level and this deficient performance prejudiced Applicant.

Attorney Wise also rendered ineffective assistance of appellate counsel by failing to argue to the Supreme Court that the conviction with the lower sentence, involuntary manslaughter, should stand in the event the court agreed with Applicant's argument that the homicide by child abuse and involuntary manslaughter guilty verdicts were inconsistent.

On appeal, Applicant contended (and the Supreme Court agreed) that although it may have been proper to present both charges to the jury, the trial court should have instructed the jury that Applicant could not be found guilty of both charges. *State v. Greene*, 423 S.C. 263, 282, 814 S.E.2d 496, 506 (2018). Rather, depending on their view of the evidence, the jury could only find Applicant not guilty of both offenses, guilty of homicide by child abuse, or guilty of involuntary manslaughter.⁷ *Id.*

The Supreme Court reasoned that the jury's guilty verdict on homicide by child abuse precluded a guilty verdict on the involuntary manslaughter charge and thus vacated the conviction for involuntarily manslaughter. Attorney Wise rendered ineffective assistance of appellate counsel by failing to properly frame the argument as requiring reversal of *both* convictions and a new trial.

⁷ As the Supreme Court noted, the jury could have concluded that the State failed to prove Applicant committed "a deliberate or intentional act under circumstances revealing an extreme indifference to human life" as required by the homicide by child abuse statute, yet nevertheless found her guilty of involuntary manslaughter. The Supreme Court elaborated on the distinction between the two charges, noting that the homicide by child abuse statute "reflects the legislature's intent to define and target a specific societal problem—child abuse resulting in death" whereas involuntary manslaughter covers "unintentional killings from both unlawful conduct the occurrence of which naturally tend to place another in danger of death or serious bodily harm and lawful conduct that recklessly places another in danger of harm." *Greene*, 423 S.C. at 281, 814 S.E.2d at 506.

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Attorney Wise raised the correct issue on appeal regarding whether the trial court erred by failing to give the proper jury instruction. However, in the briefing, Attorney Wise did not ask for any particular relief for this error. Attorney Wise should have requested that the court reverse both convictions and require a new trial with the proper jury instruction. Instead, by failing to specify any requested relief, the Supreme Court simply opted to eliminate the concurrent conviction and sentence for involuntary manslaughter, which ultimately had no impact on the total term of Applicant's incarceration. Attorney Wise "won" the issue on appeal, but it was a pyrrhic victory due to his failure to request the proper relief. This significantly prejudiced Applicant because there was an opportunity to seek reversal of both convictions that was not advocated or pursued.

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

Accordingly, for all these reasons, ineffective assistance of appellate counsel also warrants granting the application for postconviction relief.

III. The cumulative effect of Attorney Wise's errors constitutes a separate ground for granting postconviction relief.

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

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could be prejudicial to deny an individual a right to a fair trial when they were viewed together). The Fourth Circuit, however, expressly recognizes cumulative error in the habeas context. *See Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) (holding that ineffective assistance of counsel claims can be reviewed collectively, joining the “majority of our sister circuits that have considered the issue”).

Here, the grounds raised by Petitioner in her Application and established through the evidence and testimony at the PCR hearing, as detailed herein, each independently warrant granting postconviction relief. However, to the extent the Court disagrees, at a minimum the cumulative effect of Attorney Wise’s errors necessitates postconviction relief in the form of a new trial. Attorney Wise agreed at the PCR hearing that taking all of the deficiencies presented by Applicant together could have made a difference in the outcome of Applicant’s trial. (PCR Day II Tr. at 53:22-54:2.)

If the Court finds that no individual ground is sufficient, Applicant urges the Court to recognize the cumulative effect doctrine as consistent with South Carolina law and grant postconviction relief on that basis.

IV. The Zipursky paper constitutes new evidence satisfying the standard for granting Applicant a new trial on that basis.

Lastly, the new evidence of the Zipursky paper represents a separate, independent ground for granting the application for postconviction relief. The Zipursky paper, published in 2020, represents a critical piece of evidence because it flatly disproves the *only* medical literature or scientific paper that the State’s experts were able to cite to support the theory that a lethal level of morphine could be transmitted through breastmilk (the Canadian case).

As Dr. Scialli testified, there were available mechanisms by which Attorney Wise could have challenged the Canadian case’s conclusions at the time of trial. It was error that he failed

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do so. The Canadian case was from an entirely different, inapposite context and its conclusions were unreliable even at the time of Applicant's trial. However, the case remained a published example of supposed morphine toxicity in an infant resulting from breastfeeding. This gave credence and "teeth" to the State's theory of the case because there was at least one concrete example that allegedly backed up its position. At best, Applicant could have introduced testimony from someone like Dr. Scialli to try to undermine the Canadian case. However, it was unlikely Applicant would have been able to exclude reference to it entirely. The Canadian case significantly hampered Attorney Wise's jury argument that the State's theory was "impossible" since the State supposedly had at least one credible example where it had occurred previously and, unlike Dr. Scialli, Dr. Karch was not able to testify to that effect.

The Zipursky paper changes the dynamic entirely as it directly rebutted and discredited the Canadian case study so thoroughly that one of the associated publications was retracted. Considering the exhaustive analysis and emphatic conclusions of the Zipursky paper, and in light of the retraction, it is unlikely that the Canadian case would have been deemed a proper subject for testimony at Applicant's trial had it been available at that time. The Zipursky paper is particularly poignant because the authors noted they scoured the medical literature and could not find *any credible instance of lethal morphine toxicity solely due to transmission through breast milk despite use by "millions" of mothers over the years.* (See Applicant's Ex. 7 – Zipursky & Juurlink, The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, Clinical Pharmacology & Therapeutics (May 2020).) Zipursky concluded that other factors would have to be at play for this to occur including, most importantly, renal failure—precisely what Applicant established at the PCR hearing happened with L.G.

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Each of the factors supporting a new trial are met. *See Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014). First, the Zipursky paper would likely change the outcome if a new trial occurred since the State would have no credible example (or any scientific evidence for that matter) supporting its theory of the case. Second, the Zipursky paper was published in 2020, long after Applicant's criminal trial. Third, it could not have been discovered before trial for the same reason. Fourth, it is material to the issue of guilt or innocence since it directly contradicts the *mens rea* of extreme indifference to human life as required by the homicide by child abuse statute. Finally, it is not merely cumulative or impeaching.

Therefore, the Zipursky paper satisfies the standard for granting a new trial based on new evidence and is an independent basis for granting postconviction relief to Applicant.

Conclusion

For the reasons stated above and argued by counsel at the PCR hearing, the Court should grant the application for postconviction relief, vacate Applicant's convictions and sentences, and remand the matter to the trial court for a new trial.

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) FOR THE SEVENTH JUDICIAL CIRCUIT
)

Stephanie Irene Greene,) Case No.: 2019-CP-42-01605
S.C.D.C. No. 359489,)
)

Applicant,)

v.)

State of South Carolina,)

Respondent.)
_____)

RESPONDENT STATE'S
POST-TRIAL BRIEF

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This matter is a post-conviction relief (PCR) matter. On September 19-20, 2022, this Court held an evidentiary hearing at the Spartanburg County Courthouse. At the conclusion of the hearing, this Court requested post-hearing briefs. Respondent submits Applicant is not entitled to relief and failed to meet Applicant's burden of proof. Respondent also maintains all arguments raised in Respondent's pleadings and at the hearing.

PROCEDURAL HISTORY

A jury found Applicant guilty as charged for homicide by child abuse, involuntary manslaughter, and unlawful conduct towards a child following trial on August 30 to September 2, 2014. C. Rauch Wise, Esquire, represented Applicant. Seventh Circuit Solicitor Barry J. Barnette and Assistant Solicitor Timi Poulos, prosecuted the case. Judge Cole sentenced Applicant to concurrent sentences of twenty years' imprisonment for homicide by child abuse, five years' imprisonment for involuntary manslaughter, and five years' imprisonment for unlawful conduct towards a child.

Mr. Wise continued to represent Applicant on appeal, and raised four appellate issues. By order filed May 5, 2016, the Supreme Court of South Carolina certified the appeal pursuant to

Rule 204(b), SCACR. By opinion issued on May 23, 2018, the Supreme Court affirmed Applicant's convictions for homicide by child abuse and unlawful conduct towards a child, but vacated the conviction for involuntary manslaughter. State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018). The Remittitur was issued on June 26, 2018. Mr. Wise petitioned the Supreme Court of the United States for a writ of certiorari on November 19, 2018, which was denied by summary disposition published January 7, 2019.

I. South Carolina Supreme Court's summary of facts

Applicant's infant child, Alexis (Victim), died at forty-six days old. Toxicology results showed lethal levels of morphine and the presence of other drugs in Victim's blood, liver, and brain. Applicant received prescriptions for numerous drugs including MS Contin, a form of slow release morphine, without the prescribing doctor aware that Applicant was pregnant with Victim and later, breastfeeding Victim. The prosecution's theory of the case was morphine and other drugs passed through Applicant's breastmilk and caused Victim to die from respiratory depression. The Supreme Court succinctly summarized evidence at trial below:

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. The evidence at trial revealed 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.

Greene, 423 S.C. at 267, 814 S.E.2d at 498.

The Supreme Court, in denying the allegation that the trial court should have granted a directed verdict on causation, noted:

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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.

Greene, 423 S.C. at 275, 814 S.E.2d at 503. The Supreme Court also rejected the claim that insufficient evidence of the intent element of homicide by child abuse – extreme indifference – was presented to the jury. The Court explained:

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.

Greene, 423 S.C. at 277, 814 S.E.2d at 503. The Supreme Court found:

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. . . . One of the State's experts, Dr. Eagerton, testified that the use of morphine during lactation is not recommended. . . . 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.

Greene, 423 S.C. at 278, 814 S.E.2d at 504. The Supreme Court also noted that
Victim's death, Applicant omitted morphine from the list of her prescriptions, even with

confronted with the pill bottle found in her bedroom. She later admitted she hid her pregnancy because she was afraid they would take her off the morphine. Id. at 278-79, 814 S.E.2d at 504.

II. Facts from the trial transcript

Terri Carter, an investigator for the Spartanburg County Coroner's Office, and fellow investigator Ellen Holmes, responded to a call to Applicant's residence concerning the death of an infant on November 13, 2010. Holmes interviewed Applicant while Carter inspected the house. Carter noticed Applicant was stumbling, slurred her words, spilled her coffee, her eyes were not focused, and she seemed cognitively unsound. Tr. pp. 43-46.

Numerous pill bottles covered the dresser in Applicant's bedroom. Carter published some of the warnings on the labels of these pill bottles that warned about taking the pills while pregnant or breastfeeding. Tr. pp. 50-53. 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. Tr. pp. 50-56. Notably, the label for the morphine pills indicated it originally contained 90 pills and the instructions allowed for one pill every eight hours. Accounting for the proper dosage, the morphine pill bottle was six pills short, there should have been eighteen pills remaining, but only twelve were found in the bottle. Tr. p. 59; p. 65.

Larger amounts of pills were missing from some other of Applicant's prescriptions. A prescription for hydrocodone pills was filled November 4, 2010. Nine days later, when Victim died, only twenty-seven pills should have been missing, but instead forty-eight were missing. Tr. pp. 59-60. The pill count was short for Baclofen and Gabapentin as well. Tr. pp. 63-64.

Ellen Holmes, the other investigator from the Coroner's Office, interviewed Applicant and her husband at their home the day Victim was found dead. Tr. pp. 86-87. Holmes noticed

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Applicant "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." Tr. p. 87, lines 19-22. Nonetheless, Applicant denied she took any medications that morning. Tr. pp. 87-88.

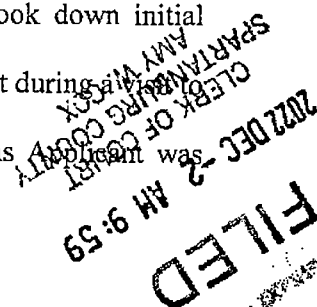
Applicant told Holmes that on Wednesday, Victim was congested, and the doctor's office recommended a vaporizer and baby rub. Victim was not running a temperature. According to Applicant, she woke up at 4:30 a.m. on Saturday to find Victim unresponsive. Applicant told Holmes she breastfed Victim the night before at around 11:00 p.m., claiming she fell asleep, and she later claimed she breastfed Victim for thirty minutes on each side. Tr. pp. 89-91.

Applicant named six medications she was taking. The other medications found, which Applicant did not tell Holmes about, were Requip, Durotan, Savella, Soma, alert tabs, and Morphine. On the extended form provided by Holmes for Applicant to fill out, Applicant was asked to list medications she took during her pregnancy. Applicant listed MS Contin. However, **Applicant did not tell Holmes that she took MS Contin while breastfeeding.** Applicant was asked several times about her prescriptions. Tr. pp. 91-92.

Applicant hides pregnancy

RN Elaine Olsen from Piedmont Women's Healthcare testified on March 25, 2010, Applicant called and informed Nurse Olsen that Applicant took a home pregnancy test and tested positive. An appointment was scheduled for April 12, but Applicant never came to the appointment or an ultrasound scheduled for March 26. Tr. pp. 116-117; p. 123.

Instead, Applicant waited until May 7 to see an OBGYN, by which point she had already been prescribed morphine. Vera Andrus, an LPN for Carolina OBGYN, took down initial information from Greene on May 10, 2010, after Applicant took a pregnancy test during a visit to Dr. Nichols on May 7. Nurse Andrus asked Applicant about the medications Applicant was



taking. Tr. pp. 97-98; p. 100. Nurse Andrus explained it was important to ask patients about their medications to know what the baby has been exposed to during pregnancy and to wean the patient off any medications that should not be taken during pregnancy. Tr. p. 98, lines 15-19. Nurse Andrus testified each time a patient comes in, the patient is asked if there are any changes to their medications. Tr. p. 98, lines 20-23. Although Applicant received a prescription for morphine only ten days earlier, Applicant did not tell Nurse Andrus she was taking morphine or MS Contin, and she did not tell Nurse Andrus she was taking morphine or MS Contin during the follow up visit either. Tr. p. 99, lines 6-25.

On September 27, 2010, Applicant was treated and then admitted into the hospital. Applicant reported taking some medications, but did not mention that she took MS Contin or Vicoprofen. Applicant delivered Victim the next day. Tr. pp. 109-12.

Prescriptions from multiple doctors

Dr. Suzanne Kovacs, Applicant's primary physician, treated Applicant from November 2007 into 2010. She prescribed Applicant's MS Contin, but she never knew Applicant was pregnant or had a child and was breastfeeding. Dr. Kovacs adjusted Applicant's medications during an April 30, 2010 visit, changing the prescription from a Duragesic patch to a prescription for MS Contin after Applicant reported the patch was falling off or not working. Applicant, who only had minimal weight gain at that point, **never told Dr. Kovacs she was already pregnant when changing medication to MS Contin.** Tr. pp. 163-68.

Dr. Kovacs gave Applicant further prescriptions for MS Contin on May 27, 2010, June 28, 2010, July 27, 2010, August 26, 2010, and after Victim was born, on October 15, 2010. On October 29, 2010, Applicant was given a new prescription for Klonopin. Tr. pp. 168-69, 171, lines 4-8; p. 174, lines 10-13.

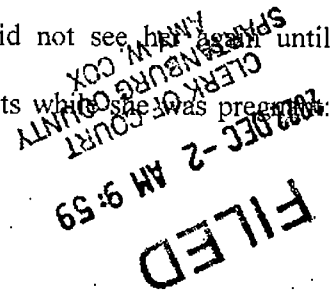
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Dr. Kovacs testified she was unaware of any prescriptions that her other doctors, Dr. Kooistra or Dr. Bridges, gave Applicant. Dr. Kovacs testified Applicant was not supposed to be receiving the prescriptions from Dr. Kooistra at that point in time. Applicant never told Dr. Kovacs about a number of the other doctors' prescriptions during the pregnancy. Tr. pp. 170-74.

Dr. Kovacs testified she would not have prescribed morphine or any pain medication during pregnancy had she known Applicant was pregnant. Dr. Kovacs would let the gynecologist or obstetrician issue any prescriptions. Tr. p. 171, lines 20-24; Tr. p. 176. Dr. Kovacs also did not know Applicant was breastfeeding. Dr. Kovacs was unaware Dr. Kooistra gave Applicant a prescription for Klonopin, and three other medications on November 4, 2010. Dr. Kovacs testified she would not have gave Applicant a prescription for Klonopin on October 29, 2010, if she knew Dr. Kooistra would give Applicant another prescription for Klonopin just five days later. Dr. Kovacs did not know Applicant was pregnant, gave birth, and lost the child until Dr. Kovacs was visited by law enforcement in 2011. Tr. pp. 172-176.

Dr. Carol Kooistra, a neurologist, first saw Applicant in 2006 when Applicant was pregnant. Dr. Kooistra did not prescribe any narcotics during Applicant's prior 2006 pregnancy, only a prescription for a seizure disorder. (Levetiracetam, aka Keppra). Tr. pp. 209-10. Applicant signed a narcotic pain medication contract with Dr. Kooistra's office on January 5, 2006 that specified Applicant was not to request or accept controlled substance medications from any other physicians while a patient with Dr. Kooistra. Tr. p. 209; p. 212. In the contract, Applicant indicated she had a college degree and a Bachelor of Science in nursing. Tr. p. 213, lines 16-21.

Dr. Kooistra saw Applicant on February 16, 2010, and did not see her until November 4, 2010. Applicant failed to appear for two appointments while she was pregnant.



May 13, 2010, and August 25, 2010. Instead, Applicant requested her prescriptions by phone. When Applicant requested a prescription by phone for Soma on October 28, 2010, Dr. Kooistra declined the request since she had not seen Applicant since February. Subsequently, Applicant came to her November 4, 2010 appointment, but did not tell Dr. Kooistra that between visits she became pregnant and gave birth or that she was currently breastfeeding. When Dr. Kooistra asked why she had not made any of her appointments since February, Applicant claimed she was in a severe depression and unable to leave her house. Applicant never told Dr. Kooistra she was pregnant in March 2010 even though she continued to receive prescriptions from Dr. Kooistra for Vicoprofen, Soma, Klonopin, and Gabapentin. Dr. Kooistra did not know Applicant was seeing an OBGYN and did not know that Dr. Kovacs was prescribing MS Contin. Tr. pp. 213-16. **On November 4, 2010, Dr. Kooistra prescribed Klonopin, unaware that Dr. Kovacs wrote a prescription for Klonopin on October 29, 2010.** Tr. pp. 219-20.

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.

Tr. p. 235, lines 4-9.

Doctor Kelly Ann Bridges, a doctor with Carolina OBGYN, saw Applicant for the first time when Applicant was already twenty-six weeks pregnant on June 30, 2010. When Applicant advised her she was taking Vicoprofen, Dr. Bridges changed Applicant's medication to Darvocet because Vicoprofen is dangerous during pregnancy.¹ Applicant did not tell Dr. Bridges she was

¹ Applicant did not stop taking Vicoprofen though: on August 5, Applicant received a prescription for Vicophen from Dr. Kooistra. Tr. p. 171.

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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. Tr. pp. 236-41. Dr. Bridges testified she would not have prescribed Darvocet if she knew Applicant was taking morphine and other drugs, "[b]ecause you could potentially overdose on narcotics if you're combining those medications. It could be dangerous." Tr. p. 242, lines 5-11.

Reviewing the office records, Dr. Bridges testified the last time Applicant 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 Applicant informed Dr. Nichols that she was taking morphine. Tr. pp. 242-43. Victim died nine days later.

Toxicology results

SLED forensic toxicologist Quintus Leon Young, II, performed an initial screen from Victim's blood tested positive for benzodiazepines, cocaine metabolite, opiates and salicylates. This prompted Young to perform a more comprehensive screen that detected several drugs, including blood levels in Victim of .52 mg/liter of morphine, which is within lethal levels. Tr. pp. 141-44. Young received and tested samples of Victim's brain and liver tissue to verify the morphine levels. The sample from the brain tested at .54 mg/liter, and the liver sample indicated a morphine level of .56 mg/liter. Tr. p. 144; pp. 147-48.

Wendy Bell, an expert in forensic toxicology involving drugs and alcohol, reviewed SLED toxicologist Quintus Young's report. She testified every phase of testing in the laboratory is triple-checked to ensure correct results. Tr. p. 253. 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;

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Methorphanan: .04 mg/Liter;

Morphine: .52 mg/Liter;

Clonazepam (benzodiazepine): .01 mg/Liter.

Tr. pp. 257-59 (emphasis added). Bell noted there is limited pediatric information on the type of medications involved. Tr. p. 260. Bell also noted, "Children under ten months old cannot tolerate high levels of narcotics" and noted a lot of literature supports that proposition. Tr. p. 261, lines 10-15.

Applicant's admissions

Investigator William Robert Gary interviewed Applicant on June 24, 2011. She initially deflected responsibility. However, Investigator Gary spoke with Applicant about her omitting information from her doctors and 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." Tr. pp. 293-94; p. 302 (direct quote, Tr. p. 294, lines 22-23).

Applicant claimed she was not taking the pills while pregnant, but she 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, Applicant said that by that point, her husband trusted her enough to leave them out, but still kept some locked up. Tr. p. 295. Of course, these claims are evidence that Applicant may have stockpiled drugs for after the pregnancy.

Investigator Gary testified as follows about his conversation with Applicant regarding breastfeeding Victim:

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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.

Tr. p. 297, lines 14-20. Investigator Gary testified the investigators confronted Applicant about how she omitted morphine from the list of medications on forms she filled out at the doctors' offices. Toward the end of the interview, **Applicant broke down crying and admitted the doctors would stop prescribing morphine to her if they knew about her pregnancy or other medications.** Applicant admitted she and her husband discussed the possibility Victim's death could be from the drugs. Tr. pp. 299-301. Significantly, Applicant claimed to have researched the safety of the drugs online on her computer. Tr. p. 303.

Kaushik Kotecha from the State Bureau of Drug Control, part of the Department of Health and Environmental Control (DHEC), was present during the June 2011 interview. During the interview, Applicant admitted she was addicted to pain killers. She admitted she lied to doctors to avoid losing her prescriptions. Tr. pp. 325-26.

Expert testimony from the prosecution and Dr. Karch's expert testimony

Kotecha, a licensed pharmacist for twenty-five years, was qualified as an expert in the field of pharmacy. Tr. pp. 307-10. Kotecha testified, "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." Tr. p. 315, lines 10-15. Kotecha testified that if he knew MS Contin was prescribed to someone who was breastfeeding, he would have additional questions and want to talk to the doctor. Tr. p. 317, lines 17-19.

The warnings for Clonazepam advise in part as follows: "Do not use if you are pregnant or suspect you are pregnant or breastfeeding." Tr. p. 318, lines 20-23. The warnings on the bottle of

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Keppra pills likewise warns about discussing use with a doctor if pregnant. Another drug prescribed to Applicant was Ropinirole, used for restless leg syndrome. It likewise warns that breastfeeding is not recommended while using the drug, and to consult with a doctor or pharmacist. Tr. pp. 319-20. Kotecha noted six morphine pills were missing than should be and additionally noted the missing hydrocodone pills that were originally prescribed only nine days beforehand on November 4, 2010. Tr. pp. 323-24.

Dr. David Eagerton, an assistant professor at the Presbyterian College School of Pharmacy, testified as an expert in forensic toxicology and pharmacology. Dr. Eagerton was the chief forensic toxicologist with SLED for approximately twelve years until he retired in 2009 and became a professor. Tr. pp. 343-45.

Dr. Eagerton testified Victim had toxic levels of morphine. He also noted Clonazepam or Klonopin is a very potent benzodiazepine. Dr. Eagerton testified these medicines may have a synergistic effect on each other. Tr. pp. 346-50. Dr. Eagerton published FDA warnings about MS Contin from the Medication Guide, approved by the U.S. Food and Drug Administration, which warns, "Tell your healthcare provider if you are pregnant or planning to become pregnant. MS Contin passes into the breast milk and may harm your baby." Tr. p 354, line 17 – 355, line 3.

Dr. Eagerton noted 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. Tr. pp. 357-58. 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 down to an . . . uncertain level or an unsafe level, and they don't recommend it even prior to these studies.

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Tr. 358, lines 6-10. Dr. Eagerton noted 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. Tr. pp. 360-61; Tr. p. 400. Dr. Eagerton testified "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." Tr. p. 361, 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." Tr. pp. 361-62.

Dr. Eagerton noted taking morphine **acutely** while breastfeeding may be perceived as acceptable because "you don't get that good penetration into this, into the brain." Tr. p. 396, 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." Tr. 396, lines 11-15.

Dr. Eagerton was asked to consider other modes of delivery than breast milk for explaining the morphine level in Victim. Dr. Eagerton noted the lack of needle marks on Victim 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." Tr. pp. 398-99 (direct quote, Tr. p. 399, 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:

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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.

Tr. pp. 399-400.

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.

Tr. pp. 404-05.

Forensic pathologist Dr. John David Wren performed the autopsy on Victim. Dr. Wren observed Victim was normally developed and of normal weight. Victim did not have any of the tell-tale signs of SIDS. Dr. Wren observed Victim's lung was congested, but Dr. Wren observed nothing else physically wrong with Victim. Tr. pp. 415-29.

Dr. Wren testified about the drug levels in Victim's blood. Acetaminophen levels were .19 mg/Liter, which is the high end of therapeutic levels. Tr. 425-26. Chlorpheniramine levels were .06 mg/Liter. Dr. Wren testified therapeutic levels are .01 to .04 mg/Liter. Tr. p. 431. The dextromethorphan metabolite was .04 mg/Liter and therapeutic levels are .007 to .01 mg/Liter, indicating elevated levels of this drug. As to morphine, the level was .02 mg/Liter. Dr. Wren testified therapeutic levels are .001 to .002 mg/Liter.

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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. Dr. Wren testified deaths were reported with levels as low as .20 mg/Liter. Tr. p. 432. 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." Tr. p. 434, lines 14-20.

Dr. Wren concluded Victim died 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." Tr. p. 433, lines 18-22. Dr. Wren noted "all of these drugs essentially lead to respiratory depression." Tr. p. 433, lines 15-16.

Dr. Wren also concluded the morphine was administered orally, as there were no signs of injection. However, Dr. Wren declined to opine if the morphine was transmitted through breastmilk. Tr. pp. 434-35.

The defense presented Dr. Steven Bernard Karch as an expert in the effect of drugs on the human body. Dr. Karch earned his M.D. from Tulane University and undertook 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 worked for the San Francisco Medical Examiner for roughly a decade. Importantly, Dr. Karch authored the "Pathology of Drug Abuse, Fourth Edition." Tr. pp. 485-92.

Dr. Karch disagreed 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. Dr. Karch claimed the American Academy of Pediatrics did not even list morphine as being dangerous for

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women who are breastfeeding. Tr. pp. 492-94. 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.

Tr. p. 511, lines 5-10. Dr. Karch did not know of any medical group that advises against taking morphine while breastfeeding. Tr. 513, lines 22-25. Dr. Karch testified about the 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." Tr. 515, lines 17-23. Dr. Karch's testimony is discussed more thoroughly in the analysis of Applicant's claims.

Holmes was recalled as a reply witness for the State. She testified the medical records indicated Victim was 7 lbs., 2 oz. when born. In her second week, Victim weighed 7 lbs., 11 oz. At the time of death, Victim only weighed 7 lbs., 6 oz—a loss of five ounces since her two week check-up. Holmes also testified when she saw Victim the day she died, she was "extremely pale, very pale, all over." Tr. p. 525, lines 11-15.

III. Ineffective Assistance of Trial Counsel, Generally

Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

In order to prove counsel was ineffective, a PCR applicant must prove that counsel's performance was deficient and the applicant was prejudiced by the deficient performance. Id. at

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687. Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." Id. The applicant is prejudiced by the deficient performance if "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

"Under Strickland, counsel's representation must be only objectively reasonable, not flawless or to the highest degree of skill." Id. at 688-89. "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6 (2003); see Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

IV. Alternative theory of causation

Applicant presented expert testimony opining Victim suffered renal failure in the last three days of her life and this caused morphine levels to accumulate. Applicant postulates that the child would not have died but for renal failure. However, neither of Applicant's two experts that testified at the PCR hearing could eliminate morphine as the cause of death. On the other hand, Mr. Wise diligently prepared a multi-faceted defense utilizing the expert testimony.

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bible” of toxicology and participated in every drug-related autopsy for a decade in San Francisco.

A. Mr. Wise did not render deficient performance

Applicant fails to show Mr. Wise rendered deficient performance. To defend the charges based on Victim’s death from morphine, Mr. Wise presented Dr. Karch, perhaps the foremost expert in toxicology. Mr. Wise fully utilized Dr. Karch to not only present a formidable defense, but to prepare examination of the prosecution’s experts. Mr. Wise’s well-researched, well-planned trial strategy was reasonable and did not fall below reasonable norms.

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 689. “Judicial scrutiny of counsel’s performance must be highly deferential.” Id. In order to prove a claim of ineffectiveness, “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id.

“Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992); see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Strickland requires extreme deference to counsel’s strategic judgments that are adequately investigated; as Strickland explains: “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.”

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Strickland, 466 U.S. at 690-91. Even “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Id. “[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up.” Rompilla v. Beard, 545 U.S. 374, 383 (2005).

Mr. Wise testified he started representing Applicant after she was released on bond for the charges and spent several months in jail. Counsel recalled that Applicant was not arrested until about ten months after Victim’s death. PCR 2 Tr. pp. 54-55.

Mr. Wise reached out to an attorney at the National Advocates for Pregnant Woman who recommended Dr. Karch. PCR 2 Tr. p. 55. After an initial consultation on phone, Mr. Wise met with Dr. Karch in San Francisco for preliminary discussions. Mr. Wise testified even though he knew something about pain drugs,² the meeting made him realize, “I didn’t know anything about drugs passing through breast milk and I had a lot of work to do.” PCR 2 Tr. p. 56, lines 4-13. Mr. Wise testified as follows about Dr. Karch’s credentials: “[T]here’s some people that say basically he has written the bible on toxicology in his fifth or sixth edition of a book, which I have a copy of, dealing with studies of the effects of drugs in the human body. . . . I have found that most people have copy of his book that deal[s] with determination of toxic levels of drugs.” PCR 2 Tr. p. 56, lines 15-23. Mr. Wise explained the book is a useful learning tool that can be used to cross-examine experts. PCR 2 Tr. p. 57.

Mr. Wise explained his strategy, which was to argue to the jury that a child could not reach a lethal level of morphine by breast-feeding from a mother taking morphine, utilizing

² Mr. Wise testified he had previous experience with toxicology defending a doctor in federal court whose patient died of a drug overdose. PCR 2 Tr. pp. 61-62.

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articles Dr. Karch referred him to and articles Mr. Wise found on his own. PCR 2 Tr. p. 57. Mr.

Wise expounded further on this:

Well I used [those articles] to cross-examine, in particular, Dr. Eagerton with as to the fact that there's no basis for finding that a woman taking morphine and breastfeeding a child can reach a level of even a toxic level of morphine in the child, because it, you know, it's not something you go out and do. You know, what are we gonna do today? We're gonna do an experiment on how much morphine can we get in a child? That, you don't do that.

Having said that, there are studies where a woman in the hospital is given morphine while breastfeeding and they monitor the mother and morphine. They monitor the amount of morphine given, the amount of morphine in the mother, and the amount of morphine in the child. Those are the types of studies you have in this.

And I would assume you have studies that if an infant studies and they test the blood, do you have morphine and not have morphine, I'm assuming that would have been included in it. I believe Dr. Wren even mentioned a study that talked about the ratio between the morphine level in the mother and the morphine level in the child as to what would pass through breast milk.

And I thought we were able to use that to our advantage, but the jury obviously didn't think so.

PCR 2 Tr. p. 57, line 23 – p. 58, line 21. Mr. Wise further explained that analyzing the .52 reading and extrapolating back to what should be in Applicant, Applicant “should have been dead three times over in order to pass that type of level to her child” which would illustrate how small an amount passes through the body. PCR 2 Tr. pp. 58-59 (direct quote p. 59, lines 3-5).

Mr. Wise testified he read a number of articles, some of which he used at trial that were suggested by Dr. Karch or found in Dr. Karch's book. Mr. Wise also set up an account with several online publications to access articles. PCR 2 Tr. pp. 60-61. Mr. Wise testified that Dr. Karch was a pathologist. Mr. Wise testified he sent the autopsy report to Dr. Karch to review. Dr. Karch, for example, opined that the stomach contents should have been tested. PCR 2 Tr. pp. 62-64.

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Dr. Karch reviewed SLED's testing that showed the high morphine level and counsel developed testimony to counter the SLED numbers. PCR 2 Tr. pp. 66-67. Mr. Wise testified as follows:

The strategy, basic trial strategy, after conferring with Dr. Karch was that the State had a case that they could not prove that's a matter of, to a reasonable degree of medical certainty, that a lethal dose of morphine would pass through breast milk to a child. That's it in a nutshell. . . .

PCR 2 Tr. p. 68, lines 14-20.

Mr. Wise testified "I thought Dr. Karch as an expert was a very good expert. He literally wrote the book. You know, he was not, however, an expert on drugs in infants." PCR 2 Tr. p. 70, lines 6-8. Mr. Wise added Dr. Karch was "[p]robably as good a toxicologist as you can find" and admitted he viewed the case as a toxicology case at the time. PCR 2 Tr. p. 70, lines 12-20. Mr. Wise did not consider using any other expert witnesses and Dr. Karch did not suggest utilizing any other expert witnesses. Mr. Wise thought Dr. Karch would be a good witness for his case. PCR 2 Tr. p. 70, line 21 – p. 71, line 6.

Dr. Karch assisted Mr. Wise in formulating a strategy in cross-examining the pathologist, Dr. Wren. Dr. Karch also helped Mr. Wise have the confidence to know that if he asked, the State's experts would not be able to show any articles saying "don't take morphine while breastfeeding." PCR 2 Tr. p. 71, lines 7-16. Mr. Wise testified that at the time of trial, he felt his cross-examinations of both Dr. Wren and Dr. Eagerton were successful. PCR 2 Tr. p. 71, line 17 – p. 72, line 9.

Mr. Wise agreed the autopsy report indicated the kidneys appeared normal. He also agreed that Dr. Twombly's diagnosis of renal failure was based on what amounted to

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symptoms, and that most children that get colds do not die from renal failure.³ Further, Mr. Wise agreed that Dr. Karch had expertise in pathology and given his qualifications, Mr. Wise agreed he would at least to some extent rely on Dr. Karch about where to go in the investigation of the case. Mr. Wise agreed that if kidney or renal failure was a viable lead, he would expect that lead to come from Dr. Karch. PCR 2 Tr. pp. 79-81.

Dr. Karch was well-qualified and presented a formidable challenge to the prosecution's evidence.

To properly assess Mr. Wise's performance, the expert testimony Mr. Wise presented at trial should be considered. Dr. Karch testified to his impressive credentials at trial. For instance, he reviewed every drug-related death in San Francisco for a ten year period while an assistant medical examiner with the San Francisco Medical Examiner's Office. Dr. Karch advised he is published in toxicology and published the Pathology of Drug Abuse, 4th edition. Tr. pp. 487-89. Dr. Karch testified as an expert by his estimation between fifty to a hundred times. Tr. p. 490.

Counsel presented powerful testimony to counter the prosecution's theory of the case and challenge the prosecution's evidence. Dr. Karch testified he does not know of any cases of death by morphine passing through breast milk. Tr. p. 492-93. He noted articles that indicate morphine consumption by a breast feeding mother is not dangerous to the breast-fed child. Tr. pp. 494-95.

Dr. Karch opined that the contents of the stomach should have been analyzed to see if any pills were taken orally in the child or any intravenous entry occurred (which would create ion trapping). Tr. pp. 495-96. Dr. Karch countered testimony concerning the ability of a child to

³ Dr. Twombly agreed lethargy is a symptom consistent with respiratory depression and weight loss is consistent with central nervous system (CNS) depression. PCR 2 Tr. pp. 219-20.

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metabolize opioids, opining that by one month, the child's liver has 80% of adult function, and humans only need about 20% function to live. Tr. pp. 497-98. He testified that you should "never ever ever ever ever ever ever" take blood from the heart or anywhere near the heart "because you know you're going to get a phony number that is way high." Tr. p. 501, lines 1-4. Dr. Karch bemoaned the use of the application of therapeutic ranges of blood levels to post-mortem assessment, arguing that it is an "intuitive leap" that is unproven. Tr. pp. 501-02.

Dr. Karch testified "[O]ne of the biggest controlling factors for our blood level and one that's probably operative here is the fact that if this baby didn't have the proper enzyme, which is named U.D.G.P.6, he -- she could not have broken down any morphine, any -- the little bit of morphine that is in normal breast milk of mothers taking morphine." Tr. p. 503, lines 8-16. Dr. Karch testified a test could be run for that. He testified the lack of the enzyme would be unknown to the mother. Tr. p. 503.

Dr. Karch was skeptical of the blood level of morphine, but explained if accepting that number, then, "If I accept that, then either the baby got an overdose of morphine or the baby has a genetic defect and is unable to metabolize morphine exactly in the same way that the Canadian case could [sic] metabolize . . . codeine." Tr. p. 504, lines 7-18. Dr. Karch agreed with trial counsel's calculations that Applicant would need to take 125 times more morphine to reach the level in the present case than a woman in a study who took five milligrams of morphine, resulting in her infant receiving four nanograms of morphine. Tr. pp. 507-08.

Dr. Karch noted that the SLED lab could have tested Applicant's urine for the presence of morphine metabolites (M-3-G). Dr. Karch also noted Applicant's hair could be tested to determine the use of morphine. Tr. pp. 511-13. Additionally, he noted in the Canadian study the mother preserved milk, which was available for testing. Tr. pp. 516-17.

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Dr. Karch referenced recent research showing an undetected genetic defect was the main cause of sudden deaths among people ages zero to forty. Tr. p. 509. Dr. Karch reiterated that not very much morphine is found in breastmilk. He confirmed no medical group advises against taking morphine while breastfeeding, and he was unaware of any case in which an infant received a lethal dose of morphine through breastmilk. Tr. pp. 513-14.

In many cases, a range of hypothetical experts exist that a trial attorney could theoretically consult. However, a trial attorney is not expected to consult every conceivable type of expert possibly applicable to the case – such a task may turn distractive – instead counsel is entitled to formulate a focused strategy cognizant of the reasonable use of resources and time. Harrington v. Richter, 131 S.Ct. 770, 789 (2011).

The Ninth Circuit observed:

Experts are valuable to an attorney's investigation, . . . not only because they have special abilities to process the information gathered by the attorney, but because they also are able to guide the attorney's efforts toward collecting relevant evidence. To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all information necessary to reach mental health diagnosis demands that an attorney already be possessed of the skill and knowledge of the expert. . . . If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous.

Hendricks v. Calderon, 70 F.3d 1032, 1038-39 (9th Cir. 1995). The Ninth Circuit rejected a claim that counsel was ineffective for relying on the conclusion by the two mental health professionals counsel retained that there was no basis for a mental health defense, explaining:

To hold otherwise would raise the Sixth Amendment hurdle well above the floor of minimal competence, requiring attorneys to have the specialized knowledge to evaluate an expert's conclusions before relying upon them in making strategic choices. By forcing lawyers to second-guess their experts, the position Hendricks

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argues would effectively eliminate the legitimate role experts play in guiding and narrowing an attorney's investigation.

Id., at 1039.

In the present case, Mr. Wise found a well-qualified expert that helped him formulate and present a formidable defense. Counsel's tactical decisions are given great deference and must meet only objectively reasonable standards. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000); Dunn v. Reeves, 141 S.Ct. 2405, 2410 (2021) (“[E]ven if there is reason to think that counsel’s conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.” (citation and internal quotation marks omitted)). “[I]t is difficult to establish ineffective assistance when counsel’s overall performance indicates active and capable advocacy.” Harrington v. Richter, 562 U.S. 86, 111 (2011). In the present case, Mr. Wise’s performance rose well “above the floor of minimal competence” and his performance was not ineffective.

Given Mr. Wise’s utilization of a well-qualified toxicologist with considerable pathology experience, who did not steer Mr. Wise towards a renal failure theory, and Mr. Wise’s thorough investigation of defenses on multiple fronts, this is simply not a case in which it could fairly be said that Mr. Wise’s performance fell below professional norms. Mr. Wise was not ineffective for failing to call the two experts advanced by Applicant at the PCR hearing.

B. Prejudice analysis

Applicant also fails to meet her burden of prejudice. One problem is that the expert testimony tends to confirm that morphine was at least a contributing cause of death. Secondly, the expert testimony fails to counter the considerable evidence of Applicant’s criminal intent, especially extreme indifference. Here, Applicant mistakenly believes a detailed understanding of the cause of death is required for the intent element when the problem is Applicant’s knowing

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put her child's health at risk by hiding her medications from the obstetricians treating Applicant and hiding the existence of her child from the doctors treating Applicant.

Proximate causation

"A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased." State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008) (citation omitted). "The defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased." Id.

In State v. Riley, 219 S.C. 112, 116, 64 S.E.2d 127, 129 (1951), Riley was charged for murder after shooting a man who broke up an altercation between Riley and another man. The shooting victim later came down with typhoid fever and died. One doctor, Dr. Wolfe, testified the cause of death was typhoid fever, the contributory cause of death was the bullet wound, secondary to pneumonia. Dr. Wolfe testified, "Had it not been for the typhoid fever his chances for recovery, in my opinion, very good, but I could not state whether or not he would have lived if he had not had the typhoid fever, . . ." Id. The second doctor, Dr. Wells, was asked "if the Typhoid fever was not related to the wound?" Dr. Wells answered, "No, sir. The only connection between the typhoid and the injury was the contusion." Id. at 117, 64 S.E.2d at 129. Dr. Wells agreed with his examiner that a lot of patients recover from the wound the victim suffered and agreed the victim died from typhoid fever, but the inflicted gunshot wound contributed to the man's death by "weakening his condition." Id. at 117, 64 S.E.2d at 130. Citing various cases, the Supreme Court held, "[O]ne who inflicts an injury on another is deemed by law to be guilty of homicide where the injury contributes mediately or immediately to the death of the other. **The fact that other causes also contribute to the death does not relieve the actor from responsibility.**" Id. at 118, 64 S.E.2d at 130 (emphasis added).

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People v. Arzon, 401 N.Y.S.2d 156 (Sup. Ct. 1978) is demonstrative. In that case, the New York Supreme Court denied Arzon's motion to dismiss where the evidence was Arzon intentionally set a fire on the fifth floor of a building. Firefighters responded and were trapped under the fifth floor and above the second floor, where a second fire, not started by Arzon occurred. The Court held, "[T]he defendant's conduct need not be the sole and exclusive factor in the victim's death. . . . [A]n individual is criminally liable if his conduct was a sufficiently direct cause of the death, and the ultimate harm is something which should have been foreseen as being reasonably related to his acts." Id. at 159.

In another case, a stabbing victim arrived at the hospital with substantial loss of blood and in shock. She died from a rare reaction to a dye utilized in a commonly used procedure. "The evidence includes medical testimony that the victim's immediate cause of death was the reaction to the dye, that she probably would have survived absent the reaction, but that she probably would not have survived without medical treatment." State v. Jenkins, 278 S.C. 209, 210-11, 277 S.E.2d 147, 147-48 (1981). The Court found the trial court did not err in declining to instruct the jury on two degrees of assault and battery, explaining, "The verdict in this case is consistent with those cases holding that one who inflicts an injury on another is deemed by law to be guilty of homicide where the injury contributes mediately or immediately to the death of another." Id. at 211, 277 S.E.2d at 148.

In State v. McCall, 304 S.C. 465, 405 S.E.2d 414 (Ct. App. 1991) *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), the defendant and two accomplices robbed a seventy-two year old man and forced him into the man's trunk, leaving the vehicle on a remote logging road. The man was later found deceased in the trunk of the vehicle and it was determined he died of a heart attack – he was "literally scared to death."

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405 S.E.2d at 415. The jury was instructed on both murder and involuntary manslaughter. The Court rejected an argument that McCall did not receive an adequate King charge because the Court determined he was not entitled to an instruction on involuntary manslaughter.

In reaching this result, the Court of Appeals found:

Under the facts of this case, McCall intended to rob and kidnap Stroud; he is charged under the law with the legal responsibility of the consequences of his locking and imprisoning a 72 year-old man in the trunk of an automobile parked on an out-of-the-way logging road. McCall's argument that he did not intend to kill Stroud is untenable in view of the well-established law that a person is responsible for the results of his criminal acts.

Id. at 470, 405 S.E.2d at 416; see also State v. Chiles, 44 S.C. 338, 22 S.E. 339, 341 (1895) (finding no error in jury instruction instructing the jury that defendant was guilty if the jury found beyond a reasonable doubt that death resulted as a consequence of the whipping (victim was severely whipped but later contracted pneumonia) and "also, that **if this woman's death was hastened** by that whipping, and you believe that beyond a reasonable doubt, you could find the defendant guilty of manslaughter." (emphasis added)).

As demonstrated below, neither of the Applicant's experts, Dr. Twombly, or Dr. Scialli, could eliminate morphine as a cause of death. Even if renal failure contributed to the death, this does not alleviate Applicant's guilt. Dantonio, 376 S.C. at 605, 658 S.E.2d at 343 ("The defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased."). As in Riley and McCall, even assuming Victim would not have died but for renal failure, Applicant's illegal act of child abuse – taking dangerous medicines outside of a doctor's knowledge while breastfeeding her child – was a contributing cause of death and therefore constitutes her guilt.

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Testimony of Dr. Twombly/Dr. Scialli

Applicant presented testimony from Dr. Twombly, who was qualified in pediatric nephrology and renal failure. PCR1 Tr. p. 191. She explained that a kidney's function is to clean unfiltered blood by taking out toxins and unneeded matter. PCR1 Tr. p. 196, lines 16-20. She explained when renal failure occurs, filtration of the blood does not occur and toxins will not be excreted from the body, resulting in clean, filtered blood not being returned to the remainder of the body. PCR1 Tr. p. 197, lines 18-21.

Dr. Twombly opined Victim died of renal failure. She testified her opinion was based on the fact that Victim had a normal well-child check at two weeks of age (on October 11, 2010), "and was fine until several days before the baby passed when the baby developed an illness." PCR1 Tr. pp. 198-99; p. 201, lines 16-18. Dr. Twombly noted according to the coroner's report: "[Applicant] stated that [Victim] had a cold on Wednesday, November 10th and was congested, not eating well, and somewhat lethargic that day." PCR1 Tr. p. 203, lines 4-6. Dr. Twombly stated that when children get congested, they do not eat as well, and since they are fed breastmilk or formula, they do not take in as much liquid and this can lead to dehydration. Dr. Twombly observed, "It's one of the most common causes of renal failure in infants." PCR1 Tr. p. 205, lines 9-18.

Toxins in the blood would include morphine if morphine is in the child and renal failure may cause the accumulation of toxins such as morphine. Other toxins, such as potassium may

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build up and cause the heart to stop.⁴ PCR1 Tr. p. 206, line 25 – p. 207, line 4. Dr. Twombly claimed that but for renal failure, the child would not have died. PCR1 Tr. p. 207, lines 10-13.

On cross-examination, Dr. Twombly admitted that if the morphine and its metabolites are not cleared, a lethal level morphine may accumulate in a child in less than 24 hours.⁵ PCR1 Tr. p. 213, lines 7-18.

Dr. Twombly agreed too much morphine could suppress breathing and ultimately lead to respiratory depression. PCR1 Tr. p. 216, lines 19-23. She agreed that lethargy, a reported symptom, is a symptom of respiratory depression. She also agreed that losing weight would be a symptom of central nervous system (CNS) depression. Further, Dr. Twombly agreed that congestion is not an unusual occurrence for a neonate or infant that gets sick. PCR1 Tr. p. 220, lines 1-18. Although opining dehydration occurred, Dr. Twombly agreed Victim was receiving both formula and breastmilk according to the trial transcript. PCR1 Tr. p. 224. Dr. Twombly conceded she did not know what occurred between October 11, the day of the well-check, and November 10, when symptoms were reported. Dr. Twombly agreed she did not know what symptoms Victim exhibited before November 10, undermining her direct testimony that one thing leading to her conclusion was that the baby was fine from the time of the well-check until November 10. PCR1 Tr. pp. 224-25 (contradicting PCR1 Tr. p. 198, lines 17-22). Dr. Twombly admitted the level of morphine can be lethal. PCR1 Tr. pp. 227-29.

Dr. Twombly could not eliminate morphine as a cause of death:

⁴ Note Dr. Twombly did not opine that potassium actually built up to levels that would impact Victim's heart. Importantly, Dr. Wren testified at trial that Victim's heart did not appear to have any abnormalities. Tr. p. 418, line 7 – p. 419, line 21. The only toxin noted to have built up to lethal levels was morphine.

⁵ This is incongruent with Dr. Scialli's testimony that "under ordinary circumstances" the amount of breastmilk consumed would need to be in excess of 50 gallons to reach the 12 mg/L morphine level. PCR 2 Tr. pp. 44-45.

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Q: . . . Let me phrase it this way: are you disputing the 0.52 milligram per liter level of morphine that was reported?

A: No.

Q: And you actually agree this much morphine could accumulate if there was renal failure?

A: Yes.

Q: And would you dispute whether or not that's a lethal level of morphine?

A: It can be a lethal dose of morphine.

Q: And you can't say that – you can't say today, to a degree of medical certainty, that morphine didn't lead to respiratory depression or CNS depression and cause the death of this child?

A: I can say with a reasonable medical certainty **that I think** renal failure is the cause of this child's death.

Q: But there's this morphine level, right?

A: Uh-huh.

Q: It's a lethal level of morphine?

A: **I don't know which one killed the child. I can't say.**

Q: Right. It could be renal failure or it could be morphine?

A: It could be both.

Q: It could be both acting in conjunction?

A: Uh-huh.

PCR1 Tr. p. 227, line 8 – p. 228, line 9. If acting in conjunction, as Dr. Twombly suggests, Applicant proximately caused Victim's death and is guilty of homicide by child abuse. Riley, McCall, Dantonio.

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Dr. Scialli's PCR testimony likewise effectively bolstered the prosecution's case during cross-examination:

Q: What you're saying today is because of renal failure, enough morphine built up in the system to kill [Victim]?

A: Yes, sir.

Q: Okay. And so – and the morphine caused respiratory depression?

A: Yes, sir.

Q: And so morphine was the cause of death?

A: It – it may have been, I can't tell whether this child would have died of renal failure, but it's possible that it was the morphine. It's possible it was the renal failure.

Q: But it's possible it was the morphine?

A: Yes, sir.

PCR 1 Tr. p. 84, lines 1-14. Therefore, counsel was not ineffective because the alternate theory of renal failure is an alternate theory of guilt that aids, rather than hinders the prosecution. Wong v. Belmontes, 558 U.S. 15, 25 (2009) ("The type of 'more-evidence-is-better' approach advocated by Belmontes and the Court of Appeals might seem appealing – after all, what is there to lose? But here there was a lot to lose."); Id. at 26 ("[T]he reviewing court must consider all the evidence – the good and the bad – when evaluating prejudice. . . . Here, the worst kind of evidence would have come in with the good.").

Dr. Scialli's testimony concerning proximate causation, although presented first, was primarily ancillary to Dr. Twombly's testimony. Dr. Scialli performed calculations purporting to show that Victim would need to consume inordinate amounts of breastmilk under "ordinary" circumstances and Dr. Scialli concluded that the concentration was too high.

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"without some other factor, most likely the prevention of excretion – or rather lack of excretion of morphine and its metabolites like a kidney [sic]." PCR 1 Tr. p. 52, lines 7-12.

In his calculations, Dr. Scialli relied on the median steady state volume of distribution (7.3 L/kg) found in a study of twenty children ages 0-6 years old. PCR 1 Tr. p. 147, lines 12-15; Plaintiff's Ex. 2 at Greene 0626. The study included only three neonates and was designed to measure the results in children receiving morphine after congenital heart surgery. PCR 1 Tr. p. 50, lines 16-21 Plaintiff's Ex. 2 (Greene 620). On cross-examination, Dr. Scialli explained steady state volume of distribution is the volume of distribution at the point that the amount of a drug being absorbed is equal to the amount excreted. PCR 1 Tr. p. 141, lines 2-19. In other words, this calculation contemplates normal excretion.⁶ It also means the analogy of filling milk jugs is somewhat misleading. Really, the analogy depicts how much milk it takes to fill a jug with a hole in it. Moreover, although Dr. Scialli was attempting to show the morphine level was impossible, he did not use or even know the lowest volume of distribution number in the study. A lower volume of distribution would mean a lower amount of breastmilk necessary to reach the levels found in Victim. PCR 1 Tr. pp. 141-46. In the present case, the lowest amount of milk that would need to be consumed is not known because Dr. Scialli did not include or know the lowest volume of distribution among the members of the study, which is also faulted because it covered an expansive age-range.

⁶ Dr. Scialli agreed neonates eliminate morphine more slowly. PCR 1 Tr. p. 99. On direct examination, he testified metabolism is dependent on the age of the child. PCR 1 Tr. p. 35, lines 4-6.

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More importantly, Dr. Scialli neglected to calculate the possible amount of the active metabolite (m-6-G). Significant amounts of m-6-G pass through breastmilk.⁷ Importantly, it is believed that at least some (m-6-G) is converted back to morphine in the infant's gut. Respondent's Ex. 1 (Greene 0614). The claim that the effect of m-6-G does not need to be calculated because the prosecution did not test for it is a strawman's argument: Dr. Scialli was calculating a hypothetical morphine breastmilk level for Applicant's breastmilk, and could have (and should have) calculated a hypothetical level for m-6-G as well. In fact, at trial Dr. Wren performed calculations of his own that included the hypothetical amount of m-6-G. Tr. pp. 440-43 (m-6-G discussed at p. 442, lines 16-22). Ironically, one of the criticisms in the Zipursky paper of the Canadian study was that Zipursky noted a level of codeine in the child and criticized the Canadian study because some of the morphine level in that child would likely not be from morphine ingested through breastmilk, but from codeine in the child that the child converted to morphine. Dr. Scialli makes the same mistake and masking whether or not Victim's blood levels were tested for m-6-G does not obviate that mistake.

Regardless, the calculations, graphics depicting milk jugs of breastmilk, and testimony as a whole on "ordinary circumstances" fails to deflect criminal liability. As discussed in Riley, McCall, and Dantonio, morphine does not need to be the sole cause of death for Applicant to be guilty.

⁷ For instance, in one study, the women tested had median morphine levels of 34, 24, 7, 21 mcg/L and corresponding levels of m-6-G of 273, 672, 426, 527, and 350 mcg/L. 1, Greene 615. Dr. Scialli testified that m-6-G has greater mass than morphine, but did not know the relative mass relationship between morphine and the metabolite. PCR 1 Tr. pp. 128-32

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Extreme indifference

At the PCR hearing, Mr. Wise opined that aside from the question of proximate causation, the Applicant's expert testimony would be beneficial to challenge the extreme indifference element of homicide by child abuse because in Mr. Wise's view, renal failure would not be a normal or expected intervening circumstance.⁸ However this does not impact the prosecution's proof of the intent element because Applicant took morphine outside of her doctors' care, hiding her pregnancy, hiding that she was breastfeeding, and even hiding the child's death, from the doctor prescribing her morphine. Applicant took multiple medications that bore warnings about taking the medication during pregnancy or while breastfeeding, including Klonopin, for which Victim had therapeutic levels. Further, Applicant attempted to hide her use of morphine from the deputy coroners, evidencing consciousness of guilt.

"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). "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." State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). The meaning of extreme indifference to human life in the context of a homicide by child abuse case is consistent

⁸ Note, however, Mr. Wise's hindsight observations do not prevail under the Strickland standard. Brown v. Ornoski, 503 F.3d 1006, 1013 (9th Cir. 2007) (explaining despite trial counsel testifying he would do things differently given a chance, "We do not judge counsel's actions through the twenty-twenty lens of hindsight . . . and recognize there are many different ways to try a case[.]") (citations omitted); McAfee v. Thurmer, 589 F.3d 353, 356 (9th Cir. 2009) (commenting on counsel's hindsight reflection she should have taken a different approach, the Court explained, "[T]his kind of reflection after the fact is irrelevant to the question of ineffective assistance of counsel").

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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)).

A person’s knowing exposure to a child in the person’s care to dangerous drugs outside a doctor’s care may constitute extreme dangerousness. State v. Phillips, 416 S.C. 184, 196, 785 S.E.2d 448, 454 (2016) (finding “[i]t is common knowledge that giving another person, particularly a toddler, drugs not prescribed to him is inherently dangerous”). “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).

The Supreme Court’s holding in the instant case remains true for this PCR: “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.**” State v. Greene, 423 S.C. 263, 277, 814 S.E.2d 496, 503 (2018) (emphasis added). Further, the Court’s footnote to this paragraph observed Victim also tested positive for Klonopin and the pill bottle found in Greene’s bedroom “specifically instructed, ‘Do not use if pregnant or suspect you are pregnant or are breastfeeding.’” Id. at 263, 814 S.E.2d at 503 n.5.

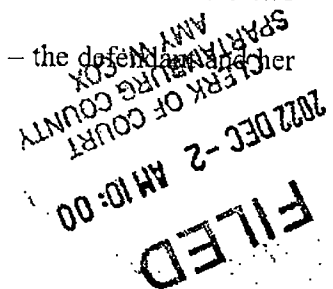
The occurrence of renal failure does not alleviate Applicant’s guilt because it does not alter the conduct that marks Applicant’s extreme indifference. Her decision to conduct research amplifies her criminal intent. It was not for Applicant to calculate the actual danger of

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taking morphine and other medications without a doctor's knowledge that she was breastfeeding – she needed to make this information known to the doctors prescribing morphine and other dangerous narcotics. Yet she deliberately withheld this information. State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002) (“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.”); see generally State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957) (“We think the evidence was sufficient to sustain a verdict of murder. The conduct of the driver was such as to imperil human life. Although it may be fairly assumed there was no actual intent to kill or injure another, there is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice.”). Contrary to Mr. Wise’s assertion, the alleged incidence of renal failure does not present a defense to the extreme indifference element because Applicant’s decision for her and Victim to chart unknown waters without a doctor in the boat is what constitutes extreme indifference, regardless of the actual machinations leading to Victim’s death from morphine ingested from Applicant’s breastmilk. So here too, Applicant fails to meet her burden of proving prejudice.

V. Failure to investigate the prosecution’s failure to test breast milk/failure to argue to the jury the lack of testing of breast milk.

Applicant alleged in her application that fresh breastmilk samples were in Applicant’s refrigerator at the time of death. Only bottles of **formula** were in the fridge the morning of Victim’s death, no evidence was presented at the PCR hearing that any breastmilk was available. At trial, Ellen Holmes, the investigator from the Coroner’s Office testified: “There were two bottles in the refrigerator. We opted not to take those because they had – the defense attorney



husband told us that those bottles were freshly made **and they were formula, they were not breast milk.**" Tr. p. 466, lines 4-7.

Further, the toxicology testing was not performed until sometime after Victim's death and therefore, by the time law enforcement became aware a crime occurred, testing Applicant's breastmilk would not be probative in determining the consumption of morphine and other narcotics through Applicant's breast milk. Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1999) (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result). Of course, if there was no breastmilk to take, there was none to test. Given that the morning of Victim's death, law enforcement did not have toxicology results and did not have probable cause to believe Victim's death was the result of ingestion of morphine through breastmilk, law enforcement would not be capable of requiring Applicant to provide a breastmilk sample.

VI. Synergy or synergistic effects of medications

Applicant alleges counsel was ineffective for failing to challenge expert testimony from the prosecution concerning the synergistic effect of the multiple medications. Dr. Scialli testified that none of the medications have a synergistic effect with each other. For the most part, the prosecution's experts only stated that the medications "could" have a synergistic effect with each other. Mr. Wise agreed that none of the witnesses stated that morphine and any particular drug did create a synergistic effect. PCR 2 Tr. p. 82, lines 7-11.

Mr. Wise testified as follows about the synergistic effect issue:

Q: [W]hich number in the toxicology reports was the number that everyone was most concerned with at trial?

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A: Everybody was most concerned with the morphine level. . . . I mean, I think when Dr. Wren was attempting to talk about synergy finally said, I might as well say morphine death because the number was there.

Tr. p. 81, lines 15-24. Mr. Wise further commented, "[H]e wasn't talking about synergy. He was talking about the morphine was lethal." PCR 2 Tr. p. 82, lines 2-6.

Mr. Wise successfully persuaded the trial court to charge that the cause of death needed to be morphine coming through breastmilk – the trial court admonished the jury that the cause of death needed to be from a schedule II drug and morphine was the only schedule II drug found in Victim. Tr. p. 590; p. 592; PCR 2 Tr. p. 83. Mr. Wise testified as to his lack of objection: "And, you know, I could make an argument as to how that impacted it. But one thing when you talk about the synergistic effect, the jury charge was such that the State had to prove there was an excessive amount of a schedule II drug" PCR 2 Tr. p. 49, lines 8-21. Mr. Wise noted morphine was the only schedule II drug. PCR 2 Tr. p. 49, lines 18-21. Solicitor Barnette, in his closing argument, did not argue or mention any synergistic effects of morphine and the other substances found in Victim, seemingly abandoning it as a theory of causation. Solicitor Barnette argued during closing that Dr. Wren looked for a cause of death "because people want answers to those questions. They want to know why this baby died. Well, he found a reason why. It was the morphine that she gave through her breast milk to [Victim]." Tr. p. 568, lines 5-10.

Mr. Wise was not ineffective. Because he successfully persuaded the trial court to give a special instruction specifying that morphine was the cause of death, Mr. Wise nullified the prospect of synergistic effect as the cause of death. Mr. Wise observed the morphine level was the main focus of the parties at trial and it was the only drug within lethal levels – well above lethal levels actually. Mr. Wise did not render deficient performance in handling the issue.

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Applicant was not prejudiced due to the trial court's instructions and the limited testimony on the matter.

VII. The "burden-shifting" answer

Applicant alleges Mr. Wise should have objected when during cross-examination of Dr. Eagerton, Dr. Eagerton answered the morphine, "Had to get in the baby somehow." Tr. p. 383, lines 16-18. Applicant contends the answer was burden-shifting.

Undoubtedly, it is important for the jury to understand the burden lies with the State. See State v. Attardo, 263 S.C. 546, 552, 211 S.E.2d 868, 870 (1975) ("The obvious rationale behind the principle that the burden of proof is on the State is the safeguard of the presumption of innocence."). However, as discussed below, the trial court's instructions to the jury firmly commanded the proper burden, so any confusion from the lone question was surely cured, and any supposed error was rendered harmless by the instructions. State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (noting the jury is presumed to follow the law as instructed to them in the trial court's jury charge); United States v. Olano, 507 U.S. 725, 740 (1993) ("[It is] the almost invariable assumption of the law that juries follow their instructions.") (citation omitted).

Context is relevant to assessing the testimony. During Mr. Wise's cross-examination of Dr. Eagerton, Mr. Wise required Dr. Eagerton to publish a portion of an article, "The medical literature describes scant evidence of opioid toxicity in breastfed infants." Tr. p. 382, line 2 – p. 383, line 1. Then Dr. Eagerton admitted he did not have any evidence contrary to that sentence. Tr. p. 383, lines 2-5. Then Mr. Wise proceeded with cross-examination as follows:

Q: So there's scant evidence?

A: That is correct.

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Q: So you're in no position to say then that the number came through breast milk.

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

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

A: Had to get there 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. So I don't think I have basis to say that it didn't, or at least some of it.

Tr. p. 383, line 6 – p. 384, line 2.

Mr. Wise's performance was not deficient for failing to object to the answer to Mr. Wise's question because it is not burden shifting, it is only the witness' statement of the obvious: the morphine came from an external source – obviously Victim did not create morphine by photosynthesis. It certainly was not a statement that Applicant was required to disprove that the morphine did not come through breast milk. Counsel's follow up question, quoted above, "cured" the error to the extent that Dr. Eagerton was forced to explain the extent of his equivocal support for the idea that "at least some" of the morphine was ingested through breastmilk.

Counsel's cross-examination demonstrated performance well above professional norms. See Hunt v. Nuth, 57 F.3d 1327, 1333 (4th Cir. 1995) (dismissing arguments as merely constituting "a grading of the quality of counsel's cross-examination. None of the suggested errors or omissions is of such magnitude as to place the conduct outside of prevailing

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professional norms.”). Further, the trial court’s extensive instructions to the jury on the State’s burden of proof certainly cures any conceivable misconception that the lone answer created. See Tr. p. 571, line 8 – p. 572, line 25; p. 573, lines 4-6; p. 576, lines 7-20; p. 585, lines 8-15. The jurors certainly understood it was the prosecution’s burden to prove beyond a reasonable doubt that morphine ingested through breastmilk caused Victim’s death. Accordingly, Mr. Wise was not ineffective for not objecting to the answer to one of his own questions.

VIII. Leading questions

Applicant alleges Mr. Wise was ineffective for not objecting to leading questions. Mr. Wise for his part, noted the prosecutor phrased some questions with the term “obviously” and in hindsight, proposes he should have objected to those questions since use of the phrase “obviously” indicates a leading question. PCR 2 Tr. pp. 87-89. Some of those questions and answers are posed below:

Q: And obviously that was a lethal level?

A: That was very much a concern to us when we saw it.

Tr. p. 259, lines 5-6. That a lethal level of morphine was found in Victim, of course, is not contested. Further:

Q: So like you were telling the jury, the child’s organs – liver and so forth – haven’t developed enough to fully metabolize these –

A: No. And narcotics – particularly – there’s lots of literature that supports it. Children under ten months old cannot tolerate high levels of narcotics.

Q: So obviously they’re very susceptible to this from the literature you’ve read.

A: That’s correct. They could be.

* * *

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Q: And obviously these are not – all of these drugs are not drugs that you would normally see in children, and especially morphine, I know.

A: They're not normally dosed to children. They can arrive here in different ways. We know that mothers do breastfeed. Most of these are not going to be unsafe if they're encountered that way in low doses.

Tr. p. 261, lines 7 – 24.

First, even if the questions posed were technically leading, Wendy Bell did not respond with simple yes/no answers, but elaborated or explained the concept posed to her. Further, generally speaking, the content of the answers, such as whether the morphine level was potentially lethal, was not a fact in dispute. And some leading questions were merely a follow up or summation of testimony Ms. Bell already provided.

Counsel is not ineffective because the prosecutor would simply be able to rephrase the questions, the information elicited was admissible, and Ms. Bell did not simply provide yes no answers even when the questions were leading. See Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (“Burnett does not point out any specific instances and explain how those instances likely would have resulted in a different trial outcome. It appears that the leading questions could have been simply rephrased. In any event, assuming there were instances where objections should have been made, Burnett has failed to show how they likely prejudiced his defense.”); United States v. Bosch, 914 F.2d 1239, 1246 (9th Cir. 1990) (rejecting ineffective assistance claim: “Bosch, however, does not maintain that any of this testimony would not have been admissible had it been elicited through nonleading questions.”).

IX. Opinion issue

Applicant alleges the following question and response from Ms. Bell opinion testimony:

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Q: Would [it] be appropriate to tell the doctors about when you're taking medications and letting them know about these medications that she's taking?

A: I would think so but I – that's a little out of my area of expertise.

Tr. p. 262, lines 4-8. Bell then agreed she was “basically on the pharmacology side.” Tr. p. 262, lines 9-10. Mr. Wise, at the PCR hearing agreed he did not object, but explained, “[Y]ou know, [in] all fairness, I think that was a fact beyond dispute.” PCR 2 Tr. p. 48, lines 14-17.

The testimony is a common sense proposition: lay people would know that it is wise to inform your doctor what medication you are taking. Further, several nurses and doctors testified at length about the importance of providing doctors accurate information about medications. Finally, Bell disavowed having any expertise on the question. Counsel's observation that it was a fact not in dispute demonstrates reasonable professional judgement. Accordingly, counsel was not ineffective for failing to object to the question or answer.

X. Expert opinion as to whether morphine found in Victim was from ingested breastmilk

Applicant alleged in his pleadings that Mr. Wise was ineffective for failing to object to the prosecution's experts testifying to a reasonable degree of certainty that the morphine levels in Victim came through breastmilk. Much like the failure to test breastmilk allegation, the factual premise of this allegation is unsupported by the record. Mr. Wise explained he was prepared to object if an expert offered that opinion, but it was never asked. PCR2 pp. 46-47. Counsel was not ineffective as no witness testified to a reasonable degree of certainty that the morphine found in Victim came through breastmilk.

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XI. Ineffective Assistance of Appellate Counsel

In her pretrial brief, Applicant alleged Mr. Wise provided ineffective assistance of counsel for not challenging the homicide by child abuse statute (S.C. Code § 16-3-85) as unconstitutionally vague. Applicant did not provide any authority for this proposition.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). “However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .”)).

Applicant must show that appellate counsel’s performance was deficient and that he or she was prejudiced by the deficiency. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

In the present case, Mr. Wise, who continued representation on appeal, presented four issues. The first two, issues concerning directed verdict, if successful, would have resulted in a

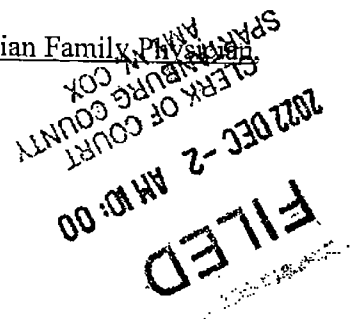
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functional acquittal of all the charges. Justice Few dissented from the majority on the issue of causation, evidencing reasonable strategy from appellate counsel in raising these issues. Appellate counsel argued a double jeopardy violation under the federal constitution, and in turn, the Supreme Court vacated the involuntary manslaughter sentence on a similar state-law ground. The fourth issue concerned the procedure for closing arguments and presented a viable issue at the time of briefing and argument, but was mooted by the Supreme Court's substituted opinion in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018).

Mr. Wise showed reasonable professional judgment in the issues he selected to raise. In contrast, the issue Applicant alleges Mr. Wise should have raised was rejected in State v. McKnight, 352 S.C. 635, 576 S.E.2d 168, n. 6 (2003). Therefore, the proposed appellate issue is not clearly stronger than those issues Mr. Wise chose to raise. Mr. Wise did not provide ineffective assistance on appeal.

XII. New evidence/after-discovered evidence

One of the studies discussed during trial by both prosecution witnesses and Dr. Karch (the Canadian study) was retracted in 2020. The paper discussed the death of a thirteen day-old child from high-morphine levels after the breastfeeding mother took lawfully prescribed codeine (codeine metabolizes to morphine). Madadi P. et al. Safety of codeine during breastfeeding. Fatal morphine poisoning in the breastfed neonate of a mother prescribed codeine, Can Fam Physician 2007; 53:33-5. The retraction cited in Applicant's pleadings notes that the study published in 2007 had been cited in hundreds of articles prior to the 2020 retraction. Ross T. Tsuyuki & Nicholas Pimlott, Risks of maternal codeine intake in breast-fed infants: A Joint Statement of Retraction from the Canadian Pharmacists Journal and Canadian Family Physician, Canadian Pharmacists Journal v. 154(1) (Nov. 18, 2020).



The retraction followed the publication in May 2020 of a paper criticizing the study. Zipursky, et. al. The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, 108(5) Clinical Pharmacology & Therapeutics (May 2020). The conclusion from that article is as follows:

Neonatal opioid toxicity resulting from maternal codeine use during breastfeeding could only arise from a highly improbable combination of factors: **a high maternal codeine dose**,⁹ unusually high concentrations of opioids in breast milk, a large volume of neonatal milk intake, and – critically – profoundly impaired neonatal opioid clearance. The unlikely occurrence of such a scenario is consistent with the paucity of reports of neonatal opioid toxicity, despite the use of these drugs by millions of nursing mothers over the past two decades.

This should not be viewed as an endorsement of opioid use while breastfeeding. Codeine in particular is an unpredictable analgesic choice given its variable conversion to morphine, while other opioids such as oxycodone carry greater abuse liability. Acetaminophen and non-steroidal anti-inflammatory drugs are generally sufficient for the management of postpartum pain. When opioids are required, **short courses**¹⁰ should not be viewed as hazardous to breastfeeding neonates.

(Emphasis added).

On the balance, the Canadian study was exploited by the defense, rather than the prosecution. Counsel testified part of his strategy was to argue that the State should have tested for any genetic defects and failed to, and he used the Canadian study to explain the high number and explain that a genetic defect would “prove that through no fault of [Applicant], that the number got that high.” PCR 2 Tr. pp. 68-69 (direct quote p. 69, lines 11-13). He agreed Dr.

⁹ Dr. Scialli admitted he did not know how much morphine Applicant was taking at any given time during Victim’s lifespan. PCR 1 Tr. pp. 95-97.

¹⁰ In the present case, Applicant filled the last prescription twenty-four days before Victim’s death and consumed in excess of an average of three pills, or 90 mg of MS Contin a day, based on missing pills at the time of death.

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Karch used the Canadian study to argue a genetic defect could explain the buildup of morphine.
PCR 2 Tr. p. 77, line 14 –p. 78, line 14.

An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983).

The retraction is not evidence sufficient to grant a new trial based on after-discovered evidence. Most obvious is that the “new evidence” is not material to guilt or innocence. Applicant’s guilt is not dependent or even influenced by whether or not the child in Canada died as concluded by the Canadian study. Moreover, the retraction is unlikely to change the result if a new trial was held. For instance, the conclusion confirms that high dose, long-term use of opioids by breast-feeding mothers may be dangerous. Also, during trial the study was primarily used by Mr. Wise during cross-examination of State witnesses’ and during Dr. Karch’s testimony to suggest an unexpected genetic defect could be the reason for the high morphine level. Additionally, the retraction, at best, is merely evidence that is impeaching and as a matter of law does not qualify as after-discovered evidence.

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CONCLUSION

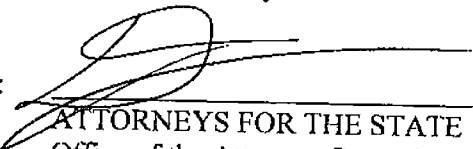
For the foregoing reason, Respondent respectfully submits Applicant failed to meet her burden of proof and her PCR application should be denied. Respondent denies each allegation not expressly admitted, qualified, or explained.

Respectfully submitted,

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November 28, 2022

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) FOR THE SEVENTH JUDICIAL CIRCUIT
)

Stephanie Irene Greene,) Case No.: 2019-CP-42-01605
S.C.D.C. No. 359489,)
)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

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This matter is before this Court by way of an application for post-conviction relief (PCR) filed May 2, 2019. Attorney Susannah Ross was appointed to represent Applicant Greene on May 13, 2019. The State filed its return on August 5, 2019. The State was served notice that attorneys Daniel J. Westbrook, Blake T. Williams, John Kuppens and Caroline A. Warner, all of Nelson, Mullins, Riley, & Scarborough Law Firm, were additionally representing Applicant. A consent order for discovery was issued on December 16, 2020. Subsequently, the PCR application was amended twice before the evidentiary hearing.

An evidentiary hearing was held at the Spartanburg County Courthouse on September 19-20, 2022. Applicant was present and represented by all the attorneys listed above. The State was represented by Senior Assistant Attorney General David Spencer. At the conclusion of the hearing, this Court requested post-hearing briefs. Both parties submitted their briefs.

PROCEDURAL HISTORY

A jury found Applicant guilty as charged for homicide by child abuse, involuntary manslaughter, and unlawful conduct towards a child following trial on August 30 to September 2, 2014. C. Rauch Wise, Esquire, represented Applicant. Seventh Circuit Solicitor Barry J. Barnette


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and Assistant Solicitor Timi Poulos, prosecuted the case. Judge Cole sentenced Applicant to concurrent sentences of twenty years' imprisonment for homicide by child abuse, five years' imprisonment for involuntary manslaughter, and five years' imprisonment for unlawful conduct towards a child.

Mr. Wise continued to represent Applicant on appeal, and raised four appellate issues. By order filed May 5, 2016, the Supreme Court of South Carolina certified the appeal pursuant to Rule 204(b), SCACR. By opinion issued on May 23, 2018, the Supreme Court affirmed Applicant's convictions for homicide by child abuse and unlawful conduct towards a child, but vacated the conviction for involuntary manslaughter. State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018). The Remittitur was issued on June 26, 2018. Mr. Wise petitioned the Supreme Court of the United States for a writ of certiorari on November 19, 2018, which was denied by summary disposition published January 7, 2019.

Even though the present PCR requires an analysis under Strickland v. Washington, 466 U.S. 668 (1984) – an analysis of whether a deficiency of counsel and resulting prejudice, if any, that denied Applicant of her fair right to a trial under the Sixth Amendment – the substance of this PCR, from an evidentiary standpoint, is medically intense.

Evidence at trial

Applicant's infant child, Alexis (Victim), died at forty-six days old. Toxicology results showed lethal levels of morphine and the presence of other drugs in Victim's blood, liver, and brain. Applicant received prescriptions for numerous drugs including MS Contin, a form of slow release morphine, without the prescribing doctor aware that Applicant was pregnant with Victim and later, breastfeeding Victim. The prosecution's theory of the case was morphine and other



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drugs passed through Applicant's breastmilk and caused Victim to die from respiratory depression.

The Supreme Court succinctly summarized evidence at trial below:

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. The evidence at trial revealed 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.

Greene, 423 S.C. at 267, 814 S.E.2d at 498.

The Supreme Court, in denying the allegation that the trial court should have granted a directed verdict on causation, noted:

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.

Id. at 275, 814 S.E.2d at 503. The Supreme Court also rejected the claim that insufficient evidence of the intent element of homicide by child abuse – extreme indifference – was presented to the jury. The Court explained:

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.

Id. at 277, 814 S.E.2d at 503. The Supreme Court found:

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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. . . . One of the State's experts, Dr. Eagerton, testified that the use of morphine during lactation is not recommended. . . . 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.

Id. at 278, 814 S.E.2d at 504. The Supreme Court also noted the morning of Victim's death, Applicant omitted morphine from the list of her prescriptions, even when confronted with the pill bottle found in her bedroom. She later admitted she hid her pregnancy because she was afraid they would take her off the morphine. Id. at 278-79, 814 S.E.2d at 504.

Certainly, the above evidence was significant to the Supreme Court when it affirmed the trial court's denial of Applicant's direct verdict motion.

Evidence at PCR hearing

At the PCR hearing, only three witnesses, all called by Applicant, were presented: (1) Applicant's trial and appellate counsel, Rauch Wise; (2) Dr. Scialli, an expert in Reproductive and Developmental Toxicology, Obstetrics and Gynecology, and (3) Dr. Katherine Twombly, an expert in Pediatric Nephrology. The qualifications for the two expert witnesses were substantial and material to their believability. They both appeared very knowledgeable, their subject matter



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expertise was relevant to the issues presented to the Court, and they were also highly credible while testifying.

Dr. Scialli opined that the morphine concentration measure that was in the child could not have derived from breastfeeding alone (to a certain extent, his testimony called in to question the pre-trial investigation by law enforcement). His opinion was that the morphine concentration measured in the child mostly explained by the inhibition of the excretion of morphine and its metabolites, almost certainly due to renal failure (renal failure was not related to morphine or its transmission through breast milk). Dr. Scialli also testified that reliance on the Canadian case report by the State's trial witnesses was inappropriate because it concerned codeine, not morphine, and because the paper was unreliable even with respect to codeine, as a subsequent 2020 research paper established in material detail. He further explained that the testimony of the State's expert witnesses regarding "synergy" was not appropriate because there is no literature for support for synergy in this case.

More broadly, Dr. Scialli's testimony, including the State's cross-examination, indicates at the very least, that the medical science underpinning infant morphine toxicity such as in the present case is complex and is outside the purviews of the common knowledge of the fact finder. One of the most glaring examples of the complexity of the topic was revealed by Dr. Scialli when he explained that the Canadian study relied upon by the State's trial toxicologist had been retracted in 2020 by two medical journals and he explained the new research that refuted the prior study.

Dr. Twombly opined to a reasonable degree of certainty that the child suffered from acute renal failure and renal failure was the cause of her death. She explained the information she had showed the child had a normal two-week well doctor's visit (on October 11, 2010), and there was absolutely no concern for the baby's health. On November 10th, a few days before the child's

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death, the medical records indicate the child was "congested, not eating well and somewhat lethargic." Dr. Twombly explained that when babies are congested, they cannot take in the amount of formula or breast milk they typically need. As a result, dehydration occurs. Dehydration is the most common cause of renal failure. Renal failure, she stated, was the cause of the victim's death and, to a reasonable degree of medical certainty, the victim would not have died absent renal failure. Dr. Twombly explained that the morphine in the child's system was not the cause of renal failure. Even if the child had no morphine in her system, other toxins like potassium could build up and cause her death. Her opinion included that even if morphine toxicity was a factor, death would not have occurred absent the renal failure. She also opined that renal failure would not have been reasonably foreseeable to the Applicant.

As stated above, these two witnesses appeared credible while on the stand. Their credentials are impeccable. Moreover, the terminology used by these experts clearly placed their opinions within the certainty of reasonable medical standards. No experts were presented by the State to counter these experts. While the State asserts neither of these witnesses could eliminate morphine as the cause of death, their testimony, at least, assuming *arguendo* agreement with the State's position, constitutes evidence that the child would not have died but for renal failure, and that the victim's renal failure was not caused by morphine. More broadly, Dr. Twombly's testimony underscores, again, the medical complexity of the issues in this case, including causation of the child's death.

Rauch Wise (Counsel), Applicant's trial and appellate counsel, testified at the PCR hearing and was a credible witness. Considering his testimony and the transcript, this Court finds Counsel could have researched and developed the alternative cause of death (renal failure) as part of his representation of Applicant. Based on the information and evidence presented as part of the PCR,

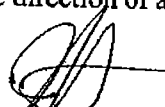
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this Court finds Counsel's performance deficient for failing to present the alternative theory of death (renal failure). Unlike the testimony presented by Dr. Karch, the experts at the PCR hearing offered an alternative cause of death. However, as explained below, despite this Court finding Counsel's performance deficient for failing to research and present the alternative theory of death, this Court disagrees that a reasonable probability exists that the alternative cause of death theory would have changed the outcome of trial and finds Applicant was not prejudiced by Counsel's deficient performance.

Applicant was convicted of homicide by child abuse. As the Supreme Court noted on direct appeal, the elements of this offense require the State to prove beyond a reasonable doubt Applicant caused 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. State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018).

What is not contested in the instant PCR case are the facts in the record related to the elements of extreme indifference towards Applicant's child. This Court will not attempt to better the summary the evidence of the extreme indifference than already set forth by both the majority's and the dissent's explanations in the State v. Greene opinion, and as recited by the State in its post-trial brief (Applicant's addiction, how she hid the pregnancy from medical providers, prescriptions from multiple doctors, her excessive consumption of MS Contin and other prescription medicines). A person's knowing exposure to a child in the person's care to dangerous drugs outside a doctor's care may constitute extreme dangerousness. State v. Phillips, 416 S.C. 184, 196, 785 S.E.2d 448, 454 (2016) (finding "[i]t is common knowledge that giving another person, particularly a toddler, drugs not prescribed to him is inherently dangerous"). "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



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that is inherently dangerous.” State v. Taylor, 626 A.2d 201, 202 (R.I. 1993); see also State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002) (“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.”)

The medical evidence presented as part of the present PCR, as previously mentioned, was credible and substantial. Further, unlike Dr. Karch’s testimony, the expert testimony offered a possibility of an alternative cause of death. Given the circumstantial nature of the medical evidence presented at trial, the medical evidence presented as part of this PCR convinces this Court that Counsel was deficient in his investigation and representation of Applicant. While the State argues that counsel did not render deficient representation (Counsel employed Dr. Karch and the State asserts the Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight), this Court views Counsel’s conduct through the lens of Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). Similar to the present PCR, the trial attorneys in Ard v. Catoe presented a viable defense based on the investigation they performed. In granting a new trial, the Court felt the investigation was insufficient and the trial attorneys should have called an alternative expert to present facts to the jury concerning gunshot residue on the Victim’s hand. However, in the instant case, despite this Court’s finding of deficiency of counsel, this Court finds Applicant failed to establish prejudice. In the present case, the evidence of extreme indifference and medical causation overlap and are linked together.

The State discounts the importance of the two medical experts presented during this PCR by asserting its proximate cause analysis is dispositive, therefore the Applicant cannot establish prejudice. This Court finds the State’s assertion of proximate cause is misplaced. The experts in the PCR established, among other things, the child would not have died but for renal failure. There

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the morphine in Victim came through breast milk rather than some alternate form of delivery. Accordingly, the prosecution proved that lethal amounts of morphine passed through Applicant's breast milk. The prosecution's evidence further includes the findings of the forensic pathologist, Dr. Wren, that the cause of death was respiratory failure due to morphine toxicity and additional effects of other medications found in Victim's blood.² Dr. Twombly agreed that lethargy, a reported symptom, is consistent with respiratory failure and further agreed that the reported weight loss³ may also be consistent with central nervous system depression. PCR 2 Tr. pp. 219-20. This supports Dr. Eagerton's testimony at trial that Victim died from a chronic exposure: Dr. Eagerton, an expert in forensic toxicology and pharmacology, testified "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." Tr. p. 361, lines 15-18. Dr. Eagerton added: "[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." Tr. pp. 361-62.

"A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased." State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008) (citation omitted). "The defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased." Id. Given the toxic level of morphine in Victim, and that even Applicant's experts admitted morphine could have played a role in Victim's death,⁴ abundant evidence supports the causation element of homicide by child

² Medically, the "synergistic drug interaction" idea was not supported in this PCR and was not a conclusion defended by the State during this PCR

³ The medical records indicated Victim was 7 lbs., 2 oz. when born. In her second week, Victim weighed 7 lbs., 11 oz. At the time of death, Victim only weighed 7 lbs., 6 oz.—a loss of five ounces since her two week check-up. Tr. p. 525, lines 11-15.

⁴ Dr. Scialli admitted that the morphine level could have led to respiratory depression and Victim's death. PCR 1 Tr. p. 84, lines 1-14.

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abuse. The jury is simply unlikely to look past the high morphine levels and conclude the cause of death was not morphine toxicity. Therefore Applicant was not prejudiced by counsel's failure to present this alternative cause of death.

This Court notes the Supreme Court's evaluation of causation in State v. Greene, and this Court has before it the Record on Appeal, including the transcript, which it has reviewed. Even though this Court is impressed with the presentation and the quality of the witnesses, and even though this Court agrees with trial counsel that renal failure as a causation defense should have been explored, the circumstantial evidence presented at trial on causation, and the majority's analysis of that evidence, strongly influences this Court to deny the PCR application. This Court is not convinced a jury would likely reach a different result if the renal failure theory of death was presented.

Leading questions

This Court also finds trial counsel erred by failing to object to the State's leading questions, primarily during Wendy Bell's testimony. However, Applicant was not prejudiced by the deficiency. First, even if the questions posed were technically leading, Wendy Bell did not respond with simple yes/no answers, but elaborated or explained the concept posed to her. Further, generally speaking, the content of the answers, such as whether the morphine level was potentially lethal, was not a fact in dispute. And some leading questions were merely a follow up or summation of testimony Ms. Bell already provided.

Counsel is not ineffective because the prosecutor would simply be able to rephrase the questions, the information elicited was admissible, and Ms. Bell did not simply provide yes no answers even when the questions were leading. See Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) ("Burnett does not point out any specific instances and explain how those instances

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likely would have resulted in a different trial outcome. It appears that the leading questions could have been simply rephrased. In any event, assuming there were instances where objections should have been made, Burnett has failed to show how they likely prejudiced his defense.”); United States v. Bosch, 914 F.2d 1239, 1246 (9th Cir. 1990) (rejecting ineffective assistance claim: “Bosch, however, does not maintain that any of this testimony would not have been admissible had it been elicited through nonleading questions.”).

Synergistic effects

Dr. Scialli’s testimony established some clarity that medical science does not support the idea of “synergistic effect” of the other drugs taken by Applicant. The State notes in the Post-Trial Brief that “For the most part, the prosecution’s experts only stated that medications “could” have a synergistic effect with each other.” And the solicitor did not argue or mention to the jury any “synergistic” effect of the drugs. Respondent’s Post-Trial Brief, pp. 38-39. Thus, trial counsel was not ineffective for failing to challenge the “synergistic effect” of the multiple-medications. Counsel convinced the trial judge that to tell the jury the cause of death needed to be a schedule II drug and morphine was the only schedule II found in the victim. Notably, counsel convinced the judge that the “synergistic effect” was insufficient for the jury to convict appellant of homicide by child abuse in this case. Further, Counsel explained that the number everyone was concerned with at trial was the lethal level of morphine in Victim’s blood. PCR2 Tr. pp. 81-82. This Court does not find counsel ineffective for not objecting to expert testimony about synergistic effects.

Canadian study (After-discovered evidence)

One of the studies discussed during trial by both prosecution witnesses and Dr. Karch (the Canadian study) was retracted in 2020. The paper discussed the death of a thirteen-day-old child from high-morphine levels after the breastfeeding mother took lawfully prescribed codeine

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(codeine metabolizes to morphine). Madadi P. et al. Safety of codeine during breastfeeding. Fatal morphine poisoning in the breastfed neonate of a mother prescribed codeine, Can Fam Physician 2007; 53:33-5. The retraction cited in Applicant's pleadings notes that the study published in 2007 had been cited in hundreds of articles prior to the 2020 retraction. Ross T. Tsuyuki & Nicholas Pimlott, Risks of maternal codeine intake in breast-fed infants: A Joint Statement of Retraction from the Canadian Pharmacists Journal and Canadian Family Physician, Canadian Pharmacists Journal v. 154(1) (Nov. 18, 2020).

The retraction followed the publication in May 2020 of a paper criticizing the study. Zipursky, et. al. The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, 108(5) Clinical Pharmacology & Therapeutics (May 2020). The conclusion from that article is as follows:

Neonatal opioid toxicity resulting from maternal codeine use during breastfeeding could only arise from a highly improbable combination of factors: a high maternal codeine dose, unusually high concentrations of opioids in breast milk, a large volume of neonatal milk intake, and – critically – profoundly impaired neonatal opioid clearance. The unlikely occurrence of such a scenario is consistent with the paucity of reports of neonatal opioid toxicity, despite the use of these drugs by millions of nursing mothers over the past two decades.

This should not be viewed as an endorsement of opioid use while breastfeeding. Codeine in particular is an unpredictable analgesic choice given its variable conversion to morphine, while other opioids such as oxycodone carry greater abuse liability. Acetaminophen and non-steroidal anti-inflammatory drugs are generally sufficient for the management of postpartum pain. When opioids are required, short courses should not be viewed as hazardous to breastfeeding neonates.

Id. (emphasis added).

On the balance, the Canadian study was exploited by the defense, rather than the prosecution. Counsel testified part of his strategy was to argue that the State should have tested for any genetic defects and failed to, and he used the Canadian study to explain the high number

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and explain that a genetic defect would "prove that through no fault of [Applicant], that the number got that high." PCR 2 Tr. pp. 68-69 (direct quote p. 69, lines 11-13). He agreed Dr. Karch used the Canadian study to argue a genetic defect could explain the buildup of morphine. PCR 2 Tr. p. 77, line 14 -p. 78, line 14.

An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

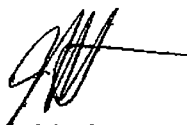
- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983).

The retraction is not evidence sufficient to grant a new trial based on after-discovered evidence. During trial, the study was primarily used by Mr. Wise during cross-examination of State witnesses' and during Dr. Karch's testimony to suggest an unexpected genetic defect could be the reason for the high morphine level. Moreover, the retraction, at best, is evidence that is impeaching and does not qualify as after-discovered evidence.

This Court agrees that the Zipursky paper's repudiation of the Canadian study would offer some benefit Applicant during the criminal trial. However, while evidence at the PCR hearing produced clarity as to the Canadian study in that it is no longer considered a credible source to be relied upon for medical information, this Court cannot find that Applicant has met her burden of proof as to these allegations for the reasons stated above.

Cumulative error doctrine


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This Court has found counsel deficient for multiple errors. This Court would note South Carolina does not recognize the cumulative error doctrine. However, it is proper to examine the record as a whole. Lorenz v. State, 351 S.C. 184 (2008) (citing Green v. State, 351 S.C. 18 (2002) and Simpson v. Moore, 367 S.C. 58 (2006)); see also Smalls v. State, 422 S.C. 174 (2018); Wong v. Belmontes, 558 U.S. 15, 25 (2009) (“The type of ‘more-evidence-is-better’ approach advocated by Belmontes and the Court of Appeals might seem appealing – after all, what is there to lose? But here there was a lot to lose.”); Id. at 26 (“[T]he reviewing court must consider all the evidence – the good and the bad – when evaluating prejudice. . . . Here, the worst kind of evidence would have come in with the good.”). Viewing the record as a whole, this Court concludes Applicant was not prejudiced by counsel’s deficient performance as discussed above as this Court concludes that the deficiencies do not create a reasonable probability of a different result.

CONCLUSION

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

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Austin v. State, 305 S.C. 453 (1991). Rule 71.1(g), SCRCP, provides that if applicant wants appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

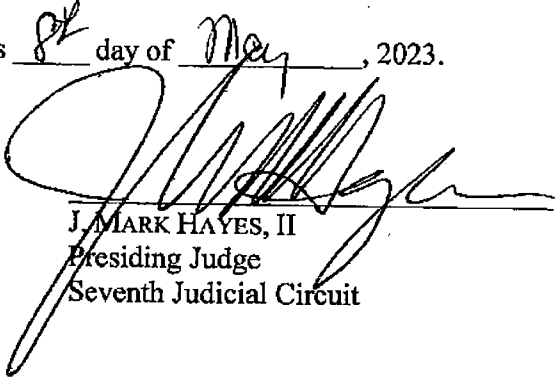


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1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 8th day of May, 2023.


J. MARK HAYES, II
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Stephanie Irene Greene, # 359489,	)	Case Action No. 2019-CP-42-01605
	)	
Applicant,	)	
	)	
v.	)	<u>APPLICANT'S MOTION TO</u>
	)	<u>RECONSIDER AND AMEND</u>
State of South Carolina,	)	
	)	
Respondent.	)	

Stephanie Irene Greene, # 359489 ("Applicant"), through her undersigned counsel, respectfully moves pursuant to Rules 52(b) and 59(e), SCRPC the Court to amend the Order of Dismissal dated May 8, 2023 to correct the errors of law set forth herein and grant Applicant's petition for postconviction relief.

The grounds for this motion are set forth herein. Any arguments, factual positions and legal positions asserted prior to, during, and after the trial in this matter not herein listed are adopted and incorporated the same as if fully set forth herein as additional grounds supporting this motion. Moreover, all arguments set forth in any written motions or submissions on evidentiary matters, motions in limine, and post-trial briefing, including any supporting memoranda and exhibits, as well as all arguments made during oral argument before the Court in support of said motions, or at any time in these proceedings, are incorporated herein by reference. This includes, but is not limited to: (1) Applicant's Second Amended Application for Postconviction Relief; (2) Applicant's Motion in Limine; and (3) Applicant's Post-trial Brief.

The Court held an evidentiary hearing on Applicant's petition for postconviction relief on September 19 and 20, 2022. Applicant and the State both submitted post-trial briefs at the Court's request on December 1, 2023. On February 1, 2023 the Court entered a preliminary Form 4 Order

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outlining its anticipated ruling and requesting that the State prepare a proposed order for the Court's consideration. The Court entered its final Order of Dismissal on May 8, 2023. Applicant timely submits this motion to reconsider.

STANDARD OF REVIEW

Rule 59(e) of the civil rules allows a party to move the court to alter or amend a judgment within 10 days after it receives written notice the order was entered: Rule 59(e), SCRCPP; *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21–22, 602 S.E.2d 772, 778–79 (2004) (“A motion under Rule 59(e) long has been viewed as ‘motion for reconsideration’ despite the absence of those words from the rule.”). A party is permitted to file a motion to reconsider pursuant to Rule 59(e), SCRCPP, upon a belief that: “the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue.” *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). “Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.” *Id.* (citing *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992)).

Argument

The Court's Order of Dismissal acknowledges that Applicant's presentation at the evidentiary hearing was persuasive and impactful. Nevertheless, the Court finds that it would not have had a sufficient impression on the minds of the jury and thus Applicant failed to establish prejudice. Respectfully, these two findings cannot be reconciled. The Court overlooked or failed to fully consider several of Applicant's arguments in reaching its conclusions. Moreover, the Court failed to rule on several other arguments advanced by Applicant. Therefore, Applicant respectfully requests that the Court grant this motion, amend its Order of Dismissal, and grant Applicant's petition for post-verdict relief.

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I. The Court's Order of Dismissal correctly recognizes that the testimony of Dr. Scialli and Dr. Twombly was compelling and that trial counsel was ineffective.

The Order began by discussing the testimony of Applicant's experts Dr. Tony Scialli and Dr. Katherine Twombly. The Order notes that they each had "substantial" qualifications and were "very knowledgeable." The Order further found that their subject matter expertise was relevant to the issues before the Court, and their testimony was "highly credible." (Order at 4-5.)

The Order accurately summarized Dr. Scialli's four central opinions: (1) the morphine concentration measured in L.G. could not have been explained due to breastfeeding alone; (2) the morphine concentration measured in L.G. was most likely explained by the inhibition of excretion of morphine and its metabolites, almost certainly due to renal failure; (3) the reliance of the State's witnesses on the Canadian case report was inappropriate because it concerned codeine, not morphine, and because the paper was unreliable even with respect to codeine, as a 2020 paper detailed; and (4) testimony of the State's expert witnesses regarding "synergy" was not appropriate because there is no literature support for synergy in this case. (Order at 5.)

The Court also correctly summarized Dr. Twombly's key opinion that, to a reasonable degree of medical certainty, L.G. suffered from acute renal failure and that the renal failure was the cause of her death. (*Id.* at 5-6.)

After recapping their testimony, the Court again highlighted the credibility of these experts and their "impeccable" credentials. The Court noted that the State presented no experts to counter Applicant's witnesses. Moreover, the Court acknowledged that these witnesses underscored the medical complexity of the issues in the case, including causation. (*Id.* at 6.)

The Order of Dismissal then turned to trial counsel's testimony, which the Court also found to be credible. The Court was satisfied with Applicant that trial counsel could have researched and developed renal failure as an alternative cause of death as part of his representation of Applicant.

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Moreover, the Court agreed with Applicant that trial counsel was deficient by failing to present this alternative theory.

Applicant's post-trial brief discusses the testimony presented at the evidentiary hearing in detail, and Applicant incorporates that summation by reference here in full.

II. The Court should reconsider its finding that Applicant suffered no prejudice from trial counsel's deficient performance in failing to present the alternative cause of renal failure.

A. Respectfully, the Court's findings on prejudice regarding the alternative cause of death cannot be reconciled.

As an initial matter, the Court's assertion that the "facts in the record" related to the elements of extreme indifference are "not contested" is, respectfully, not accurate. It is correct that Applicant did not dispute the accuracy of the level of morphine measured in L.G.'s system identified on the toxicology report, that Applicant consumed morphine, or that Applicant was breastfeeding. However, Applicant vehemently disputes that these actions satisfied the *mens rea* of homicide by child abuse.

As the evidence and testimony elicited at PCR supported, morphine is generally safe and effective for breastfeeding mothers and is often prescribed directly to newborns where appropriate (for example, after surgery). (PCR Day I 35:7-37:4, 193:18-194:4.) As Dr. Scialli detailed, there is no scientific support for the possibility that morphine can transmit through breast milk at a lethal level. (*Id.* at 32:1-6, 41:4-8.) To demonstrate this fact, Dr. Scialli performed calculations determining that, under normal circumstances, L.G. would have had to consume over 50 gallons of breast milk in a one-day period for her body to have a morphine level equal to what was found in the toxicology screening. (*Id.* at 47:19-48:9.)

As Dr. Twombly opined, what caused L.G. to die was renal failure – a very **abnormal** circumstance which Applicant would have had no reason to suspect. (*Id.* at 198:12-17, 207:14-

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20, 212:2-9.) The renal failure is what caused the morphine to build up in her system to a level that would never have occurred otherwise. (*Id.* at 234:10-5.) L.G. could have died of renal failure regardless of whether Applicant was consuming morphine, and Dr. Twombly opined that it was not reasonably foreseeable to Applicant that L.G. was in renal failure. (*Id.* at 206:16-207:20.) She opined that L.G. was suffering from dehydration, as evidenced primarily by L.G.'s weight loss between the two-week well visit and the time of death, and that this was the cause of the renal failure. (*Id.* at 212:7-9, 232:1-7.) Dehydration is one of the most common causes of renal failure in infants. (*Id.* at 205:14-23.)

All of these facts directly rebutted the State's assertion that Applicant knowingly and intentionally acted with extreme indifference towards her child through her morphine consumption while breastfeeding. It is difficult to see how the testimony of Dr. Scialli and Dr. Twombly would not have been persuasive to the jury on this element. This is particularly true where the only testimony that the jury heard, *including from Applicant's own expert*, was that breast milk *could transmit in a lethal level under ordinary circumstances*.

The Court's reliance on *State v. Phillips*, 416 S.C. 184, 785 S.E.2d 448 (2016) and *State v. Taylor*, 626 A.2d 201 (R.I. 1993) to support its conclusion that Applicant suffered no prejudice further demonstrates the error inherent in the Order. Those cases each involved situations where the defendant *knowingly* permitted a child to *directly* access and consume a controlled substance. This case presented a very different scenario where Applicant consumed a controlled substance herself and it was only "administered" to the child to the extent a very small portion of the metabolized drug passed through her breast milk.

The *Taylor* case actually drives this point home. See *State v. Taylor*, 626 A.2d 201, 203 (R.I. 1993). As the Court explained, in that case, even if the death may have been unintentional,

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it could be “viewed as *reasonably foreseeable* in view of the dangerousness of the act or conduct of the accused.” *Id.* Here, as the testimony and evidence presented at PCR established, L.G.’s death was not reasonably foreseeable.

The Order then proceeds to address the prejudice issue and begins by agreeing with Applicant that the State’s reliance on “proximate cause is misplaced.” Critically, the Court agreed that Applicant’s experts “established, among other things, the child would not have died but for renal failure.” (Order at 8.) The Court also noted “there is no factual or medical information that causally connects the morphine and renal failure” and that the expert testimony established that L.G. could have died from “renal failure regardless of the high morphine level.” Despite these findings, the Order of Dismissal nevertheless finds that this would not likely have affected the outcome of the trial on the merits. (*Id.* at 9.)

Under *Strickland*, a “reasonable probability” is a probability “sufficient to undermine confidence in the outcome.” *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101-02 (2013). (quoting *Strickland*, 466 U.S. at 694). For guilt or innocence issues, this means “whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.” *Strickland*, 466 U.S. at 695. Again, respectfully, the Court failed to fully consider the inherent conflict between its findings that Applicant established a highly persuasive alternative theory as to the cause of death and trial counsel’s ineffectiveness for failing to present said theory, yet that this did not undermine the confidence in the outcome of the underlying trial.

As noted above, the Order of Dismissal bases its conclusion on the evidence from the underlying trial that a lethal level of morphine was found in L.G. However, the Court overlooked the crux of Applicant’s presentation at the PCR. The cause of the lethal level of morphine was the renal failure (which itself was caused from dehydration), not Applicant’s consumption of

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morphine. Applicant would have had no way of knowing that L.G. was suffering from renal failure and that her continued consumption of morphine (which is safe for infants under ordinary circumstances, as established by both experts' un rebutted testimony) was placing her child at risk. If trial counsel had presented the alternative theory, it would have entirely negated the element of intent.¹

The State's arguments at both the underlying trial and PCR, and the Court's findings in its Order of Dismissal, overlook this critical fact. Homicide by child abuse requires a showing of a "*deliberate or intentional* act under circumstances revealing an *extreme indifference* to human life." *Greene*, 423 S.C. at 281, 814 S.E.2d at 506. The statute "reflects the legislature's intent to define and target a specific societal problem—child *abuse* resulting in death." *Greene*, 423 S.C. at 281, 814 S.E.2d at 506. If trial counsel had utilized the evidence and testimony presented by Applicant at PCR, the jury would have learned that Applicant was consuming a drug that is: (1) safe for use while breastfeeding and can be administered directly to infants in normal circumstances, (2) does not pass in a lethal level through breast milk, and that (3) L.G. was suffering from a condition, renal failure—a condition Applicant had no knowledge of and would not have had any reason to—which could cause substances to build up in her system in a way that would not occur under normal circumstances. It is difficult to see how this would not have had an impact on the jury's consideration of whether Applicant engaged in deliberate actions manifesting an extreme indifference to L.G.

¹ Under the State's theory of the case, a mother risks potential criminal liability for taking any medication while breastfeeding (no matter how medically necessary it is for the mother's health and safety) if something later happens to her child that could arguably be tied to the medication in any way.

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Unless the evidence in the underlying action is “conclusive,” it does not foreclose a finding of prejudice. The Court of Appeals’ recent decision in *Ryals v. State*, Op. No. 5971 (S.C. Ct. App. Filed March 1, 2023) (Howard Adv. Sh. No. 8 at 16) is instructive. In *Ryals*, the PCR court found that trial counsel was potentially deficient but denied PCR because the applicant failed to establish prejudice in view of the “overwhelming evidence” against him. Op. No. 5971 at 19. The Court of Appeals reversed. As the court explained, the strength of the State’s case is only one factor that the PCR court must consider. *Id.* Although it is a “significant” factor, the court must also consider the impact of counsel’s error and other relevant considerations in determining whether the applicant has met her burden. *Id.* Importantly, the Court explained that for evidence to be “overwhelming” such that it precludes a finding of prejudice, it must include something *conclusive*, such as a “confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability . . . the factfinder would have had a reasonable doubt’ *cannot possibly* be met.” *Id.* (quoting *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018) (emphasis added)). The evidence here was far from “conclusive” as demonstrated by what Applicant established at PCR.

Finally, Attorney Wise agreed that it was error to not present the alternative cause of renal failure. (*Id.* at 38:2-34:21.) The Order of Dismissal overlooks this key fact. As he explained, cause of death was a critical issue and if there had been an alternative explanation then it would have been “virtually impossible” for the State to argue morphine was the cause of death. (*See id.*) Renal failure would have “changed the dynamics of the case in that the State could no longer say the cause of death was a drug overdose. And unless and until they eliminate renal failure as a cause of death, . . . Attorney Wise testified that if he had presented this alternative cause, it would have raised a *very serious question as to whether or not the case even goes to the jury*,

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unless the State came in with some testimony that it wasn't renal failure and have a good reason for it." (*Id.* at 40:16-23 (emphasis added).) He later reiterated that it was error to not present the renal failure issue because it was a "100% exoneration" rather than just something to "get to the jury and create controversy." (*Id.* at 50:20-25.)

For all these reasons, Applicant satisfied her burden on showing prejudice due to counsel's deficient performance. Respectfully, the Order of Dismissal erred in concluding otherwise. The Court should grant Applicant's motion to reconsider.

B. The Court overlooked Applicant's argument about the prejudicial effect of Dr. Karch's testimony.

The Court's Order of Dismissal also overlooks the prejudicial effect of trial counsel's ineffectiveness in calling Dr. Stephen Karch to testify at trial. Dr. Karch was the only expert that Attorney Wise called at trial. As Applicant detailed at PCR, however, Dr. Karch's testimony ultimately agreed with the State's theory of the case and only served to bolster the State's position. Dr. Karch did not opine that it was *impossible* for a lethal level of morphine to be transmitted solely through breastfeeding (as Dr. Scialli did at PCR). In fact, he conceded that it *was* possible this to have occurred. Dr. Karch also speculated that L.G. could have had a "genetic defect" but offered no further explanation on what that defect could have been.

At trial, Applicant's counsel did not rebut or otherwise object to the State's evidence and testimony that a lethal level of morphine could be transmitted through breast milk (which no witness testified could occur to a reasonable degree of medical certainty). The purpose of relying on Dr. Karch was to undermine the State's theory of the case, but Attorney Wise was aware that Dr. Karch could not provide any positive proof and he ultimately agreed with the State's theory. On direct examination, Attorney Wise asked Dr. Karch if he thought the morphine level could be

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explained solely by transmission through breast milk and he replied "yes," which *conceded the State's entire theory of the case*. (Trial Tr. 504:19-21, 511:5-10, 513:8-16.) D

As Applicant detailed in her post-trial brief, this situation is analogous to *McKnight* because the methodology of the expert "mimicked that of the State's star expert" and served to "bolster the State's theory of the case." *Id.* at 643, 576 S.E.2d at 172. Respectfully, the Order of Dismissal errs in finding that Applicant suffered no prejudice. The Court should grant Applicant's motion to reconsider for this reason as well.

C. The Court overlooked Applicant's argument about the prejudicial effect of trial counsel's failure to seek to have the testimony of the State's experts excluded or restricted.

As Applicant's post trial brief detailed, Attorney Wise stated that he intended to request a hearing if the State's witnesses offered testimony that morphine could be transmitted at a lethal level through breast milk:

I think that if he has an expert that can say a child can die from morphine through breast milk we may need a hearing to determine whether or not that's valid science, because I have -- like I say, I cannot find anything that substantiates that position as a matter of science, not as a -- you know, I mean, just I cannot find articles or scientists. And my expert tells me that's because there are none that say a child can die through breast milk. So if that's going to be his scientific position, I think that we need to have some sort of hearing to determine whether or not that's valid.

(Trial Tr. 19:11-21.) The trial court agreed to have such a hearing if necessary. (*Id.* at 20:2-3.) Inexplicably, however, Attorney Wise never objected or requested a hearing despite several of the State's witnesses offering this exact testimony. (See Trial Tr. 358:17-359:4, 361:19-362:2, 439:6-446:5.) At the PCR hearing, Attorney Wise agreed that he did not make any pretrial motions or otherwise challenge or object to this testimony and there was not a strategic reason for doing so.

(Trial Tr. 19:11-21.) The only justification he offered was that the State never asked the witnesses

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if their testimony was to a reasonable degree of medical certainty. (*Id.*) However, if anything this made the failure to object *more problematic* since the jury heard speculative, unreliable expert testimony that should have been excluded in the first instance since it could not be offered to a reasonable degree of medical certainty.

Therefore, as Applicant detailed, Attorney Wise's failure to seek to have this testimony excluded prejudiced Applicant because it permitted the State to present its scientifically unreliable theory that breastfeeding alone could cause morphine to transmit at a lethal level to the jury—one which the jury agreed with in finding Applicant guilty, clearly demonstrating its outcome determinative effect and prejudice.

Furthermore, the Court overlooked Applicant's argument that this also prejudiced Applicant by depriving her of a potential appellate ground if the trial court denied a motion to exclude or overruled Attorney Wise's objections to this expert testimony.

This prejudice also warrants reconsideration and granting Applicant's petition.

III. The Court should reconsider its finding that Applicant suffered no prejudice from trial counsel's deficient performance in failing to object to leading questions.

The Order of Dismissal overlooks two critical arguments made by Appellant on this ground. First, the improper leading questions were directed to several witnesses, as Applicant's post-trial brief detailed, not just Dr. Wendy Bell. Second, the prejudicial effect of these unobjected to questions was significant because it gave the impression to the jury that it was undisputed that: (1) L.G. died because of Applicant's breast feeding and (2) other drugs measured on the toxicology report had a "synergistic effect" on the morphine and these points were not contested by the defense.

Applicant incorporates by reference the arguments on this issue in her post-trial brief in full herein. However, Applicant would direct the Court's attention to the most notable examples.

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First, during the testimony of the State's examination of pharmacology and forensic toxicology expert Dr. David H. Eagerton, the following occurred:

Q 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?

A No. They don't.

(Trial Tr. 358:17-359:4 (emphasis added).) Additionally, the following exchange occurred during the questioning of pathology expert Dr. John David Wren:

Q But obviously this child died from -- well, actually morphine plus the other drugs and synergetic [sic] effect from them.

A That's my opinion, yes.

Q And from that -- and obviously the morphine could have came from the milk, breast milk, from the -- from the mother.

A 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.

(Trial Tr. 444:2-16 emphasis added).)

The Solicitor also asked inappropriate leading questions regarding the supposed synergistic effect of the medications found in L.G. (which should never have been permitted in the first instance, as detailed below). The following exchange occurred during the testimony of Dr. Bell:

Q And the combination of all of these drugs, plus the Klonopin on the next page, they'd have a syntroitic [sic] effect on each other, I guess.

A They could.

Q And obviously this could be the reason why she died.
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(Trial Tr. 265:16-21 (emphasis added).) Likewise, the following occurred during Dr. Eagerton's testimony:

Q But it could be like one-plus-one-equals-three type situation.

A It could be one plus one equals three, or it could be one plus one equals five. It could be one plus one equals something greater than that.

(Trial Tr. 351:3-11 (emphasis added).) Lastly, a similar question was posed to Dr. Wren:

Q But obviously this child died from -- well, actually morphine plus the other drugs and synergetic [sic] effect from them.

A That's my opinion, yes.

(Trial Tr. 444:2-5 (emphasis added).) Again, no objections were raised to any of these leading questions.

Applicant suffered significant prejudice due to this deficient performance by trial counsel because, as noted, it allowed the State to suggest to the jury that the concepts that: (1) morphine can be transmitted in a lethal level solely through breast feeding was "obviously" a sound scientific principle and (2) other medications reflected on the toxicology report had a "synergistic effect" on the morphine and contributed to the cause of death. This was highly prejudicial in light of the evidence and testimony presented at PCR demonstrating that neither was accurate. The Order's finding that "the content of the answers, such as whether the morphine level was potentially lethal, was not a fact in dispute" demonstrates precisely why the prejudice was so damaging – that fact **should** have been in dispute at the underlying trial because the only reason it built up to a lethal level was because the child suffered from renal failure, not because of Applicant's extreme indifference. The Order's assertion that the testimony was "admissible" is also not accurate for

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the reasons detailed herein. Trial counsel should have objected to these improper leading questions and sought to have it excluded.

IV. The Court should reconsider its finding that Applicant suffered no prejudice from trial counsel's failure to challenge the synergistic effect questions.

Here, again, the Court acknowledges that Applicant made a persuasive case at PCR that the "medical science does not support the idea of 'synergistic effect' of the other drugs taken by Applicant." (Order at 12.) However, the Court finds that Applicant was not prejudiced because the solicitor did not argue this to the jury. The Court overlooks Applicant's primary argument on this point. The fact that the concept was *not* supported by the medical science demonstrated the need for trial counsel to seek to have any such evidence and testimony excluded prior to trial or, at a minimum, to present testimony rebutting this point. Although the trial court ultimately agreed that the issue should not be charged or argued to the jury in closing, multiple State witnesses had already testified about the concept and its applicability here. The damage was done and the bell could not be unrung, especially considering the Court did give the jury any instruction to disregard that testimony.

Attorney Wise was on notice that the State intended to present testimony as to the "synergistic effect" of the medications on the toxicology report. At the pretrial hearing, Attorney Wise informed the trial court that the State appeared to have "tweaked" its case from just morphine to the theory that "not only morphine but the other drugs in the system could have helped kill the child." (Trial Tr. at 24:4-7.) Attorney Wise acknowledged he had *never discussed* the "relevance of the other drugs" with Dr. Karch because they had been focusing on the morphine. (*Id.* at 24:11-12.) As the Solicitor pointed out, however, Dr. Wren's report included the synergistic "force of the different other drugs, on the morphine" and described it as a "one-plus-one-equals-three theory." (*Id.* at 24:18-22.) He noted this was "not a surprise to the defense" since it had been

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given in discovery and all of the State's experts agreed that synergy would be a "factor of the morphine increasing the effects of the morphine on the child." (*Id.* at 24:22-253.) The trial judge expressly told Attorney Wise that he would need to "have that conversation with your expert to determine if that creates an issue in this trial." (*Id.* at 25:6-8.) The trial judge further stated that since the concept was in Dr. Wren's report, Dr. Karch "would therefore have contemplated [it] sufficiently," and the court was "satisfied he has an opinion in that regard." (*Id.* at 25:9-26:20.)

Despite this exchange and the trial judge's statements, Attorney Wise made no effort to prevent the State's experts from testifying about this concept and presented no rebuttal evidence on this theory. *As he acknowledged on the record pretrial*, he had failed to sufficiently explore and investigate the synergistic effect theory and assess whether it had merit before trial began. As the State and the court explained, however, Attorney Wise had long been on notice that Dr. Wren would offer this opinion, yet he failed to even discuss it with Dr. Karch. Attorney Wise was unprepared to challenge this theory and, in fact, failed to do so either through objection or rebuttal testimony. This significantly prejudiced applicant because the only testimony that the jury heard presented "synergistic effect" as an established fact despite it having no basis in the science as Dr. Scialli detailed at the PCR hearing.

Similarly, Attorney Wise was deficient by failing to move to exclude any testimony about this unsupported, scientifically unreliable theory prior to trial. Dr. Karch was an expert in toxicology (as Attorney Wise phrased it at the PCR hearing, he "wrote the book" (PCR Day II Tr. 57:10-12)) and should have been able to assist Attorney Wise in understanding this concept and why it would not apply here. Inexplicably, Attorney Wise never asked Dr. Karch. As Applicant established at PCR, Attorney Wise could have consulted with an expert such as Dr. Scialli who would have been able to detail why synergy did not apply in this case and could offer such

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testimony to a reasonable degree of medical certainty. Had Attorney Wise properly investigated the issue and discussed it with Dr. Karch, he could have requested a *State v. Council* hearing and moved to exclude such testimony. Again, however, Attorney Wise neglected to do so because of his deficient investigation and preparation. This prejudiced Applicant because the jury heard this scientifically unreliable testimony multiple times throughout the trial—testimony that should never have been allowed in the first place had Attorney Wise mounted a proper challenge.

Third, Attorney Wise failed to object when the State's witnesses offered this testimony. *Five expert witnesses for the State testified about the supposed "synergistic effect" of the medications found in L.G. on the morphine.* That testimony is detailed in full in Applicant's post-trial brief and Applicant incorporates that discussion by reference herein. Dr. Bell, Dr. Kotecha, and Dr. Wren all additionally opined that it could have contributed to L.G.'s death. (Trial Tr. 260:5-15, 265:12-21; 322:2-13, 341:3-8; 430:11-433:22, 444:2-5.)

Attorney Wise did not object to or otherwise challenge the testimony of these five expert witnesses. This was highly prejudicial to Applicant because, again, there was no scientific basis for synergy as it is not supported by the medical literature, yet the only impression given to the jury was that this was an established concept that applied in this case. This was especially concerning since none of the State's experts testified that synergy applied to a reasonable degree of medical certainty or cited any supporting paper or treatise to justify their opinions (nor were they asked to do so by Attorney Wise).

For the same reasons, Attorney Wise was ineffective for failing to present any affirmative testimony detailing why synergy had no scientific basis in this case. Dr. Scialli emphatically testified that synergy was not applicable and would have been able to offer such testimony at the time of Applicant's trial to a reasonable degree of medical certainty. However, Attorney Wise did

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not investigate the synergy issue, did not consult with any expert who could help him rebut it, and did not present any testimony explaining why it did not apply. Again, the unchallenged and un rebutted nature of the State's testimony on this issue likely had a significant impact in the minds of the jury, which demonstrates the prejudice to Applicant.

At PCR, Attorney Wise suggested that this ultimately did not matter because the trial court charged the jury that it could only return a guilty verdict if it found that Applicant's consumption of Schedule II substances (of which only morphine qualified) caused L.G.'s death and, as a result, the State limited its closing argument to this question. (PCR Day II Tr. 49:12-21, 83:13-20.) The Court's order reached a similar conclusion. (Order at 12.) If anything this supports the exact opposite point—the reason this testimony was especially prejudicial is that it was *ultimately not even relevant to the question charged to the jury*. If the jury was not to consider the other medications, then Attorney Wise should have made every effort to have testimony and evidence about their impact excluded. Instead, the jury heard extensive testimony about all of the medications that were found in L.G., with witness after witness explaining how they acted synergistically. This prejudice tainted the entire trial.

For all these reasons, there is a reasonable probability that but for counsel's deficiencies, the outcome would have been different. Therefore, the Court should grant postconviction relief for this reason as well.

V. The Court overlooked Applicant's ineffective assistance of appellate counsel argument, which represented an independent basis for granting postconviction relief.

The Court's order did not address this argument. As Applicant detailed, Attorney Wise also rendered ineffective assistance of appellate counsel by failing to argue to the Supreme Court that the conviction with the lower sentence, involuntary manslaughter, should stand in the event

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the court agreed with Applicant's argument that the homicide by child abuse and involuntary manslaughter guilty verdicts were inconsistent.

On appeal, Applicant contended (and the Supreme Court agreed) that although it may have been proper to present both charges to the jury, the trial court should have instructed the jury that Applicant could not be found guilty of both charges. *State v. Greene*, 423 S.C. 263, 282, 814 S.E.2d 496, 506 (2018). Rather, depending on their view of the evidence, the jury could only find Applicant not guilty of both offenses, guilty of homicide by child abuse, or guilty of involuntary manslaughter.² *Id.*

The Supreme Court reasoned that the jury's guilty verdict on homicide by child abuse precluded a guilty verdict on the involuntary manslaughter charge and thus vacated the conviction for involuntarily manslaughter. Attorney Wise rendered ineffective assistance of appellate counsel by failing to properly frame the argument as requiring reversal of *both* convictions and a new trial. Attorney Wise raised the correct issue on appeal regarding whether the trial court erred by failing to give the proper jury instruction. However, in the briefing, Attorney Wise did not ask for any particular relief for this error. Attorney Wise should have requested that the court reverse both convictions and require a new trial with the proper jury instruction. Instead, by failing to specify any requested relief, the Supreme Court simply opted to eliminate the concurrent conviction and sentence for involuntary manslaughter, which ultimately had no impact on the total term of

² As the Supreme Court noted, the jury could have concluded that the State failed to prove Applicant committed "a deliberate or intentional act under circumstances revealing an extreme indifference to human life" as required by the homicide by child abuse statute, yet nevertheless found her guilty of involuntary manslaughter. The Supreme Court elaborated on the distinction between the two charges, noting that the homicide by child abuse statute "reflects the legislature's intent to define and target a specific societal problem—child abuse resulting in death" whereas involuntary manslaughter covers "unintentional killings from both unlawful conduct that does not naturally tend to place another in danger of death or serious bodily harm and lawful conduct that recklessly places another in danger of harm." *Greene*, 423 S.C. at 281, 814 S.E.2d at 506.

Applicant's incarceration. Attorney Wise "won" the issue on appeal, but it was a pyrrhic victory due to his failure to request the proper relief. This significantly prejudiced Applicant because there was an opportunity to seek reversal of both convictions that was not advocated or pursued.

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

Accordingly, for all these reasons, ineffective assistance of appellate counsel also warrants granting the application for postconviction relief. The Court should grant Applicant's motion to reconsider and amend the Order accordingly.

VI. The Court should reconsider its finding that the Zipursky study does not constitute new evidence warranting a new trial.

The new evidence of the Zipursky paper represents a separate, independent ground for granting the application for postconviction relief. The Zipursky paper, published in 2020, represents a critical piece of evidence because it flatly disproves the *only* medical literature or scientific paper that the State's experts were able to cite to support the theory that a lethal level of morphine could be transmitted through breastmilk (the Canadian case). At the time of trial, it represented the sole published example of supposed morphine toxicity in an infant resulting from breastfeeding. This gave credence and "teeth" to the State's theory of the case because there was at least one concrete example that allegedly backed up its position. That is precisely what happened on cross-examination when Attorney Wise asked the prosecution witnesses if they had any scientific support for their assertion that a lethal level of morphine could transmit through

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At the time of trial, Applicant could have, at best, introduced testimony from someone like Dr. Scialli to try to undermine the Canadian case. As Dr. Scialli's testimony detailed, there were

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several avenues for demonstrating its scientific unreliability that could have been raised at that time. However, Applicant was not able to exclude reference to it entirely. As a result, the Canadian case significantly hampered Attorney Wise's jury argument that the State's theory was "impossible" since the State supposedly had at least one credible example where it had occurred previously and, unlike Dr. Scialli, Dr. Karch was not able to testify to that effect.

The Zipursky paper changes the dynamic entirely as it directly rebutted and discredited the Canadian case study so thoroughly that one of the associated publications was retracted. Considering the exhaustive analysis and emphatic conclusions of the Zipursky paper, and in light of the retraction, it is unlikely that the Canadian case would have been deemed a proper subject for testimony at Applicant's trial had it been available at that time. The Zipursky paper is particularly poignant because the authors noted they scoured the medical literature and could not find *any credible instance of lethal morphine toxicity solely due to transmission through breast milk despite use by "millions" of mothers over the years.* (See Applicant's Ex. 7 – Zipursky & Juurlink, The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, Clinical Pharmacology & Therapeutics (May 2020).) Zipursky concluded that other factors would have to be at play for this to occur including, most importantly, renal failure—precisely what Applicant established at the PCR hearing happened with L.G.

Each of the factors supporting a new trial are met. See *Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014). First, the Zipursky paper would likely change the outcome if a new trial occurred since *the State would have no longer have any other example case (or any scientific evidence at all for that matter) supporting its theory of the case.* Second, the Zipursky paper was published in 2020, long after Applicant's Criminal trial. Third, it could not have been discovered before trial for the same reason. Fourth, it is material to the issue of guilt or innocence since it

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directly contradicts the *mens rea* of extreme indifference to human life as required by the homicide by child abuse statute. The Zipursky paper is directly in line with the evidence and testimony Applicant presented at PCR. Finally, it is not merely cumulative or impeaching because, again, it directly contradicts the heart of the State's theory of the case that morphine toxicity could result in a child from a mother's breastfeeding alone.

Therefore, the Zipursky paper satisfies the standard for granting a new trial based on new evidence and is an independent basis for granting postconviction relief to Applicant.

The Court's Order also overlooks Attorney Wise's acknowledgement at PCR that the Zipursky paper's repudiation of the Canadian case would have been extremely helpful since the State's case was not a "slam dunk." (*Id.* at 42:20-8.) Although he tried to distinguish the Canadian case at trial, it was difficult to rebut because it "made it easier . . . for the jury to accept that if it happened in that case, it could have happened in this case." (*Id.* at 43:18-23.) He agreed it could have easily made a difference in the outcome if the State had not been permitted to refer to that case since it was "probably one of most significant facts." (*Id.* at 44:16-23.)

For all of these reasons, the elements for granting a new trial are met here. The Court should grant Applicant's motion to reconsider and grant Applicant's petition on this basis as well.

VII. The cumulative effect of Attorney Wise's errors constitutes a separate ground for granting postconviction relief.

The Court's Order of Dismissal errs by finding that South Carolina does not recognize the cumulative error doctrine. South Carolina appellate courts have not stated whether or not the cumulative error of counsel represents an independent basis for granting postconviction relief. *See Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002) ("Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina."); *see also State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985) (cumulation of errors

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warranted reversal, but the court also found each individual error caused prejudice), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Freeman*, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) (finding multiple errors, which were not prejudicial separately, could be prejudicial to deny an individual a right to a fair trial when they were viewed together).³

Here, the grounds raised by Petitioner in her Application and established through the evidence and testimony at the PCR hearing, as detailed herein, each independently warrant granting postconviction relief. However, to the extent the Court disagrees, at a minimum the cumulative effect of Attorney Wise's errors necessitates postconviction relief in the form of a new trial. Attorney Wise agreed at the PCR hearing that taking all of the deficiencies presented by Applicant together could have made a difference in the outcome of Applicant's trial. (PCR Day II Tr. at 53:22-54:2.)

Therefore, the Court should also grant Applicant's motion to reconsider in light of the prejudice caused by trial counsel's cumulative error, amend its Order to confirm that the cumulative effect doctrine is consistent with South Carolina law, and grant Applicant's petition for postconviction relief.

Conclusion

For the reasons set forth herein, as well as any additional memorandum submitted in support of these motions, and for the further reasons to be presented at oral argument, Applicant requests that this Court amend its Order dated May 8, 2023, and enter an order granting Applicant's

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³ The Fourth Circuit expressly recognizes cumulative error in the habeas context. *See Fisher v. Angelone*, 163 F.3d 835, 853 (4th Cir. 1998) (holding that ineffective assistance of counsel claims can be reviewed collectively, joining the "majority of our sister circuits that have considered the issue").

petition for postconviction relief, vacating her convictions and sentences, and remaining the matter to the trial court for a new trial.

Respectfully submitted,

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May 18, 2023

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Stephanie Irene Greene,	)	Case No.: 2019-CP-42-01605
S.C.D.C. No. 359489,	)	
	)	
Applicant,	)	
	)	STATE'S RETURN TO APPLICANT'S
v.	)	RULE 59(e), SCRCP MOTION
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The State now makes its return to Applicant's motion under Rule 59(e), SCRCP. In so doing, the State maintains all arguments previously presented in its pleadings, briefings, and at the evidentiary hearing, and all arguments advanced at all stages of this case. The State would respectfully reserve the ability to submit further briefing and reserve the opportunity to respond to any further briefing submitted by Applicant.

This matter is before this Court by way of an application for post-conviction relief (PCR) filed May 2, 2019. An evidentiary hearing was held at the Spartanburg County Courthouse on September 19-20, 2022. At the conclusion of the hearing, this Court requested post-hearing briefs. Both parties submitted their briefs. On January 27, 2023, this Court made a preliminary ruling denying relief and requested the State to draft a formal order. The State submitted a proposed order and this Court issued its Order of Dismissal on May 8, 2023. Applicant filed a motion pursuant to Rule 59(e), SCRE. The State makes its return to Applicant's motion.

Extreme indifference

Applicant argues this Court's order fails to appreciate the strength of Applicant's expert testimony to counter the element of extreme indifference. This is based on the idea that

Applicant herself would be unaware of any dangers of taking MS Contin while breastfeeding and that some doctors, at least the experts testifying at the PCR hearing, might find it safe to prescribe morphine while a patient was breastfeeding a child. It is further premised on the contention that morphine is generally safe and only an unexpected event, renal failure, caused the buildup of morphine in Victim.

However, the proof of Applicant's extreme indifference is rooted in her deliberate actions to hide her pregnancy and the birth of her child from the doctor prescribing her MS Contin and Klonopin, and her actions to hide her consumption of MS Contin, Klonopin, and several other medications from her pediatrician. The doctor that should have made the decision as to whether MS Contin was safe for Applicant to use while Applicant was pregnant and later breastfeeding Victim was Dr. Kovacs. Greene hid her pregnancy and birth from Dr. Kovacs when attaining the MS Contin prescription. She hid her use of MS Contin from Dr. Bridges, her pediatrician. See Greene, at 278, 814 S.E.2d at 504 ("Dr. Kovacs testified she would not have given Appellant the medication had she known about the pregnancy and Dr. Bridges testified that no mention of the morphine was made during Appellant's post-partum visit. Due to her non-disclosure, the record reveals that Appellant received an additional prescription for MS Contin and continued to breast feed [Victim]."). In case Applicant's lack of concern for Victim was in doubt, Victim had with therapeutic levels of Klonopin in her blood and the pill bottle with Klonopin warned: "Do not use if pregnant or suspect you are pregnant or are breastfeeding." Id. at 263, 814 S.E.2d at 503 n.5. Applicant obtained prescriptions for Klonopin from both Dr. Kooistra and Dr. Kovacs only five days apart from each other and about two weeks before Victim's death. The attempt to use two doctors years later to justify whatever internal calculus Applicant might have applied to

justify exposing Victim to these dangerous drugs fails to defeat the abundant evidence of Applicant's extreme indifference.

On direct appeal, the Supreme Court rejected the claim that insufficient evidence of extreme indifference was presented to the jury. The Court explained:

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.

Greene, 423 S.C. at 277, 814 S.E.2d at 503. The Supreme Court found:

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.¹ Nevertheless, Appellant failed to disclose this important information to any of her doctors.

The morphine addiction and concealment continued after Alexis's birth. . . . 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.

¹ Applicant's claim in footnote one in his motion that a mother could later be prosecuted for taking prescription medicine that she is lawfully receiving is meritless. In the instant case, Applicant was not taking the medicines lawfully; she withheld important information from her doctors so she could continue to take medications that would be unavailable to her for the child's safety if her doctors were fully informed. This constitutes the deliberate and intentional conduct establishing extreme indifference. State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002) ("A parent has a specific and undelgable duty to serve the best interests of her child and should make every effort not to knowingly place her child in harm's way.")

Greene, 423 S.C. at 278, 814 S.E.2d at 504. The Supreme Court also noted the morning of Victim's death, Applicant omitted morphine from the list of her prescriptions, even when confronted with the pill bottle found in her bedroom. She later admitted she hid her pregnancy because she was afraid they would take her off the morphine. Id. at 278-79, 814 S.E.2d at 504.

The source of Applicant's fear that she would not be allowed to take morphine while pregnant is perhaps rooted in the events of her prior pregnancy. Applicant first became a patient of Dr. Kooistra in 2006 when she was already pregnant. Dr. Kooistra testified she tries to avoid prescribing medications of any sort during pregnancy. She only prescribed seizure medicine and "limited quantities" of Darvocet during Applicant's 2006 pregnancy. Tr. pp. 209-10.

At trial, 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.

Tr. p. 235, lines 4-9.

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.

Tr. pp. 404-05.

Investigator Gary spoke with Applicant about her omitting information from her doctors and 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." Tr. pp. 293-94; p. 302 (direct quote, Tr. p. 294, lines 22-23).

Toward the end of the interview, Applicant broke down crying and admitted the doctors would stop prescribing morphine to her if they knew about her pregnancy or other medications. Applicant admitted she and her husband discussed the possibility Victim's death could be from the drugs. Tr. pp. 299-301.

At the PCR hearing, Mr. Wise opined that Applicant's expert testimony would be beneficial to challenge the extreme indifference element of homicide by child abuse because in Mr. Wise's view, renal failure would not be a normal or expected intervening circumstance.² However this does not impact the prosecution's proof of the intent element because Applicant took morphine outside of her doctors' care, hiding her pregnancy, hiding that she was breastfeeding, and even hiding the child's death, from the doctor prescribing her morphine. Applicant took multiple medications that bore warnings about taking the medication during pregnancy or while breastfeeding, including Klonopin, for which Victim had therapeutic levels.

² Note, Mr. Wise's hindsight observations do not prevail under the Strickland standard. Brown v. Ornoski, 503 F.3d 1006, 1013 (9th Cir. 2007) (explaining despite trial counsel testifying he would do things differently given a chance, "We do not judge counsel's actions through the twenty-twenty lens of hindsight . . . and recognize there are many different ways to try a case[.]") (citations omitted); McAfee v. Thurmer, 589 F.3d 353, 356 (7th Cir. 2009) (commenting on counsel's hindsight reflection she should have taken a different approach, the Court explained, "[T]his kind of reflection after the fact is irrelevant to the question of ineffective assistance of counsel").

Further, Applicant attempted to hide her use of morphine from the deputy coroners, evidencing consciousness of guilt. Mr. Wise's hyperbole, that the experts' testimony would "negate" the intent element is an inaccurate assessment of the standard applied at the directed verdict stage. "[O]ur duty is not to weigh the plausibility of the parties' competing explanations. Rather, we must assess whether, in the light most favorable to the State, there was substantial circumstantial evidence from which the jury could infer [the defendant]'s guilt." State v. Larmand, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015); State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002) (When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight.).

"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). "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." State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). 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)).

A person's knowing exposure to a child in the person's care to dangerous drugs outside a doctor's care may constitute extreme dangerousness. State v. Phillips, 416 S.C. 184, 196, 785

S.E.2d 448, 454 (2016) (finding “[i]t is common knowledge that giving another person, particularly a toddler, drugs not prescribed to him is inherently dangerous”). “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).

The Supreme Court’s holding in the instant case remains true for this PCR: “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.**” State v. Greene, 423 S.C. 263, 277, 814 S.E.2d 496, 503 (2018) (emphasis added). Further, the Court’s footnote to this paragraph observed Victim also tested positive for Klonopin and the pill bottle found in Greene’s bedroom “specifically instructed, ‘Do not use if pregnant or suspect you are pregnant or are breastfeeding.’” Id. at 263, 814 S.E.2d at 503 n.5.

At the PCR hearing, Dr. Scialli admitted the following on cross-examination:

Q: Tell me about the studies where mothers have taken MS Contin for several weeks and they study to see how much morphine accumulated in a child that was breastfeeding.

A: I haven’t found any studies that looked at that question.

Q: What studies are there out there that, for a period of 24 days or longer, a woman took 90 milligrams of MS Contin a day, and they tested to see what the result was with the breast feeding infant?

A: I don’t know of any.

PCR day 1 Tr. p. 120, lines 15-25.

It was not for Applicant to calculate the actual danger of taking morphine and other medications without a doctor’s knowledge that she was breastfeeding – she needed to make this

information known to the doctors prescribing morphine and other potentially dangerous narcotics. Yet she deliberately withheld this information knowing that for the sake of the baby's health she would lose prescriptions to these medications. State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002) ("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."). In withholding this information from her doctors, Applicant did not need to anticipate that renal failure might cause the buildup of morphine in her child to still be guilty of homicide by child abuse. See generally State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957) ("We think the evidence was sufficient to sustain a verdict of murder. The conduct of the driver was such as to imperil human life. Although it may be fairly assumed there was no actual intent to kill or injure another, there is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice."). This Court correctly assessed the considerable evidence of extreme evidence in this case in finding Applicant was not prejudiced by counsel not calling experts like the two doctors that testified at the PCR hearing.

This Court correctly found Applicant was not prejudiced by any deficiency of counsel.

Applicant contends this Court misapplied its prejudice analysis in the instant case, relying on Ryals v. State, ___ S.C. ___, 886 S.E.2d 239 (Ct. App. 2023). In Ryals, the defendant appeared in prison garb and counsel neither objected nor moved for a continuance until the defendant had street clothes. The PCR court found counsel's performance deficient, but found no prejudice in light of overwhelming evidence of guilt. The Court of Appeals reversed, finding the PCR court did not compare the "impact of Ryals's forced appearance at trial in prison clothing

against the strength of the State's case against him." *Id.* at ___, 886 S.E.2d at 242. However, in the present case, this is precisely what this Court does in its Order of Dismissal. This Court balanced the benefit of the experts' testimony with some of the shortcomings and dangers inherent in the experts' testimony, and balanced that against the State's evidence, including the considerable evidence of Applicant's extreme indifference, the lack of challenge to the idea that all the morphine Victim consumed was through breast milk, and the unchallenged level of morphine found in the child.³ Contrary to Applicant's contention, this Court in its Order of Dismissal clearly contemplates the record as a whole in assessing whether Applicant met her burden of proving prejudice.

Ryals also notes for evidence to be categorically overwhelming so as to preclude finding prejudice, "such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so the Strickland standard of a reasonable probability the factfinder would have a reasonable doubt' cannot possibly be met."

In the instant case, there is *unchallenged physical evidence* that Victim had a lethal level of morphine at the time of death at 46 days old. Applicant *confessed* she was addicted to morphine and lied to her doctors to avoid losing her proscriptioin to morphine. No evidence was presented that the morphine in Victim came from any other source than Victim's breastmilk.

³ Both experts at the PCR hearing admitted that the lethal morphine level may have caused the death even though they believe renal failure was involved. "A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased." State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008) (citation omitted). "The defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased." *Id.* Further, Respondent would note that morphine does not need to have caused renal failure to still be considered a contributing cause of death. For instance, in State v. Riley, 219 S.C. 112, 116, 64 S.E.2d 127, 129 (1951), Riley shot a man who later came down with typhoid fever and died. The conviction was upheld on the basis that the shooting was a contributing cause of death even though obviously the shooting did not cause Riley to contract typhoid fever.

The record is simply replete with her furtive behavior to maintain her access and consumption of opioids which included ensuring that Applicant and Victim remained outside a knowledgeable doctor's care. The expert testimony presented at the PCR hearing maybe presents a potential defense, but one that is not supported by physical evidence. No physical evidence was presented to support the belief Victim suffered renal failure. The experts' diagnosis is ultimately based of Applicant's hearsay reports of cold-like symptoms Victim had roughly two days before Victim's death. Consistent with Ryals, this Court properly determined that Applicant was not prejudiced by the deficiency of counsel that this Court found.

Dr. Karch's testimony

Applicant attempts to establish prejudice by attacking the quality of Dr. Karch's testimony, attempting to argue that he conceded the State's whole theory of the case. This simply did not happen. Dr. Karch testified as follows:

Q: Could the baby have ever gotten a morphine level that high from breast milk?

A: Yes.

Q: How?

A: I don't know, but I have one case here where a baby got an 84 nanogram blood level from a mother on morphine.

Q: And did that baby die?

A: No.

Q: All right. Is there any reported case of a baby dying from breast milk from the mother?

A: No.

Tr. p. 504, line 19 – p. 505, line 4. So Dr. Karch testified he was aware of a case where the morphine level was that high. It was not a theory, but a case he was apparently aware of. It was

a question he was required to answer truthfully. However, Dr. Karch made clear he did not know how the level was that high. Mr. Wise ensured that the jury understood that there was no reported case of a child dying from breast milk. This is hardly conceding the State's case.

Later, Dr. Karch testifies as follows:

Q: All right. Is there anything in this case in your review of everything and your knowledge that leads one to believe that breast milk contains some amount of morphine that caused the death of this child?

A: Only in the sense that we know that there is morphine in breast milk or women that are using morphine. We know it isn't very much. And if you see a whole lot, they are either A, you have a -- a mother that's misleading you, or B, you don't have the genetic ability to clear it.

Tr. p. 513, lines 8-16. Again, this is hardly conceding the State's case; instead Dr. Karch is asserting that the only way a number could get this high is the child's lack of genetic ability to clear the morphine, which is not dissimilar to Dr. Scialli's claim of renal failure as an extraordinary circumstance negating the intent element.

Dr. Karch noted articles that indicate morphine consumption by a breast feeding mother is not dangerous to the breast-fed child. Tr. pp. 494-95. Dr. Karch reiterated that not very much morphine is found in breastmilk. He confirmed no medical group advises against taking morphine while breastfeeding, and he was unaware of any case in which an infant received a lethal dose of morphine through breastmilk. Tr. pp. 513-14.

Dr. Karch also testified to his impressive credentials at trial. For instance, he reviewed every drug-related death in San Francisco for a ten year period while an assistant medical examiner with the San Francisco Medical Examiner's Office. Dr. Karch advised he is published in toxicology and published The Pathology of Drug Abuse, 4th edition. Tr. pp. 487-89.

Dr. Karch testified about tests law enforcement could have run and challenged aspects of how testing was performed, something detailed further in the State's pre-trial and post-trial briefs. Tr. pp. 495-96; pp. 501-03; pp. 511-13. Dr. Karch agreed with trial counsel's calculations that Applicant would need to take 125 times more morphine to reach the level in the present case than a woman in a study who took five milligrams of morphine, resulting in her infant receiving four nanograms of morphine. Tr. pp. 507-08.

In comparison, Dr. Scialli did not claim that morphine was ingested from any other source than Applicant's breastmilk, he just claimed that because of renal failure, the morphine was not excreted as expected, and therefore it built up to lethal levels. Applicant's statement in the motion that Dr. Scialli testified that the morphine could not reach lethal levels solely from breast milk is misleading. All the morphine came from breast milk, it just was not excreted at a rate Dr. Scialli expected. In fact, Dr. Scialli admitted that the morphine level found in Victim could have led to respiratory depression and Victim's death. PCR 1 Tr. p. 84, lines 1-14. By Applicant's measure, Dr. Scialli conceded the State's case. So did Dr. Twombly when she admitted that a lethal amount of morphine may accumulate in a breastfeeding child in twenty-four hours. PCR1 Tr. p. 213, lines 7-18. "A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased." State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008) (citation omitted). "The defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased." Id. A jury hearing Applicant's experts admit that morphine could be the cause of death, after hearing the State's evidence as well, would convict. Therefore, this Court correctly found Applicant was not prejudiced by the failure to call experts like the doctors testifying at the PCR hearing.

No Rule 702, SCRE objection

Applicant alleged in his pleadings that Mr. Wise was ineffective for failing to object to the prosecution's experts testifying to a reasonable degree of certainty that the morphine levels in Victim came through breastmilk. Trial counsel, prior to trial, discussed whether the Solicitor would present an expert that would opine that the morphine in Victim came through breast milk, and indicated he would challenge that opinion, if offered, under Rule 702, SCRE. No expert provided that opinion at trial, which Mr. Wise noted at the PCR hearing. Mr. Wise explained he was prepared to object if an expert offered that opinion, but it was never asked. PCR2 pp. 46-47. Applicant claims that witnesses provided the opinion to a reasonable degree of certainty that the morphine levels in Victim came from breastmilk. However, that is simply inaccurate. Dr. Eagerton testified about some symptoms he would expect to see if Victim suffered from a slow build-up of morphine. He discussed how morphine and drugs in general are metabolized. But he did not opine that the entire morphine level found in Victim came through breast-milk. Tr. pp. 358-62. Dr. Wren also did not provide this opinion. Dr. Wren discussed studies about morphine levels found in children that breastfed from mothers taking morphine. However, Dr. Wren was blunt about the fact that he did not know how the morphine got in Victim, "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." Tr. p. 444, lines 9-11. Counsel was not ineffective as no witness testified to a reasonable degree of certainty that the morphine found in Victim came through breastmilk.

Leading questions

Applicant seeks for this Court to find Applicant was prejudiced by Mr. Wise not objecting to several leading questions. This Court found Applicant was not prejudiced by Mr. Wise's failure to object to leading questions. In his motion to amend, Applicant offers several

examples, some of which the witness did not answer in no/yes answers despite the questions being leading. Others concern facts not in dispute. For instance, Applicant points to two questions posed to Dr. Wren. Tr. p. 444, lines 2-16. The first question simply restates Dr. Wren's opinion as to cause of death – Dr. Wren knew his own opinion as to the cause of death. The Solicitor would inevitably elicit this testimony by restating the question as a direct question. The follow-up question, whether the morphine could have come from breast milk, despite being leading, did not result in prejudice because Dr. Wren does not answer the question with a yes or no answer, but instead he essentially answered that he does not know. This Court correctly found Applicant was not prejudiced to the extent Mr. Wise could be said to be deficient for failing to object to leading questions. See Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (“Burnett does not point out any specific instances and explain how those instances likely would have resulted in a different trial outcome. It appears that the leading questions could have been simply rephrased. In any event, assuming there were instances where objections should have been made, Burnett has failed to show how they likely prejudiced his defense.”); United States v. Bosch, 914 F.2d 1239, 1246 (9th Cir. 1990) (rejecting ineffective assistance claim: “Bosch, however, does not maintain that any of this testimony would not have been admissible had it been elicited through nonleading questions.”).

Synergy

Applicant argues to alter or amend this Court's findings as to testimony presented on the synergistic effect of taking multiple medications. For the most part, the prosecution's experts only stated that the medications “could” have a synergistic effect with each other. Mr. Wise agreed that none of the witnesses stated that morphine and any particular drug did create a synergistic effect. PCR 2 Tr. p. 82, lines 7-11.

Mr. Wise testified as follows about the synergistic effect issue:

Q: [W]hich number in the toxicology reports was the number that everyone was most concerned with at trial?

A: Everybody was most concerned with the morphine level. . . . I mean, I think when Dr. Wren was attempting to talk about synergy finally said, I might as well say morphine death because the number was there.

Tr. p. 81, lines 15-24. Mr. Wise further commented, “[H]e wasn’t talking about synergy. He was talking about the morphine was lethal.” PCR 2 Tr. p. 82, lines 2-6. The solicitor did not argue or mention to the jury any “synergistic” effect of the drugs during closing argument.

Trial counsel was not ineffective for failing to challenge the “synergistic effect” of the multiple-medications. Counsel convinced the trial judge that to tell the jury the cause of death needed to be a schedule II drug and morphine was the only schedule II found in the victim. Notably, counsel convinced the judge that the “synergistic effect” was insufficient for the jury to convict appellant of homicide by child abuse in this case. “It would be absurd to upset a verdict upon a speculation that the jury did not do their duty and follow the instructions of the court.” Graham v. United States, 231 U.S. 474, 481 (1913); State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (noting the jury is presumed to follow the law as instructed to them in the trial court’s jury charge).

Further, Counsel explained that the number everyone was concerned with at trial was the lethal level of morphine in Victim’s blood. PCR2 Tr. pp. 81-82. It simply strains credulity that the jury was ready to acquit Applicant of any charges based on proof relating to morphine, but only convicted based on the synergistic effects of drugs when no other medications were present above therapeutic levels. See Fisher v. Angelone, 163 F.3d 835, 849 (4th Cir. 1998) (finding even though counsel failed to state grounds for his objection to admission of tapes, “[t]he tapes

were but a small part of the prosecution's overwhelming case against Fisher. . . . In sum, we cannot say that, but for counsel's failure to state grounds for his objection to the tapes, there is a reasonable probability that the result of the proceeding was fundamentally unfair or unreliable."'). Accordingly, this Court should deny the 59(e) on this basis.

Applicant complains that Mr. Wise failed to have a discussion with Dr. Karch about the synergy issue, relying on a pretrial discussion Mr. Wise with the trial court. The trial court suggested Mr. Wise to consult with Dr. Karch. Applicant then makes a claim, without citation, that Mr. Wise **never** reviewed the concept of synergistic effects of medication with Dr. Karch. Respondent's review of the PCR transcript fails to reveal any evidence or testimony that Mr. Wise **never** consulted with Dr. Karch on the topic, even during the multi-day trial. It is logical that Mr. Wise likely consulted with Dr. Karch during trial or a recess. So this is an assumption by Applicant made without evidence.

Ineffective Assistance of Appellate counsel

Applicant asks this Court to address a claim of ineffective assistance of appellate counsel. Applicant contends that Mr. Wise should have raised a claim to the Supreme Court that the conviction for homicide by child abuse should be set aside as opposed to the conviction for involuntary manslaughter. Missing from the analysis is any authority to support that argument would be successful on appeal or that authority exists that suggests the issue would likely be successful. Not Applicant did not elicit any testimony on this claim at the PCR hearing.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues

according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .”)).

Applicant must show that appellate counsel’s performance was deficient and that he or she was prejudiced by the deficiency. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

In the present case, Mr. Wise presented four issues. The first two, issues concerning directed verdict, if successful, would have resulted in a functional acquittal of all the charges. Justice Few dissented from the majority on the issue of causation, evidencing reasonable strategy from appellate counsel in raising these issues. Appellate counsel argued a double jeopardy violation under the federal constitution, and in turn, the Supreme Court vacated the involuntary manslaughter sentence under state law by adopting a new common-law rule. The fourth issue concerned the procedure for closing arguments and presented a viable issue at the time of briefing and argument, but was mooted by the Supreme Court’s substituted opinion in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018).

The lack of authority from Applicant in his motion makes his proposed issue to raise weaker than those issues Mr. Wise raised. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (holding “that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se.”). The Supreme Court in Teamer declared the following:

This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law. E.g., Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (“We have never required an attorney to be clairvoyant or anticipate changes in the law. . . .” (citing Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765 (“This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.”).

Id.; see Kornaharens v. Evatt, 66 F.3d 1350 (4th Cir. 1995) (holding “the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law.”).

Mr. Wise showed reasonable professional judgment in the issues he selected to raise. Applicant on the other hand, has failed to show that the issue contemplated is clearly stronger than the issues raised by Mr. Wise. Nor has Applicant shown a reasonable probability of a different result. Mr. Wise did not provide ineffective assistance of counsel on appeal.

Canadian study (after-discovered evidence)

Applicant restates her argument for her after-discovered evidence claim concerning the retraction of the Canadian study. Ironically, it was the defense that primarily elicited testimony concerning the study to form the argument that a genetic defect – an extraordinary circumstance – could be the cause of the morphine buildup in Victim.

The retraction of the Canadian study followed the publication in May 2020 of a paper criticizing the study. Zipursky, et. al. The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, 108(5) Clinical Pharmacology & Therapeutics (May 2020). The conclusion from that article is as follows:

Neonatal opioid toxicity resulting from maternal codeine use during breastfeeding could only arise from a highly improbable combination of factors: a high maternal codeine dose,⁴ unusually high concentrations of opioids in breast milk, a large volume of neonatal milk intake, and – critically – profoundly impaired neonatal opioid clearance. The unlikely occurrence of such a scenario is consistent with the paucity of reports of neonatal opioid toxicity, despite the use of these drugs by millions of nursing mothers over the past two decades.

This should not be viewed as an endorsement of opioid use while breastfeeding. Codeine in particular is an unpredictable analgesic choice given its variable conversion to morphine, while other opioids such as oxycodone carry greater abuse liability. Acetaminophen and non-steroidal anti-inflammatory drugs are generally sufficient for the management of postpartum pain. When opioids are required, short courses⁵ should not be viewed as hazardous to breastfeeding neonates.

Id. (emphasis added). The conclusion underscored that short-term use of morphine should not be viewed as dangerous, while in the present case, Victim was exposed to morphine for twenty-four days or more of her forty-six day life.

On the balance, the Canadian study was exploited by the defense, rather than the prosecution. Counsel testified part of his strategy was to argue that the State should have tested for any genetic defects and failed to, and he used the Canadian study to explain the high number

⁴ Dr. Scialli admitted he did not know how much morphine Applicant was taking at any given time during Victim's lifespan. PCR 1 Tr. pp. 95-97.

⁵ In the present case, Applicant filled the last prescription for MS Contin twenty-four days before Victim's death and consumed in excess of an average of three pills, or 90 mg of MS Contin a day based on missing pills at the time of death. The present case was not an example of a "short course."

and explain that a genetic defect would “prove that through no fault of [Applicant], that the number got that high.” PCR 2 Tr. pp. 68-69 (direct quote p. 69, lines 11-13). He agreed Dr. Karch used the Canadian study to argue a genetic defect could explain the buildup of morphine. PCR 2 Tr. p. 77, line 14 –p. 78, line 14.

An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983).

The retraction is not evidence sufficient to grant a new trial based on after-discovered evidence. Most obvious is the “new evidence” is not material to guilt or innocence. Applicant’s guilt is not dependent or even influenced by whether or not the child in Canada died as concluded by the Canadian study. Further, the retraction is merely impeaching. Johnston v. Belk-McKnight Co. of Newberry, 188 S.C. 149, 158, 198 S.E. 395, 399 (1938) (“[I]mpeaching must mean that which is outside the evidence already given, and impeaches that evidence; it may be by attacking the character, the motives, the integrity, or veracity of those who gave the testimony.”).

Additionally, the conclusion in the Zipursky paper confirms that high dose, long-term use of opioids by breast-feeding mothers may be dangerous. This underlines how Applicant avoided taking morphine and breastfeeding outside the care of doctors. She chose to sail

unchartered and dangerous waters without a doctor supervision. As a result, the child died with lethal levels of morphine. This is homicide by child abuse.

Moreover, during trial the study was primarily used by Mr. Wise during cross-examination of State witnesses' and during Dr. Karch's testimony to suggest an unexpected genetic defect could be the reason for the high morphine level. The State was not using the study in its case in chief. This Court should deny the motion to alter or amend its analysis of this allegation.

Cumulative error doctrine

Applicant cites Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998) under the mistaken belief that the Fourth Circuit adopted the cumulative error doctrine and in so doing, was following the majority of circuits. However, Fisher stands for the polar opposite, rejecting the cumulative error doctrine, as has the majority of the federal circuit courts. The Fourth Circuit explained the following:

Next Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be constitutional error, see Lockhart v. Fretwell, 506 U.S. 364, 369 n.2, 113 S.Ct. 838, 122 L.E.2d 180 (1993) ("Under [Strickland], an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates: (1) deficient performance *and* (2) prejudice." (emphasis added)), it would be odd, to say the least, that those same actions, when considered collectively, deprived Fisher of a fair trial.

Id. at 852.

The Fourth Circuit noted its own precedent that examined each claim of ineffective assistance of counsel individually rather than collectively. Id. (citations omitted). The Fourth Circuit concluded, "To the extent this Court has not specifically stated that ineffective assistance claims, like claims of trial court error, must be reviewed individually rather than collectively, we

do so now. In so holding, we are in agreement with the majority of our sister circuits.” Id. at 852-83 (citations omitted). The majority rule among the federal circuits, including the Fourth Circuit, is logical. If an individual claim of ineffective assistance of counsel fails on either prong, then no constitutional deprivation occurs. Adding up claims that fall short of a constitutional error individually to reach some unknown calculus of error makes little sense. See Hunt v. Smith, 856 F.Supp. 251, 258 (D. Md. 1994) (“The fact that many claims of counsel error are pressed does not alter fundamental math – a string of zeros still adds up to zero.”). This Court correctly found that no deprivation occurred individually or collectively.

CONCLUSION

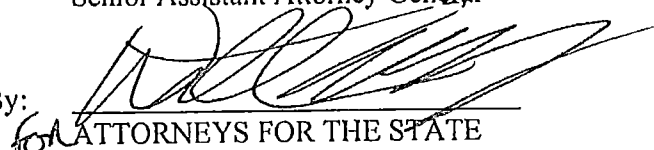
For the foregoing reason, Respondent respectfully submits this Court should deny the Rule 59(e), SCRE motion.

Respectfully submitted,

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By:



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June 5, 2023

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Stephanie Irene Greene,
S.C.D.C. No. 359489,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE SEVENTH JUDICIAL CIRCUIT

)
) Case No.: 2019-CP-42-01605
)

) **ORDER DENYING APPLICANT'S**
) **RULE 59(e), SCRCF MOTION**
)
)
)
)

This matter comes before this Court by Applicant Stephanie Greene's May 18, 2023 Motion to Reconsider and Amend its May 6, 2023 Order denying post-conviction relief. The Respondent through Assistant Attorney General David Spencer made a Return to the motion dated June 5, 2023. On July 18, 2023, a virtual hearing was heard before this Court on the motion. The Applicant was present and represented by counsel and Blake T. Williams argued the motion on her behalf. The Respondent was represented Deputy Attorney General Donald J. Zelenka due to Mr. Spencer's unavailability due to illness.¹

After, once again, reviewing the transcripts and considering the arguments offered by both sides, the present motion is not granted. On October 3, 2023, the Court made initial findings and requested the prevailing party to prepare a proposed formal order denying the motion. This Order follows.

In her motion, the Applicant raised the following assertions why a motion to reconsider and amend the judgment denying post-conviction relief should be granted.

¹ This Court has been informed that Mr. Spencer died on October 16, 2023.

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1. The Court's Order of Dismissal correctly recognizes that the testimony of Dr. Scialli and Dr. Twombly was compelling and that trial counsel was ineffective. Motion, p. 3.
2. The Court should reconsider its finding that Applicant suffered no prejudice from trial counsel's deficient performance in failing to present the alternative cause of renal failure.
 - A. Respectfully, the Court's findings on prejudice regarding the alternative cause of death cannot be reconciled. Motion, p. 4-9.
 - B. The Court overlooked Applicant's argument about the prejudicial effect of Dr. Karch's testimony. Motion, p. 9-10.
 - C. The Court overlooked Applicant's argument about the prejudicial effect of trial counsel's failure to seek to have the testimony of the State's experts excluded or restricted. Motion, p. 10-11.
3. The Court should reconsider its finding that Applicant suffered no prejudice from trial counsel's deficient performance in failing to object to leading questions. Motion, p. 11-14.
4. The Court should reconsider its finding that Applicant suffered no prejudice from trial counsel's failure to challenge the synergistic effect questions. Motion, p. 14-17.
5. The Court overlooked Applicant's ineffective assistance of appellate counsel argument, which represented an independent basis for granting post-conviction relief. Motion, p. 17-19.
6. The Court should reconsider its finding that the Zipursky study does not constitute new evidence warranting a new trial. Motion, p. 19-20.
7. The cumulative effect of Attorney Wise's errors constitutes a separate ground for granting post-conviction relief. Motion, p. 21-22.

Motion to Reconsider and Amend, 1- 23.

SUMMARY OF DECISION

This Court finds certain salient facts underlie its decision. First, the material facts presented during the trial that relate to the medical issues of this case and the facts presented as part of this PCR that relate to the medical issues are not in conflict but the proper conclusions to be drawn from those facts are in conflict. Second, this Court has only the trial transcript from which to view the credibility of the medical testimony presented during the trial. The medical

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testimony - witnesses this Court was able to hear and view - presented during the PCR hearing, as stated in the prior order, was believable and credible. Order of Dismissal, p. 5-6, 8. Trial counsel Rauch Wise's PCR testimony also was believable and credible. Order of Dismissal, p. 6.

While the Applicant reserved all prior arguments, the focus of review for purposes of the present motion has been on the issue involving this Court's finding that applicant failed to meet her burden of proof as to the element of prejudice. This Court viewed the Sixth Amendment prejudice prong issue as her strongest argument and the one that needed the most clarity.

This Court, as it did in its original order, believes that the PCR witnesses established a highly persuasive alternative theory as to the cause of the child's death related to renal failure. This Court, again, finds that it was error for trial counsel to have not presented such a theory and therefore meet its burden of proof to show Sixth Amendment deficiency under Strickland v. Washington, 466 U.S. 668(1984). See Order of Dismissal, p. 8.

As further noted in the original order, this Court finds that the synergistic effect of drugs is not supported from the trial or PCR records. Order, p. 10, n. 2. This issue was adequately addressed in its earlier Order at page 12. Further, this Court found that the State had not defended the alleged effect deriving from the findings of forensic pathologist, Dr. Wren, that the cause of death was respiratory failure due to morphine toxicity and additional effects of other medications found in the victim's blood.² However, most importantly, the Applicant failed to

² This Court finds that the synergistic effect of drugs is not supported from the trial or PCR records. This Court finds credible the testimony of Dr. Scialli that there is a lack of lack of medical evidence to support a "synergetic" drug theory. This Court is aware that the State argued in its Post-Hearing Brief before this Court, pages 38-40 concerning the evidence related to synergistic effect. Dr. Scialli testified that none of the medications have a synergistic effect with morphine and that no medical literature supports a conclusion that any of the drugs had a synergistic effect on morphine. PCR 1, p. 74-78. For the most part, the prosecution's experts only stated that the medications "could" have a synergistic effect with each other. See Tr.p. 260, l. 5-15 (Bell); Trp. 322, l. 2-13, 328, 341 (Kotecha); Tr.p. 350-351, 386, 390-91 (Eagerton); Tr.p. 433, 444 (Wren). Mr. Wise agreed that none of the witnesses stated that morphine and any particular drug did create a synergistic effect. PCR 2 Tr. p. 82, lines 7-11.

prove deficiency and prejudice under Strickland the in light of the limiting instruction given in this case that the jury had to find that the cause of death needed to be from a schedule II drug and morphine was the only schedule II drug found in Victim. Tr. p. 590; p. 592; PCR 2 Tr. p. 83.

Again, as found in the prior Order, this Court will not alter or change its view that the prejudice element was not met. Order of Dismissal, p. 9-11. This Court acknowledges that applicant's PCR presents substantial arguments as to the issue of prejudice. This Court reads the State's analysis as focusing on "extreme indifference" and the facts surrounding the applicant's deceitful use of morphine while she was pregnant. The facts underlying the applicant's

Mr. Wise testified as follows about the synergistic effect issue:

Q: [W]hich number in the toxicology reports was the number that everyone was most concerned with at trial?

A: Everybody was most concerned with the morphine level. . . . I mean, I think when Dr. Wren was attempting to talk about synergy finally said, I might as well say morphine death because the number was there.

Tr. p. 81, lines 15-24. Mr. Wise further commented, "[H]e wasn't talking about synergy. He was talking about the morphine was lethal." PCR 2 Tr. p. 82, lines 2-6.

Mr. Wise successfully persuaded the trial court to charge that the cause of death needed to be morphine coming through breastmilk – the trial court admonished the jury that the cause of death needed to be from a schedule II drug and morphine was the only schedule II drug found in Victim. Tr. p. 590; p. 592; PCR 2 Tr. p. 83. Mr. Wise testified as to his lack of objection: "And, you know, I could make an argument as to how that impacted it. But one thing when you talk about the synergistic effect, the jury charge was such that the State had to prove there was an excessive amount of a schedule II drug . . ." PCR 2 Tr. p. 49, lines 8-21. Mr. Wise noted morphine was the only schedule II drug. PCR 2 Tr. p. 49, lines 18-21. Solicitor Barnette, in his closing argument, did not argue or mention any synergistic effects of morphine and the other substances found in Victim, seemingly abandoning it as a theory of causation. Solicitor Barnette argued during closing that Dr. Wren looked for a cause of death "because people want answers to those questions. They want to know why this baby died. Well, he found a reason why. It was the morphine that she gave through her breast milk to [Victim]." Tr. p. 568, lines 5-10.

This Court finds Mr. Wise was not deficient on this limited issue. Order, p. 12. Because he successfully persuaded the trial court to give a special instruction specifying that morphine was the cause of death, Mr. Wise nullified the prospect of synergistic effect as the cause of death. Mr. Wise observed the morphine level was the main focus of the parties at trial and it was the only drug within lethal levels – well above lethal levels actually. Mr. Wise did not render deficient performance in handling the issue and Applicant was not prejudiced due to the trial court's instructions and the limited testimony on the matter.

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obtaining and using morphine while pregnant are very significant and highly probative to the present PCR and were the same at trial. The applicant argues that such facts do not lead to the necessary *mens rea*. This Court disagrees with the applicant.

While the PCR medical testimony supports a conclusion beneficial to applicant's legal analysis of the medical issues in this case, the trial transcript and the State's position as to "extreme indifference" are supported in the records before this Court.³ Moreover, and as discussed herein (below) the Supreme Court (the direct appeal of the applicant's trial) has examined the underlying facts. This Court, agreeing with the Supreme Court, does not view the facts underlying the criminal case, as being in dispute. Given the Supreme Court's factual analysis and, more importantly, the majority's medical analysis when it rejected the dissent's position, this Court, even when considering the Court of Appeals' opinions offered by the applicant,⁴ this Court cannot find that the applicant has met her burden of proof of prejudice.

Applicant also asserts that trial counsel's failure to seek to exclude the testimony of the State's expert witnesses was error and, by not doing so, she was denied a valid issue on appeal. This issue was raised in the motion, p. 1-11. This Court views the arguments as substantial primarily due to the convincing testimony of the applicant's medical testimony during the PCR

³ Applicant's claim in footnote 1 in his motion that a mother could later be prosecuted for taking prescription medicine that she is lawfully receiving is meritless. In the instant case, Applicant was not taking the medicines lawfully; she withheld important information from her doctors so she could continue to take medications that would be unavailable to her for the child's safety if her doctors were fully informed. This constitutes the deliberate and intentional conduct establishing extreme indifference. State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002) ("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.")

⁴ Greene v. State, 440 S.C. 165, 889 S.E.2d 636 (Ct. App. 2023) (trial counsel's failure to request limiting instruction regarding defendant's prior conviction was deficient performance and prejudiced the defendant); Washington v. State, 440 S.C. 550, 891 S.E.2d 668 (Ct. App. 2023), reh'g denied (Sept. 21, 2023) (petitioner's trial counsel performed deficiently by failing to contemporaneously object to solicitor's statement during closing argument concerning petitioner's "pattern of robbing old folks, intimidating old folks, kidnapping old folks, holding them up[,] as element of claim of ineffective assistance and was prejudiced by trial counsel's failure to contemporaneously object to solicitor's statement, and thus failure amounted to ineffective assistance).

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presented that the morphine in Victim came from any other source than Victim's breastmilk. The record is simply replete with her furtive behavior to maintain her access and consumption of opioids which included ensuring that Applicant and Victim remained outside a knowledgeable doctor's care. The expert testimony presented at the PCR hearing maybe presents a potential defense, but one that is not supported by physical evidence. No physical evidence was presented to support the belief Victim suffered renal failure. The experts' diagnosis is ultimately based of Applicant's hearsay reports of cold-like symptoms Victim had roughly two days before Victim's death. Consistent with Ryals v. State, 439 S.C. 230, 886 S.E.2d 239 (Ct. App. 2023), this Court properly determined that Applicant was not prejudiced by the deficiency of counsel that this Court found. Order, p. 7-11.

Dr. Karch's testimony

Applicant attempts to establish prejudice by attacking the quality of Dr. Karch's testimony, attempting to argue that he conceded the State's whole theory of the case. Motion, p. 9-10. This simply did not happen. Dr. Karch testified as follows:

Q: Could the baby have ever gotten a morphine level that high from breast milk?

A: Yes.

Q: How?

A: I don't know, but I have one case here where a baby got an 84 nanogram blood level from a mother on morphine.

Q: And did that baby die?

A: No.

Q: All right. Is there any reported case of a baby dying from breast milk from the mother?

A: No.

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Tr. p. 504, line 19 – p. 505, line 4. Dr. Karch testified he was aware of a case where the morphine level was that high. It was not a theory, but a case he was apparently aware of. It was a question he was required to answer truthfully. However, Dr. Karch made clear he did not know how the level was that high. Mr. Wise ensured that the jury understood that there was no reported case of a child dying from breast milk by his examination of Dr. Karch's limited knowledge. This is hardly conceding the State's case.

Later, Dr. Karch testified as follows:

Q: All right. Is there anything in this case in your review of everything and your knowledge that leads one to believe that breast milk contains some amount of morphine that caused the death of this child?

A: Only in the sense that we know that there is morphine in breast milk or women that are using morphine. We know it isn't very much. And if you see a whole lot, they are either A, you have a – a mother that's misleading you, or B, you don't have the genetic ability to clear it.

Tr. p. 513, lines 8-16. Again, this is hardly conceding the State's case; instead Dr. Karch is asserting that the only way a number could get this high is the child's lack of genetic ability to clear the morphine, which is not dissimilar to Dr. Scialli's claim of renal failure as an extraordinary circumstance negating the intent element.

Dr. Karch also noted articles that indicate morphine consumption by a breast feeding mother is not dangerous to the breast-fed child. Tr. pp. 494-95. Dr. Karch confirmed no medical group advises against taking morphine while breastfeeding, and he was unaware of any case in which an infant received a lethal dose of morphine through breastmilk. Tr. pp. 513-14.

Dr. Karch also testified to his impressive credentials at trial. For instance, he reviewed every drug-related death in San Francisco for a ten year period while an assistant medical

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examiner with the San Francisco Medical Examiner's Office. Dr. Karch advised he is published in toxicology and published The Pathology of Drug Abuse, 4th edition. Tr. pp. 487-89.

Dr. Karch testified about tests law enforcement could have run and challenged aspects of how testing was performed, something detailed further in the State's pre-trial and post-trial briefs. Tr. pp. 495-96; pp. 501-03; pp. 511-13. Dr. Karch agreed with trial counsel's calculations that Applicant would need to take 125 times more morphine to reach the level in the present case than a woman in a study who took five milligrams of morphine, resulting in her infant receiving four nanograms of morphine. Tr. pp. 507-08.

In comparison, Dr. Scialli did not claim that morphine was ingested from any other source than Applicant's breastmilk, he just claimed that because of renal failure, the morphine was not excreted as expected, and therefore it built up to lethal levels. Applicant's statement in the motion that Dr. Scialli testified that in his opinion the morphine could not reach lethal levels solely from breast milk is misleading. He opined that the amount of morphine was too high to have been achieved through breastfeeding alone without inhibition of the excretion of morphine and its metabolites. PCR 1, pp. 41, 44-48. In fact, Dr. Scialli admitted that the morphine level found in Victim could have led to respiratory depression and Victim's death. PCR 1 Tr. p. 84, lines 1-14. Similarly, Dr. Twombly admitted that a lethal amount of morphine may accumulate in a breastfeeding child in twenty-four hours. PCR1 Tr. p. 213, lines 7-18. "A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased." State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008) (citation omitted).

"The defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased." Id. A jury hearing Applicant's experts admit that morphine could be the cause of death, after hearing the State's evidence as well, would

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convict. Therefore, this Court correctly found Applicant was not prejudiced under the Strickland standard by the failure to call experts like the doctors testifying at the PCR hearing.

Leading questions

Applicant seeks for this Court to reconsider its rejection and find Applicant was prejudiced by Mr. Wise not objecting to several leading questions. This Court found Applicant was not prejudiced by Mr. Wise's failure to object to leading questions. Order, p. 11-12. In his motion to amend, Applicant offers several examples, some of which the witness did not answer in no/yes answers despite the questions being leading. Others concern facts not in dispute. For instance, Applicant points to two questions posed to Dr. Wren. Tr. p. 444, lines 2-16. The first question simply restates Dr. Wren's opinion as to cause of death – Dr. Wren knew his own opinion as to the cause of death. The Solicitor would inevitably elicit this testimony by restating the question as a direct question. The follow-up question, whether the morphine could have come from breast milk, despite being leading, did not result in prejudice because Dr. Wren does not answer the question with a yes or no answer, but instead he essentially answered that he does not know. This Court correctly found Applicant was not prejudiced to the extent Mr. Wise could be said to be deficient for failing to object to leading questions. See Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) ("Burnett does not point out any specific instances and explain how those instances likely would have resulted in a different trial outcome. It appears that the leading questions could have been simply rephrased. In any event, assuming there were instances where objections should have been made, Burnett has failed to show how they likely prejudiced his defense."); United States v. Bosch, 914 F.2d 1239, 1246 (9th Cir. 1990) (rejecting ineffective assistance claim: "Bosch, however, does not maintain that any of this testimony would not have

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been admissible had it been elicited through nonleading questions.”). The request to amend is denied.

Ineffective Assistance of Appellate counsel

Applicant asks this Court to address a claim of ineffective assistance of appellate counsel. Motion, p. 17-19T. This issue was not addressed in the Court’s prior order. The issue was raised in the post-trial briefs as well as the pre-trial briefs. Applicant contends that Mr. Wise should have raised a claim to the Supreme Court that the conviction for homicide by child abuse should be set aside as opposed to the conviction for involuntary manslaughter. Missing from the Applicant’s analysis is any authority to support that argument would have been successful on appeal or that authority exists that suggests the issue would likely be successful. Not Applicant did not elicit any testimony on this claim at the PCR hearing.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). “However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .”)).

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Applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

In the present case, Mr. Wise presented four issues on appeal. The first two, issues concerning directed verdict, if successful, would have resulted in a functional acquittal of all the charges. Justice Few dissented from the majority on the issue of causation, evidencing reasonable strategy from appellate counsel in raising these issues. Appellate counsel argued a double jeopardy violation under the federal constitution, and in turn, the Supreme Court vacated the involuntary manslaughter sentence under state law by adopting a new common-law rule. The fourth issue concerned the procedure for closing arguments and presented a viable issue at the time of briefing and argument, but was mooted by the Supreme Court's substituted opinion in State v. Beatty, 423 S.C. 26, 813 S.E.2d 502 (2018).

The lack of authority from Applicant in his motion makes his proposed issue to raise weaker than those issues Mr. Wise raised. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (holding "that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se."). The Supreme Court in Teamer declared the following:

This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law. E.g., Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764,

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765 (1993))), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309-10, 426 S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

Id.; see *Kornaharens v. Evatt*, 66 F.3d 1350 (4th Cir. 1995) (holding "the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law.").

Mr. Wise showed reasonable professional judgment in the issues he selected to raise. Applicant on the other hand, has failed to show that the issue contemplated is clearly stronger than the issues raised by Mr. Wise. Nor has Applicant shown a reasonable probability of a different result. Mr. Wise did not provide ineffective assistance of counsel on appeal.

Canadian study (after-discovered evidence)

Applicant restates her argument for her after-discovered evidence claim concerning the retraction of the Canadian study. This issue was fully addressed in the Court's prior order. Order, p. 12-14. This Court denies the motion to alter or amend its analysis of this allegation.

Cumulative error doctrine

The Court denied the request to apply the so-called "cumulative error doctrine" in its order. Order, p. 14-15. The Applicant makes another request to apply it in its motion. Motion, p. 21-22. Applicant cites *Fisher v. Angelone*, 163 F.3d 835 (4th Cir. 1998) under the mistaken belief that the Fourth Circuit adopted the cumulative error doctrine and in so doing, was following the majority of circuits. Motion, p. 22, n. 3. However, *Fisher* stands for the polar opposite, rejecting the cumulative error doctrine, as has the majority of the federal circuit courts. The Fourth Circuit explained the following:

Next Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree.

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Having just determined that none of counsel's actions could be constitutional error, see Lockhart v. Fretwell, 506 U.S. 364, 369 n.2, 113 S.Ct. 838, 122 L.E.2d 180 (1993) ("Under [Strickland], an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates: (1) deficient performance and (2) prejudice." *emphasis added*)), it would be odd, to say the least, that those same actions, when considered collectively, deprived Fisher of a fair trial.

Id. at 852.

The Fourth Circuit noted its own precedent that examined each claim of ineffective assistance of counsel individually rather than collectively. Id. (citations omitted). The Fourth Circuit concluded, "To the extent this Court has not specifically stated that ineffective assistance claims, like claims of trial court error, must be reviewed individually rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits." Id. at 852-83 (citations omitted). The majority rule among the federal circuits, including the Fourth Circuit, is logical. If an individual claim of ineffective assistance of counsel fails on either prong, then no constitutional deprivation occurs. Adding up claims that fall short of a constitutional error individually to reach some unknown calculus of error makes little sense. See Hunt v. Smith, 856 F.Supp. 251, 258 (D. Md. 1994) ("The fact that many claims of counsel error are pressed does not alter fundamental math – a string of zeros still adds up to zero."). This Court correctly found that no deprivation occurred individually or collectively which required. As this Court previously stated: "[V]iewing the record as a whole, this Court concludes that the Applicant was not prejudiced by counsel's deficient performance as discussed above as this Court concludes that the deficiencies do not create a reasonable probability of a different result." Order, p. 15. The request to reconsider and amend by application of a cumulative error doctrine which the Supreme Court has not adopted must be denied. Consistent with the opinions of Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2008) and Strickland v. Washington, *supra*, this Court considered

the record as a whole, including the trial record and post-conviction record in making its assessment.

CONCLUSION

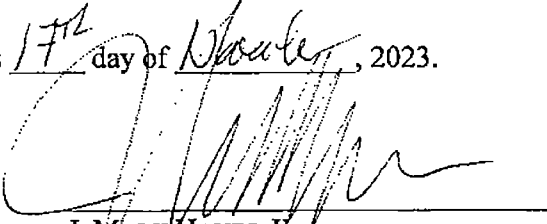
Based on all the foregoing, this Court finds and concludes Applicant has not established any requirement for the Court to alter or amend its prior order. The motion to amend after the Court's reconsideration must be denied.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of order denying the motion to secure the appropriate appellate review. See Rule 203, SCACR. An Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Austin v. State, 305 S.C. 453 (1991). Rule 71.1(g), SCRCP, provides that if applicant wants appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the motion to amend the Order of Dismissal of the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 17th day of October, 2023.


J. MARK HAYES, II
Presiding Judge
Seventh Judicial Circuit

Spaulding, South Carolina

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