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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas**

J. Mark Hayes, II, Circuit Court Judge

**Post-Conviction Relief Case No. 2019-CP-42-01605
Appellate Case No. 2023-001934**

Stephanie Irene Greene, #359489, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

**ALAN WILSON
Attorney General**

**J. BENJAMIN APLIN
Assistant Attorney General**

**BARRY BARNETTE
Solicitor, Seventh Judicial Circuit**

ATTORNEYS FOR RESPONDENT

Other Counsel of Record:

**John F. Kuppens, Esquire
Blake T. Williams, Esquire
Caroline A. Warner, Esquire
NELSON MULLINS RILEY
& SCARBOROUGH, LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201**

**Susannah C. Ross, Esquire
330 East Coffee St.
ROSS & ENDERLIN, P.A.
Greenville, SC 29601**

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the PCR court properly denied relief on grounds that Greene failed to carry her burden of proving prejudice despite findings of deficiency related to Counsel's failure to present the alternative cause of renal failure and challenge to the lack of scientific support for the State's breast milk transmission theory where there was probative evidence in the record to support the findings of the PCR court?
2. Whether the PCR court properly concluded Counsel was not ineffective for failing to challenge testimony related to the synergistic effect of the medications found in Victim's toxicology report where: (1) Counsel successfully convinced the trial court to charge the jury that to convict, the cause of death could only be from a Schedule II drug and morphine was the only Schedule II drug found in Victim's system, and (2) the State did not argue or mention any synergistic effect during closing arguments?
3. Whether the PCR court properly concluded Counsel was not ineffective for failing to object to the State's leading questions and/or Greene was not prejudiced by Counsel's failure to object where: (1) in some instances the witness did not provide a yes/no answer, and (2) in other instances the leading question simply could have been rephrased had an objection been made?
4. Whether the PCR court properly concluded Counsel was not ineffective in the direct appeal for failing to argue for a specific remedy from this Court where Counsel *did* request the remedy?
5. Whether the PCR court properly found that South Carolina does not recognize the cumulative error doctrine and that even when viewing the record as a whole, any deficiencies did not create a reasonable probability of a different result?
6. Whether the PCR court properly concluded the post-trial retraction of the "Canadian study" did not constitute after-discovered evidence sufficient to grant a new trial where: (1) during trial the study was primarily exploited by the defense in an attempt to suggest an unexpected genetic defect could be the reason for the high morphine level, and (2) the evidence of retraction would be merely impeaching?

STATEMENT OF THE CASE

Petitioner, Stephanie Irene Greene (Greene), was indicted at the September, 2011 term of the grand jury for Spartanburg County for homicide by child abuse (2011-GS-42-5758 - count one), involuntary manslaughter (2011-GS-42-5758 - count two), and unlawful conduct towards a child (2011-GS-42-5758 - count three)—charges all related to the death of her forty-six day old infant. She was represented by C. Rauch Wise, Esquire (Counsel). Respondent (the State) was represented by Solicitor Barry Barnette and Assistant Solicitor Timi Poulos of the Seventh Circuit Solicitor's Office. On March 27-April 3, 2014, Greene proceeded to trial before the Honorable J. Derham Cole and a jury, pursuant to which she was found guilty as indicted. On April 4, 2014, Judge Cole sentenced Greene to twenty (20) years' imprisonment for homicide by child abuse, five (5) years' concurrent imprisonment for involuntary manslaughter, and five (5) years' concurrent imprisonment for unlawful conduct towards a child. (App.p.1-2; p.675-p.693).

Petitioner filed a timely notice of intent to appeal with the South Carolina Court of Appeals and an appeal was perfected by Counsel, who continued to represent Greene on appeal. Greene raised four issues on appeal, including a double jeopardy challenge. (App.p.750-p.777). In regard to that issue, she asked that the matter be "remanded for a new trial with the state being required to elect upon which charge they desired to proceed, or the jury be instructed to return only a verdict on one charge." (App.p.777). The State filed a brief in response (App.p.695-p.749) and Greene filed a brief in reply. (App.p.778-793). By order filed May 5, 2016, this Court certified the appeal pursuant to Rule 204(b), SCACR. In a published opinion filed May 23, 2018, this Court affirmed Greene'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). (App.p.795-p.824). Greene filed a petition for

rehearing (App.p.825-p.836), the State filed a return to that petition (App.p.837-p.848), and Greene filed a reply. (App.p.849-p.852). In an Order dated June 26, 2018, this Court denied the petition for rehearing and the Remittitur was returned. (App.p.853). On November 19, 2018, Greene petitioned the Supreme Court of the United States for a writ of certiorari and by summary disposition published January 7, 2019, the petition was denied. (App.p.855-899).

On May 2, 2019, Greene filed a pro se application for post-conviction relief (PCR) alleging she was being held in custody unlawfully for a variety of reasons, and on July 23, 2019, she submitted an addendum to her application. (App.p.474-p.485; p.1125-p.1132). On August 5, 2019, the State filed a return asking that an evidentiary hearing be held. (App.p.1133-p.1169). Greene, through counsel, subsequently submitted three amended applications for PCR (App.p.1170-p.1200) and the State file a pretrial brief and return (App.p.1201-p.1234). An evidentiary hearing into the matter was held on September 19-20, 2022, at the Spartanburg County Courthouse before the Honorable J. Mark Hayes, II. Greene was present and represented by Blake T. Williams and Daniel J. Westbrook of Nelson Mullins Riley Scarborough, PA. The State was represented by Senior Assistant Attorney General David A. Spencer and Assistant Attorney General Chelsey Marto of the Office of the Attorney General. During the hearing, Greene presented testimony from three witnesses: Dr. Anthony Scialli, Dr. Katherine Twombly, and Counsel, C. Rauch Wise, Esquire. The State did not call witnesses in reply, relying instead on cross-examination of Greene's witnesses and arguments from Mr. Spencer. (App.p.1235-1643). At the conclusion of the evidentiary hearing the PCR court asked the parties to submit post-hearing briefs (App.p.1639-p.1640) and on December 2, 2022, the parties filed their respective briefs. (App.p.1669-p.1761). On May 8, 2023, Judge Hayes issued a written order

finding Greene had not established any constitutional violations or deprivations that would require granting the PCR application and, therefore, denied relief. (App.p.1762-p.1777).

On May 22, 2023, Greene filed a motion to reconsider or amend and on June 5, 2023, the State filed a return. (App.p.1778-p.1822). On July 18, 2023, a virtual hearing on the motion was heard before the PCR court with Greene represented by Mr. Williams and the State represented by Deputy Attorney General Donald J. Zelenka because of Mr. Spencer's unavailability due to illness.¹ In an order dated November 17, 2023, and filed November 20, 2023, Judge Hayes denied and dismissed Greene's motion to amend with prejudice. (App.p.1823-p.1837). On December 18, 2023, Greene timely filed a notice of appeal, appealing the PCR court's denial of his application for PCR. On January 20, 2024, Greene filed her Petition for a Writ of Certiorari and the Appendix with this Court. This Return on behalf of the State now follows.

STATEMENT OF FACTS

Greene's infant child (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. Greene received prescriptions for numerous drugs including MS Contin, a form of slow-release morphine, without the prescribing doctor aware that Greene was pregnant with Victim and later, breastfeeding Victim. This Court succinctly summarized the State's causation theory and evidence at trial as follows:

The State's causation theory was Appellant consumed excessive amounts of central nervous system depressants, principally morphine, while breastfeeding [Victim] and these drugs passed through Appellant's breast milk, resulting in [Victim]'s death. The evidence at trial revealed that Appellant took more morphine than her doctors prescribed. In addition, Appellant exclusively breastfed [Victim] until approximately one week before her death. Appellant told investigators that she began supplementing with formula due to her new blood pressure medication; however,

¹ Mr. Spencer died on October 16, 2023.

Appellant also told investigators that she breastfed [Victim] extensively during the two nights immediately preceding [Victim]’s death. Thus, sufficient evidence was shown that Appellant took many drugs, including morphine, and breastfed [Victim].

Greene, 423 S.C. at 267, 814 S.E.2d at 498. In denying the allegation that the trial court should have granted a directed verdict on causation, this Court 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 [Victim] exhibited symptoms consistent with morphine toxicity; and that [Victim]’s death was caused by respiratory failure secondary to synergistic drug intoxication.

Id. at 275, 814 S.E.2d at 503. This 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 [Victim]’s safety.

Id. at 277, 814 S.E.2d at 503. It 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 [Victim]’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 [Victim].

Id. at 278, 814 S.E.2d at 504. Finally, this Court noted that the morning of Victim's death, Greene 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.

At the PCR hearing, Dr. Scialli opined that the morphine concentration measure that was in Victim could not have derived from breastfeeding alone without another circumstance, which was almost certainly due to renal failure (renal failure was not related to morphine or its transmission through breast milk) preventing the excretion of morphine and its metabolites. (App.p.166; p.1290-p.1291; p.1312). On cross-examination, Dr. Scialli opined that renal failure was almost certainly the reason why the morphine was elevated in Victim. He agreed the morphine level was high enough to cause respiratory depression and within a reasonable degree of medical certainty it was possible, due to renal failure, for enough morphine to build up to kill a child. (App.p.1406-p.1407). Dr. Scialli also testified that any reliance by the State's trial witnesses on the "Canadian study" was inappropriate because it concerned codeine, not morphine, and because the paper was unreliable even with respect to codeine, as a subsequent 2020 research paper (Zipursky) established in material detail. (App.p.1266; p.1291-p.1303). Finally, Dr. Scialli opined that the testimony of the State's expert witnesses referencing "synergy," a toxicological principle, was not appropriate because there is no literature supporting synergy in this case. (App.p.1266; p.1305-p.1312).

Dr. Twombly opined to a reasonable degree of medical certainty that Victim suffered from acute renal failure, that renal failure was the cause of her death, and Victim would not have died absent renal failure. (App.p.1432; p.1441). Dr. Twombly explained that the morphine in the child's system was not the cause of renal failure, but that renal failure can cause the accumulation of morphine. (App.p.1440-p.1441). She also opined that renal failure would not have been reasonably foreseeable to Greene. (App.p.1441). On cross-examination, Dr. Twombly admitted the level of morphine in Victim was "pretty darn high" and that a lethal level could accumulate in a child in less than twenty-four hours. (App.p.1447). She agreed the level found in Victim could be lethal and could not say to a reasonable degree of medical certainty which killed Victim, renal failure or morphine, because it could have been both. (App.p.1462). Dr. Twombly opined that, if a child has renal failure, enough morphine can ultimately build up in a child and cause his or her death when that morphine is coming through breast milk. (App.p.1463). Counsel then testified extensively about his trial strategy and decisions, answering specific questions about particular parts of trial. (App.p.1501-p.1584).

Standard of Review

The appellate court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them. *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). Questions of law are reviewed de novo, and the appellate court will reverse the PCR court's decision when it is controlled by an error of law. *Id.*

ARGUMENT

I.

The PCR court properly denied relief on grounds that Greene failed to carry her burden of proving prejudice despite findings of deficiency related to Counsel's failure to present the alternative cause of renal failure and challenge to the lack of scientific support for the State's breast milk

transmission theory, where there was probative evidence in the record to support the findings of the PCR court.

In her petition, Greene first argues the PCR court erred in denying relief on grounds that she failed to carry her burden of proving prejudice from counsel's alleged deficiencies in: (A) failing to present the alternative cause of renal failure; (B) deciding to call Dr. Karch and present his testimony in defense; and (C) failing to challenge the lack of scientific support for the State's breast milk transmission theory. The State disagrees and submits the PCR properly denied post-conviction relief.

Where the PCR application alleges ineffective assistance of counsel as a ground for relief, Greene 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, an applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. *Id.* at 687. Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." *Id.* The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). 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. "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)).

At the outset, before responding to Greene's three related challenges under the prejudice prong, the State invites this Court to deny certiorari on grounds that, contrary to the findings of

the PCR court but supported in the record before this Court, counsel's performance was in fact **not deficient** because it was, in all respects, objectively reasonable and did not fall outside the wide range of professionally competent assistance. Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

At the PCR hearing, Greene presented expert testimony opining Victim suffered renal failure in the last three days of her life and this caused morphine levels to accumulate. Greene postulates that the child would not have died but for renal failure. However, neither of Greene's two experts that testified at the PCR hearing could eliminate morphine as the cause of death, and both admitted the morphine levels in Victim could be lethal. On the other hand, Counsel diligently prepared a multi-faceted defense utilizing Dr. Karch, perhaps the foremost expert in toxicology who wrote "the bible" of toxicology and participated in every drug-related autopsy for a decade in San Francisco. Counsel fully utilized Dr. Karch to not only present a formidable defense, but to prepare examination of the prosecution's experts. Counsel's well-researched, well-planned trial strategy was reasonable and did not fall below reasonable norms.

Counsel explained his strategy, which was to argue to the jury that a child could not reach a lethal level of morphine by breastfeeding from a mother taking morphine, utilizing articles referred by Dr. Karch and articles Counsel found on his own. (App.p.1527). Counsel further explained that analyzing the .52 morphine reading and extrapolating back to what should be in Greene, she "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. (App.p.1528-p.1529). Counsel testified: "I thought Dr. Karch as an expert was a very good expert. He literally wrote the book." He 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. Counsel did not consider using any other expert witnesses and Dr. Karch did not suggest utilizing any other expert witnesses. He thought Dr. Karch would be a good witness for his case. (App.p.1540-p.1541).

Dr. Karch assisted Counsel in formulating a strategy in cross-examining the pathologist, Dr. Wren. Dr. Karch also helped Counsel 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.” (App.p.1541, lines 7-16). Counsel testified that at the time of trial, he felt his cross-examinations of both Dr. Wren and Dr. Eagerton were successful. (App.p.1541, line 17-p.1542, line 9).

In the present case, Counsel 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*, 594 U.S. 731, 739 (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). Counsel’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 Counsel towards a renal failure theory, and Counsel’s thorough investigation of defenses on multiple fronts, this is simply not a case in which it could fairly be

said that Counsel's performance fell below professional norms. Counsel was not ineffective for failing to call the two experts advanced by Greene at the PCR hearing. Furthermore, Greene failed to meet her burden of prejudice. First, the expert testimony from the PCR hearing tends to confirm that morphine was at least a contributing cause of death. Second, the expert testimony fails to counter the considerable evidence of Greene's criminal intent, especially extreme indifference. Here, Greene mistakenly believes a detailed understanding of the cause of death is required for the intent element when the problem was Greene knowingly put her child's health at risk by hiding her medications from the treating obstetricians and hiding the existence of her child from her doctors.

I(A). The PCR court properly found Greene failed to carry her burden of proving prejudice despite a finding of deficiency related to counsel's failure to present the alternative cause of renal failure.

In her petition, Greene agrees with the PCR court's conclusion that trial counsel was deficient for failing to present a "highly persuasive" alternative theory as to the cause of the child's death related to renal failure; however, she argues the PCR court erred in denying relief on grounds that she failed to carry her burden of proving prejudice from counsel's deficiency. She contends that where the jury heard testimony that morphine was dangerous for her to consume while breastfeeding and that it could transmit through her breast milk at a lethal level, the trial "cried out for some explanation from the defense," and that presenting the alternative explanation would have a reasonable probability of changing the outcome of trial. (Pet.p.10). Greene argues the evidence and testimony would have demonstrated that her actions did not manifest a mental state of "extreme indifference" because her baby's death was not a reasonably foreseeable result of her conduct. (Pet.p.9-p.10). Yet, Greene's argument is belied by her own experts, who agreed: (1) the morphine level found in Victim was high enough to cause

respiratory depression and within a reasonable degree of medical certainty it was possible, due to renal failure, for enough morphine to build up to kill a child (App.p.1406-p.1407), and (2) if a child has renal failure, enough morphine can ultimately build up in a child and cause his or her death when that morphine is coming through breast milk. (App.p.1463).

In support of her argument, Greene raises a series of complaints about the PCR court's findings including that the PCR court: (1) inaccurately asserted that the facts in the record related to the elements of extreme indifference are not contested; (2) improperly relied on *Phillips* and *Taylor*; (3) failed to fully consider the inherent conflict between finding deficiency but not prejudice; (4) glossed over the fact that the cause of the morphine level was the renal failure, not her consumption of morphine or her breastfeeding; (5) erroneously stated that renal failure was not supported by physical evidence and that the diagnosis of renal failure was ultimately based on hearsay reports of cold-like symptoms; and (6) erroneously drew a false analogy between Dr. Karch's testimony regarding a possible genetic defect and renal failure. She contends these mistakes led the PCR court to erroneously conclude she suffered no prejudice from Counsel's failure to present renal failure as an alternative cause of death. (Pet.p.10-p.14). The State disagrees with Greene's contentions about the renal failure theory and submits none of the complaints, taken alone or in combination, alters the propriety of the underlying decision. That decision was founded on the PCR court's proper conclusion that the jury's finding of "extreme indifference" was supported in the record and would not have been sufficiently undermined by the renal failure theory to alter confidence in the outcome of the trial.

Greene argues the PCR court failed to appreciate the strength of her expert testimony to counter the element of extreme indifference. This is based on the idea that Greene 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 Greene'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 Greene to use while pregnant and later breastfeeding Victim was Dr. Kovacs. Greene hid her pregnancy and birth from Dr. Kovacs when obtaining 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. In case Greene's lack of concern for Victim was in doubt, Victim had 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 n.5, 814 S.E.2d at 503 n.5. Greene 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 Greene might have applied to justify exposing Victim to these dangerous drugs fails to defeat the abundant evidence of Greene's extreme indifference.

As to the complaint about the PCR court stating that the facts related to the elements of extreme indifference are not contested, Greene inaccurately conflates underlying facts with legal conclusions. She acknowledges she "did not dispute the accuracy of the level of morphine measured in Victim's system identified in the toxicology report, that Greene consumed

morphine, or that she was breastfeeding” but asserts she “disputed that these actions satisfied the mens reas of homicide by child abuse.” But where the PCR court’s finding was limited to the admitted facts, it was entirely accurate. Regarding such facts, on direct appeal this Court rejected the claim that insufficient evidence of extreme indifference was presented to the jury. It provided a detailed recitation of the facts presented at trial in support of its ruling, facts Greene argues “should not have been repurposed” by the PCR court. Yet these facts were taken directly from the evidence at trial and certainly bear on any analysis of whether Greene was prejudiced by Counsel’s failure to present the alternate theory. They were properly considered.

In addition to the facts recited by this Court, additional evidence from trial included Dr. Kooistra publishing the medication guide for MS Contin that advises:

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.

(App.p.310, lines 4-9). Dr. Eagerton also published a portion of LactMed pertaining to the use of morphine, as follows: “Maternal use of oral narcotics during breastfeeding can cause infant drowsiness, central nervous system depression and even death.” (App.p.479-p.480). Greene herself admitted she and her husband discussed the possibility Victim’s death could be from the drugs she ingested. (App.p.374-p.376).

As to the complaint that the PCR court erroneously relied on *Phillips* and *Taylor*, these cases shared close similarities and provided useful analysis and comparison on the issues of extreme indifference. Indeed, 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).

Contrary to Greene’s assertion, *Phillips* was a case where the medication was *administered* to the child, not one where the defendant merely “permitted a child to directly access and consume a controlled substance.” (Per.p.11). And as in *Phillips*, Greene’s actions were inherently dangerous, making Victim’s death in this case reasonably foreseeable. Indeed, this Court’s holding in the direct appeal 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 [Victim’s] safety.” *State v. Greene*, 423 S.C. 263, 277, 814 S.E.2d 496, 503 (2018).

As to the complaint that the PCR court failed to fully consider the inherent conflict between its findings of deficiency and prejudice, the State submits no conflict exists for the reasons set out by the PCR court. To the extent there is a conflict, it is solely because the PCR court should have found no deficiency in Counsel’s performance in the first place.

As to the complaint that the PCR court glossed over the alleged fact that the cause of the morphine level was the renal failure, not Greene’s consumption of morphine and breastfeeding, Greene’s own experts agreed: (1) the morphine level found in Victim was high enough to cause respiratory depression and within a reasonable degree of medical certainty it was possible, due to renal failure, for enough morphine to build up to kill a child (App.p.1406-p.1407), and (2) if a

child has renal failure, enough morphine can ultimately build up in a child and cause his or her death when that morphine is coming through breast milk. (App.p.1463).

As to the complaints the PCR court erroneously stated the renal failure was not supported by physical evidence and that the order conflicts with what the court told State's counsel during the evidentiary hearing, those complaints are of no moment where the PCR court properly analyzed the impact of the alternative theory in the context of the overwhelming evidence of extreme indifference. Indeed, it was the concept that the postulated renal failure alone would have led to death absent the introduction of morphine by Greene that was not supported by physical evidence. Greene's experts could not opine to a reasonable degree of medical certainty that this was the case. (App.p.1406-p.1407; p.1463).

Finally, as to the complaint that the PCR court drew a false analogy between Dr. Karch's testimony regarding a possible genetic defect and renal failure, the PCR court's reference to his testimony on this issue was entirely appropriate. It was not for Greene 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, Greene 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. The PCR court correctly assessed the

considerable evidence of extreme evidence in this case by finding Greene was not prejudiced by counsel not calling experts like the two doctors that testified at the PCR hearing.

Relying on *Ryals v. State*, 439 S.C. 230, 886 S.E.2d 239 (Ct. App. 2023), Greene contends the PCR court misapplied its prejudice analysis in the instant case. The State disagrees. 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 Ryal's forced appearance at trial in prison clothing against the strength of the State's case against him." *Id.* at 236-37, 886 S.E.2d at 242. However, in the present case, this is precisely what the PCR court did in its order of dismissal. It balanced the benefit of the experts' testimony with some of the shortcomings and dangers inherent in the experts' testimony, and then balanced that against the State's evidence, including the considerable evidence of Greene'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 Victim. Contrary to Greene's contention, the PCR court clearly contemplated the record as a whole in assessing whether Greene met her burden of proving prejudice.

In the instant case, there is *unchallenged physical evidence* that Victim had a lethal level of morphine at the time of death at forty-six days old. Greene *confessed* she was addicted to morphine and lied to her doctors to avoid losing her prescription to morphine. No evidence was presented that the morphine in Victim came from any other source than Victim's breast milk. The record is simply replete with her furtive behavior to maintain her access and consumption of opioids which included ensuring that Greene and Victim remained outside a knowledgeable

doctor's care. Consistent with *Ryals*, the PCR court properly determined that Greene was not prejudiced by the alleged deficiency of Counsel. Certiorari should be denied.

I(B). The PCR court properly found Greene failed to carry her burden of proving prejudice despite findings of deficiency related to Counsel's decision to call Dr. Karch and present his testimony in defense.

In her petition, Greene attacks the quality of Dr. Karch's testimony, arguing that he conceded the State's entire theory of the case. (Pet.p.14-p.15). This simply did not happen. Dr. Karch testified the baby could have gotten a morphine level that high from breast milk; however, he qualified that testimony by explaining he did not know how that could possibly happen except that he was aware of one case where a baby got an 84 nanogram blood level from a mother on morphine. Interestingly, Greene's experts filled in this gap in Karch's knowledge during the PCR hearing when they explained that if a child has renal failure, enough morphine can ultimately build up and cause death when that morphine is coming through breast milk. (App.p.1463). Dr. Karch went on to note that the baby in that case did not die and there were no reported cases of babies dying from breast milk from a mother. (App.p.579, line 19-p.580, line 4). 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.

(App.p.588, 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. In other words, as both Dr. Karch and Dr. Scialli agreed, the level of morphine would have to have been caused by "another circumstance." (App.p.1266).

Dr. Karch noted articles that indicate morphine consumption by a breast feeding mother is not dangerous to the breast-fed child. (App.p.569-p.570). Dr. Karch reiterated that not very much morphine is found in breast milk. 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 breast milk. (App.p.588-p.589). Dr. Karch agreed with trial counsel's calculations that Greene 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. (App.p.582-p.583).

In comparison, Dr. Scialli did not claim it was impossible for a lethal level of morphine to be transmitted solely through breastfeeding; he just claimed that it could only do so due to another circumstance. (App.p.1266). Here, Greene posited that circumstance was renal failure that caused the morphine not to be excreted as expected, and therefore it built up to lethal levels. 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. (App.p.1318, lines 1-14). By Greene'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. (App.p.1447, lines 7-18). A jury hearing Greene's experts admit that morphine could be the cause of death, after

hearing the State's evidence, would put Greene in no worse position than the testimony of Dr. Karch alone. Therefore, the PCR court correctly denied relief and certiorari should be denied.

I(C). The PCR court properly found Greene failed to carry her burden of proving prejudice despite findings of deficiency related to counsel's failure to challenge or seek to exclude testimony from State's experts as scientifically unreliable where: (1) no expert provided the testimony Greene contends was offered at trial; (2) even if challenged, the testimony that was offered would have been admitted over objection; (3) the trial testimony was significantly weaker without the State being able to offer testimony on the ultimate opinion, and (4) even if preserved via objection the issue would not have resulted in a different outcome on appeal.

In her petition, Greene alleges Counsel was ineffective for failing to object to the State's witnesses providing the opinion, to a reasonable degree of medical certainty, that the morphine was transmitted to Victim in lethal levels through her breast milk. (Pet.p.15). She argues Counsel was ineffective for failing to submit a motion to exclude or a motion in limine and/or request a *State v. Council* hearing as to the reliability of the testimony and opinions the State's witnesses intended to offer. (Pet.p.16). The State disagrees. Counsel, prior to trial, discussed whether the State 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. However, no expert provided that opinion at trial, which Counsel noted at the PCR hearing. Counsel explained he was prepared to object if an expert offered that opinion, but it was never offered. (App.p.1516-p.1517).²

The PCR court properly concluded Counsel was not ineffective and Greene suffered no prejudice from Counsel's failure to challenge or seek to exclude expert testimony because no witness testified to a reasonable degree of medical certainty that the morphine found in Victim's body came through breast milk. Because the allegedly scientifically unreliable opinion was not

² See testimony of Dr. Eagerton (App.p.433-p.437) and Dr. Wren (App.p.519, lines 9-11).

given, a challenge or objection on this basis would not have led to exclusion. Furthermore, the testimony that was introduced was ultimately weaker than if it had been excluded because the State's experts failed to offer the one opinion that would have carried the day without relying on the jury to connect the dots. Finally, as set forth by the PCR court in reliance on this Court's decision on direct appeal: the State presented evidence that Greene was taking morphine and breastfeeding Victim continuously, morphine *can* pass from a mother to a baby through breast milk, the level of morphine *can* build up in a baby due to the inability to process it, and Victim died from a lethal level of morphine. Nothing more was required for the jury to make a logical deduction. (App.p.1828). Thus, it was not Counsel's failure to seek exclusion of scientifically unreliable expert testimony that led to Green's conviction, because no such testimony was given. Instead, it was the admission of admissible expert testimony recognized by this Court, testimony now effectively corroborated by Dr. Scialli and Dr. Twombly. (App.p.1406-p.1407; p.1463). The PCR court properly denied relief and certiorari should be denied.

II.

The PCR court properly concluded Counsel was not ineffective for failing to challenge testimony related to the synergistic effect of the medications found in Victim's toxicology report where: (1) Counsel successfully convinced the trial court to charge the jury that to convict, the cause of death could only be from a Schedule II drug and morphine was the only Schedule II drug found in Victim's system, and (2) the State did not argue or mention any synergistic effect during closing arguments.

In her petition, Greene argues Counsel was ineffective for failing to challenge testimony about synergy and the synergistic effect of the medications in Victim's toxicology report because it was not supported by medical science. (Pet.p.17). The State disagrees and submits the PCR court properly concluded Counsel was not deficient and Greene suffered no prejudice because: (1) Counsel successfully convinced the trial court to charge the jury that to convict the cause of

death could only be from morphine, and (2) the State did not argue or mention synergistic effect during closing arguments. If anything, hearing that some drugs *could* have a synergistic effect and then failing to argue this in closing, while also having the consideration of synergy *precluded* by the jury charge, had the opposite effect from prejudice because it undermined the strength and clarity of the State's case in the eyes of the jury.

At the PCR hearing, Counsel agreed that none of the witnesses stated that morphine and any particular drug *did* create a synergistic effect. (App.p.1552, lines 7-11). Consequently he convinced the judge that the "synergistic effect" was insufficient for the jury to convict appellant of homicide by child abuse in this case and got an incredibly favorable jury charge. (App.p.1551-p.1552). At trial, the solicitor did not argue or mention to the jury any "synergistic" effect of the drugs during closing argument. (App.p.612-p.614; p.631-p. 644). It simply strains credulity that the jury was ready to acquit Greene 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. Accordingly, the PCR court properly denied relief and certiorari should be denied.

III.

The PCR court properly concluded Counsel was not ineffective for failing to object to the State's leading questions and/or Greene was not prejudiced by Counsel's failure to object where: (1) in some instances the witness did not provide a yes/no answer, and (2) in other instances the leading question simply could have been rephrased had an objection been made.

In her petition, Greene argues the PCR court erred in concluding she was not prejudiced by Counsel's failure to object to leading questions because they "implied to the jury it was undisputed that: (1) morphine can be transmitted in a lethal level solely through breastfeeding was 'obviously' a sound scientific principle and (2) other medications identified on the

toxicology report had a 'synergistic effect' on the morphine." (Pet.p.20). She contends the PCR court's finding that the testimony largely related to facts not in dispute, like the level of morphine being fatal, demonstrates prejudice because "the facts *should* have been in dispute" where "[r]enal failure was the reason for the morphine level, not [Greene's] extreme indifference in consuming morphine while breastfeeding." (Pet.p.20-p.21). The State disagrees.

As noted by the PCR court, in some instances the witness did not provide a yes/no answer and in other instances the leading question simply could have been rephrased had an objection been made. Thus, the failure to object did not result in prejudice. Further, Greene's entire argument is premised on her fundamental misunderstanding of the key distinction in this case. She continues to argue renal failure was the cause of death rather than the morphine that was administered to Victim, with extreme indifference, through her breast milk. As recognized by this Court on direct appeal, there was ample evidence to support the verdict. In the PCR hearing, no expert testified that Victim would, to a reasonable degree of medical certainty, have died of renal failure without **also** receiving the lethal level of morphine from Greene. Instead, they indicated the morphine likely reached that level due to renal failure or some other circumstance. Greene did not need to know or understand the exact biological process that led to Victim's death for the jury to conclude she acted with extreme indifference. The PCR court properly denied relief and certiorari should be denied.

IV.

The PCR court properly concluded Counsel was not ineffective in the direct appeal for failing to argue for a specific remedy from this Court where Counsel *did* request the remedy.

In her petition, Greene argues appellate counsel was ineffective for failing to ask this Court to reverse both convictions (involuntary manslaughter and homicide by child abuse) and

request a new trial with the proper jury instructions. (Pet.p.21-p.22). The State disagrees. In the direct appeal, Counsel asked that the matter be “remanded for a new trial with the state being required to elect upon which charge they desired to proceed, or the jury be instructed to return only a verdict on one charge.” (App.p.777). The PCR court properly denied relief, and certiorari should be denied.

V.

The PCR court properly found that South Carolina does not recognize the cumulative error doctrine and that even when viewing the record as a whole, any deficiencies did not create a reasonable probability of a different result.

The State submits Greene’s invitation for this Court to adopt the cumulative error doctrine is insufficient to warrant a grant of certiorari under the circumstances of this case. *See Hunter v. Smith*, 856 F.Supp. 251, 258 (D. Md. 1994) (“The fact that many claims of counsel error are pressed does not alter the fundamental math—a string of zeros still adds up to zero.”). Therefore, the PCR court properly denied relief and certiorari should be denied.

VI.

The PCR court properly concluded the post-trial retraction of the “Canadian study” did not constitute after-discovered evidence sufficient to grant a new trial where: (1) during trial the study was primarily exploited by the defense in an attempt to suggest an unexpected genetic defect could be the reason for the high morphine level, and (2) the evidence of retraction would be merely impeaching.

In her petition, Greene argues the retraction of the Canadian study, in combination with the Zipursky paper flatly disproving that study, could have been used to directly contradict the State’s theory and bolster Counsel’s argument that the State’s theory was impossible. However, as properly analyzed by the PCR court, Counsel effectively made the impossibility argument by leveraging parts of that study against the State. Furthermore, the PCR court properly recognized

that under these circumstances, the retraction would have been 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.”). The PCR court properly denied relief and certiorari should be denied.

CONCLUSION

Based on the foregoing reasons, this Court should deny the petition for a writ of certiorari in its entirety and let stand the decision of the PCR court. If the Court grants the petition, the State hereby requests permission under the rules to fully brief the issues contained herein.

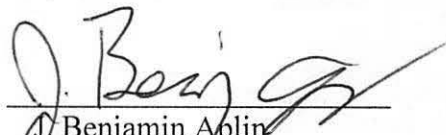
Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

BARRY BARNETT
Solicitor, Seventh Judicial Circuit

BY:


J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
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