

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM
SPARTANBURG COUNTY

S.C. SUPREME COURT

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.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities ii

Argument 1

 I. The State’s Return misconstrues Petitioner’s arguments and seeks to impose an improper burden for establishing prejudice. 1

 A. Trial Counsel’s performance was deficient, and Petitioner suffered prejudice as a result..... 2

 B. The PCR court’s reliance on this Court’s discussion of causation in its opinion from the merits appeal was improper. 7

 C. Trial counsel’s reliance on Dr. Karch was improper. 9

 D. The PCR Court erred in finding that Petitioner suffered no prejudice due to trial counsel’s failure to have scientifically unreliable evidence excluded. 10

 II. The State also misconstrues Petitioner’s argument about use of other medications and “synergy,” which should have been excluded in the first instance. 11

 III. The leading questions posed by the State were not harmless and the prejudice would not have been rectified simply by rephrasing. 13

 IV. Counsel rendered ineffective assistance on appeal. 14

 V. The Court should grant certiorari and formally recognize the cumulative error doctrine. 14

 VI. The Zipursky paper constitutes newly discovered evidence warranting granting certiorari and reversing for a new trial. 15

Conclusion 15

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| Cases | |
| <i>Ard v. Catoe</i> , 372 S.C. 318, 642 S.E.2d 590 (2007) | 10 |
| <i>Fisher v. Angelone</i> , 163 F.3d 835 (4th Cir. 1998) | 15 |
| <i>Green v. State</i> , 351 S.C. 184, 569 S.E.2d 318 (2002) | 14 |
| <i>Jamison v. State</i> , 410 S.C. 456, 765 S.E.2d 123 (2014) | 15 |
| <i>Price v. State</i> , 284 S.W.3d 462 (Ark. 2008)..... | 5 |
| <i>Rivers v. State</i> , No. 2017-002302, 2023 WL 4489438 (S.C. Ct. App. July 12, 2023) | 5, 6 |
| <i>State v. Avery</i> , No. 2011-194506, 2013 WL 8596560 (S.C. June 12, 2013) | 5 |
| <i>State v. Greene</i> , 423 S.C. 263, 814 S.E.2d 496 (2018) | 5 |
| <i>State v. Jarrell</i> , 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002)..... | 7 |
| <i>State v. Peterson</i> , 287 S.C. 244, 335 S.E.2d 800 (1985) | 14 |
| <i>State v. Phillips</i> , 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014)..... | 6, 7 |
| <i>State v. Phillips</i> , 416 S.C. 184, 785 S.E.2d 448 (2016) | 8 |
| <i>Strickland v. Washington</i> , 466 U.S. 668 (1984)..... | 1, 2 |
| <i>Taylor v. State</i> , 404 S.C. 350, 745 S.E.2d 97 (2013) | 1 |

Other Authorities

Zipursky & Juurlink, The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, *Clinical Pharmacology & Therapeutics* (May 2020).....4, 5

Argument

I. The State's Return misconstrues Petitioner's arguments and seeks to impose an improper burden for establishing prejudice.

Much of the State's Return focuses on the evidence introduced at the original trial and essentially faults Petitioner for failing to prove actual innocence at PCR. This misstates Petitioner's burden. Under *Strickland*, if an applicant establishes deficient performance by counsel, the prejudice prong only requires a showing that, but for counsel's error, there is "a reasonable probability that the result of the proceedings would have been different." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101-02 (2013) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)). 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.

Through her postconviction relief action, as the lower court's order of dismissal acknowledged, Petitioner presented persuasive and impactful (not to mention unrebutted) expert testimony regarding an alternative cause of death for her daughter L.G. Petitioner's expert witnesses testified to a reasonable degree of medical certainty that L.G. suffered from renal failure and that this was the cause of her death. Petitioner also presented testimony supporting that morphine consumption while breast feeding is not inherently dangerous, and L.G. would have had to consume an impossible amount of breast milk to reach the level measured on the toxicology report absent some externality not reasonably foreseeable to Petitioner (here, renal failure). Both of Petitioner's experts also opined to a reasonable degree of medical certainty that the renal failure L.G. experienced was not caused by the morphine.

This alternative cause was critically absent from the defense at the underlying trial and, as the PCR court correctly determined, trial counsel was deficient for failing to develop this

argument. Contrary to the State's contention, the underlying defense was not "formidable" because although counsel attempted to poke holes in the State's theory that the morphine level was solely due to Petitioner's breastfeeding, the jury heard no explanation for why the level was so high and why it could not be attributed to Petitioner's actions. The question of "if not for the State's theory, then what?" remained. If trial counsel had developed and presented the expert testimony introduced at PCR, there is a reasonable likelihood that the jury would have found that it sufficiently negated the *mens rea* element of the crime of homicide by child abuse.

The PCR Court properly found that counsel was deficient but erred in finding that Petitioner suffered no prejudice. This Court should grant the Petition for a Writ of Certiorari, reverse, and remand for a new trial.

A. Trial Counsel's performance was deficient, and Petitioner suffered prejudice as a result.

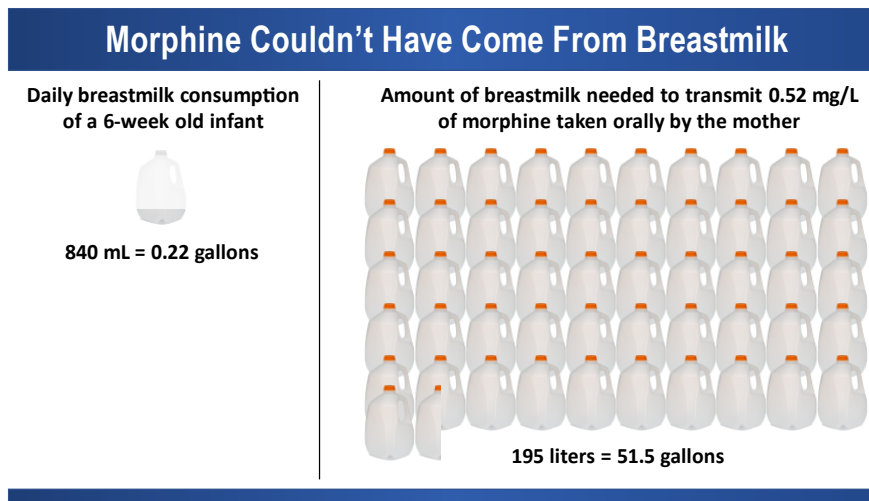
The State's Return extensively discusses the evidence from the underlying trial regarding Petitioner's actions and contends that they were sufficient to constitute extreme indifference. The expert testimony introduced by Petitioner at PCR, however, provided compelling support for why this was not the case. As noted, Petitioner was not required to prove actual innocence at the PCR; rather, she needed to show a reasonable probability that, absent counsel's errors, the jury would have had reasonable doubt respecting guilt. *Strickland*, 466 U.S. at 695.

The testimony of both of Petitioner's experts, reproductive and developmental toxicologist Dr. Anthony Scialli and pediatric nephrologist Dr. Katherine Twombly, supported that morphine is generally safe and effective for breastfeeding mothers and is often prescribed directly to newborns where appropriate.¹ (PCR Day I 35:7-37:4, 193:18-194:4; A. 1269-71,

¹ Respondent cites the product label for MS Contin (the brand of morphine prescribed to Petitioner) in an attempt to rebut this proposition. However, as Dr. Scialli testified, product labels are the byproduct of negotiations between the sponsor and the agency, and labeling is "not optimum as far as conveying the

1247.) Dr. Scialli testified that he had seen thousands of patients over the course of his career, and around a third of those were breast-feeding women. (*Id.* at 35:7-15; A. 1269.) He had prescribed opioids, including morphine, to pregnant and breastfeeding women as well as neonates. (*Id.* at 35:21-37:4; A. 1269-71.) Dr. Twombly noted that she has had infant patients who were directly administered morphine for longer than six weeks, with some even taking it for months at a time. (*Id.* at 221:5-23; A. 1455.)

Dr. Scialli opined that there is no scientific support for the possibility that morphine can pass through breast milk at a lethal level. (*Id.* at 32:1-6, 41:4-8; A. 1266, 1275.) Dr. Scialli performed calculations showing that L.G. would have had to consume over 50 gallons of milk in a 24-hour period to reach the level measured on the toxicology report. (*Id.* at 47:19-48:9; A. 1281-82.) As he explained, this is 232 times the typical daily milk intake for a six-week-old infant.² Dr. Scialli prepared the following demonstrative exemplifying this point:



science.” (PCR Day I 154:3-10.; A. 1388.) Dr. Scialli testified that he has prescribed medications to breastfeeding women despite a warning label regarding taking the drug while breastfeeding, and the fact that a drug could have some potential for being harmful does not mean it should not be prescribed. (PCR Day I 174:23-175:6; A. 1408-09.) Regardless, the warning label introduced at trial was published in July 2012 which *post-dated L.G.’s death by 18 months*, (Trial Tr. 355:9-23; A. 430), and was thus irrelevant in the first instance.

² Dr. Scialli’s explanation for how he arrived at this opinion and the supporting data is fully detailed in Applicant’s post-trial brief. Applicant incorporates that analysis by reference herein.

Dr. Scialli also testified about the importance of the Zipursky paper and its conclusions, which aligned with and confirmed the opinions he would have been prepared to offer had been called at Petitioner’s trial. (See Applicant’s Ex. 7, Zipursky & Juurlink, The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, Clinical Pharmacology & Therapeutics (May 2020); A. 1647-66.) The Zipursky paper concluded that “the belief that newborns can develop opioid toxicity from breastfeeding is supported by very little data, and . . . neonatal opioid toxicity from breastfeeding is *exceedingly improbable*.” (*Id.* (emphasis added).) Aside from the Canadian case discussed at Petitioner’s trial (which the Zipursky paper rebutted, resulting in the Canadian case’s retraction by two publications), there were “*no other confirmed cases of neonatal death despite the use of these drugs by millions of nursing women over the past two decades*.” (*Id.* (emphasis added).)

Dr. Scialli opined that the morphine concentration measured in L.G. was most likely explained by renal failure causing an inability to excrete morphine and its metabolites. (PCR Day I at 52:3-18, 54:21-25, 56:15-25; A. 1286, 1288, 1290.) As he explained, renal failure was not something caused by Petitioner’s consumption of morphine and its transmission through her breast milk. (*Id.* at 54:21-25, 56:15-25; A. 1288, 1290.) Rather, the renal failure was an independent problem suffered by the child. (*Id.*)

Petitioner’s other expert, Dr. Twombly, is a pediatric nephrologist who specializes in treating children with kidney disorders. (*Id.* at 181:24-185:17 A. 1415-19.) She also concluded to a reasonable degree of medical certainty that L.G. suffered from renal failure. (*Id.* at 198:12-17, 212:2-9; A. 1432, 1446.) As she explained, one of the most common causes of acute renal failure is illness. (*Id.* at 186:25-187:6; A. 1419-20.) Here, the medical records reflected that L.G. developed a cold a few days before she passed. (*Id.* at 198:18-22, 203:2-15; A. 1432,

1437.) When babies are congested, they do not feed as well and can become dehydrated, which is one of the most common causes of renal failure. (*Id.*)

Dr. Twombly opined to a reasonable degree of medical certainty that L.G. would not have died absent renal failure.³ (*Id.* at 207:10-13; A. 1441.) Moreover, the morphine in L.G.’s system was not the cause of the renal failure. (*Id.* at 206:3-15; A. 1440.) Critically, renal failure **would not have been reasonably foreseeable to Petitioner.** (*Id.* at 207:14-20; A. 1441.)

Petitioner, therefore, provided persuasive, **unrebutted** expert testimony calling into serious doubt whether Petitioner’s consumption of morphine while breastfeeding was a “deliberate or intentional act under circumstances revealing an extreme indifference to human life,” *see State v. Greene*, 423 S.C. 263, 282, 814 S.E.2d 496, 506 (2018) (emphasis added), that would satisfy the homicide by child abuse statute. As the Court of Appeals has explained, to show extreme indifference, “the State must submit evidence the defendant **consciously engaged in a life-threatening act with indifference as to whether Victim lived or died** to establish the requisite mental state.” *State v. Avery*, No. 2011-194506, 2013 WL 8596560, at *3 (S.C. June 12, 2013) (quoting *Price v. State*, 284 S.W.3d 462, 466 (Ark. 2008)) (emphasis added); *see also Rivers v. State*, No. 2017-002302, 2023 WL 4489438, at *4 (S.C. Ct. App. July 12, 2023) (explaining that extreme indifference is “when a defendant displays sheer apathy in the face of a life-threatening situation to a child”).⁴

³ The State wrongly contends that Dr. Twombly could not say to a reasonable degree of medical certainty whether the renal failure or morphine level that accrued led to L.G.’s death. Dr. Twombly’s testimony to a reasonable degree of medical certainty was that renal failure was the cause of L.G.’s death. (PCR Day I 198:12-17, 207:10-13; A. 1432, 1441.) To the extent it contributed, the morphine accrual was only because of the renal failure. (*Id.* at 234:6-14 A. 1468.)

⁴ Petitioner acknowledges that these cases are unpublished case and not binding precedent. They are cited for illustrative purposes only.

The PCR court correctly determined that trial counsel's failure to develop and present the renal failure alternative cause was deficient.⁵ Trial counsel was unable to introduce any opinion to a reasonable degree of medical certainty explaining how the morphine level could have reached what was measured on L.G.'s toxicology report. Presenting the viable alternative cause of death that Petitioner established 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, these opinions would have required the State to disprove renal failure in connection with its case. This would have been very compelling to the jury when compared to the State's *res ipsa loquitur* theory that the morphine had to come from somewhere and since Petitioner was breastfeeding and taking morphine, that was the only explanation for the level. Trial counsel's deficient performance prejudiced Petitioner because there is a reasonable probability that the jury would have found that the elements of homicide by child abuse, particularly the extreme indifference intent requirement, were not met under these circumstances. Petitioner's morphine consumption while breastfeeding was not inherently dangerous and the only reason that the morphine accrued at the level measured in the toxicology report was because L.G. was suffering from the unforeseeable condition of renal failure.

Contrary to the State's contention (and the PCR Court's findings), *State v. Taylor* and *State v. Phillips* are inapposite. As Petitioner detailed in her petition, both cases involved situations where a caregiver knowingly gave a controlled substance to a child. They are not

⁵ Trial counsel agreed it was error to not present the alternative cause of renal failure and there was no strategic reason for failing to do so. (PCR Day II 38:2-34:21; A. 1508.) He acknowledged that this alternative cause could have changed the outcome of applicant's trial. (*Id.* at 41:5-42:11; A. 1511.) He had prior experience with a drug overdose case and was aware of the importance of an alternative explanation for cause of death. (*See id.* at 38:14-39:10 A. 1508-09.) As Petitioner detailed in her post-trial brief, 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 thought the State could not prove their theory. However, this left the jury with no other explanation to consider aside from the State's.

analogous to this case where L.G.'s exposure to the medications was much more attenuated and not due to any intentional action by Petitioner to give her a controlled substance. The exposure here was only to the extent very small quantities were metabolized by Petitioner's body, made their way into her breast milk, and were ingested and processed by L.G.'s body.

The Court of Appeals' analysis from *Phillips* drives home the stark distinction between that case and Petitioner's. As the court explained, to prove extreme indifference the State was required to show "the defendant performed a deliberate act that he or she *knew would create a risk of death to the child.*" *State v. Phillips*, 411 S.C. 124, 135, 767 S.E.2d 444, 449 (Ct. App. 2014), *aff'd as modified on other grounds*, 416 S.C. 184, 785 S.E.2d 448 (2016). This necessitated that the State prove the defendant intended to give medication "with the knowledge that doing so would create a risk to the child's life." *Id.* Here, there was no evidence presented in the underlying trial or at PCR that Petitioner acted with the knowledge that she was creating a risk of death to L.G. by allegedly consuming morphine while breastfeeding.⁶

In light of the foregoing, the Court should grant certiorari, reverse the PCR Court, and remand the matter for a new trial.

B. The PCR court's reliance on this Court's discussion of causation in its opinion from the merits appeal was improper.

The PCR court (and the State in its briefing, *see* Ret. p. 14) relied extensively on this Court's description of the underlying facts and its causation analysis from the opinion on the merits appeal to find a lack of prejudice. This was error.

⁶ The *State v. Jarrell* case cited by the State is likewise distinguishable. In that case, the Court of Appeals found that the trial court properly denied directed verdict on a homicide by child abuse charge, finding there was sufficient evidence of extreme indifference where the defendant plotted her child's murder with the child's father and purposefully left the child in the home with the father knowing that he intended to kill the child. *State v. Jarrell*, 350 S.C. 90, 96-98, 564 S.E.2d 362, 366-67 (Ct. App. 2002).

For the merits appeal, the issue before the court was whether the trial court should have granted directed verdict, which required the Court to construe the evidence in the light most favorable to the State. As this Court explained in *State v. Phillips*, 416 S.C. 184, 193, 785 S.E.2d 448, 452 (2016), when ruling on a directed verdict motion, the trial court must submit the case to the jury if there is “any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.” *Id.* While a jury “**must consider alternative hypotheses**, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt.” *Id.* (emphasis added). On the other hand, “[t]he jury’s focus is on determining whether every circumstance relied on by the State is proven beyond a reasonable doubt, and that all of the circumstances be consistent with each other and, taken together, point conclusively to the guilt of the accused **to the exclusion of every other reasonable hypothesis**.” *Id.* (emphasis added).

Therefore, reliance on this Court’s analysis of whether there was sufficient evidence on extreme indifference to survive directed verdict in the underlying trial was misplaced since it was construing all inferences in the light most favorable to the State. Regardless, Petitioner introduced evidence and testimony at PCR demonstrating another reasonable hypothesis that the jury should have been permitted to consider. The State’s theory on extreme indifference at the underlying trial was that Petitioner was pregnant, hid that pregnancy from her doctors,⁷ and

⁷ There has been much evidence, testimony, and argument from the State throughout this matter about Petitioner “concealing” her pregnancy. This is entirely irrelevant. L.G. did not die in utero; rather, she was forty-six days old when she passed. As Dr. Twombly testified and the medical records reflected, L.G. was doing well until the renal failure occurred. (PCR Day I 198:18-22; A. 1432.) She had a normal, “healthy” well visit at two weeks of age with “absolutely no concerns by the pediatrician” and was “fine” until a few days before she passed. (PCR Day I 198:18-22, 200:17-201:20, 204:10-21; A. 1432, 1434-35, 1438.)

Likewise, the State has devoted considerable attention to Petitioner’s actions following L.G.’s death such as omitting the fact that she was taking medications from investigators. This likewise had nothing to do with Petitioner’s actions towards L.G. and whether they manifested extreme indifference.

continued to take prescription medication. However, the testimony from PCR supported that this was not inherently dangerous and that L.G.'s cause of death was not because of any deliberate action by Petitioner to put L.G. in harm's way because she suffered from renal failure. The jury should have been permitted to balance these positions and, had the jury been permitted to do so, there is a reasonable probability that its conclusion would have been different.

C. Trial counsel's reliance on Dr. Karch was improper.

In addition to the failure to develop the alternative cause theory, trial counsel was deficient for relying solely on Dr. Karch, and Petitioner was prejudiced as a result. The State contends that Dr. Karch helped form part of a "formidable defense" seeking to show that the morphine level could not be explained through transmission through breast milk. The State and the PCR Court, however, both overlooked that Dr. Karch did not opine that it was impossible for the level of morphine found in L.G. to be explained solely because of breastfeeding as Dr. Scialli did. He was only ever able to speculate that he did not *think* that was the case. Dr. Karch could not offer any reliable testimony explaining how the morphine level could have gotten as high as it did if not solely due to Petitioner's breastfeeding. In fact, when Attorney Wise asked Dr. Karch on direct examination if he thought that the level could be explained solely because of transmission through breast milk, he replied "yes." (Trial Tr. 504:19-21; A. 579.) Dr. Karch's testimony was ultimately detrimental to the defense because it could not offer any rebuttal to the State's theory.

Moreover, contrary to the PCR Court's finding and the State's argument, Dr. Karch's speculation about a possible "genetic defect" was not analogous to the renal failure theory established at PCR. Dr. Karch did not clarify what sort of defect could have caused this outcome and did not testify to a reasonable degree of medical certainty that L.G., in fact, had any genetic defect that would have impaired her ability to process morphine. Both of Petitioner's experts at

PCR, on the other hand, testified that she suffered from renal failure to a reasonable degree of medical certainty and that this caused the morphine accrual.

Finally, the State's contention that Attorney Wise appropriately relied solely on Dr. Karch in preparing the defense is without merit. Counsel conceded that Dr. Karch was the only expert he spoke with, and he did not give thought to consulting with any others. (PCR Day II 37:4-11, 70:21-74:2, 71:3-16; A. 1507, 1540-41.) As this Court noted in *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007), effective assistance means that counsel “[w]ith 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.” *Id.* at 332, 642 S.E.2d at 597. As Petitioner established at PCR, Attorney Wise could have found experts like Dr. Scialli and Dr. Twombly who would have allowed for a much more persuasive and full-throated defense against the State's theory and been able to testify as to the alternative cause of renal failure to a reasonable degree of medical certainty.

Trial counsel was deficient in calling and relying solely on Dr. Karch as a defense expert, and Petitioner suffered prejudice as a result.

D. The PCR Court erred in finding that Petitioner suffered no prejudice due to trial counsel's failure to have scientifically unreliable evidence excluded.

The State, like the PCR Court, misconstrues Petitioner's argument regarding trial counsel's failure to have scientifically unreliable testimony excluded. The fact that the State's experts did not offer their opinions about morphine transmission through Petitioner's breastmilk to a reasonable degree of medical certainty is *precisely why* counsel was deficient and Petitioner suffered prejudice. Counsel should have been moving to exclude this testimony pretrial via a *State v. Council* hearing and objecting to it as the testimony was given.

The fact that the State's experts could not definitively state that the level measured in L.G. could be explained from the breastfeeding drives the problem home. Dr. Eagerton testified that the morphine "had to get into the baby somehow" when asked if it could have been through the breast milk, and Dr. Wren testified similarly. (Trial Tr. 383:12-18, 439; 444:6-16, A. 458, 519.) The most Dr. Eagerton and Dr. Wren could testify to was that at least *some* of the morphine level could be attributed to Petitioner's breastfeeding. (Trial Tr. 383:19-384:21, 444:2-11, A. 458-59, 519.) Trial counsel should have been utilizing experts like Dr. Scialli to challenge, undermine, and exclude this unreliable speculation, yet he failed to do so. This resulted in significant prejudice to Petitioner because the jury heard testimony which would not have survived the court's gatekeeping function had it been challenged.

For all these reasons, the PCR erred by finding that although trial counsel's performance was deficient, Petitioner was not sufficiently prejudiced to warrant postconviction relief. This Court should grant certiorari, reversal, and remand for a new trial.

II. The State also misconstrues Petitioner's argument about use of other medications and "synergy," which should have been excluded in the first instance.

As Petitioner detailed in her opening brief, the PCR Court and the State both labor under the mistaken assumption that since the trial court ultimately charged the jury that they should only consider ingestion of a Schedule II substance (of which only morphine qualified) in assessing extreme indifference, the considerable testimony about "synergy" was rendered harmless.⁸ As Petitioner has explained, however, the very fact that the Court agreed with trial counsel at the end of trial that the other medications should not be considered by the jury demonstrates the problems with trial counsel's performance and the resulting prejudice.

⁸ Notably, the Court did not explicitly tell the jury that only morphine met this criteria. (Trial Tr. 581:15-19; A. 656.)

The PCR Court acknowledged that Petitioner made a persuasive case at PCR that the “medical science does not support the idea of ‘synergistic effect’ of the other drugs taken by [Petitioner].” (Order of Dismissal at 12; Order Den. Mot. at 3-4; A. 1773, 1825-26.)⁹

At PCR, Dr. Scialli emphatically testified that there was no support for “synergy” in this case. (PCR Day I at 78:11-16; A. 1312.) As Dr. Scialli explained, synergy is a concept in toxicology where two or more 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; A. 1307.) At Petitioner’s criminal trial, five of the State’s expert witnesses testified that the medications consumed by Petitioner had a synergistic effect, with several agreeing that the statement that the medications found in L.G. interacted in a “one plus one equals three” or “one plus one equals five” manner. (*See* Trial Tr. 148, 259-61, 265, 322, 341, 349-53, 386-91, 430-34, 444; A. 223, 335-36, 340, 396-97, 425-26, 505-19.) Dr. Scialli opined, however, that *none* of the medications on the toxicology report for L.G. would have had a synergistic effect such that the morphine’s effects would have been enhanced. (PCR Day I 78:11-16; A. 1312.)

Trial counsel, however, admittedly made no effort to explore this issue with the trial expert, Dr. Karch (a toxicologist), or attempt to obtain opinions from someone like Dr. Scialli who could have explained why this theory was meritless. (PCR Day II 24:11-12, 49:12-50:7; A. 1494, 1519.) Doing so would have enabled trial counsel to exclude any such evidence and

⁹ The State’s Return seeks to have it both ways regarding the other medications such as Klonopin (also known by clonazepam, its generic name) and their import. The State notes that the trial court properly charged the jury that they should only consider the morphine and that this rectified any prejudice. However, it repeatedly highlights that Petitioner consumed other medications that were reflected on L.G.’s toxicology report as if that has bearing on her guilt or innocence. The State references the other medications as early as the second sentence of its statement of facts. (Ret. p. 4.) Moreover, the State cites the presence of Klonopin on the toxicology report as further support for Petitioner’s “lack of concern for victim.” (Ret. p. 13.) This is yet another distraction in the State’s efforts to paint Petitioner in a negative light. Regardless, Dr. Scialli testified at PCR, this medication is also directly administered to neonates and prescribed to pregnant and breastfeeding women. (PCR Day I 76:8-22; A. 1310.)

testimony in the first instance. Despite being on notice that the State intended to present testimony on “synergy,” trial counsel did not investigate this theory, attempt to exclude it, or prepare any rebuttal. Trial counsel also failed to move to exclude or strike the testimony on the basis that no experts opined to a reasonable degree of medical certainty regarding the supposed applicability of synergy. Finally, trial counsel made no argument to the jury that they should disregard the testimony about use of other medications and their (scientifically unsupported) “synergistic effect” on the morphine in light of the court’s charge that they should only consider L.G.’s consumption of “Schedule II controlled substance” (of which only morphine qualified). These deficiencies prejudiced Petitioner since the jury would not have heard any testimony about synergy or any of the other medications for that matter but for counsel’s deficiencies. This also warrants granting certiorari, reversing, and remanding for a new trial.

III. The leading questions posed by the State were not harmless and the prejudice would not have been rectified simply by rephrasing.

The significant problem with the State’s leading questions (some of which the PCR court agreed trial counsel was deficient for failing to object to) was that they suggested to the jury 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. None of the State’s experts offered any such opinion to a reasonable degree of medical certainty. The PCR Court found that the content of the answers were not “facts in dispute,” and thus there was no prejudice. However, as Petitioner as consistently argued, those facts should have been in dispute had trial counsel not rendered a deficient performance. The jury never should have been permitted to hear the scientifically unreliable evidence and testimony that the State suggested to the jury was “obviously” true. Therefore, the questions were not harmless and merely rephrasing

would not have rectified the prejudice. The Court should also grant certiorari, reverse, and remand for a new trial for this additional reason.

IV. Counsel rendered ineffective assistance on appeal.

Counsel raised the correct issue on appeal regarding the inconsistency of the homicide by child abuse and involuntary manslaughter verdicts. However, counsel failed to sufficiently advocate for *why* the appropriate relief would be either a remand for a new trial or reversal/vacatur of the conviction and sentence for homicide by child abuse. Although this Court agreed that the convictions were inconsistent, it opted to simply vacate the lesser conviction and sentence for involuntary manslaughter. Attorney Wise failed to seek reconsideration or rehearing of Court's holding. If the charges were inconsistent as the Court found, then it was inherently confusing to present both to the jury for consideration and the matter should have been remanded for a new trial with instruction that the State elect one theory at a minimum.

This deficiency significantly prejudiced Petitioner because there was an opportunity to seek reversal of both convictions and a new trial in light of the Supreme Court's ruling that was not advocated for or pursued by counsel. This represents a separate and independent ground for granting certiorari, reversing, and remanding for a new trial.

V. The Court should grant certiorari and formally recognize the cumulative error doctrine.

The State does not dispute that the applicability of the cumulative error doctrine is an unsettled question of South Carolina law. *See Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002); *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985). Rather, it simply contends that the Court should not recognize the doctrine. Petitioner respectfully submits that the series of errors found by the PCR Court warrants recognition of the cumulative error doctrine in this case. As the Fourth Circuit explained, under federal cumulative error precedent a series of errors that

were harmless individually can cumulatively arise to sufficient prejudice to warrant relief. *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998). The Court should grant certiorari, formally recognize this doctrine, reverse the PCR Court, and remand for a new trial in light of the prejudice caused resulting from counsel's cumulative errors.

VI. The Zipursky paper constitutes newly discovered evidence warranting granting certiorari and reversing for a new trial.

Although the State is correct that its experts did not directly rely on the Canadian case at the underlying trial, it gave the State an avenue to avoid directed verdict because it represented at least one example in the medical literature suggesting that morphine toxicity could occur because of the mother's breastfeeding. The Canadian case has now been thoroughly discredited by the Zipursky paper. Therefore, 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 Petitioner'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 under these facts. Finally, it is not merely cumulative or impeaching.

Therefore, the Zipursky paper satisfied the standard for granting a new trial based on new evidence and is an independent basis for granting certiorari.

Conclusion

For the reasons stated herein and in Petitioner's petition for a writ of certiorari, the Court should grant certiorari, reverse the order of the PCR Court, and remand the matter for a new trial.

Respectfully submitted,

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