RECEIVED
Nov 03 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
SPARTANBURG COUNTY

The Honorable J. Mark Hayes, II
Circuit Court Judge

Appellate Case No. 2023-001934
Case No. 2019-CP-42-01605

Stephanie Irene Greene, # 359489

Petitioner,

v.

State of South Carolina

Respondent.

Amended Brief of Petitioner

NELSON MULLINS RILEY & SCARBOROUGH, LLP

John F. Kuppens
SC Bar No. 12948
E-Mail: john.kuppens@nelsonmullins.com
Blake T. Williams
SC Bar No. 100794
Email: blake.williams@nelsonmullins.com
Caroline A. Warner
SC Bar No. 104280
Email: caroline.warner@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

ROSS & ENDERLIN, P.A.

Susannah C. Ross
SC Bar No. 11205
E-Mail: susannah@rossenderlin.com
330 East Coffee St.
Greenville, SC 29601

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

STATEMENT OF THE ISSUES

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

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

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

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

INTRODUCTION

This matter arises out of the death of Petitioner Stephanie Irene Greene, # 359489's ("Petitioner") infant daughter ("L.G."). The State's theory at trial was that Ms. Greene improperly used prescription morphine while breastfeeding, which transmitted through her breast milk to her daughter and caused her to overdose. Trial counsel did not rebut the State's evidence and testimony that a lethal level of morphine could be explained solely from breastfeeding. Moreover, trial counsel failed to investigate, develop, or present any testimony or evidence (expert or otherwise) that demonstrated an alternative cause for L.G.'s death.

At PCR, Petitioner introduced expert testimony establishing that the morphine concentration measured in L.G. could not have been explained due to breastfeeding alone. Instead, to a reasonable degree of medical certainty, L.G. suffered acute renal failure and this was the cause of her death. The PCR Court agreed that trial counsel's performance was deficient because of his failure to investigate and present this alternative cause/theory.

The PCR Court's Order of Dismissal acknowledged that Petitioner's presentation at the evidentiary hearing was persuasive and impactful. Nevertheless, the PCR Court found that it would not have made a sufficient impression on the minds of the jury and thus Applicant failed to establish prejudice. The PCR Court also found that newly published scientific literature which corroborated Petitioner's expert testimony about the inability for opioids such as morphine to pass through breast milk at a lethal level did not constitute newly discovered evidence warranting a new trial. Respectfully, the PCR Court's findings cannot be reconciled and constitute reversible error.

STATEMENT OF THE CASE AND FACTS

I. Criminal Trial

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

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

The State also presented evidence and testimony at trial contending that the morphine acted "synergistically" with other medications identified on the toxicology report for L.G. to enhance the effects of the morphine. Yet, in closing, the State argued that L.G.'s death was solely due to the morphine and Petitioner's breast milk was the lone source from which it was received.

When asked on cross-examination if there were any reported cases of a lethal dose through breast milk, the State's toxicology expert, Dr. David Eagerton, cited a singular study out of Canada. Parvaz Madadi, et al., Safety of codeine during breastfeeding. Fatal morphine poisoning in the breastfed neonate of a mother prescribed codeine, Can Fam Physician, 53:33-5 (2007) (A. 1644-46) (the "Canadian study"). The Canadian study was harshly criticized and discredited in a subsequent paper published in 2020 (the "Zipursky paper"). (*See* Applicant's Ex.

7, Zipursky & Juurlink, The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, Clinical Pharmacology & Therapeutics (May 2020) (A. 1647-66).) Following publication of the Zipurksy paper, two of the journals that published literature about the Canadian study issued a retraction.[1] (PCR Day I, Tr. at 67:15-24; A. 1301)

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

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

II. Direct Appeal

Petitioner appealed and the matter was *sua sponte* transferred to the Supreme Court. After two oral arguments, the Court affirmed Petitioner's convictions and sentences for homicide by child abuse and unlawful conduct toward a child in a 4-1 decision issued on May 23, 2018. The Court, however, vacated the involuntary manslaughter conviction and sentence, finding that

[1] S*ee* Pimlott & Tsuyuki, Risks of maternal codeine intake in breastfed infants: a joint statement of retraction from Canadian Family Physician and the Canadian Pharmacists Journal, Can Fam Physician (2020) (A. 1667-68.)

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

Petitioner could not be found guilty for both homicide by child abuse and involuntary manslaughter without running afoul of double jeopardy.

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

III. Post-Conviction Relief

On May 2, 2019, Petitioner timely filed a petition for post-conviction relief (PCR). After discovery and three amendments to the Petition, the Honorable J. Mark Hayes, II held an evidentiary hearing on September 19 and 20, 2022. Petitioner presented testimony from three witnesses: reproductive and developmental toxicology expert Dr. Anthony Scialli, pediatric nephrology expert Dr. Katherine Twombley, and trial counsel Attorney Wise. The State did not call any witnesses and limited its presentation to cross-examination and argument of counsel.

a. Dr. Scialli's Testimony

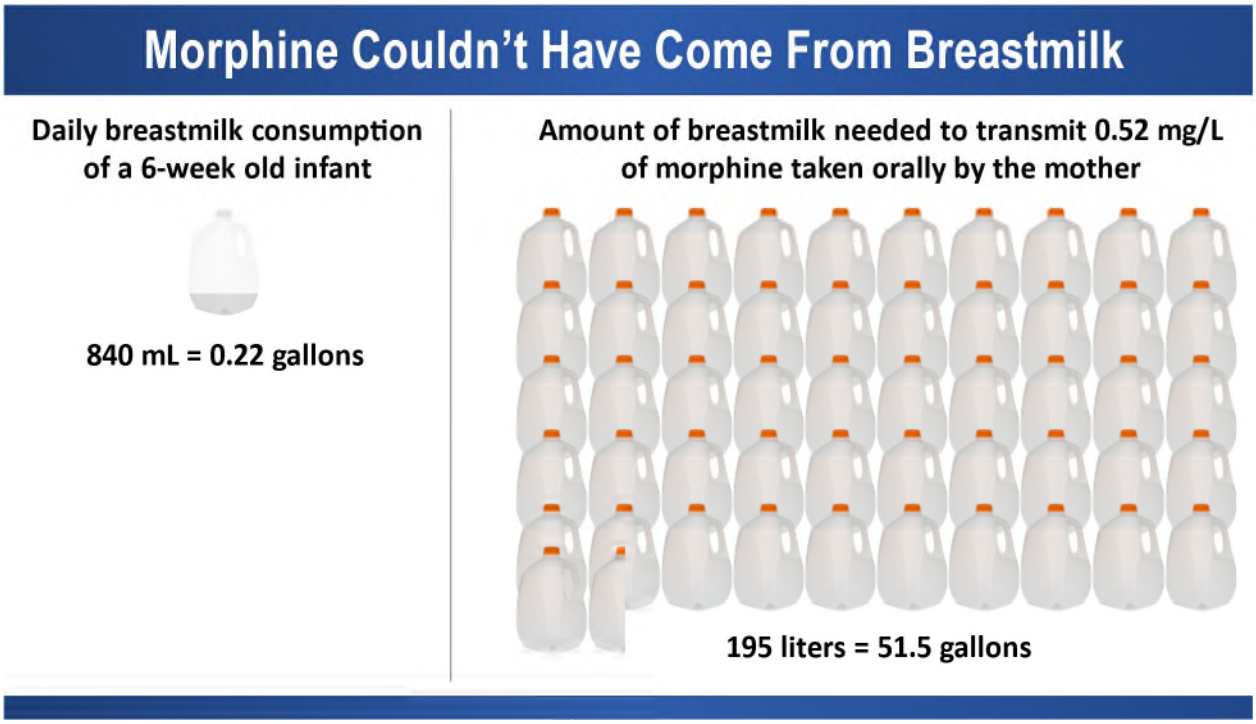
Dr. Anthony Scialli specializes in reproductive and developmental toxicology and has extensive experience treating pregnant and breastfeeding women, particularly those with issues involving exposure to medication. He was qualified as an expert in this field without objection. (PCR Day I, Tr. 8:16-23, 20:15-22; A. 1242, 1254.) Dr. Scialli testified that he had seen thousands of patients over the course of his career, and around a third of his patients were breast-feeding women. (*Id.* at 35:7-15; A. 1269.)

Dr. Scialli offered four critical opinions at the PCR trial. **First**, he opined that the morphine concentration level measured in L.G. could not have been explained due to breastfeeding alone. (*Id.* at 32:1-6; A. 1266.) **Second**, he opined that the morphine concentration level measured in L.G. was most likely explained by the inhibition of excretion of morphine and its metabolites, almost certainly due to renal failure. (*Id.* at 52:3-18, 54:21-25, 56:15-25; A. 1286, 1288, 1290.) 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.*) **Third**, Dr. Scialli opined that the reliance of the State's witnesses on the Canadian study was inappropriate because it concerned codeine, not morphine, and because the paper was unreliable even with respect to codeine, as the 2020 Zipursky paper detailed. (*Id.* at 78:11-16; A. 1312.) **Finally**, Dr. Scialli opined that the testimony of the State's expert witnesses regarding the "synergistic effect" of other medications identified on the toxicology report on the morphine was not appropriate because there is no literature support for synergy in this case. (*Id.* at 78:17-20; A. 1312.)

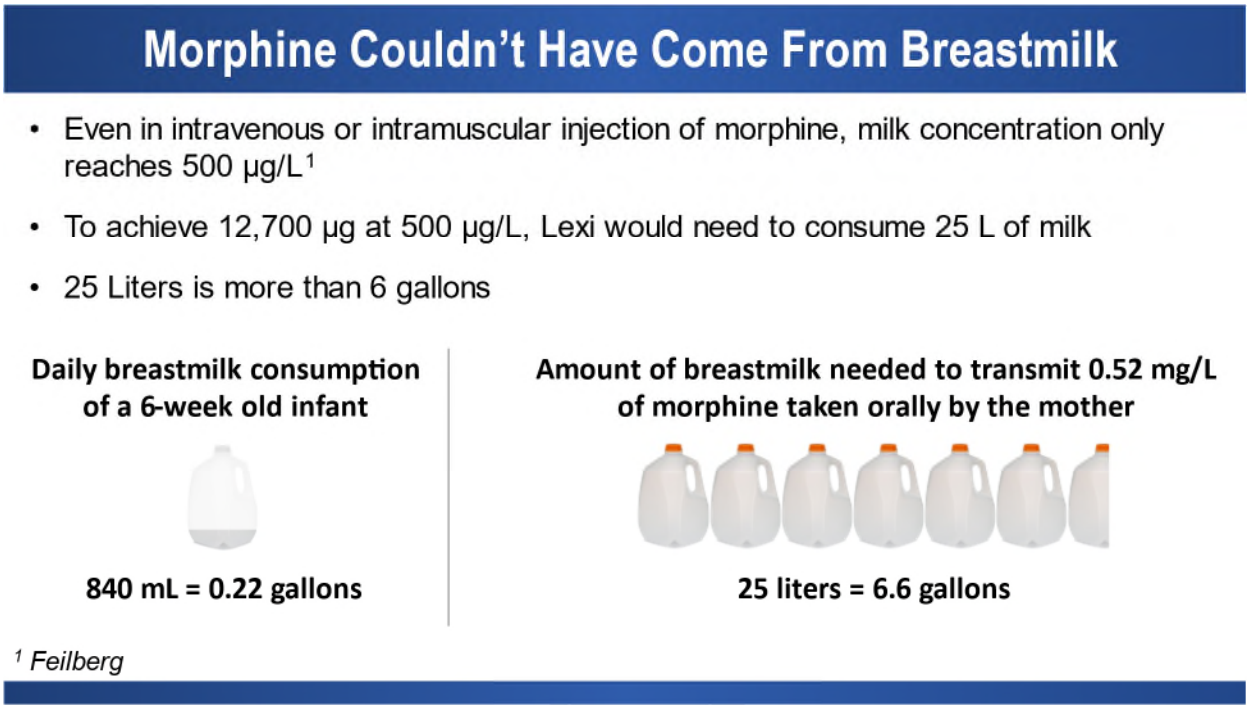
Dr. Scialli performed calculations to estimate how much breast milk L.G. would have had to consume to reach the morphine level measured on the toxicology report, concluding that she would have had to consume over **50 gallons of milk in a 24-hour period**.[3] (*Id.* at 47:19-48:9; A. 1281-82.) **As he explained, this is 232 times the typical daily milk intake for a six-week-old infant**, which is 840 milliliters (less than 1 liter per day). Dr. Scialli prepared the following demonstrative exemplifying this point:

[3] These calculations were based on the most reliable information Dr. Scialli found in the medical literature. He began by researching the medical literature to identify the volume of distribution of morphine in children, which the research showed was 7.3 liters per kilogram. (PCR Day I, Tr. 46:21-24; A. 1280.) 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; A. 1281.) Dr. Scialli then 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; A. 1279.) As Dr. Scialli explained, this was deferential to the State as he would expect the amount to be ***lower***; however, he wanted to use the highest concentration he could find in the literature for orally administered morphine out of deference to the State. (*See id.* at 45:17-46:6; A. 1279-80.) With an expected level of 65 micrograms per milliliter in the breast milk, L.G. would have had to consume approximately 195 liters of milk daily to achieve the dose of 12.675 milligrams consistent with the toxicology report (65 micrograms multiplied by 195 liters would yield a dose of 12,675 micrograms or, converted to milligrams, 12.675 milligrams, of morphine). (*Id.* at 47:19-48:9; A. 1281.)



As an additional illustration, Dr. Scialli researched the medical literature to identify any examples of a higher morphine concentration measured in breast milk from inapposite contexts such as morphine administered intravenously to a nursing mother (where ***more*** morphine would make its way into the breast milk). The highest reported amount he could find from ***any context*** was 500 micrograms. **Even using that unrealistic number, L.G. would have had to consume around 6.6 gallons of breast milk in a 24-hour period, 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:

[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.



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

b. Dr. Twombley's Testimony

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

Based on her review of the case materials, L.G.'s medical records, and her professional knowledge, skill, training, and experience, **Dr. Twombley opined to a reasonable degree of medical certainty that L.G. suffered from acute renal failure and this was the cause of her death**. (*Id.* at 198:12-17, 212:2-9; A. 1432; 1446.) She premised this conclusion on certain 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; A. 1432.) Dr. Twombley noted that this 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; A. 1435.) Second, L.G.'s medical records noted she had a cold on Wednesday, November 10th (around two days before her death) and was "congested, not eating well, and somewhat lethargic." (*Id.* at 203:2-15; A. 1437.) When Petitioner called her pediatrician's office about these issues, the nurse informed Petitioner that if L.G. did not have a fever, she did not need to come to the office. (*Id.*) Dr. Twombley 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.

(*Id.* at 203:16-204:1; A. 1437-38.) The failure to take in the appropriate amount of milk or formula caused by illness can lead to dehydration, which is "one of the most common causes of renal failure." (*Id.* at 205:3-23; A. 1439.)

Based on these facts, Dr. Twombley concluded that renal failure was likely the cause of death and that, **to a reasonable degree of medical certainty, L.G. would not have died absent renal failure**. (*Id.* at 207:10-13; A. 1441.) **As she explained, the morphine that was in L.G.'s system was not the cause of the renal failure**. (*Id.* at 206:3-15; A. 1440.) Renal failure could

cause morphine or other toxins to build up rapidly (within 24 hours even). (*See id.* at 206:3-15, 213:3-11; A. 1440.) Dr. Twombley noted that even if no morphine had been present in L.G., potassium could have built up and caused her death. (*Id.* at 206:19-207:9; A. 1440-41.) Thus, renal failure could have caused her death regardless. (*Id.* at 234:15-21; A. 1468.) Dr. Twombley opined that renal failure would not have been reasonably foreseeable to Petitioner. (*Id.* at 207:14-20; A. 1441.)

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

c. Attorney Wise's Testimony

Petitioner's final witness was Attorney Wise, who served both as Petitioner's trial counsel and appellate counsel. He conceded that he did not present renal failure as an alternative cause of L.G.'s death and was not aware of this possibility until contacted by PCR counsel. (PCR Day II, Tr. 36:20-37:2; A. 1506-07.) He acknowledged that he did not consult an expert in reproductive and developmental toxicology or pediatric nephrology at the time of the underlying trial. (*Id.* at 37:4-11; A. 1507.) In fact, he only spoke with one expert (Dr. Karch) and did not give thought to consulting any others. (PCR Day II 37:4-11, 70:21-74:2, 71:3-16; A. 1507, 1540-41.)

Attorney Wise emphatically agreed that it was an error not to present the alternative cause of renal failure and there was no strategy reason for not doing so. (*Id.* at 38:2-41:4, 50:20-25; A. 1508-11, 1520.) As he explained, cause of death was a critical issue, and if there had been an alternative explanation, it would have been "virtually impossible" for the State to argue

morphine was the cause of death. It was error not to present the renal failure issue because it was a "100% exoneration" rather than just something to "create controversy" with the jury. (*Id.* at 50:20-25; A. 1520.) He believed that this alternative cause of death could have changed the outcome of Petitioner's trial. (*Id.* at 41:5-42:11; A. 1511-12.)

Attorney Wise also acknowledged there were several opportunities where he failed to attack evidence and testimony the State submitted. For example, he did not object to State expert, Dr. Wren's, statement that the morphine "had to get into the baby somehow." (*Id.* at 44:24-45:1-12; A. 1515.) Attorney Wise also agreed 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; A. 1516-18.)

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

Attorney Wise further acknowledged that he failed to object to the State's testimony about the synergistic effect of the medications on the toxicology report for L.G., and had he discussed the issue with someone like Dr. Scialli, he would have been able to present expert testimony supporting that synergy was not at issue. (*See id.* at 49:8-50:7; A. 1519-20.)

Finally, Attorney Wise agreed that the Zipursky paper's repudiation of the Canadian study would have been extremely helpful and could have easily made a difference in the

outcome. (*Id.* at 42:12-43:8, 44:16-23; A. 1512-14.) The Solicitor expressly referenced the Canadian study in his closing argument,[5] and Attorney Wise noted it was "probably one of the most significant facts" in the case. (*Id.* at 44:16-23; A. 1514.)

d. Conclusion of the PCR hearing.

The Court requested post-trial briefs from the parties at the conclusion of the hearing. Petitioner and the State both submitted their post-trial briefs on December 1, 2022.

e. The PCR Court's Findings

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

Relevant to this appeal, the PCR Court found that trial counsel was deficient for failing to investigate and present an alternative theory of renal failure. Still, the PCR court nevertheless held that Petitioner was not prejudiced by counsel's deficiencies under *Strickland*.

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

The Court also held that South Carolina does not recognize the "cumulative error doctrine," and that "[v]iewing the record as a whole," Petitioner was not prejudiced by counsel's deficient performance, and the deficiencies do not create a reasonable probability of a different result.

[5] The Solicitor's references to the Canadian case were at pages 557 and 563 of the underlying trial transcript, A. 632, 638.

Finally, the court found that the Zipursky paper and the retraction of the Canadian study did not constitute new evidence warranting a new trial.

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

After certiorari was fully briefed,[6] the Court issued an Order granting certiorari on the four grounds argued in this brief on September 25, 2025.

STANDARD OF REVIEW

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

[6] During the certiorari briefing stage, the American College of Obstetricians and Gynecologist, Pregnancy Justice, and Time Served submitted an amicus curiae brief in support of Petitioner. Their brief detailed the extreme outlier nature of Petitioner's conviction and the concerning policy implications of what amounts to the criminalization of breastfeeding. Petitioner incorporates those arguments by reference and requests that the Court review and consider all of the arguments raised by amicus curiae in reaching its decision.

outcome." *Id.* (quoting *Strickland,* 466 U.S. at 694). For guilt or innocence issues, this means whether there is a reasonable probability that, absent the errors, the fact finder would have had reasonable doubt respecting guilt." *Strickland,* 466 U.S. at 695.

ARGUMENT

I. Petitioner suffered prejudice due to trial counsel's ineffective assistance in failing to investigate and present the alternative cause of renal failure and to challenge the lack of scientific support for the State's breast milk transmission theory.

A. The PCR Court erred in finding that although trial counsel was ineffective, Petitioner nevertheless suffered no prejudice because this would not have changed the outcome.

The PCR Court acknowledged that Petitioner's expert testimony regarding renal failure established a highly persuasive alternative theory as to the cause of death and found that counsel was deficient for failing to present this theory. (Order Den. Mot. at 3; A. 1825.) The court held, however, that there was not a reasonable probability that the theory would have changed the outcome of trial, and therefore, Petitioner suffered no prejudice. (Order of Dismissal, at 7; A. 1829.) This Court should reverse.

At the underlying trial, the jury heard extensive testimony that morphine was dangerous for Petitioner to consume while breastfeeding and that it could transmit through her breast milk at a lethal level (which Petitioner's own expert conceded was possible). The defense gave the jury no other explanation for why the morphine level was so high or why it could not be attributed to Petitioner's actions. The question of "if not for the State's theory, then what?" remained. Petitioner filled that gap at PCR. First, Petitioner showed that there is no scientific support for the theory that a lethal level of morphine can pass through breast milk. Then, Petitioner established that where a child is suffering from renal failure, it can cause an inability to excrete toxins and, to a reasonable degree of medical certainty, this was the cause of death. This evidence and testimony would have demonstrated that Petitioner's actions did not manifest

a mental state of "extreme indifference" because L.G.'s death was not a reasonably foreseeable result of her conduct. There is a high likelihood that the jury would have found this evidence and testimony highly persuasive, just as the PCR court did, and it could have changed the verdict.

The PCR court erred in several respects. First, it incorrectly asserted that the "facts in the record" related to the elements of extreme indifference are "not contested."[7] Although Petitioner did not dispute the accuracy of the level of morphine measured in L.G.'s system identified on the toxicology report, that Petitioner consumed morphine, or that Petitioner was breastfeeding, Petitioner vehemently disputed that these actions satisfied the *mens reas* of homicide by child abuse.

As the evidence and testimony elicited at PCR supported, morphine is generally safe and effective for breastfeeding mothers and is often prescribed directly to newborns where appropriate. (PCR Day I, Tr. 35:7-37:4, 193:18-194:4; A. 1269-71, 1427-28.) As Dr. Scialli detailed, there is no scientific support for the possibility that morphine can transmit through breast milk at a lethal level. (*Id.* at 32:1-6, 41:4-8; A. 1266, 1275.) As detailed above, he performed calculations and determined 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 the toxicology screening reflected. (*Id.* at 47:19-48:10; A. 1281-82.)

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

As Dr. Twombley opined, what caused L.G. to die was renal failure—a very abnormal circumstance which Petitioner would have had no reason to suspect. (*Id.* at 198:12-17, 207:14-20, 212:2-9; A. 1432, 1441, 1446.) L.G. could have died of renal failure regardless of whether Petitioner was consuming morphine, and Dr. Twombley opined that it was not reasonably foreseeable to Petitioner that L.G. was in renal failure. (*Id.* at 206:16-207:20; A. 1440-41.) 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 dehydration is one of the most common causes of renal failure in infants. (*Id.* at 205:14-23, 212:7-9, 232:1-7; A. 1439, 1446, 1466.)

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 this Court 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) [8] (quoting *Price v. State*, 284 S.W.3d 462, 466 (Ark. 2008)) (emphasis added); *see also Rivers v. State*, 446 S.C. 1, 13, 916 S.E.2d 335, 342 (2025) (explaining that the extreme indifference standard requires the State to prove that "the defendant was aware of the risk of death and disregarded it").

[8] Petitioner acknowledges that this unpublished case is ot binding precedent. It is cited for illustrative purposes only.

The PCR Court agreed that Petitioner's experts "established, among other things, the child would not have died but for renal failure." (Order of Dismissal at 8; A. 1769.) The Court also noted that "there is no factual or medical information that causally connects the morphine and renal failure" and the expert testimony established that L.G. could have died from "renal failure regardless of the high morphine level." (*Id.* at 9; A. 1770) Therefore, the PCR court correctly determined that trial counsel's failure to develop and present the renal failure alternative cause was deficient.[9] Trial counsel was unable 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

[9] As noted, trial counsel agreed it was error not to present the alternative cause of renal failure, there was no strategic reason for failing to do so, and it could have changed the outcome of Petitioner's trial. (PCR Day II 38:2-34:21, 41:5-42:11; A. 1508, 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.) 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.

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.

Despite these findings, however, the Court nonetheless erroneously held that this would not likely have affected the outcome of the trial on the merits. (*Id.*) 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. The PCR Court failed to fully consider the inherent conflict between its findings that Petitioner established a highly persuasive alternative theory of causation and trial counsel's ineffectiveness for failing to present said theory, yet that this did not undermine the confidence in the outcome of the underlying trial.

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

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

Furthermore, despite concluding that the alternative theory was persuasive and viable, the PCR Court erroneously stated that renal failure was not supported by physical evidence and that "[t]he experts' diagnosis is ultimately based of [sic] [Petitioner]'s hearsay reports of cold-like symptoms Victim had roughly two days before Victims Death." (Order Den. Mot. at 7; A. 1829.) This was incorrect. The deputy coroner read her report into the record at the underlying trial containing a summary of L.G.'s condition prior to the days leading up to her death. This report noted L.G. had a cold and was congested and lethargic, Petitioner had called the pediatrician, and the nurse told her if L.G. was not running a fever she did not need to bring her in. (Trial Tr. 92:20-93:8; A. 167-68.)[10] Pathologist Dr. David Wren also testified in the underlying trial that he saw physical evidence of congestion in L.G.'s autopsy. (Trial Tr. 448:22-449:02; A. 523-24.) Finally, the deputy coroner testified about L.G.'s weight loss. (Trial Tr. 524:16-525:10; A. 599-600).[11] The PCR court's finding does not find footing in the record and is error.

Unless the evidence in the underlying action is "conclusive," it does not foreclose a finding of prejudice. This Court's decision in *Ryals v. State* is instructive. 439 S.C. 230, 886 S.E.2d 239 (Ct. App. 2023). In *Ryals*, the PCR court found that trial counsel was potentially

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

[11] Information regarding L.G.'s weight loss was also contained in the medical records obtained in discovery in the post-conviction relief proceedings.

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

The PCR Court's reliance on *State v. Phillips*, 416 S.C. 184, 785 S.E.2d 448 (2016) and *State v. Taylor*, 626 A.2d 201 (R.I. 1993) to support its finding of no prejudice further demonstrates its error. Those cases each involved situations where a caregiver knowingly gave a controlled substance to a child. They are not 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, however, 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.

A fair reading of this record does not support a conclusion that overwhelming evidence from the State regarding extreme indifference precluded Petitioner from showing prejudice. Although physical evidence was present in the form of morphine found in L.G., the case still came down to the State's unsupported theory that morphine was the cause of death due to Petitioner's use of morphine while breastfeeding L.G.

Balancing the errors of trial counsel – failing to investigate, develop, and offer an alternative theory of causation (renal failure) – against the strength of the State's case, the errors significantly undermine confidence in the outcome of Petitioner's trial and leave a reasonable probability that, but for counsel's deficiencies, the result of the trial would have been different. *Cherry v. State*, 300 S.C. 1155, 117-18, 386 S.E.2d 624, 625 (1989).

Petitioner respectfully submits that the PCR Court erred in holding that the extreme indifference evidence presented "overwhelming evidence of guilt" as a categorical bar to pos-conviction relief where the State did not present conclusive proof of guilt. *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845.

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

Dr. Karch who was the only expert that Attorney Wise called at trial. As Petitioner detailed at PCR, although Petitioner intended for Dr. Karch's testimony to undermine the State's theory of the case, Dr. Karch's testimony only helped bolster the State's position. 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. Moreover, 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, ***on direct examination***, Attorney Wise asked Dr. Karch if he thought the morphine level could be explained solely by transmission through breast milk and he replied "yes," which conceded the State's entire theory of the case. The State even pointed out Dr. Karch's concession during its closing. (Trial Tr. 504:19-21, 511:5-10, 513:8-16; 556:21-557:02; A. 579, 586, 588, 631-32.)

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

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

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

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

At trial, Attorney Wise stated that he intended to request a hearing if the State's witnesses offered such testimony:

> I think that if he [counsel for the State] 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 we would need to have some sort of hearing to determine whether or not that's valid.

(Trial Tr. 19:11-21; A. 94.) The trial court agreed to have such a hearing if necessary. (*Id.* at 20:2-3; A. 95.) Inexplicably, however, Attorney Wise never objected or requested a hearing despite several of the State's witnesses offering this exact testimony. (*See* Trial Tr. 358:17-359:4, 361:19-362:2, 439:6-446:5; A. 433-34.)

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

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

speculative, unreliable expert testimony that should have been excluded in the first instance since it could not be offered to a reasonable degree of medical certainty.

The fact that the State's experts could not definitively state that the morphine 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 using 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.

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

Therefore, the PCR Court erred in holding that trial counsel's failure to exclude this testimony did not prejudice Petitioner. Furthermore, the PCR Court erred in holding that this did

not prejudice Petitioner by depriving her of a potential appellate ground if the trial court denied a motion to exclude or overruled Attorney Wise's objections to this expert testimony.

II. Trial counsel was ineffective for failing to challenge or rebut the State's expert testimony related to the synergistic effect of the medications found on the toxicology report for L.G. and Petitioner suffered prejudice as a result.

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.) At PCR, Dr. Scialli emphatically testified that there was no support for "synergy" in this case. (PCR Day I, Tr. 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, Tr. 78:11-16; A. 1312.) Nevertheless, the PCR Court erroneously found Petitioner suffered no prejudice because the trial court only charged Schedule II substances (meaning only morphine) and the State did not argue this to the jury.

The PCR Court overlooked Petitioner's argument that the fact that synergy was not supported by the medical science demonstrated the need for trial counsel to seek to have any such evidence and testimony excluded before trial or, at a minimum, to present testimony rebutting this point. Although the trial court ultimately agreed that the issue should not be

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

Attorney Wise was on notice that the State intended to present testimony as to the "synergistic effect" of the medications listed on the toxicology report. At the pretrial hearing, Attorney Wise noted the State appeared to have "tweaked" its case to the theory that "not only morphine but the other drugs in the system could have helped kill the child." (Trial Tr. at 24:4-7; A. 99.) At that hearing, Attorney Wise acknowledged that he had never discussed the "relevance of the other drugs" with Dr. Karch because they had been focusing on the morphine. (*Id.* at 24:11-12; A. 99.) As the Solicitor pointed out, however, Dr. Wren's report included the synergistic "force of the different other drugs on the morphine" and described it as a "one-plus-one-equals-three theory." (*Id.* at 24:18-22; A. 99.) He noted this was "not a surprise to the defense" since it had been given in discovery and all of the State's experts agreed that synergy would be a "factor of the morphine increasing the effects of the morphine on the child." (*Id.* at 24:22-25:3; A. 99-100.) The trial judge expressly told Attorney Wise that he would need to "have that conversation with your expert to determine if that creates an issue in this trial." (*Id.* at 25:6-8; A. 100.) 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; A. 100-01.)

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

expert in toxicology and should have been able to assist Attorney Wise in understanding this concept and why it would not apply here. If Dr. Karch could not, as Petitioner established at PCR, Attorney Wise could have consulted with an expert such as Dr. Scialli who could offer an opinion as to a reasonable degree of medical certainty. At PCR, Dr. Scialli emphatically testified that synergy was not applicable here and would have been able to offer such testimony at the time of Petitioner's trial to a reasonable degree of medical certainty. 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.

Attorney Wise also failed to object or otherwise challenge the State's witnesses when they offered this scientifically unreliable testimony. Five expert witnesses for the State testified about the supposed "synergistic effect" of the medications found in L.G. on the morphine. Quintus Leon Young, III (forensic toxicology), Dr. Wendy Bell (forensic toxicology involving drugs and alcohol), Dr. Kaushik Kotecha (pharmacy), Dr. David H. Eagerton (pharmacology and forensic toxicology), and Dr. John David Wren (forensic pathology) all testified regarding the supposed "synergistic effect" of the particular drugs that Petitioner was taking and/or that "one plus one equals three" or "one plus one equals five" when analyzing drug interactions. (Trial Tr. 148:13-17, 260:05-261:24, 265:16-21, 322:02-13, 350:02-351:11, 430:25-44:21; A. 223, 335-36, 340, 396-97, 425-26, 505-19.) 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; A. 335, 340, 425, 505-19.)

This was prejudicial to Petitioner because, again, there was no scientific basis for synergy under these facts, yet the only testimony the jury heard was that this was an established concept

applicable in this case from what appeared to be eminently qualified experts who could speak authoritatively on this issue. The prejudice was compounded by the fact that none of the State's experts testified that synergy applied to a reasonable degree of medical certainty or cited any supporting literature.

The PCR Court erroneously found that Petitioner nevertheless suffered no prejudice because the trial court charged the jury that it could only return a guilty verdict if it found that Petitioner's consumption of Schedule II substances (of which only morphine qualified) caused L.G.'s death and, as a result, the State limited its closing argument to this question. (*See* Order of Dismissal at 12; Order Den. Mot. at 3-4; A. 1773, 1825-26.) As Petitioner has consistently noted, if anything, this supports the inverse ***because the prejudice was amplified by the fact that it was ultimately not even relevant to the question charged to the jury***. If the jury was not to consider the effect of the other medications, then Attorney Wise should have made every effort to have the testimony and evidence about them excluded. Instead, the jury heard multiple experts testify about the synergistic effect of the other medications on the morphine and that bell could not be unrung. This prejudice tainted the entire trial.

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

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

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

South Carolina appellate courts have not definitively stated whether the cumulative error of counsel represents an independent basis for granting postconviction relief. *See Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002) ("Whether the cumulative of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina."); *see also State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985) (cumulation of errors warranted reversal, but the court also found each individual error caused prejudice), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Freeman*, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) (finding multiple errors, which were not prejudice separately, could be prejudicial to deny an individual a right to a fair trial when they were viewed together).[12]

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

[12] The Fourth Circuit has recognized the 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"). Although the PCR Court held that *Fisher* did not adopt the cumulative effect doctrine, the court in *Fisher* held that there is a "legitimate cumulative-error analysis" available which "evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient." *Id.* at 853, n.9.

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

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

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

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

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

The Zipursky paper represents a critical piece of evidence because it disproves the Canadian study. (*See* Applicant's Ex. 7, Zipursky & Juurlink, The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, Clinical Pharmacology & Therapeutics (May 2020); A. 1647-66.) Additionally, it was a significant development that the two journals that published literature about the Canadian study issued the retraction. As Dr. Scialli testified, a retraction is "very rare" and generally only done where a paper presented "fraudulent data" or where its conclusions are "so erroneous that they represent a risk to the reading public." (PCR Day I, Tr. 69:5-15; A. 1303.) Dr. Scialli agreed that it was fair to say that the Canadian study, the only study cited in Petitioner's underlying trial in support of the State's breast milk theory, had been disproven. (*Id.* at 69:12-15; A. 1303.)

The Zipursky paper significantly changes the dynamic because it directly rebutted and discredited the Canadian study. Considering the exhaustive analysis and emphatic conclusions of the Zipursky paper, and in light of the retraction, the Canadian study would probably not have been deemed a proper subject for testimony at Petitioner's trial had it been available at that time.

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).) 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***.[13] The Zipursky paper concluded that other factors would have had to be at play for this to occur including, most importantly, renal failure – precisely what Petitioner established at the PCR hearing happened with L.G.

Subsequent to the PCR, Dr. Zipursky published additional research examining whether maternal opioid treatment after delivery is associated with an increased risk of adverse infant outcomes. The findings suggested "no association between maternal opioid prescription after delivery and adverse infant outcomes, including death." Zipursky et al., Maternal opioid treatment after delivery and risk of adverse infant outcomes: population based cohort study, BMJ (Mar. 15, 2023), *available at* https://www.bmj.com/content/380/bmj-2022-074005. Although

[13] This alone demonstrates the manifest significance of this paper to Petitioner. The paper authors could not find a single credible case, yet Petitioner has been incarcerated since April 10, 2014 pursuant to this very theory.

they "endorse[d] caution," they noted that "clinicians and parents should be reassured that infants are at low risk of harm." *Id.*

At the time of trial, Petitioner could have, at best, introduced testimony from someone like Dr. Scialli to undermine the Canadian study. As Dr. Scialli's testimony detailed, there were several avenues for demonstrating its scientific unreliability that could have been raised at that time. However, because Petitioner did not exclude reference to it entirely, the Canadian study significantly hampered Attorney Wise's jury argument that the State's theory was "impossible" since the State supposedly had at least one example where it had occurred previously and, unlike Dr. Scialli, Dr. Karch was not able to testify as to why it was inapposite.

Attorney Wise also acknowledged at PCR that the Zipursky paper's repudiation of the Canadian study would have been extremely helpful since the State's case was not a "slam dunk." (PCR Day II, Tr. 42:20-8; A. 1512.) Although he tried to distinguish the Canadian study 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; A. 1513.)

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

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

CONCLUSION

Based on the above, the Court should reverse the order of the PCR Court and remand the case for a new trial.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: /s/ Blake T. Williams
John F. Kuppens
SC Bar No. 12948
E-Mail: john.kuppens@nelsonmullins.com
Blake T. Williams
SC Bar No. 100794
Email: blake.williams@nelsonmullins.com
Caroline A. Warner
SC Bar No. 104280
Email: caroline.warner@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

ROSS & ENDERLIN, P.A.

Susannah C. Ross
SC Bar No. 11205
E-Mail: susannah@rossenderlin.com
330 East Coffee St.
Greenville, SC 29601

Attorneys for Stephanie Irene Greene

Columbia, South Carolina

November 3, 2025