STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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

Stephanie Irene Greene, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases:

State Cases:

State Rules:

RESPONDENT'S STATEMENT OF ISSUES ON CERTIORARI

1. Whether the PCR court properly denied relief on grounds that Greene failed to carry her burden of proving prejudice despite findings of deficiency related to Counsel's: (1) failure to present "the alternative cause of renal failure;" (2) decision to call Dr. Karch and present his testimony in defense; and (3) failure to challenge the lack of scientific support for the State's breast milk transmission theory, because there was probative evidence in the record to support the findings of the PCR court.

2. Whether the PCR court properly concluded Counsel Wise was not ineffective for failing to challenge testimony related to the synergistic effect of the medications found in Victim's toxicology report where: (1) both the defense and the State emphasized in closing that the *only* theory presented by the State and therefore the *only* issue for the jury to decide was whether Victim received *morphine* through breast milk to the extent it caused her death; (2) the State did not argue or mention any synergistic effect during its closing argument; and (3) Counsel successfully convinced the trial court to charge the jury that to convict, the cause of death could only be from a Schedule II drug and morphine was the only Schedule II drug found in Victim's system.

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

4. Whether the PCR court properly concluded the publication of the Zipursky paper and the post-trial retraction of the "Canadian study" did not constitute after-discovered evidence sufficient to grant a new trial where: (1) during trial the "Canadian study" was primarily exploited by the defense in an attempt to suggest extraordinary circumstances, such as an unexpected genetic defect, could provide an explanation for the high morphine level; (2) the State's witnesses acknowledged the "Canadian study" was about codeine and *not* morphine; and (3) the evidence of the Zipursky paper and the retraction of the "Canadian study" would be merely impeaching.

STATEMENT OF THE CASE

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

Petitioner filed a timely notice of intent to appeal with the South Carolina Court of Appeals and an appeal was perfected by Mr. Wise, who continued to represent Greene on appeal. Greene raised four issues on appeal, including a double jeopardy challenge. (App.p.750-p.777). In regard to that issue, she asked that the matter be "remanded for a new trial with the state being required to elect upon which charge they desired to proceed, or the jury be instructed to return only a verdict on one charge." (App.p.777). The State filed a brief in response (App.p.695-p.749) and Greene filed a brief in reply. (App.p.778-793). By order filed May 5, 2016, the South Carolina Supreme Court certified the appeal pursuant to Rule 204(b), SCACR. In a published opinion filed May 23, 2018, the supreme court affirmed Greene's convictions for homicide by child abuse and unlawful conduct towards a child, but vacated the conviction for involuntary manslaughter. *State v. Greene*, 423 S.C. 263, 814 S.E.2d 496 (2018). (App.p.795-p.824). Greene

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

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

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

On May 22, 2023, Greene filed a motion to reconsider or amend and on June 5, 2023, the State filed a return. (App.p.1778-p.1822). On July 18, 2023, a virtual hearing on the motion was heard before the PCR court with Greene represented by Mr. Williams and the State represented by Deputy Attorney General Donald J. Zelenka because of Mr. Spencer's unavailability due to illness.[1] In an order dated November 17, 2023, and filed November 20, 2023, Judge Hayes denied and dismissed Greene's motion to amend with prejudice. (App.p.1823-p.1837). On December 18, 2023, Greene timely filed a notice of appeal, appealing the PCR court's denial of his application for PCR. On January 20, 2024, Greene filed her Petition for a Writ of Certiorari and the Appendix with the Supreme Court. On May 31, 2024, a Return to Petition for Writ of Certiorari was filed on behalf of the State.

In an Order dated July 11, 2024, the Supreme Court transferred the matter to this Court. Subsequently, in an order filed September 29, 2025, this Court granted the petition for a writ of certiorari as to Petitioner's Questions 1, 3, 5, and 6 but denied as to Questions 2 and 4. On November 3, 2025, an Amended Brief of Petitioner was filed on Petitioner's behalf by John F. Kuppens, Mr. Williams, and Caroline A. Warner of Nelson Mullins Riley & Scrarborough, LLP, and Susannah C. Ross of Ross & Enderlin, P.A.. This Brief of Respondent on behalf of the State follows.

STATEMENT OF FACTS

Greene's infant child (Victim) died at forty-six days old. Toxicology results showed lethal levels of morphine and the presence of other drugs in Victim's blood, liver, and brain.

[1] Mr. Spencer passed away on October 16, 2023.

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

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

Greene, 423 S.C. at 267, 814 S.E.2d at 498. In denying the allegation that the trial court should have granted a directed verdict on causation, the court noted:

> In sum, the State presented evidence that Appellant continuously ingested substantial doses of morphine and other drugs while pregnant and breastfeeding; that morphine and other drugs can and do pass from a nursing mother to a breastfeeding child through breast milk; that infants cannot metabolize morphine and other drugs effectively; that [Victim] exhibited symptoms consistent with morphine toxicity; and that [Victim]'s death was caused by respiratory failure secondary to synergistic drug intoxication.

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

> In this case, sufficient evidence was presented to show that Appellant was addicted to prescription drugs – including morphine – and Appellant knew she should use caution in taking morphine

> while pregnant or breastfeeding but elected to take it in excessive amounts without a doctor's supervision ensuring [Victim]'s safety.

Id. at 277, 814 S.E.2d at 503. It found:

> Throughout her pregnancy, Appellant failed to disclose that she was pregnant to the doctors prescribing morphine to her and failed to disclose that she was taking morphine to her prenatal doctors. In addition, she routinely omitted the fact that she was taking morphine from the paperwork that she submitted to her doctors. The testimony at trial was that at the very least, the drug should only be taken under a doctor's supervision so the baby's health could be monitored. Nevertheless, Appellant failed to disclose this important information to any of her doctors.
>
> The morphine addiction and concealment continued after [Victim]'s birth. . . . One of the State's experts, Dr. Eagerton, testified that the use of morphine during lactation is not recommended. . . . Dr. Kovacs testified that she would not have given Appellant the medication had she known about the pregnancy, and Dr. Bridges testified that no mention of morphine was made during Appellant's postpartum visit. Due to her nondisclosure, the record reveals that Appellant received an additional prescription for MS Contin and continued to breastfeed [Victim].

Id. at 278, 814 S.E.2d at 504. Finally, the supreme court noted that the morning of Victim's death, Greene omitted morphine from the list of her prescriptions, even when confronted with the MS Contin pill bottle found in her bedroom. She later admitted she hid her pregnancy because she was afraid they would take her off the morphine. *Id.* at 278-79, 814 S.E.2d at 504.

At the PCR hearing, Dr. Scialli opined that the morphine concentration measure that was in Victim could not have derived from breastfeeding alone without another circumstance, which was almost certainly due to renal failure (renal failure which was not related to morphine or its transmission through breast milk) preventing the excretion of morphine and its metabolites. (App.p.166; p.1290-p.1291; p.1312). On cross-examination, Dr. Scialli opined that renal failure was almost certainly the reason why the morphine was elevated in Vicitm. He agreed the

morphine level was high enough to cause respiratory depression and within a reasonable degree of medical certainty it was possible, due to renal failure, for enough morphine to build up to kill a child. (App.p.1406-p.1407). Dr. Scialli also testified that any reliance by the State's trial witnesses on the "Canadian study" was inappropriate because it concerned codeine, not morphine, and because the paper was unreliable even with respect to codeine, as a subsequent 2020 research paper (Zipursky paper) established in material detail. (App.p.1266; p.1291-p.1303). Finally, Dr. Scialli opined that the testimony of the State's expert witnesses referencing "synergy," a toxicological principle, was not appropriate because there is no literature supporting synergy in this case. (App.p.1266; p.1305-p.1312).

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

STANDARD OF REVIEW

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

ARGUMENTS

I.

The PCR court properly denied relief on grounds that Greene failed to carry her burden of proving prejudice despite findings of deficiency related to Counsel's: (1) failure to present "the alternative cause of renal failure;" (2) decision to call Dr. Karch and present his testimony in defense; and (3) failure to challenge to the lack of scientific support for the State's breast milk transmission theory, because there was probative evidence in the record to support the findings of the PCR court.

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

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

an applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. *Id.* at 687. Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." *Id.* The Sixth Amendment guarantees *reasonable competence*; not perfect advocacy judged with the benefit of hindsight. *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (emphasis added). The applicant is prejudiced by the deficient performance if "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

At the outset, before responding to Greene's three related challenges under the prejudice prong, the State invites this Court to affirm on grounds that, contrary to the findings of the PCR court but supported in the record before this Court, Mr. Wise's performance was in fact **not deficient** because it was, in all respects, objectively reasonable and did not fall outside the wide range of professionally competent assistance. Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Even if Mr. Wise's performance, viewed with the benefit of hindsight, was not perfect, it was certainly reasonably competent and therefore provides an alterative basis to affirm.

At the PCR hearing, Greene presented expert testimony opining Victim suffered renal failure in the last three days of her life and this caused morphine levels to accumulate. Greene postulates that the child would not have died but for renal failure. However, neither of Greene's two experts that testified at the PCR hearing could eliminate morphine as the cause of death, and

both admitted the morphine levels that accumulated in Victim could be lethal. On the other hand, Mr. Wise diligently prepared a multi-faceted defense utilizing Dr. Karch, perhaps the foremost expert in toxicology who wrote "the bible" of toxicology and participated in every drug-related autopsy for a decade in San Francisco. Mr. Wise fully utilized Dr. Karch to not only present a formidable defense, but to prepare examination of the prosecution's experts. Mr. Wise's well-researched, well-planned trial strategy was reasonable and did not fall below reasonable norms.

Mr. Wise explained his strategy, which was to argue to the jury that a child could not reach a lethal level of morphine by breastfeeding from a mother taking morphine, utilizing articles referrenced by Dr. Karch and articles Mr. Wise found on his own. (App.p.1527). Mr. Wise further explained that analyzing the .52 morphine reading and extrapolating back to what should be in Greene, she "should have been dead three times over in order to pass that type of level to her child" which would illustrate how small an amount passes through the body. (App.p.1528-p.1529). Mr. Wise testified: "I thought Dr. Karch as an expert was a very good expert. He literally wrote the book." He added: Dr. Karch was "[p]robably as good a toxicologist as you can find" and admitted he viewed the case as a toxicology case at the time. Mr. Wise did not consider using any other expert witnesses and Dr. Karch did not suggest utilizing any other expert witnesses. He thought Dr. Karch would be a good witness for his case. (App.p.1540-p.1541).

Dr. Karch assisted Mr. Wise in formulating a strategy in cross-examining the pathologist, Dr. Wren. Dr. Karch also helped Mr. Wise have the confidence to know that if he asked, the State's experts would not be able to show any articles saying "don't take morphine while breastfeeding." (App.p.1541, lines 7-16). Mr. Wise testified that at the time of trial, he felt his

cross-examinations of both Dr. Wren and Dr. Eagerton were successful. (App.p.1541, line 17-p.1542, line 9). Indeed, Mr. Wise asked about the Canadian study and got both Dr. Eagerton and Dr. Wren to acknowledge, just as Dr. Scialli had testified to at the PCR hearing, that it had *no direct application* to Victim's death because it was a study about *codeine* and *not* a study about *morphine*. (App.p.440-p.446; p.530). Dr. Eagerton even admitted that in 2013, the American Academy of Pediatrics warned doctors not to use codeine with a nursing mother and to use morphine instead, ultimately agreeing he was unaware of any peer reviewed publication that said a mother taking morphine could create a toxic level of morphine in the child through breast milk. (App.p.443-p.446).

In the present case, Mr. Wise conducted detailed, pointed, and knowledgeable cross-examinations of the State's experts. He also found a well-qualified expert that helped him formulate and present a formidable defense. Mr. Wise's tactical decisions are given great deference and must meet only objectively reasonable standards. *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000); *Dunn v. Reeves*, 594 U.S. 731, 739 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." (citation and internal quotation marks omitted)). "[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v. Richter*, 562 U.S. 86, 111 (2011). Mr. Wise's performance rose well "above the floor of minimal competence" and his performance was clearly not ineffective in any constitutional sense.

Given Mr. Wise's utilization of a well-qualified toxicologist with considerable pathology experience, who did not steer Mr. Wise towards a renal failure theory, and Mr. Wise's thorough

investigation of defenses on multiple fronts, this is simply not a case in which it could fairly be said that Mr. Wise's performance fell below professional norms. Mr. Wise was not ineffective for failing to call the two experts advanced by Greene at the PCR hearing. Furthermore, as found by the PCR court, Greene failed to meet her burden of proving prejudice. First, the expert testimony from the PCR hearing tends to confirm that morphine was at least a contributing and proximate cause of death. Second, the expert testimony fails to counter the considerable evidence of Greene's criminal intent, especially extreme indifference. Here, Greene mistakingly believes a detailed understanding of the cause of death is required for the intent element when the problem was that Greene knowingly put her child's health at risk by hiding her medications from the treating obstetricians and hiding the existence of her child from her doctors with the knowledge this was dangerous.

I(A). The PCR court properly found Greene failed to carry her burden of proving prejudice despite a finding of deficiency related to Counsel's failure to present "the alternative cause of renal failure" because presentation of that theory would not have rebutted the extensive evidence of extreme indifference any more effectively than the strategies employed by Counsel.

In her petition, Greene agrees with the PCR court's conclusion that Mr. Wise was deficient for failing to present a "highly persuasive" alternative theory as to the cause of the child's death related to renal failure; however, she argues the PCR court erred in denying relief on grounds that she failed to carry her burden of proving prejudice from Mr. Wise's deficiency. She contends that where the jury heard testimony that morphine was dangerous for her to consume while breastfeeding and that it could transmit through her breast milk at a lethal level, the defense gave the jury "no other explanation for why the morphine level was so high or why it could not be attributed to [Greene's] actions," and that presenting the alternative explanation would have a reasonable probability of changing the outcome of trial. (Brief of Petitioner, p.14).

Greene argues the evidence and testimony would have demonstrated that her actions did not manifest a mental state of "extreme indifference" because her baby's death was not a reasonably foreseeable result of her conduct. (Brief of Petitioner, p.14-p.15). Yet, Greene's argument is belied by her own experts, who agreed: (1) the morphine level found in Victim was high enough to cause respiratory depression and within a reasonable degree of medical certainty it was possible, due to renal failure, for enough morphine to build up to kill a child (App.p.1406-p.1407), and (2) if a child has renal failure, enough morphine can ultimately build up in a child and cause his or her death when that morphine is coming through breast milk. (App.p.1463).

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

the renal failure theory to alter confidence in the outcome of the trial. Indeed, the renal failure theory, like the genetic defect theory introduced by Mr. Wise, simply served as an "extraordinary circumstance" which might have explained Victim's elevated morphine level in the eyes of the jury, which in turn undercut the narrative that she acted with extreme indifference.

Greene argues the PCR court failed to appreciate the strength of her expert testimony to counter the element of extreme indifference. This is based on the idea that Greene herself would be unaware of any dangers of taking MS Contin while breastfeeding and that some doctors, at least the experts testifying at the PCR hearing, might find it safe to prescribe morphine while a patient was breastfeeding a child. It is further premised on the contention that morphine is generally safe and only an unexpected event, renal failure, caused the buildup of morphine in Victim.

However, the proof of Greene's extreme indifference is rooted in her deliberate actions to hide her pregnancy and the birth of her child from the doctor prescribing her MS Contin and Klonopin, and her actions to hide her consumption of MS Contin, Klonopin, and several other medications from her pediatrician. The doctor that should have made the decision as to whether MS Contin was safe for Greene to use while pregnant and later breastfeeding Victim was Dr. Kovacs. Greene hid her pregnancy and birth from Dr. Kovacs when obtaining the MS Contin prescription. She then hid her use of MS Contin from Dr. Bridges, her pediatrician. *See Greene*, at 278, 814 S.E.2d at 504. In case Greene's lack of concern for Victim was in doubt, Victim had therapeutic levels of Klonopin in her blood and the pill bottle with Klonopin warned: "'Do not use if pregnant or suspect you are pregnant or are breastfeeding.'" *Id.* at 263 n.5, 814 S.E.2d at 503 n.5. Greene obtained prescriptions for Klonopin from both Dr. Kooistra and Dr. Kovacs only five days apart from each other and about two weeks before Victim's death. The attempt to

use two doctors years later to justify whatever internal calculus Greene might have applied to justify exposing Victim to these dangerous drugs fails to defeat the abundant evidence of Greene's extreme indifference.

As to the complaint about the PCR court stating that the facts related to the elements of extreme indifference are not contested, Greene inaccurately conflates underlying facts with legal conclusions. She acknowledges she "did not dispute the accuracy of the level of morphine measured in [Victim's] system identified in the toxicology report, that [Greene] consumed morphine, or that [she] was breastfeeding" but asserts she "disputed that these actions satisfied the *mens reas* of homicide by child abuse." (Brief of Petitioner, p.15). But where the PCR court's finding was limited to the admitted facts, it was entirely accurate. Regarding such facts, on direct appeal the supreme court rejected the claim that insufficient evidence of extreme indifference was presented to the jury. It provided a detailed recitation of the facts presented at trial in support of its ruling, facts Greene argues "should not have been repurposed" by the PCR court. Yet these facts were taken directly from the evidence at trial and certainly bear on any analysis of whether Greene was prejudiced by Mr. Wise's failure to present the alternate theory. They were properly considered.

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

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

(App.p.310, lines 4-9). Dr. Eagerton also published a portion of LactMed pertaining to the use of morphine, as follows: "Maternal use of oral narcotics during breastfeeding can cause infant

drowsiness, central nervous system depression and even death." (App.p.479-p.480). Greene herself admitted she and her husband discussed the possibility Victim's death could be from the drugs she ingested. (App.p.374-p.376).

As to the complaint that the PCR court failed to fully consider the inherent conflict between its findings of deficiency and prejudice, the State submits no conflict exists for the reasons set out by the PCR court. To the extent there is a conflict, it is solely because, as argued above, the PCR court should have found *no deficiency* in Mr. Wise's performance in the first place. Furthermore, it is incongruous to suggest the PCR court's findings of deficiency had to translate into a finding of prejudice. If this were the case, the two-step inquiry set out by the United States Supreme Court in *Strickland* would not be required. *Strickland*, 466 U.S. at 687.

As to the complaint that the PCR court glossed over the alleged fact that the cause of the morphine level was the renal failure, not Greene's consumption of morphine and breastfeeding, Greene's own experts agreed: (1) the morphine level found in Victim was high enough to cause respiratory depression and within a reasonable degree of medical certainty it was possible, due to renal failure, for enough morphine to build up to kill a child (App.p.1406-p.1407), and (2) if a child has renal failure, enough morphine can ultimately build up in a child and cause his or her death when that morphine is coming through breast milk. (App.p.1463). These opinions simply confirmed what Dr. Eagerton already noted at trial, that renal function and the elimination of drugs once they have been metabolized by a person can also impact how long they stay in someone's body after ingestion. (App.p.435-p.436).

As to the complaints that the PCR court erroneously stated the renal failure was not supported by physical evidence and that the order conflicts with what the court told State's counsel during the evidentiary hearing, those complaints are of no moment where the PCR court

properly analyzed the impact of the alternative theory in the context of the overwhelming evidence of extreme indifference. Indeed, it was the concept that the postulated renal failure alone would have led to death *absent* the introduction of morphine by Greene that was not supported by physical evidence. Greene's experts could not opine to a reasonable degree of medical certainty that this was the case. (App.p.1406-p.1407; p.1463). Instead, their renal failure theory operated no differently that the genetic defect theory recognized by Dr. Karch, by providing an explanation for how the morphine level could have gotten so high through breastfeeding.

As to the complaint that the PCR court failed to recognize the evidence here was far from conclusive and therefore did not foreclose a finding of prejudice, the PCR court properly conducted its prejudice analysis consistent with *Strickland* and its progeny. Relying on *Ryals v. State*, 439 S.C. 230, 886 S.E.2d 239 (Ct. App. 2023), Greene contends the PCR court misapplied its prejudice analysis in the instant case. The State disagrees. In *Ryals*, the defendant appeared in prison garb and counsel neither objected nor moved for a continuance until the defendant had street clothes. The PCR court found counsel's performance deficient but found no prejudice in light of overwhelming evidence of guilt. The Court of Appeals reversed, finding the PCR court did not compare the "impact of Ryal's forced appearance at trial in prison clothing against the strength of the State's case against him." *Id.* at 236-37, 886 S.E.2d at 242. However, in the present case, this is precisely what the PCR court did in its order of dismissal. It balanced the benefit of the experts' testimony with some of the shortcomings and dangers inherent in that testimony, and then balanced it against the State's evidence, including the considerable evidence of Greene's extreme indifference, the lack of challenge to the idea that all the morphine Victim consumed was through breast milk, and the unchallenged level of morphine found in Victim.

Contrary to Greene's contention, the PCR court clearly contemplated the record as a whole in assessing whether Greene met her burden of proving prejudice.

In the instant case, there is *unchallenged physical evidence* that Victim had a lethal level of morphine at the time of death, at forty-six days old. Greene *confessed* she was addicted to morphine and lied to her doctors to avoid losing her prescription to morphine. No evidence was presented that the morphine in Victim came from any other source than Victim's breast milk. The record is simply replete with her furtive behavior to maintain her access and consumption of opioids which included ensuring that Greene and Victim remained outside a knowledgeable doctor's care. Consistent with *Ryals*, the PCR court properly determined that Greene was not prejudiced by the alleged deficiency of Mr. Wise.

As to the complaint that the PCR court erroneously relied on *Phillips* and *Taylor*, these cases shared close similarities and provided useful analysis and comparison on the issues of extreme indifference. Indeed, a person's knowing exposure of a child in the person's care to dangerous drugs outside a doctor's care may constitute extreme dangerousness. *State v. Phillips*, 416 S.C. 184, 196, 785 S.E.2d 448, 454 (2016) (finding "[i]t is common knowledge that giving another person, particularly a toddler, drugs not prescribed to him is inherently dangerous"). "By any standard the delivery of a controlled substance to a child, not under the direction of a physician in regard to dosage, is an act that is inherently dangerous." *State v. Taylor*, 626 A.2d 201, 202 (R.I. 1993). Greene argues the reliance on Phillips and Taylor demonstrates the PCR court's error because they both "involved situations where a caregiver knowingly gave a controlled substance to a child," compared to her actions in exposing Victim to morphine, which "was much more attenuated and not due to intentional action." (Brief of Petitioner, p.20). But

the "intentional act" need not be direct administration of a drug where other, clearly intentional acts were inherently dangerous.

As was the case in *Phillips*, Greene's actions were intentional, and inherently dangerous, making Victim's death in this case reasonably foreseeable. Indeed, the supreme court's holding in the direct appeal remains true for this PCR: "In this case, sufficient evidence was presented to show that Appellant was addicted to prescription drugs – including morphine – and Appellant knew she should use caution in taking morphine while pregnant or breastfeeding but elected to take it in excessive amounts without a doctor's supervision ensuring [Victim's] safety." *State v. Greene*, 423 S.C. 263, 277, 814 S.E.2d 496, 503 (2018).

To the extent Greene continues to suggest that the PCR court drew a false analogy between Dr. Karch's testimony regarding a possible genetic defect and renal failure, the PCR court's reference to his testimony on this issue was entirely appropriate. It was not for Greene to calculate the actual danger of taking morphine and other medications without a doctor's knowledge that she was breastfeeding; she needed to make this information known to the doctors prescribing morphine and other potentially dangerous narcotics. Yet she deliberately withheld this information knowing that if she put Victim's health first, she could lose prescriptions to these medications. *State v. Jarrell*, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002) ("A parent has a specific and undelegable duty to serve the best interests of her child and should make every effort not to knowingly place her child in harm's way."). In withholding this information from her doctors, Greene did not need to anticipate that renal failure, a genetic defect, or some other extraordinary circumstance might cause the buildup of morphine in her child to still be guilty of homicide by child abuse.

Here, the PCR court correctly assessed the considerable evidence of extreme evidence in this case by finding Greene was not prejudiced by Mr. Wise not calling experts like the two doctors that testified at the PCR hearing. The PCR court correctly denied relief and its decision should be affirmed.

I(B). The PCR court properly found Greene failed to carry her burden of proving prejudice despite findings of deficiency related to Counsel's decision to call Dr. Karch and present his testimony in defense because Counsel utilized the world renowned toxicologist, whom he successfully qualified as an expert in the effect of drugs on the human body, to present a formidable defense and to prepare examination of the State's experts.

In her brief, Greene attacks the quality of Dr. Karch's testimony, complaining that he "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." He argues that Dr. Karch's testimony "only helped bolster the State's position" and that "he conceded the State's entire theory of the case." (Brief of Petitioner.p.21-p.22). This simply did not happen. Dr. Karch testified Victim could have gotten a morphine level that high from breast milk; however, he strongly qualified that testimony by explaining he did not know exactly how that could possibly happen, unless she had a genetic defect. (App.p.579). Dr. Karch noted he was aware of one case where a baby got an 84 nanogram blood level from a mother on morphine, and the baby did not die, which directly challenged the State's theory that the 52 nanogram level in Victim caused her death. (App.p.579-p.580). Dr. Karch also noted a case where a child accumulated a 4 nanogram level from a nursing mother in a hospital setting, which was still only roughly a tenth of the level of morphine found in Victim. (App.p.580-p.581). Interestingly, Greene's experts filled in the gap in Karch's knowledge as to how Victim's morphine could have possibly gotten so high, during the PCR hearing, when they explained that if a child has renal failure, enough morphine

can ultimately build up and cause death even when that morphine is coming through breast milk. (App.p.1463). Again, Dr. Karch noted that the baby in the 84 nanogram case he referenced did not die and there were in fact *no* reported cases of babies dying from morphine ingestion through breast milk from a mother. (App.p.567-p.568; 579-p.580). Later, Dr. Karch testified as follows:

> Q: All right. Is there anything in this case in your review of everything and your knowledge that leads one to believe that breast milk contains some amount of morphine that caused the death of this child?
>
> A: Only in the sense that we know that there is morphine in breast milk or women that are using morphine. We know it isn't very much. And if you see a whole lot, they are either A, you have a – a mother that's misleading you, or B, you don't have the genetic ability to clear it.

(App.p.588, lines 8-16.) Again, this is hardly conceding the State's case; instead Dr. Karch is asserting that the only way a number could get this high is the child's lack of genetic ability to clear the morphine, which is not dissimilar to Dr. Scialli's claim of renal failure as an extraordinary circumstance preventing a child from clearing/eliminating the morphine, and negating the intent element. In other words, as both Dr. Karch and Dr. Scialli agreed, the *level* of morphine would have to have been caused by "another circumstance." (App.p.1266).

Similar to the testimony elicited from Dr. Eagerton by Mr. Wise on cross-examination (App.p.440-p.458), Dr. Karch noted the existence of articles that indicate morphine consumption by a breastfeeding mother is not dangerous to the breastfed child. (App.p.569-p.570). Dr. Karch reiterated that not very much morphine is found in breast milk. He confirmed no medical group advises against taking morphine while breastfeeding, and he was unaware of any case in which an infant received a lethal dose of morphine through breast milk. (App.p.588-p.589). Dr. Karch agreed with Mr. Wise's calculations that Greene would need much more morphine to reach the

level in the present case than a woman in a study who took five milligrams of morphine, resulting in her infant reaching a level of four nanograms of morphine. (App.p.582-p.583).

In comparison, Dr. Scialli did *not* claim it was impossible for a lethal level of morphine to be transmitted solely through breastfeeding; he just claimed that it could only do so due to another extraordinary circumstance. (App.p.1266). Here, Greene posited that circumstance was renal failure which caused the morphine not to be excreted as expected, and therefore it built up to lethal levels. In other words, she never disputed that all the morphine came from breast milk; it just was not excreted at a rate Dr. Scialli expected. In fact, Dr. Scialli admitted that the morphine level found in Victim could have led to respiratory depression and Victim's death. (App.p.1318, lines 1-14). By Greene's measure, Dr. Scialli *also* conceded the State's case. So did Dr. Twombley when she admitted that a lethal amount of morphine may accumulate in a breastfeeding child in twenty-four hours. (App.p.1447, lines 7-18). A jury hearing Greene's experts admit that morphine could be the cause of death, after hearing the State's evidence, would put Greene in no worse position that the testimony of Dr. Karch alone. Therefore, the PCR court correctly denied relief and its decision should be affirmed.

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

In her petition, Greene alleges Mr. Wise was ineffective for failing to object to the State's witnesses providing the opinion, to a reasonable degree of medical certainty, that the morphine

was transmitted to Victim in lethal levels through her breast milk. (Brief of Petitioner, p.22). She argues Mr. Wise was ineffective for failing to submit a motion to exclude or a motion in limine and/or request a *State v. Council*[2] hearing as to the reliability of the testimony and opinions the State's witnesses intended to offer. (Brief of Petitioner, p.23). The State disagrees. Mr. Wise, prior to trial, discussed whether the State would present an expert that would opine that the morphine in Victim came through breast milk, and indicated he would challenge that specific opinion, if offered, under Rule 702, SCRE. However, no expert provided that opinion at trial, which Mr. Wise noted at the PCR hearing. Mr. Wise explained he was prepared to object if an expert offered that opinion, but it was never offered. (App.p.1516-p.1517).[3]

The PCR court properly concluded Mr. Wise was not ineffective and Greene suffered no prejudice from Mr. Wise's failure to challenge or seek to exclude expert testimony because no witness testified to a reasonable degree of medical certainty that the morphine found in Victim's body came through breast milk. Because the allegedly scientifically unreliable opinion was *not* given, a challenge or objection on this basis would not have led to exclusion. Furthermore, the testimony that was introduced was ultimately *weaker* than if it had been excluded because the State's experts failed to offer the one opinion that would have carried the day without relying on the jury to connect the dots. Finally, as set forth by the PCR court in reliance on this Court's decision on direct appeal: the State presented evidence that Greene was taking morphine and breastfeeding Victim continuously, morphine *can* pass from a mother to a baby through breast milk, the level of morphine *can* build up in a baby due to the inability to process [metabolize and eliminate] it, and Victim died from a lethal level of morphine. Nothing more was required for the jury to make a logical deduction. (App.p.1828). Thus, it was not Mr. Wise's failure to seek

[2] *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).

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

exclusion of scientifically unreliable expert testimony that led to Green's conviction, because no such testimony was given. Instead, it was the admission of admissible expert testimony recognized by the supreme court, testimony now effectively corroborated by Dr. Scialli and Dr. Twombley. (App.p.1406-p.1407; p.1463).

Greene contends that, rather than eliminating prejudice, the fact the State experts could not definitively opine that Victim's morphine level came from breastfeeding, and instead could only testify that *some* of the morphine level could be attributed to breastfeeding, "drives the problem home." She argues that Mr. Wise "should have been using experts like Dr. Scialli to challenge, undermine, and exclude this unreliable speculation." (Brief of Petitioner, p.24). Yet, Dr. Scialli himself seemed to acknowledge that *some* of the morphine level was attributed to breastfeeding, under the normal biological processes he described. (App.p.1266-p.1269; p.1274-p.1280). As recognized by the PCR court, where the non-definitive opinion from the State's witnesses was the only expert opinion offered, it could not have resulted in prejudice. Greene goes on to claim Mr. Wise left the State's "scientifically unreliable theory that breastfeeding alone could cause morphine to transmit at a lethal level to the jury *unchallenged*." (Brief of Petitioner, p.24) (emphasis added). But as noted above, this was simply not the case. Indeed, Mr. Wise thoroughly cross-examined the State's experts, driving home the point that they were unable to offer definitive opinions. He also called Dr. Karch as a defense expert and used his expert testimony to repeatedly challenge the State's theory of the case. Thus, the PCR court properly denied relief and its decision should be affirmed.

For all of the reasons above, the PCR court's conclusion that Greene failed to carry her burden of proving prejudice despite findings of deficiency should be affirmed.

II.

The PCR court properly concluded Counsel Wise was not ineffective for failing to challenge testimony related to the synergistic effect of the medications found in Victim's toxicology report because: (1) both the defense and the State emphasized in closing that the *only* theory presented by the State and therefore the *only* issue for the jury to decide was whether Victim received *morphine* through breast milk to the extent it caused her death; (2) the State did not argue or mention any synergistic effect during its closing argument; and (3) Counsel successfully convinced the trial court to charge the jury that to convict, the cause of death could only be from a Schedule II drug and morphine was the only Schedule II drug found in Victim's system.

In her petition, Greene argues Mr. Wise was ineffective for failing to challenge testimony about synergy and the synergistic effect of the medications in Victim's toxicology report because it was not supported by medical science. She emphasizes Dr. Scialli's testimony at the PCR hearing that there was no support for "synergy" in the case because none of the medications on the toxicology report would have had a synergistic effect such that the morphine's effects would have been enhanced. Greene also focuses on her claim that five of the State's expert witnesses testified that the medication consumed by her had a synergistic effect. (Brief of Petitioner, p.25). However, the PCR court properly concluded Mr. Wise was not deficient and Greene suffered no prejudice because: (1) both the defense and the State emphasized in closing that the *only* theory presented by the State and therefore the *only* issue for the jury to decide was whether Victim received *morphine* through breast milk to the extent it caused her death; (2) the State did not argue or mention any synergistic effect during its closing arguments; and (3) Mr. Wise successfully convinced the trial court to charge the jury that to convict the cause of death could only be from morphine. If anything, hearing that some drugs *could* have a synergistic effect, then hearing several witnesses imply Greene's medications *did* have a synergistic effect, but then utterly failing to argue this in closing, while *also* having the consideration of synergy *precluded*

by the jury charge, had the opposite effect from prejudice—it undermined the strength and clarity of the State's case in the eyes of the jury.

At the PCR hearing, Mr. Wise noted that under direct examination Dr. Wren effectively brushed-off the synergy claim and explained that the proper way to frame his expert opinion was that this was really just a "morphine death" whereby Victim died from "morphine intoxication." (App.p.508). Mr. Wise further testified that although several of the witnesses implied that morphine and any particular drug *did* create a synergistic effect, he did not believe any of them directly stated so. Consequently Mr. Wise convinced the judge that the "synergistic effect" was insufficient for the jury to convict appellant of homicide by child abuse in this case and got a favorable jury charge. (App.p.1551-p.1552). During trial, both Mr. Wise and the solicitor emphasized in their respective closing arguments that the *only* theory presented by the State and therefore the *only* issue for the jury to decide was whether Victim received *morphine* through breast milk to the extent it caused her death, The solicitor also did not argue or mention to the jury any "synergistic" effect of the other drugs during closing argument. (App.p.612-p.614; p.631-p. 644). It simply strains credulity to suggest that the jury was ready to acquit Greene of any charges based on proof relating to morphine, but only convicted her based on the implied synergistic effects of other drugs, when no other medications were present above therapeutic levels and the jury was specifically charged that: "the term harm to the child's physical health or welfare in the context of this case refers to the infliction of physical injury or harm to a child resulting from the child's ingestion of a Schedule II controlled substance." (App.p.656).

Greene argues that contrary to the PCR court's finding, the jury charge Counsel successfully secured actually amplified the prejudice because synergy was not even relevant to the question charged to the jury. She contends that "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." (Brief of Petitioner, p. 28). But as recognized by the PCR court, this logic seems flawed. A hypothetical example for comparison is illustrative.

Imagine a trial in another dimension, a dimension not only of sight and sound but of mind, where a woman intentionally poisons her mother-in-law by feeding her belladonna berries. At trial, we learn a toxicology report shows the victim's stomach contained a lethal level of belladonna, but also contained other plants from the nightshade family, including tomatoes, potatoes, eggplant, and jimsonweed. If the government proceeded to call ten witnesses who all claimed these other plants had a compounding toxic effect on the belladonna, but then the prosecutor says *nothing* about compounded toxicity in closing, and the court instructs the jury that they can *only* find guilt if the belladonna itself was the cause of death, not only is there no prejudice from the testimony about compounding, it instead undermines the prosecutor's credibility and weakens the government's case. The same is true here. Accordingly, the PCR court properly denied relief and its decision should be affirmed.

III.

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

The State submits Greene's invitation for this Court to adopt the cumulative error doctrine is insufficient to warrant reversing the PCR's conclusions under the circumstances of this case. *See Hunter v. Smith*, 856 F.Supp. 251, 258 (D. Md. 1994) ("The fact that many claims of counsl error are pressed does not alter the fundamental math—a string of zeros still adds up to zero."). In his Brief, Greene makes the argument that the PCR court's deficiency findings should

have warranted a finding of prejudice and a new trial when viewed in conjunction with one another. In support of this argument, he references the opinion given by Mr. Wise at the PCR hearing that he believes all of his deficiencies, taken together, could have made a difference in the outcome of Greene's trial. (Brief of Peitioner, p.28-p.29). However, this argument is without merit as Mr. Wise did not commit any individual errors resulting in prejudice and this Court has never recognized the cumulative error doctrine as a basis for PCR. *See, e.g., Simpson v. State*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis"); *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324-25 (2002) ("Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina.").

Many other jurisdictions, including the Fourth Circuit Court of Appeals, have held that a cumulative-error analysis of *Strickland's* prejudice prong is inappropriate, and the correct analysis focuses upon each individual allegation of ineffective assistance. *Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998); *Wainwright v. Lockhart*, 80 F.3d 1226 (8th Cir. 1996); *Jones v. Sotts*, 59 F.3d 143, 147 (10th Cir. 1995). As the Fourth Circuit explained in *Fisher*:

> Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error. . . it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of the Fourth Circuit individually to assess claims under *Strickland v. Washington*. To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather

> than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue.

Id. (citations omitted). *See also Mueller v. Angelone*, 181 F.3d 557, 586 n.22 (4th Cir. 1999) ("Petitioner also urges us to consider the cumulative effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation. This argument is squarely foreclosed by our recent decision in *Fisher*, 163 F.3d [...at] 852-53 [...]"). The Fourth Circuit further explained, "legitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient." *Fischer*, 163 F.3d at 852 n. 9. As explained, this analysis controls when there are multiple findings of deficiency, as long as no single one of them was prejudicial in a constitutional sense. Here, where none of the deficiencies found by the PCR court resulted in a finding of prejudice, the PCR court properly rejected the argument that these non-prejudicial errors could cumulatively result in prejudice. Therefore, the PCR court properly denied relief and its decision should be affirmed.

IV.

> **The PCR court properly concluded the publication of the Zipursky paper and the post-trial retraction of the "Canadian study" did not constitute after-discovered evidence sufficient to grant a new trial because: (1) during trial the "Canadian study" was primarily exploited by the defense in an attempt to suggest extraordinary circumstances, such as an unexpected genetic defect, could provide an explanation for the high morphine level; (2) the State's witnesses acknowledged the "Canadian study" was about codeine and *not* morphine; and (3) the evidence of the Zipursky paper and the retraction of the "Canadian study" would be merely impeaching.**

In her brief, Greene argues the retraction of the "Canadian study," in combination with the publication of the Zipursky paper repudiating that study, could have been used to directly

contradict the State's theory and bolster Mr. Wise's argument that the State's theory was impossible. (Brief of Petitioner, p.30-p.33). However, as properly analyzed by the PCR court, Mr. Wise effectively made the impossibility argument by leveraging parts of that very study against the State. Furthermore, the PCR court properly recognized that under these circumstances, the retraction would have been merely impeaching. *Johnston v. Belk-McKnight Co. of Newberry*, 188 S.C. 149, 158, 198 S.E. 395, 399 (1938) ("[I]mpeaching must mean that which is outside the evidence already given, and impeaches that evidence; it may be by attacking the character, the motives, the integrity, or veracity of those who gave the testimony."). The PCR court properly denied relief and certiorari should be denied.

At trial, Mr. Wise and Dr. Karch were clearly aware of the "Canadian study" and Mr. Wise exploited it on cross-examination of the State's witnesses. First, Mr. Wise got Dr. Eagerton to admit the "Canadian study" only led to the death of the infant due to a genetic defect in the mother, suggesting genetic defects might, in a general sense, lead to accumulation of medications passed through breastfeeding. (App.p.441-p.442). Though not operating as the same biological mechanism, this was strikingly similar to the renal failure theory presented by Drs. Scialli and Twombly, in that it constituted an extraordinary circumstance. Second, and perhaps more crucial to the PCR court's after-discovered evidence finding, Mr. Wise got both Dr. Eagerton and Dr. Wren to acknowledge the "Canadian study" was specific to *codeine*, not morphine. (App.p.440-p.446; p.530-p.531). These efforts by Mr. Wise demonstrated not only that he provided effective assistance of counsel, but also that the Zipursky paper and the retraction of the "Canadian study" would merely have served to impeach—impeachment that Mr. Wise already accomplished on essentially the same basis Greene is now arguing should have

been used. Accordingly, the PCR court properly concluded Greene failed to show entitlement to a new trial based on after-discovered evidence and its decision should be affirmed.

CONCLUSION

Based on all of the foregoing reasons, the State respectfully requests that the judgment of the lower court be affirmed.

Respectfully submitted,

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