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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.

Reply Brief of Petitioner

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Introduction

The foundation for Petitioner's conviction rests on flawed science, which trial counsel could have shown at the time of her criminal trial had he relied on experts like those presented at the PCR hearing. Moreover, since the time of her trial, the only case study in the medical literature that even tangentially supported the State's theory of the case has been discredited and repudiated. Although the PCR Court correctly found that trial counsel was ineffective for failing to call experts such as Dr. Scialli and Dr. Twombley to detail the flaws with the State's theory and provide the alternative cause of death of renal failure, it nevertheless found that Petitioner suffered no prejudice. This was error. The Court should permit a jury to hear and consider the evidence that Petitioner presented at PCR as there is a reasonable likelihood it would change the outcome. The evidence and testimony from PCR negated the *mens rea* of homicide by child abuse by showing that Petitioner did not take deliberate actions that she knew would place her child, L.G., at a risk of death. This Court should reverse and order a new trial on the merits.[1]

Argument

I. The PCR Court correctly determined that trial counsel's performance was deficient.

The State first contends that the Court should affirm because trial counsel's performance, while "not perfect" with the benefit of hindsight, was reasonably competent. This argument lacks merit.

As the PCR Court noted, both experts Petitioner presented at the PCR hearing had "substantial" qualifications and were "very knowledgeable." (Order at 4; 1765.) Their subject matter expertise was relevant to the issues before the Court, and their testimony was "highly credible." (*Id.* at 4-5; 1765-66.) After recapping their testimony and Opinions, the PCR Court

[1] This case is unprecedented. The undersigned have not identified any other cases where a mother was convicted under the theory that her use of prescription opioids while breastfeeding allegedly caused the death of her child.

again highlighted the credibility of Petitioner's experts and their "impeccable" credentials. (*Id.* at 6; A. 1767.) The Court noted that the State presented no experts to counter Applicant's witnesses. (*Id.*) Moreover, the Court acknowledged that these witnesses underscored the medical complexity of the issues in the case, including causation. (*Id.*)

The Order of Dismissal then turned to trial counsel's testimony, which the Court also found to be credible. (*Id.*) As Petitioner's opening brief detailed, trial counsel conceded that he was deficient and there is a reasonable probability the outcome would have been different had he presented the evidence and testimony elicited at the PCR hearing. (PCR Day II 38:2-41:4, 41:5-42:11, 50:20-25; A. 1508-12, 1520.)

The PCR Court agreed with Applicant that trial counsel was deficient because he could have identified experts such as Dr. Scialli and Dr. Twombley and investigated and developed renal failure as an alternative cause of death. (Order p. 7; A. 1768.)

Although the State is correct that trial counsel's strategy attempted to challenge the State's transmission through breast milk theory, the deficiencies in his performance were in ***how*** he went about that process. A much more formidable and persuasive defense was available, and trial counsel could have presented it—as he conceded at the PCR hearing—had he conducted a better investigation and consulted with experts like Dr. Scialli and Dr. Twombley to develop the renal failure alternative cause. Trial counsel also failed to mount a full-throated attack on the weakness behind the science of the State's theory and demonstrate its impossibility, which these experts also would have helped him do.

The Court should not disturb the PCR Court's findings on this issue (which the State did not appeal). Petitioner's post-trial brief discusses the testimony presented at the evidentiary

hearing in detail and contains a full discussion of the ineffective assistance prong. Petitioner incorporates that discussion by reference here in full.

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

The State's Brief focuses heavily on the evidence from the original trial and essentially faults Petitioner for failing to prove actual innocence at the PCR hearing. This misstates Petitioner's burden. Under *Strickland*, if an applicant establishes deficient performance by counsel, the prejudice prong only requires a showing that, but for counsel's error, there is "a reasonable probability that the result of the proceedings would have been different." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101-02 (2013) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)). For guilt or innocence issues, this means "whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

Through her postconviction relief action, as the PCR Court's order of dismissal acknowledged, Petitioner presented persuasive and impactful (not to mention unrebutted)[2] expert testimony establishing an alternative cause of death for her daughter L.G. Petitioner's expert testimony also supported that morphine use while breast feeding is not inherently dangerous, and L.G. would have had to consume an impossible amount of breast milk to reach the level measured on the toxicology report absent an extraordinary circumstance not reasonably foreseeable to Petitioner (here, that L.G. was suffering from renal failure). Finally, to a reasonable degree of medical certainty, the morphine did not cause the renal failure L.G.

[2] The State relied solely on its cross examination of Petitioner's experts in opposing her application for PCR. It did not call any experts of its own.

experienced.[3] In fact, the expert testimony established that L.G. could have died "from renal failure regardless of the high morphine level." (*See* PCR Day I 206:19-207:9, 234:15-21; A. 1440-41, 1468.)

This alternative cause was critically absent from the defense at the underlying trial and, as the PCR court correctly determined, trial counsel was deficient for failing to develop this argument. Contrary to the State's contention, the underlying defense was not "formidable" because although counsel attempted to sow seeds of doubt in the State's theory that the morphine toxicity was due solely to Petitioner's breastfeeding, the jury heard no explanation for why the level was so high and why it was not due to Petitioner's deliberate indifference towards L.G. If trial counsel had developed and presented the expert testimony introduced at PCR, there is a reasonable likelihood the jury would have found that it sufficiently negated the *mens rea* element of the crime of homicide by child abuse, because Petitioner's use of morphine while breastfeeding was not a deliberate act which she knew would place her child at a risk of death. Rather, L.G. died from renal failure, which was not foreseeable to Petitioner, and the morphine accrual was merely a tragic byproduct of this condition.

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

The State first contends the evidence from the underlying trial was sufficient to constitute extreme indifference despite the renal failure. The expert testimony introduced by Petitioner at PCR, however, provided compelling support for why this was not the case. As noted, Petitioner was not required to prove actual innocence at the PCR; rather, she needed to show a reasonable probability that, absent counsel's errors, the jury would have had reasonable doubt respecting

[3] The PCR Court noted that there had been no assertion to the contrary. (Order pp. 8-9; A. 1769-70.) Thus, unlike the cases the State cited for the proposition that the fact that other causes also contribute to the death does not relieve the actor from responsibility, here there was "no factual or medical information that causally connects the morphine and renal failure." (*Id.* at 9; A. 1770.)

guilt. *Strickland*, 466 U.S. at 695. Thus, the question before the Court is not whether a jury would definitely find in Petitioner's favor, but instead whether it should be permitted to hear what Petitioner's experts testified to at PCR and whether that could change the outcome.

The testimony of Petitioner's experts, reproductive and developmental toxicologist Dr. Anthony Scialli and pediatric nephrologist Dr. Katherine Twombley, supported that morphine is generally safe and effective for breastfeeding mothers and is often prescribed directly to newborns where appropriate.[4] (PCR Day I 35:7-37:4, 193:18-194:4; A. 1269-71, 1247.) Dr. Scialli had prescribed opioids, including morphine, to pregnant and breastfeeding women as well as neonates. (*Id.* at 35:21-37:4; A. 1269-71.) Likewise, Dr. Twombley noted that she has had infant patients who were directly administered morphine for longer than six weeks, with some even taking it for months at a time. (*Id.* at 221:5-23; A. 1455.)

Dr. Scialli opined that there is no scientific support for the possibility that morphine can pass through breast milk at a lethal level, and L.G. would have had to consume over 50 gallons of milk in a 24-hour period to reach the level measured on the toxicology report (an amount that was 232 times the typical daily milk intake for a six-week-old infant). (*Id.* at 32:1-6, 41:4-8, 47:19-48:9; A. 1266, 1275, 1281-82.) Dr. Scialli also testified about the importance of the Zipursky paper and its conclusions, which aligned with and confirmed the opinions he would have been prepared to offer had he been called at Petitioner's trial. (*See* Applicant's Ex. 7,

[4] The State cites the product label for MS Contin (the brand of morphine prescribed to Petitioner) in an attempt to rebut this proposition. (Br. of Resp. p. 15.) However, as Dr. Scialli testified, product labels are the byproduct of negotiations between the sponsor and the agency, and labeling is "not optimum as far as conveying the science." (PCR Day I 154:3-10.; A. 1388.) Dr. Scialli testified that he has prescribed medications to breastfeeding women despite a warning label regarding taking the drug while breastfeeding, and the fact that a drug could have some potential for being harmful does not mean it should not be prescribed. (PCR Day I 174:23-175:6; A. 1408-09.) Regardless, the warning label introduced at trial was published in July 2012 which ***post-dated L.G.'s death by 18 months***, (Trial Tr. 355:9-23; A. 430), and is thus irrelevant in the first instance.

Zipursky & Juurlink, The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, Clinical Pharmacology & Therapeutics (May 2020); A. 1647-66.)

Dr. Scialli opined that the morphine concentration measured in L.G. was most likely explained by renal failure causing an inability to excrete morphine and its metabolites. (PCR Day I at 52:3-18, 54:21-25, 56:15-25; A. 1286, 1288, 1290.)

Dr. Twombley is a pediatric nephrologist who specializes in treating children with kidney disorders. (*Id.* at 181:24-185:17 A. 1415-19.) She also concluded to a reasonable degree of medical certainty that L.G. suffered from renal failure and would not have died absent this condition. (*Id.* at 198:12-17, 207:10-13, 212:2-9; A. 1432, 1441, 1446.) As she explained, one of the most common causes of acute renal failure is illness. (*Id.* at 186:25-187:6; A. 1419-20.) Here, the medical records reflected that L.G. developed a cold a few days before she passed. (*Id.* at 198:18-22, 203:2-15; A. 1432, 1437.) When babies are congested, they do not feed as well and can become dehydrated, and dehydration is one of the most common causes of renal failure. (*Id.*)

Both Dr. Scialli and Dr. Twombley agreed that L.G's 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, 206:3-15, 207:10-13; A. 1288, 1290, 1440-41.) Rather, it was an independent problem suffered by the child that was not reasonably foreseeable to Petitioner. (*Id.* at 54:21-25, 56:15-25, 207:14-20; A. 1288, 1290, 1441.)

Petitioner presented this persuasive, unrebutted expert testimony directly challenging the State's theory that Petitioner committed 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), by consuming morphine while breastfeeding. The PCR court correctly determined that trial counsel's failure to develop and present the renal failure alternative cause

was deficient. The PCR Court erred, however, by failing to find that Petitioner suffered prejudice. As noted, Petitioner was only required to show a reasonable probability that, absent the errors, the jury would have had a reasonable doubt respecting guilt. The negation of the *mens rea* element of homicide by child abuse by the evidence and testimony elicited at PCR supports such a reasonable probability.

Contrary to the State's contention (and the PCR Court's findings), *State v. Taylor* and *State v. Phillips* are inapposite. As Petitioner detailed in her Opening Brief, both cases 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 directly administer her a controlled substance. There was no evidence at the underlying trial that Petitioner engaged in any such action, which the State conceded at trial. (Trial Tr. 529:3-14; A. 529.) Moreover, contrary to the State's assertion in its Brief, (*see* Br. of Resp. pp. 18-19), Petitioner's consumption of morphine while breastfeeding was not an "inherently dangerous" action towards L.G. as Dr. Scialli and Dr. Twombley's unrebutted testimony showed.

As Petitioner has maintained, *Phillips* actually supports her position. The *Phillips* court explained that, to prove extreme indifference, the State must 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); *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"). In other words, the State has to

prove that the defendant intended to give medication "with the knowledge that doing so would create a risk to the child's life." *Id.* There is no such evidence here.

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

For all these reasons, the PCR Court erred in finding that Petitioner suffered no prejudice despite counsel's deficient performance in failing to develop and present the renal failure alternative cause. The Court should grant certiorari, reverse the PCR Court, and remand the matter for a new trial.

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

The PCR court (and the State in its briefing, *see* Br. of Resp. p. 5-6, 15) relied heavily on the Supreme Court's description of the underlying facts and its causation analysis to support a lack of prejudice. Had the jury heard and considered the evidence the Petitioner presented at PCR, there is a reasonable likelihood the outcome would have been different.

The excerpted discussion from the Supreme Court's opinion was from its directed verdict analysis. In reviewing the denial of a directed verdict motion, the appellate court must construe the evidence in the light most favorable to the State. *State v. Phillips*, 416 S.C. 184, 193, 785 S.E.2d 448, 452 (2016) (explaining that the trial court must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced"). *Id.* While a jury "**must consider**

alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." *Id.* (emphasis added). "The jury's focus is on determining whether every circumstance relied on by the State is proven beyond a reasonable doubt, and that all of the circumstances be consistent with each other and, taken together, point conclusively to the guilt of the accused **to the exclusion of every other reasonable hypothesis**." *Id.* (emphasis added).

Therefore, reliance on the Supreme Court's discussion of the evidence was misplaced since it was construing all inferences in the light most favorable to the State. Regardless, Petitioner introduced evidence and testimony at PCR demonstrating another reasonable hypothesis that a jury should be permitted to consider. The State's theory on extreme indifference at the underlying trial was that Petitioner was pregnant, hid that pregnancy from her doctors,[5] and continued to take prescription medication. However, the testimony from PCR

[5] There has been much evidence, testimony, and argument from the State throughout this matter about Petitioner "concealing" her pregnancy from her prescribers and this supporting deliberate indifference. This is entirely irrelevant. L.G. did not die in utero; rather, she was forty-six days old when she passed. There was no evidence that Petitioner suffered any pregnancy complications or suggestion that Petitioner gave birth to anything other than a healthy baby. As Dr. Twombley testified and the medical records reflected, L.G. was doing well until the renal failure occurred. (PCR Day I 198:18-22; A. 1432.) She had a normal, "healthy" well visit at two weeks of age with "absolutely no concerns by the pediatrician" and was "fine" until a few days before she passed. (PCR Day I 198:18-22, 200:17-201:20, 204:10-21; A. 1432, 1434-35, 1438.)

Likewise, the State has devoted considerable attention to Petitioner's actions following L.G.'s death. The State incorrectly states that Petitioner "hid her use of MS Contin from her pediatrician, Dr. Bridges" and cites to Dr. Bridges' testimony. (Br. of Resp. p. 14.) Dr. Kelly Bridges was Petitioner's OBGYN, however. (*See* Trial Tr. 236:18-25, 237:20-23; A. 311-12.) L.G.'s pediatrician ***did not*** testify.

The State also notes that Petitioner omitted the fact that she was taking medications from investigators. This post-hoc action similarly had nothing to do with whether ***Petitioner's actions towards L.G.*** manifested extreme indifference.

Finally, the State paints Petitioner as a drug seeker. Petitioner, however, was being treated for fibromyalgia and chronic pain issues that arose after a severe car accident. (Trial Tr. 228:11-19; A. 303) Petitioner's primary care physician, Dr. Kovacs, testified that Petitioner was permanently disabled. (*Id.* at 224:25-225:8; A.299-300.) Petitioner's neurologist, Dr. Kooistra, referred her to Dr. Kovacs and Dr. Kovacs would receive notes from Dr. Kooistra. (*Id.* at 187:21-188:1, 222:1-13; A. 262-63, 297.) As the State's pharmacist expert acknowledged on cross examination, all of Petitioner's physicians had access to the DHEC's prescription monitoring network and could see a list of everything that she had been

supported that this was not inherently dangerous and that L.G.'s cause of death was not because of any deliberate action by Petitioner to put L.G. in harm's way but instead was due to renal failure. A jury should be permitted to consider this evidence and testimony, which the underlying jury did not have the benefit of hearing, and the Supreme Court did not have the benefit of considering in its merits opinion.

C. Trial counsel's reliance on Dr. Karch was improper and further prejudiced Petitioner.

In addition to the failure to develop the alternative cause theory, trial counsel was deficient for relying solely on Dr. Karch, and Petitioner suffered prejudiced as a result.[6] The State contends that Dr. Karch helped form part of a "formidable defense" that similarly sought to show that the morphine level could not be explained through transmission through breast milk. The State and the PCR Court, however, both overlooked that Dr. Karch did not opine that it was impossible for the level of morphine found in L.G. to be explained solely because of breastfeeding like Dr. Scialli did at PCR. Rather, Dr. Karch was only ever able to speculate that he did not ***think*** that was the case. And, in fact, when trial counsel asked Dr. Karch on direct examination if he thought that the level could possibly be explained solely because of transmission through breast milk, he replied "yes." (Trial Tr. 504:19-21; A. 579.)

Dr. Karch's testimony was ultimately detrimental to the defense because he could not offer any true rebuttal to the State's theory. Trial counsel also failed to have Dr. Karch prepare any calculations like those Dr. Scialli performed or cite the extensive medical literature that Dr.

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prescribed. (*Id.* at 339:3-340:4, A. 414-15.) Moreover, Dr. Kooistra would send Dr. Kovacs information from Petitioner's visits with her to Dr. Kovacs, including any medication changes. (*Id.* at 222:1-223:16: A. 297-98.)

[6] Although Dr. Karch was an expert in toxicology, he did not have expertise with pregnant and nursing mothers like Dr. Scialli. Moreover, he did not have expertise in pediatrics or nephrology like Dr. Twombley.

Scialli used to support his opinions. Although Dr. Karch testified that he was not aware of any reported cases of a baby dying from morphine transmission through breast milk, he was not able to opine as to the ***impossibility*** of the State's theory like Dr. Scialli and Dr. Twombley. And his concession that it could happen undermined Petitioner's defense.[7]

Similarly, although trial counsel engaged in a very surface-level cross examination of the State's experts about the Canadian case (which was the only example of purported opioid toxicity as a result of breastfeeding that has been cited at any point during this case), calling an expert like Dr. Scialli could have shown just how inapposite the Canadian case was to this matter and undermined the credibility of the State's experts for relying on it. At PCR, Dr. Scialli went into great detail as to why the Canadian case was inapplicable, cited specific medical literature that would have been available at the time of the underling trial to support his opinions, and performed a series of the calculations to demonstrate the error in the State's position.

Contrary to the PCR Court's finding and the State's argument, Dr. Karch's speculation about a possible "genetic defect" was not analogous to the renal failure alternative cause established at PCR. Dr. Karch did not explain what sort of genetic defect could have caused this outcome and did not testify to a reasonable degree of medical certainty that L.G., in fact, had any such genetic defect that would have impaired her ability to process morphine (nor was there any evidence supporting such a genetic defect). It was pure speculation on his part and, thus, was not an equivalent unforeseeable "extraordinary circumstance" explaining L.G.'s elevated morphine level that could have made a difference in the eyes of the jury. Contrast that with the testimony

[7] Contrary to the State's suggestion, Dr. Karch's concession was vastly different from Dr. Scialli's accurate acknowledgment that the morphine level measured in L.G. could have caused respiratory depression and her death. Again, the crux of Dr. Scialli's testimony was that the morphine level was ***explained*** by the renal failure and that this level would not have accrued absent that extraordinary circumstance. Dr. Karch, on the other hand, conceded that it was possible that this level of morphine could have transmitted through Petitioner's breast milk to the level measured in L.G. ***without*** any such an unforeseeable, extraordinary circumstance.

of both of Petitioner's experts at PCR who testified that L.G. suffered from renal failure to a reasonable degree of medical certainty and that this indisputably caused the toxic morphine accrual. Dr. Scialli and Dr. Twombley's opinions had an evidentiary anchor, since there were medical records and testimony supporting that L.G. suffered from an upper respiratory infection and was congested and lethargic in the days leading up to her death, all of which were signs of renal failure. (Trial Tr. 92:20-93:8; PCR Day I 203:2-15; A. 167-68 1437.) This is a major, ***evidentiary*** difference that a jury should be permitted to hear.[8]

Finally, the State's contention that trial counsel appropriately relied solely on Dr. Karch in preparing the defense is also without merit. Counsel conceded that Dr. Karch was the only expert he spoke with, and he did not give thought to consulting with any others. (PCR Day II 37:4-11, 70:21-74:2, 71:3-16; A. 1507, 1540-41.) As this Court noted in *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007), effective assistance means that counsel "***[w]ith the assistance of appropriate experts***, counsel should [] aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence." *Id.* at 332, 642 S.E.2d at 597. As Petitioner established at PCR, trial counsel could have found experts like Dr. Scialli and Dr. Twombley who would have allowed for a much more persuasive and full-throated defense against the State's theory of the case and been able to testify as to an alternative cause of renal failure to a reasonable degree of medical certainty. Trial counsel was deficient in calling and relying solely on Dr. Karch as a defense expert, and Petitioner suffered prejudice as a result.

[8] The State's citation to Dr. Twombley's testimony that she could not opine to a reasonable degree of medical certainty that L.G. would definitely have died from renal failure absent the morphine is not the "gotcha" that the State makes it out to be. Again, Petitioner was not required to prove actual innocence at PCR.

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

The State, like the PCR Court, misconstrues Petitioner's argument regarding trial counsel's failures on this point. The fact that the State's experts did not offer their opinions about morphine transmission through Petitioner's breastmilk at a lethal level to a reasonable degree of medical certainty is ***precisely why*** counsel was deficient and Petitioner suffered prejudice. Counsel should have been moving to exclude this testimony pretrial via a *State v. Council*[9] hearing and objecting to it as the witnesses gave the testimony. Although, as the State noted, trial counsel attempted to undermine the State's experts through cross examination, this was not sufficient to rectify the problems. The fact that counsel made no effort to exclude the testimony outright, raised no objection and did not seek to strike it when offered, and did not offer any affirmative testimony from an expert like Dr. Scialli tainted the entire trial.[10] The State's experts should never have been permitted to offer these unreliable opinions before the jury in the first place. If trial counsel had mounted a proper challenge and successfully had this testimony excluded or stricken, there is a reasonable likelihood the outcome would have been different because the State could not have been able to hinge its case on the *res ipsa loquitor*, the morphine "had to get in the baby somehow" so it must be the breastfeeding, theory.

Counsel's deficiencies in handling the State's experts and the resulting prejudice further support the need for a new trial here.

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[9] 335 S.C. 1, 515 S.E.2d 508 (1999).

[10] The State's brief incorrectly characterizes Petitioner's argument as solely asserting that trial counsel should have used rebuttal experts like Dr. Scialli. As the opening brief details, this was only one element of the error. Trial counsel should have sought a *State v. Council* hearing. Then, if the trial court refused to preclude the evidence and testimony, counsel should have contemporaneously objected and moved to strike. Finally, trial counsel should have used rebuttal experts like Dr. Scialli and Dr. Twombley if he could not get the opinions excluded or stricken.

E. This Court should reverse.

For all these reasons, the PCR erred by finding that although trial counsel's performance was deficient, Petitioner did not suffer sufficient prejudice to warrant postconviction relief. This case is very analogous to *McKnight v. State*, 378 S.C. 33, 44-46, 661 S.E.2d 354, 359-60 (2008). In *McKnight*, the petitioner's daughter was stillborn. The autopsy report reflected cocaine byproducts in her system and concluded that the death was secondary to cocaine consumption, and the petitioner was charged with homicide by child abuse. *Id.* at 39, 661 S.E.2d at 357. At the postconviction relief stage, the petitioner argued that her counsel was ineffective in preparing her defense. In the petitioner's first criminal trial (which ended in a mistrial), her counsel called two experts to testify as to possible alternative causes of death (including Dr. Karch, coincidentally). *Id.* at 41, 661 S.E.2d at 358. At the second trial, however, counsel did not call Dr. Karch and failed to question the other expert about a published study that was favorable to the petitioner's defense. *Id.* at 42-43, 661 S.E.2d at 358-59. Counsel also failed to call any expert to rebut or discredit medical studies cited by the State's experts and did not cross-examine the State's experts on the matter. *Id.*

In finding counsel ineffective, the Supreme Court explained that at PCR the petitioner showed that even if Dr. Karch was not available, another expert could have testified that the cocaine did not cause the stillbirth. *Id.* at 44-45, 661 S.E.2d at 359. The petitioner presented testimony from an experienced expert who "testified at the PCR hearing that she agreed with Dr. Karch's view of the evidence and would have testified on behalf of McKnight at the second trial had she been contacted by counsel." *Id.* at 44-45, 661 S.E.2d at 359-60. As the court explained, "strategic choices made by counsel after an incomplete investigation are reasonable '***only to the extent that reasonable professional judgment supports the limitations on the investigation***.'" *Id.* at 45, 661 S.E.2d at 360 (emphasis added) (quoting *Von Dohlen v. State*, 360 S.C. 598, 607,

602 S.E.2d 738, 743 (2004)). The court reasoned that considering counsel's familiarity with the first trial "and the relative ease with which counsel could have procured favorable expert testimony at the second trial," the failure to do so was unreasonable. *Id.*

The *McKnight* court found that there was a reasonable probability that this deficiency prejudiced the petitioner. The methodology of the only expert called by petitioner at the second trial "mimicked that of the State's star expert" and served to "bolster the State's theory of the case." *Id.* at 643, 576 S.E.2d at 172. Moreover, the Court found that counsel's failure to conduct a reasonable investigation resulted in a "substantially weaker defense." *Id.* at 46, 661 S.E.2d at 360.

The same concerns that the Supreme Court identified in *McKnight* are present here, and trial counsel's deficient performance similarly prejudiced Petitioner. Therefore, this Court should reverse the PCR Court's denial of relief and remand for a new trial just as the Supreme Court did in *McKnight*.

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

The prejudicial effect of the injection of the "synergistic effect" issue and trial counsel's failure to attempt to exclude or otherwise rebut it also warrants reversal. As Petitioner detailed in her opening brief, the PCR Court and the State both labor under the mistaken assumption that since the trial court ultimately charged the jury that they should only consider ingestion of a Schedule II substance (of which only morphine qualified) in assessing extreme indifference, the considerable testimony about "synergy" was rendered harmless.[11] However, the State's agreement at the end of trial that the other medications should not be considered by the jury demonstrates the problems with trial counsel's performance and the resulting prejudice.

[11] Notably, the Court did not explain to the jury that morphine was the only Schedule II controlled substance that was at issue. (*See* Trial Tr. 581:15-19; A. 656.)

As Petitioner's opening brief detailed, trial counsel was on notice that the State intended to present testimony as to the "synergistic effect" of the medications on the toxicology report, including that the State would rely on the "one-plus-one-equals-three theory." Despite this, he did not challenge the testimony via a *State v. Council* hearing before the State's witnesses offered it or via contemporaneous objection and motion to strike. Likewise, despite having an expert in toxicology that "wrote the book" as trial counsel characterized it, he made no effort to utilize Dr. Karch's expertise to try and rebut the synergy theory. If Dr. Karch could not adequately address the concept, trial counsel could have consulted with an expert such as Dr. Scialli who would have explained why synergy did not apply in this case and could offer such testimony to a reasonable degree of medical certainty.

Instead, the synergistic effect of the other medications on the morphine became a central theme in the State's presentation at trial, with witness after witness offering devastating testimony suggesting that the confluence of the medications consumed by Petitioner amplified the effect of the morphine and its lethality as further support for her alleged deliberate indifference. Trial counsel did not object to or move to strike any of this testimony or introduce any rebuttal testimony.

Five expert witnesses for the State testified about the supposed "synergistic effect" of the medications found in L.G. First, toxicology expert Quintus Young testified "they could" when asked if the medications on the toxicology report could affect each other in a "one plus one equals three" manner. (Trial Tr. 148:13-22; A. 223.)

Next, after the State asked her about each of the medications individually, toxicology expert Dr. Wendy Bell agreed that the medications on the toxicology report "can act together

synergistically to have affects [sic] on each other" and that "obviously this could be the reason why [L.G.] died." (Trial Tr. 260:5-15, 265:12-21; A. 335, 340 (emphasis added).)

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

> Q If you could, tell the jury. What is synergistic effect?
>
> ***A Synergistic effect is one plus one equals five, or one plus one equals three***. You may be taking -- you know, like alcohol. when you mix alcohol with Benadryl it's -- you're going to be even more drowsy, you know, because if you took Benadryl you're going to be drowsy. But when you mix it with alcohol, then all of a sudden you're going to be even drowsy. So that's what synergistic effect is.
>
> ***Q Could a combination of all of these drugs together cause a baby to stop breathing?***
>
> ***A Yes.***
>
> . . .
>
> Q For morphine. Okay. And he asked about the toxicology report. In addition to morphine being found in the baby's system was Clonazepam also found?
>
> A Yes, it was.
>
> ***Q And would those drugs have a synergistic effect?***
>
> ***A Yes.***

(Trial Tr. 322:2-13, 341:3-8; A. 397, 416 (emphasis added).)

Dr. Eagerton testified almost identically to Dr. Kotecha:

> Q Okay. So based -- I think that's my next question from that standpoint.
>
> In your opinion all of these drugs, would they have an effect on each other -- the morphine as well as the – I guess those are the two main ones we'll look at, is the morphine and the cla -- Klonopin. I'm sorry.

> A Well, they don't really have an effect so much on each other, or if they do I'm not really sure of the direct or physical interaction. ***But the actions of one and the actions of the other are certainly like they can be synergistic or they are synergistic. Therefore when you take them together they -- they can increase the effect of -- that you would expect from either one alone or even putting the two together. You would see a much greater effect.***
>
> ***It's hard to quantify exactly how great that effect is because that may vary from individual to individual.***
>
> ***Q But it could be like one-plus-one-equals-three type situation.***
>
> ***A It could be one plus one equals three, or it could be one plus one equals five. It could be one plus one equals something greater than that.***

(Trial Tr. 350:11-351:7; A. 425-26; *see also* Trial Tr. 386:21-25; A. 461 (emphasis added).) Dr. Eagerton later agreed with the State that the synergistic effect here could be "one and one equals ***three or five or ten or whatever***?" (Trial Tr. 390:10-13; A. 465 (emphasis added).)

Finally, Dr. Wren specifically opined that ***synergistic effect was the cause of death***. The State walked Dr. Wren through each of the medications on the toxicology report and the levels measured. (Trial Tr. 430:11-433:14; A. 505-08.) Dr. Wren then stated:

> So based on all of that all of these drugs essentially lead to respiratory depression. And so I said based on the history and autopsy findings -- and I should have put in including toxicology results -- it was my opinion that this child died as a result of ***respiratory insufficiency secondary to synergistic drug intoxication***. I could just as easily have said morphine intoxication, but lawyers like to split hairs, and so I included them all.
>
> . . .
>
> ***Q But obviously this child died from -- well, actually morphine plus the other drugs and synergetric [sic] effect from them.***

A That's my opinion, yes.

(Trial Tr. 433:15-22, 444:2-5; A. 508, 517 (emphasis added).)[12]

Trial counsel did not object to or otherwise challenge the testimony of these five expert witnesses except through superficial cross examination. This is especially concerning since none of the State's experts offered these opinions about synergy to a reasonable degree of medical certainty or cited any supporting medical literature or treatise to justify their opinions (nor were they asked to do so by trial counsel). Nor could they, since as Dr. Scialli's testimony established at the PCR hearing, there was no scientific basis for synergy here as the medical literature did not support it. (PCR Day I at 78:17-20; A. 1312.)

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

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. to Reconsider at 3-4; A. 1773, 1825-

[12] Although Dr. Wren explained that morphine intoxication was the primary cause of death and it was "secondary to synergistic drug intoxication," (*see* Trial Tr. 433:15-22; A. 508), this does not discount that he and four other of the State's experts testified that the other drugs enhanced the effect of that morphine and its lethality.

26.)[13] Despite being on notice that the State intended to present testimony on "synergy," trial counsel did not investigate this theory, attempt to exclude it, or prepare any rebuttal. Trial counsel also failed to move to exclude or strike the testimony on the basis that no experts opined to a reasonable degree of medical certainty regarding the supposed applicability of synergy. Trial counsel also failed to request that the court explain in its jury charge that morphine was the only Schedule II controlled substance at issue in the case and that the jury should therefore disregard the testimony about use of other medications and their purported "synergistic effect" on the morphine. Finally, trial counsel neglected to address this issue in his closing either and try to make it clear to the jury that they should not factor in the purported effect of the other medications on the morphine and its alleged lethality.

All these deficiencies prejudiced Petitioner since the jury would not have heard any testimony about synergy or any of the other medications for that matter but for counsel's deficiencies. As the excerpted testimony reflects, this testimony was very damaging to Petitioner since it gave the jury the incorrect impression that Petitioner knowingly consumed a "cocktail" of dangerous medications that made the morphine much more lethal when there was no scientific support for such a theory.[14] It made an impression on the Supreme Court as well, which

[13] The State's Brief seeks to have it both ways regarding the other medications such as Klonopin (also known by its generic name clonazepam) and their import. The State notes that the trial court properly charged the jury that they should only consider Schedule II substances (*i.e.*, morphine) and that this rectified any prejudice. However, it repeatedly highlights that Petitioner consumed other medications that were reflected on L.G.'s toxicology report as if that has bearing on her guilt or innocence. The State references the other medications as early as the second sentence of its statement of facts. (Brief of Resp. pp. 4-5.) Moreover, the State cites the presence of Klonopin on the toxicology report as further support for Petitioner's "lack of concern for victim." (*Id.* at 13.) This is yet another distraction in the State's efforts to paint Petitioner in a negative light. Regardless, Dr. Scialli testified at PCR that this medication is also directly administered to neonates and prescribed to pregnant and breastfeeding women. (PCR Day I 76:8-22; A. 1310.)

[14] The State's "alternate dimension" illustration conveniently omits the key problem that infects this real-world case— trial counsel's deficiencies—and, if anything, further demonstrates the prejudice here. As Petitioner has contended, trial counsel ***should*** have made every effort to show the lack of credibility from

specifically cited the "'synergistic effect' of the morphine poisoning when considered along with Appellant's abuse of other drugs" in affirming the denial of directed verdict. *State v. Greene*, 423 S.C. 263, 266-67, 814 S.E.2d 496, 498 (2018). The Supreme Court further stated that L.G.'s "death was caused by respiratory failure secondary to synergistic drug intoxication." *Id.* at 275, 814 S.E.2d at 503. This Court should reverse and remand for a new trial.

IV. The Court should formally recognize the cumulative error doctrine.

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

The PCR Court found that trial counsel was ineffective in multiple respects. Therefore, Petitioner requests that the Court acknowledge that it may consider the cumulative effect of those errors in analyzing prejudice.

V. The Zipursky paper constitutes newly discovered evidence warranting reversal for a new trial.

The Zipursky paper represents a separate and independent basis on which the Court should grant a new trial. Although the State is correct that its experts did not directly rely on the Canadian case at the underlying trial, the Canadian case gave the State an avenue to avoid directed verdict because it represented at least one example in the medical literature suggesting that morphine toxicity could occur because of a mother's breastfeeding. The Canadian case has

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the prosecution and sought to weaken the State's case, yet he failed to do so entirely. Trial counsel ***should*** have rebutted the synergy theory head-on and made it a central point in closing argument to show that the State was relying on junk science and the jury should ask itself what else the State is wrong about. Instead, this issue went entirely unchallenged.

now been fully discredited by the Zipursky paper, however.[15] Each of the factors supporting a new trial are met. *See Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014).

Although the State is correct that trial counsel cross examined the State's experts about the Canadian case and tried to distinguish it, the study's finding that a child could suffer opioid toxicity from a mother's consumption while breastfeeding was unavoidable and highly damaging to Petitioner. It gave the State a real-world example on which to anchor its unprecedented theory of criminal liability.[16] As trial counsel explained, although he attempted to distinguish the study, it was difficult to truly 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." (PCR Day II, Tr. at 43:18-23; A. 1513.)

The Zipursky paper would have done far more than merely bolster trial counsel's position–it would have shown that the Canadian study was false and undercut the State's entire theory of the case. The study is so in-depth and emphatic that it would have supported a compelling argument for directed verdict on the State's morphine transmission through breast feeding theory. (*See* Applicant's Ex. 7, Zipursky & Juurlink, The Implausibility of Neonatal Opioid Toxicity from Breastfeeding, Clinical Pharmacology & Therapeutics (May 2020); A. 1647-66 (explaining that the authors 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***). As the Zipursky paper concluded, other

[15] The New Yorker recently published an expose that explores the many problems with the Canadian study and the fallout from the Zipursky paper's repudiation of its findings. *See* Ben Taub, *Did a Celebrated Researcher Obscure a Baby's Poisoning?*, The New Yorker (Jan. 26, 2026), available at https://www.newyorker.com/magazine/2026/02/02/did-a-celebrated-researcher-obscure-a-fatal-poisoning.

[16] Although the State attempts to minimize the Canadian case's importance by noting that it was mostly referenced in trial counsel's cross examination, this overlooks that the solicitor expressly referenced the Canadian case twice in his closing arguments, contending that it directly supported that "morphine can kill" and "can cause even death." (Trial Tr. 557:9-18, 563:11-24; A. 632, 638)

factors would have had to be at play for this to occur including, most importantly, ***renal failure***. (*Id.*; A. 1649.) This is, of course, precisely what happened with L.G., as Petitioner established to a reasonable degree of medical certainty at the PCR hearing (a conclusion which the State did not rebut with any expert testimony).

The Zipursky paper, therefore, satisfies the standard for granting a new trial based on new evidence and is an independent basis for reversing and remanding for a new trial. The Court should permit a jury to consider this new evidence and its impact in a new trial.

Conclusion

For the reasons stated in Petitioner's opening brief, the Brief of Amicus Curiae the American College of Obstetricians and Gynecologists, Pregnancy Justice, and Time Served, and herein the Court should reverse the order of the PCR Court and remand the matter for a new trial.

Signature on Following Page

Respectfully submitted,

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