THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM PICKENS COUNTY
Court of General Sessions

D. Garrison Hill, Circuit Court Judge

Opinion No. 5280 (S.C. Ct. App. filed November 12, 2014)

Appellate Case No: 2015-000351

State of South Carolina, ... Respondent,

v.

Donna Lynn Phillips, ... Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "waiver rule" argument Petitioner is asking this Court to consider on certiorari is preserved for appellate review where it was raised for the first time in her petition for rehearing to the Court of Appeals and, to the extent this Court finds Petitioner's argument was sufficiently preserved, whether the Court of Appeals nevertheless properly affirmed the trial court's denial of Petitioner's directed verdict motion where the totality of the evidence presented during trial, with or without the "direct evidence of child abuse" which was appropriately considered by the Court of Appeals under the "waiver rule," constituted substantial evidence establishing Petitioner's guilt for each element of the offense of homicide by child abuse.

STATEMENT OF THE CASE

Donna Lynn Phillips (Petitioner) was indicted at the December 16, 2008 term of the grand jury for Pickens County for homicide by child abuse (2008-GS-39-2052).[1] She was represented by James P. O'Connell, Esquire, of the Pickens County Bar. Respondent (the State) was represented by W. Douglas Richardson, Jr., and Jenny L. Barwick, of the Thirteenth Circuit Solicitor's Office. On July 23-27, 2012, Petitioner and her two co-defendants, Jamie Edward Morris (Morris) and Latasha Diane Honeycutt (Honeycutt), proceeded to a joint trial by jury pursuant to which Petitioner was found guilty of homicide by child abuse, Honeycutt was acquitted, and Morris was found guilty of homicide by child abuse - aiding and abetting. Petitioner was sentenced by the Honorable D. Garrison Hill to twenty-five (25) years' imprisonment. Morris was sentenced to twelve (12) years' imprisonment suspended upon the service of eight (8) years' imprisonment and two (2) years' probation. Petitioner timely filed a notice of intent to appeal and on November 12, 2014, her conviction for homicide by child abuse was affirmed in a published opinion from the Court of Appeals. State v. Phillips, 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014). (App.p.1-p.10). Petitioner submitted a timely Petition for Rehearing, the State filed a Return, and by Order filed January 27, 2015, rehearing was denied by the Court of Appeals. (App.p.11-p.46). On March 9, 2015, Petitioner submitted a petition for a writ of certiorari to this Court and now this return on behalf of the State follows.

[1] Latasha Diane Honeycutt, the child's mother, was also indicted for homicide by child abuse and Jamie Edward Morris, the child's father was indicted for homicide by child abuse, aiding and abetting.

STATEMENT OF FACTS

The procedural history and facts set forth in the "Statement of Facts" in the Final Brief of Respondent are hereby incorporated by reference.[2] In addition, the State specifically draws this Court's attention to the following portions of the Record.

In her opening statement, Petitioner initially argued that neither she nor her co-defendants were at fault in the child's death. Counsel said: "[T]his is a case where maybe nobody did anything wrong. Maybe they all tried to do everything right, and it just didn't work out. Now sometimes, that happens." However, Petitioner immediately switched tactics and then attempted to pin blame for the death squarely on Honeycutt. Counsel suggested Petitioner would testify in her own defense and argued that after Petitioner and Morris "brought the child to the mother [a]nd the mother took care of the child after they dropped the child off. . . . The mother didn't go check. The mother didn't go check." Counsel concluded by stating: "My client is innocent. Because she didn't do anything. She was simply a grandmother taking care of her grandkid." (R.p.36, line 23-p.39, line 6). Counsel for Honeycutt followed Petitioner's opening statement by arguing: "The facts are going to show that my client did absolutely nothing wrong." He repeated: "She's not guilty. She didn't do anything wrong, nothing." (R.p.39, line 8-p.41, line 18). Honeycutt neither directly nor indirectly claimed Petitioner gave the victim Tussionex, and she never suggested the evidence would show this is what Petitioner did. Instead, before any evidence was presented Honeycutt's defense simply consisted of the claim that she did nothing wrong.

[2] No citation is made to page numbers in the Appendix as it appears Petitioner inadvertently failed to include copies of the briefs as required by Rule 242(e), SCACR.

At trial the State presented extensive medical testimony that the child was given the cough medicine Tussionex and died from receiving multiple doses of it. (R.p.221, line 10-p.230, line 22; p.241, line 21-p.244, line 14; p.246, line 3-p.250, line 5; p.257, line 7-p.259, line 12; p.263, line 19-p.264, line 19; p.309, line 20-p.314, line 8; p.316, line 12-p.328, line 12; p.329, line 1-p.333, line 1; p.345, line 18-p.347, line 2; p.374, line 13-p.377, line 15; p.377, line 20-p.379, line 4; SROA. p.2, line 17-p.5, line 8; p.6, line 9-p.7, line 22). When Petitioner moved for a directed verdict at the close of the State's case she argued: "There's been no evidence shown whatsoever that she gave any drugs to anybody. There's no evidence to determine she did it in the manner the code says to do it, in a manner with extreme indifference to human life." She argued the circumstantial evidence wasn't sufficient to prove she gave Tussionex to the victim because: "there are other people involved in this that could have gave the child stuff and done other things." She further argued there was no showing of extreme indifference where there was no evidence she had intent to harm the victim. (R.p.395, line 4-p.396, line 6) (emphasis added). Thus, just as she did in her opening statement, Petitioner cast suspicion on Honeycutt.

After co-defendant Morris presented his defense but before co-defendant Honeycutt presented her defense, Petitioner was given the opportunity to produce evidence in her own defense. First Petitioner called Laura Phillips, Petitioner's daughter and Morris's younger sister, to the stand. Laura testified she, Morris, Petitioner and the victim were together the whole weekend and she never saw anybody give the victim any medicine. (R.p.500, line 15- p.519, line 6). Petitioner then testified in her own defense. Petitioner testified the victim was fine when they picked him up from Honeycutt's house

Friday. They noticed a little runny nose Friday night, but he woke up Saturday morning like clockwork. She testified did not give the victim any medication and would never give a child medication that wasn't prescribed for him. (R.p.540, line 11-p.555, line 5). Petitioner repeated she did not give the victim any medications or any kind from her house. She insisted she did not give any of her Tussionex to the victim and that Morris would not have given it to him either. (R.p.568, lines 17-21; p.573, line 2-p.574, line 5; p.579, lines 14-16).

After Petitioner rested, and in light of Petitioner's defense that someone other than she or Morris must have given the victim Tussionex, co-defendant Honeycutt presented her own defense. Kayla Roper testified in part that while she was in the hospital waiting room she overheard Petitioner say to Morris that Petitioner had given the victim some cough medicine over the weekend and "surely to God that's not what is wrong." (R.p.613, lines 9-23). Next Brandon Roper testified the victim was fine when he was picked up by Morris and Petitioner Friday but shortly after he returned Sunday he was crying and having trouble standing. He said he remembered Honeycutt getting up during the night Sunday night to check on the victim and their younger daughter Ava, and then he woke Monday morning to Honeycutt screaming when she discovered the victim nonresponsive. (R.p.625, line 8-p.636, line 23). Brandon described his efforts to resuscitate the victim, the call to 911, and the arrival of EMS, as well as his actions to notify Morris and Petitioner after he drove Honeycutt to the hospital. He testified that when he told Petitioner about the victim, Petitioner asked: "Is he dead?" Then as she was running out the front door she screamed: "[Morris is] going to blame me. [Morris is] going to blame me. [Morris is] going to blame me." (R.p.636, line 24-p.644, line 14).

Later, at the hospital a nurse came in and whispered that they had found opiates in the victim's system. Brandon said he looked at Petitioner and asked: "What? Opitates?" Thirty seconds later, Petitioner grabbed Morris by the arm and dragged him out the back door of the hospital. (R.p.647, lines 4-16). On re-direct Brandon testified he and Honeycutt did not have any Tussionex in their house, he did not give the victim any medication, and he did not see Honeycutt give the victim any medication. (R.p.680, line 15-p.682, line 2).

Finally, Honeycutt testified in her own defense. She said that when the victim was returned by Morris and Petitioner Sunday he was crying, pitching a fit, and not wanting to stand up, but she saw no signs or symptoms to make her worry about his health. Honeycutt testified that after putting the victim to bed, she got up three or four times during the night to check on the baby, and that each time she also checked on the victim. She said once, in the early evening, he was sleeping on his side and sounded a little congested so she turned him onto his back but otherwise did not touch him during the night. Honeycutt testified Monday morning at around 8:00 a.m. she quietly and carefully changed the victim's diaper so as not to wake him, and went back to sleep. She said when she later got up and ready for work and went to wake the victim at about 11:00 a.m. he didn't respond and she realized something was wrong. (R.p.683, line 1-p.700, line 23). Honeycutt testified she did not give the victim any medication, that she would do everything she could to help her son, and did not know he was in distress and needed medical attention before she found him and screamed for help. (R.p.711, lines 2-12).

After all three co-defendants rested, Petitioner renewed her motion for a directed verdict arguing: "The State has not proven by substantial circumstantial evidence that

anybody did anything in this case." The trial judge denied the motion. (R.p.740, lines 4-24). In closing, Petitioner continued pushing her theory of defense that Honeycutt gave the victim the Tussionex. Counsel argued Petitioner did nothing except be a great grandmother to the victim. He argued there was no evidence Petitioner gave the victim Tussionex or any other medication over the weekend, and that the victim was fine when he was dropped off at Honeycutt's house Sunday evening. Counsel said: "Whatever happened at his mother's house, I don't know. I wasn't there. My client wasn't there. But here's the question for all of you: when did the child get the alleged dosing? Not from my client. She never gave him anything." He goes on to argue: "So this child comes back to their house in good condition, in good health. Guess what? Something happened. We don't know what it was." (R.p.761, line 17-p.769, line 13).

Thereafter, the trial court charged the jury on the applicable law. (R.p.815, line 11-p.830, line 7). At the conclusion of trial the jury convicted Petitioner of homicide by child abuse and Morris of aiding and abetting homicide by child abuse. Honeycutt was found not guilty. (R.p.837, lines 2-18). Petitioner moved for a new trial on grounds that: "there is no way that this jury could have found as they found with respect to [her] actions." The motion was denied. (R.p.840, lines 15-21). The trial court sentenced Petitioner to twenty-five (25) years' imprisonment. (R.p.853, line 23-p.854, line 4).

CERTIORARI

Petitioner argues this Court should grant certiorari because the Court of Appeals erred by not applying this Court's precedent in State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013), when it affirmed the trial court's denial of her directed verdict motion. She contends the Court of Appeals overlooked or misapprehended the central holding in

Hepburn in regard to the "waiver rule" and its exceptions, as well as that holding's implications for her case.[3] Petitioner argues that if the Court of Appeals had applied Hepburn, it would have had no choice but to reverse the trial court's failure to direct a verdict of acquittal. The State disagrees for several reasons.

Initially, the State submits certiorari should be denied because this issue is not preserved for appellate review. Furthermore, the Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict both because it appropriately considered Petitioner's testimony and Honeycutt's witnesses under the "waiver rule," and because even without such evidence, the totality of the evidence presented during trial constituted substantial evidence establishing Petitioner's guilt for each element of the offense of homicide by child abuse. Pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Indeed, the Court of Appeals decision addressed the arguments raised by Petitioner on appeal and was a straightforward exercise of applying the proper standard of review and existing precedent to the particular facts and circumstances of Petitioner's case. Thus, the State respectfully requests that Petitioner's petition for a writ of certiorari be denied and dismissed.

[3] Petitioner complains that the Court of Appeals' only reference to Hepburn is in footnote 2 of the written opinion; however, this is because Hepburn was only being cited to explain why the court chose not to directly address an additional sustaining ground raised by the State for the denial of Petitioner's motion for a directed verdict. The Stated continues to maintain that Petitioner's failure to seek medical care after the child was given multiple doses of Tussionex constituted child abuse or neglect.

ARGUMENT

The argument Petitioner is asking this Court to consider on certiorari is not preserved for appellate review because it was raised for the first time in her petition for rehearing to the Court of Appeals. To the extent this Court finds Petitioner's argument was sufficiently preserved, the Court of Appeals nevertheless properly affirmed the trial court's denial of Petitioner's directed verdict motion where the totality of the evidence presented during trial, with or without the "direct evidence of child abuse" which was appropriately considered by the Court of Appeals under the "waiver rule," constituted substantial evidence establishing Petitioner's guilt for each element of the offense of homicide by child abuse.

On appeal to the Court of Appeals, Petitioner argued the trial court erred in denying her motion for a directed verdict on the charge of homicide by child abuse because the State failed to present any substantial evidence that she acted with extreme indifference where the child died from an overdose of hydrocodone as found in the cough syrup Tussionex. The State responded by arguing the trial court properly denied Petitioner's motion for a directed verdict. The State contended that when viewed in a light most favorable to the State, the evidence presented during trial constituted substantial evidence establishing Petitioner's guilt for each element of the offense of homicide by child abuse, including that Petitioner committed a deliberate act causing the victim's death under circumstances manifesting an extreme indifference to human life. The State maintained the trial court properly considered the existence of evidence as opposed to its weight and was required to deny Petitioner's directed verdict motion and submit the case to the jury. Ultimately, the Court of Appeals agreed with the State's position and affirmed the denial of Petitioner's motion for a directed verdict.

Argument is not preserved for Appellate Review

The State respectfully asks this Court to deny the petition for a writ of certiorari pursuant to Rules 208, 221, & 242, SCACR, because the argument presented in the petition is based on an issue/claim that simply was not preserved for appellate review. The "waiver rule" argued by Petitioner in this petition for a writ of certiorari was: (1) not raised to or ruled upon by the trial court; (2) not raised or argued in Petitioner's brief to the Court of Appeals; (3) not stated as a reason for the supplemental citations submitted by Petitioner on September 3, 2014; (4) not argued or mentioned a single time during oral arguments on September 10, 2014; and (5) raised for the first time in Petitioner's petition for rehearing to the Court of Appeals.

Petitioner appears to recognize that she failed to raise any argument regarding the "waiver rule" to the Court of Appeals until filing her petition for rehearing, and she is now seeking to circumvent the well-established rules of error preservation to raise the issue in a petition for certiorari. She argues her September 3, 2014, letter called the Court of Appeals' attention to State v. Hepburn, and that: "Pursuant to the limitation contained in Rule 208(b)(7), SCACR, [Petitioner] did not include any argument in her letter." (Petition, p.17). However, the limitation on including an argument with a supplemental citation is only one part of the Rule. The complete subsection provides:

> When pertinent and significant authorities come to the attention of a party after his initial brief(s) has been served and filed, the party shall promptly advise the clerk of the appellate court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to an issue to which the citations pertain, but the letter shall, without argument, state the reasons for the supplemental citations . Any response shall be made promptly and shall be similarly limited.

Rule 208(b)(7), SCACR (emphasis added).

Here, Petitioner's letter asked the Court to "take notice of the following cases which counsel may cite at oral argument" and then listed three citations to directed verdict cases, including Hepburn. Petitioner did not reference a page number of her brief or an issue to which the citations pertain, and she failed to state a substantive reason for any of the three supplemental citations. (App.p.26). Indeed, in regard to the "waiver rule" it would not have been possible to reference a page number or issue to which the citations pertain because the "waiver rule" was not argued in Petitioner's brief. Petitioner did not mention the "waiver rule" at all in her letter and the three cases cited appear to simply be some of the latest published opinions where an appellate court has reversed a trial court's denial of a motion for directed verdict. Petitioner also did not mention the "waiver rule" during oral arguments despite her apparent contention that, as the "central holding in Hepburn" the "waiver rule" was the reason she listed Hepburn as a supplemental citation. The State submits that under the plain, unambiguous, and mandatory terms of Rule 208, Petitioner's supplemental citation letter was deficient and did nothing to raise or preserve an issue she failed to argue in her Appellate brief. Furthermore, to the extent this Court finds the letter was sufficient under Rule 208, Petitioner's subsequent failure actually mention or argue the "waiver rule" during oral arguments to the Court of Appeals constituted a waiver of her right to pursue it by way of rehearing, as well as a waiver of her right to now pursue it in this petitioner for a writ of certiorari.

Evidence was Properly Considered

Petitioner acknowledges that under the "waiver rule" a defendant who presents evidence waives her directed verdict motion made at the end of the State's case and

requires the reviewing court to examine all the evidence rather than to restrict its examination to the evidence presented in the Government's case-in-chief. Hepburn, 406 S.C. at 430 n.15, 753 S.E.2d at 409 n.15. However, she argues the court should not have considered co-defendant Honeycutt's evidence because the rule is inapplicable to co-defendant testimony. Id. 406 S.C. at 434, 753 S.E.2d at 412. The State submits Petitioner's argument must be rejected for two reasons.

First, the exception is limited to "co-defendant testimony." Hepburn, 406 S.C. at 436, 753 S.E.2d at 412 ("We recognize an exception to the waiver rule where a codefendant testifies, implicating the defendant, and will not consider Lewis's testimony, or testimony elicited by Appellant that is responsive to Lewis's testimony, for purposes of determining whether the State presented substantial circumstantial evidence sufficient to survive Appellant's mid-trial motion for directed verdict."). Here, the testimony Petitioner finds offensive came from Kayla Roper and Brandon Roper, not Honeycutt. Therefore, the "waiver rule" exception described in Hepburn does not apply. From a practical standpoint, this limitation to codefendant testimony makes sense. In regard to Kayla's testimony that she heard Petitioner admit giving the victim cough medicine, Petitioner complains that "[t]he prosecution seized on this testimony, not asking Roper about anything else." (Petition, p. 14). Yet, there was absolutely nothing preventing the State from calling both Kayla and Brandon in reply, at which point the prosecution could have elicited the very same information. Indeed, as opposed to co-defendant testimony, testimony from other witnesses is: "testimony within the government's power to command in a joint trial." See Hepburn, 406 S.C. at 435, 753 S.E.2d at 412 (reciting the Fifth Circuit's explanation of the operative principle of the waiver doctrine in United

States v. Belt, 574 F.2d 1234 (5th Cir. 1978)). By offering evidence in her defense, Petitioner waived consideration of the evidence as it stood at the close of the State's case, particularly where witnesses with additional evidence previously unknown to the State could have been called in reply.

Second, Petitioner's argument is grounded in the fallacy that her defense was offered in response to Honeycutt rather than in response to the State. Even though Petitioner acknowledges she presented her defense before Honeycutt, she argues: "Both witnesses responded to Honeycutt's defense, foreshadowed during her opening statement, that [Petitioner] and Morris returned a sick child that had already been fatally medicated with Tussionex." (Petition, p.13). As explained above, Honeycutt made no such claim in her opening statement, either directly or through foreshadowing. Indeed, Honeycutt only offered testimony from Kayla Roper and Brandon Roper after Petitioner repeatedly implied Honeycutt may have been the person who gave the victim the lethal dose of Tussionex. Thus, contrary to Petitioner's assertions, Honeycutt was the one who responded to Petitioner and not the other way around, and the exception does not apply.

Petitioner further argues her own testimony qualifies for an exception to the "waiver rule" because it did not provide a missing link in the Government's evidence or rectify any deficiency in the State's case. Hepburn, 406 S.C. at 436, 753 S.E.2d at 412. Yet this is precisely what Petitioner did when she took the stand. As noted by the Court of Appeals, Petitioner's testimony provided direct evidence of her mental state by proving she knew giving prescription medication to the child when it was not prescribed to him would put the child's health at risk. (App.p.8-p.9). Although the Court of Appeals found the health risks associated with giving children medications prescribed to

adults are a matter of common knowledge, the lack of direct evidence of Petitioner's actual knowledge of these health risks was a deficiency in the State's case that was rectified by Petitioner during her defense. Thus, unlike the case in Hepburn, Petitioner's testimony did more than merely rebut Honeycutt's testimony. As explained above, not only was it not truly offered in rebuttal of Honeycutt, but it also provided a crucial missing link in the State's case. Petitioner properly was not allowed to insulate herself from the fact that her evidence was favorable to the government. When Petitioner presented testimony she lost the right to have the court review the sufficiency of the evidence based upon the State's evidence alone. Because the referenced evidence was presented by Petitioner herself, and was not merely responsive to testimony elicited by her co-defendants, it was not subject to a recognized exception to the waiver rule and was properly considered in regard to the denial of her motion for a directed verdict. Hepburn, supra.

Remaining Evidence was Sufficient

Even if this Court determines the Court of Appeals erred in considering the testimony from Kayla Roper and Brandon Roper, the remaining evidence was sufficient to withstand Petitioner's motion for a directed verdict. As argued in detail in State's final brief, the trial court properly denied Petitioner's motion for a directed verdict based on the totality of the evidence. When viewed in a light most favorable to the State, the evidence presented during trial constituted substantial evidence establishing Petitioner's guilt for each element of the offense of homicide by child abuse, including that Petitioner committed a deliberate act causing the victim's death under circumstances manifesting an extreme indifference to human life. The trial court properly considered the existence of

evidence as opposed to its weight and was required to deny Petitioner' directed verdict motion and submit the case to the jury.

In her petition for a writ of certiorari, Petitioner argues this Court "acknowledged that Kayla Roper's testimony . . . was the only evidence presented during the trial that provided any evidence tending to prove that Petitioner committed child abuse by providing the child Tussionex." (Petition, p.21). The State submits this is not accurate. While this Court may have relied heavily upon Kayla's testimony as "direct evidence" of child abuse, it never found it was the only evidence presented during trial. Indeed, the Court described significant circumstantial evidence in both its recitation of the facts and its analysis of the evidence proving Petitioner's mental state. (App.p.2-6 & 8-10). This evidence alone was enough to survive the motion for a direct verdict and allow the case to go to the jury, particularly in light of the alternate sustaining grounds argued by the State.

Contrary to Petitioner's assertions, the evidence presented at her trial did more than merely raise a suspicion of guilt. Instead, the State presented substantial evidence to support a finding that Petitioner deliberately administered adult prescription Tussionex to the victim, that she was aware of the gravity of the danger in doing so and thereby acted with extreme indifference for human life, and that she subsequently failed to get the victim medical help after the Tussionex had been administered. Dr. John Richard Yelton testified that in the months before the victim died he was a normal, healthy, twelve to twenty-one month old who was developing well with no indications of distress. In stark contrast, ER nurse Kathy Purdessy testified the victim was in cardiac arrest with no pulse when he arrived for emergency treatment on March 17, 2008. Purdessy took a urine

sample from the victim and sent it to the lab and the urine came back positive for opiates. Dr. Garmon, who was assisting in the ER, noticed a red rash that looked like bed sores on the victim's bottom, typically caused by pressure on the skin from a lack of movement over a period of time. Laboratory scientist William Gassman confirmed that shortly after arriving in the ER the victim's urine tested positive for opiates.

Lieutenant Robinson of the PCSO testified the Tussionex bottle in evidence was prescribed to Petitioner and included language on the label it is: "federal law that prescribed medications are only for the person they're prescribed to." Greenville County ME Ward testified the victim died as a result of a hydrocodone overdose.[4] He explained the overdose suppressed the victim's central nervous system leading to irritability, confusion, sleepiness, lethargy, coma, and eventual death. The lesion on the victim's lower back indicated he was lying in one position for a prolonged time without movement, and constipation indicated the victim was subject to multiple doses or hydrocodone rather than a single dose. Dr. Ward testified that if the victim had been given medical treatment Sunday night before he was put to bed, he would have lived.

Expert forensic toxicologist Robert R. Foery testified the victim's urine unequivocally revealed the presence of the opiate hydrocodone, its primary metabolite oxymorphone, and the drug chlorpheniramine. The vicitm's blood confirmed the presence of hydrocodone. Forey explained hydrocodone and chlorpheniramine are found in the pharmaceutical preparation called Tussionex. He testified the concentration of hydrocodone in the victim's blood was 102 nanograms per milliliter, two-and-a-half to five times higher than the normal therapeutic range for an adult of 10 to 40 nanograms

[4] Coroner James Mahanes also gave an opinion that the victim died from an overdose of hydrocodone that came from [Phillips'] home, in the form of Tussionex.

per milliliter. Forey testified that in his opinion, to a reasonable degree of scientific certainty, the Tussionex was first given to the victim sometime between 2:00 a.m. and 2:00 p.m. on Sunday, March 16, 2008, and that more than one dose of Tussionex was administered.

A partially empty bottle labeled as Petitioner's prescription Tussionex was removed from her residence. Chemistry expert Jeffrey Morris Hollifield tested the liquid in the bottle and detected hydrocodone and chlorpheniramine, the two active ingredients in Tussionex. Two medicine bottles removed from Honeycutt's residence tested positive only for acetaminophen, and no drugs were found in the victim's partially empty sippy cup that was removed from Honeycutt's refrigerator.

There was no dispute the victim was in the care and custody of Morris and Petitioner from Friday afternoon, March 14, 2008, through Sunday evening, March 16, 2008. Prior to trial Morris told investigative consultant Charlie Michael Lark that he and Petitioner were with the victim the entire weekend. Petitioner testified the victim was fine when they picked him up from Honeycutt's house Friday. She admitted that on Saturday when she had the pumpkin down from the closet to take her medicine the victim grabbed at the bottles, but claimed she did not give the victim any medication. Petitioner also claimed she and Morris had their eyes on the victim all weekend and she agreed the victim slept on the couch with Morris. When coupled with the expert testimony that the victim was given multiple doses of Tussionex, this constituted sufficient circumstantial evidence that Petitioner deliberately gave the victim her prescription Tussionex, which, as explained below, provided evidence demonstrating extreme indifference to human life.

Other substantial circumstantial evidence presented at trial also supported the trial judge's decision. Petitioner's statements to detective Burgess and consultant Lark were inconsistent in certain details, like whether she had Lortab or Tussionex in the pumpkin, and whether she might have dropped a bottle on the floor. This evidence suggests Petitioner knowingly gave the victim Tussionex and was trying to cover for herself, which provided circumstantial evidence of her acts. See State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) ("As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt.").

After discounting her own testimony and the testimony of Kayla Roper and Brandon Roper under the argued exceptions to the "waiver rule," Petitioner argues that since this is a purely circumstantial evidence case, the trial court should have granted a directed verdict because the State failed to exclude "every other reasonable hypothesis," i.e. that someone other than Petitioner gave the child the lethal dose of medication. This simply is not the correct standard of review at the directed verdict stage, even if the evidence was entirely circumstantial. This Court has instructed:

> When the state relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, **a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis**.

State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004) (citations omitted). For all of the reasons above, the State submits the Court of Appeals properly affirmed the

trial court's denial of Petitioner's motion for a directed verdict. The petition for a writ of certiorari should be denied.

CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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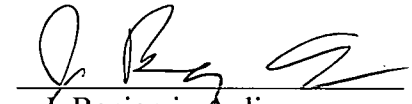
BY: 
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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
April 8, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM PICKENS COUNTY
Court of General Sessions

D. Garrison Hill, Circuit Court Judge

Opinion No. 5280 (S.C. Ct. App. filed November 12, 2014)

Appellate Case No: 2015-000351

State of South Carolina, ... Respondent,

v.

Donna Lynn Phillips, ... Petitioner.

PROOF OF SERVICE

I, Norma Bigbee, Administrative Assistant, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated April 8, 2015, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

E. Charles Grose, Jr., Esquire
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646

I further certified that all parties required by Rule to be served have been served. This 8th day of April, 2015.

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404 Main Street
Greenwood, SC 29646

RE: The State, Respondent, v. Donna Lynn Phillips, Petitioner
Appellate Case No. 2015-000351

Dear Mr. ~~Grose~~ Charles:

I am enclosing two (2) copies of the Return to Petition for a Writ of Certiorari in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Daniel E. Shearouse
(original and six copies enclosed)
Victim Services