THE STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of *Certiorari*
To the Court of Appeals

APPEAL FROM PICKENS COUNTY

D. Garrison Hill, Circuit Court Judge

Supreme Court Appellate Case Number 2015-000351
Court of Appeals Appellate Case Number: 2012-212663

The State Respondent,

v.

Donna Lynn Phillips, Petitioner.

Petition for Writ of *Certiorari*

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Certification of Counsel

On December 1, 2014, the petitioner, Donna Lynn Phillips, petitioned the Court of Appeals for rehearing. Appendix (hereinafter "A.") 11-25. On December 16, 2014, the Court of appeals requested the State to respond to the petition for rehearing. A. 32. The State filed a return on December 19, 2014, A. 33-40, and Phillips replied on December 23, 2014, A. 41-45. By written order dated January 27, 2015, the Court of Appeals denied Phillips petition for rehearing. A. 46.

Question Presented for Review

Did the Court of Appeals err 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 Phillips' directed verdict motion?

Statement of Case

On December 16, 2008, the Pickens County Grand Jury indicted petitioner, Donna Lynn Phillips, for homicide by child abuse for the death of her grandson (hereinafter "child"). R. 855. During the same term of court, the Grand Jury indicted Phillips' son, Jamie Morris, the child's father, for aiding and abetting homicide by child abuse. Supp. R. 1. On October 13, 2009, the Grand Jury indicted Latasha Honeycutt, the child's mother, for homicide by child abuse. Supp. R. 4. From July 23 to 27, 2012, the State jointly tried the three co-defendants before the Honorable D. Garrison Hill and a jury.[1] James P. O'Connell represented Phillips. John W. DeJong represented Morris. H. Chase Harbin represented Honeycutt. Doug Richardson and Jenny Barwick represented the State. R. 1.

The jurors found Phillips and Morris guilty as charged and acquitted Honeycutt. R. 837, lines 1-24; Supp. R. 3. Judge Hill sentenced Phillips to twenty-five years (25) incarceration. Judge Hill sentenced Morris to twelve (12) years, suspended to eight years, followed by two years of probation.[2] R. 853, line 23 – 854, line 10.

Phillips appealed to the Court of Appeals. LaNelle DuRant of the Appellate Defense Division represented Phillips. J. Benjamin Aplin represented the State. Phillips filed her Initial Brief of Appellant on August 23, 2013 and her Final Brief of Appellant on January 21, 2014. On January 17, 2014, the State filed the Final Brief of Respondent.

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[1] Phillips required the assistance of a breathing machine during her trial. *See* R. 365, line 13 – 366, line 10.

[2] The Court of Appeals affirmed Morris' conviction and sentence. *State v. Morris*, (S.C. Ct. App. Op. No. 2014-UP-112) (Filed March 12, 2014).

On December 11, 2013, slightly over three months ***after*** Phillips filed her initial brief, this Court decided *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013). By letter dated September 3, 2014, Phillips called the Court of Appeal's attention to *Hepburn*. A. 26. On September 10, 2014, the Court of Appeals held oral arguments. On November 12, 2014, the Court of Appeals affirmed Phillips convictions and sentences. *State v. Phillips*, 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014). A. 1-10.

On December 1, 2015, Phillips petitioned the Court of Appeals for rehearing. A. 11-25. At the same time, Phillips petitioned the Court of Appeals to substitute E. Charles Grose, Jr. for the Appellate Defense Division as her counsel. A. 27-30. By order dated December 8, 2014, the Court of Appeals granted the petition to substitute counsel. A. 31. By letter dated December 16, 2014, the Court of Appeals requested the State to file a Return to the Petition for Rehearing. A. 32. On December 19, 2014, the State filed its Return to the Petition for Rehearing. A. 33-40. On December 23, 2014, Phillips filed her Reply to the State's Return to her Petition for Rehearing. A. 41-45. By order dated January 27, 2015, the Court of Appeals denied the Petition for Rehearing. A. 46.

This Petition for Writ of *Certiorari* follows.

Argument in Support of Petition

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 Phillips' directed verdict motion.

Pursuant to Rule 242, SCACR, Donna Lynn Phillips petitions this Court for a writ of *certiorari* to review the Court of Appeals opinion. Contrary to this Court's opinion in *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013), in reviewing the trial court's denial of Phillips' directed verdict motion, the Court of Appeals considered evidence presented by co-defendant Honeycutt and Phillips herself. After reviewing the evidence presented at trial by the State and the three co-defendants, Phillips will argue why the trial court should have directed a verdict.

A. Opening Statements.

The State acknowledged the problems with its proof during its opening statement: "This crime is a crime where you will never hear the victim's story." Record on Appeal (hereinafter "R.") 29, lines 12-13. The Solicitor acknowledged, "nobody" would admit to giving the child "that lethal does of opiates." R. 30, lines 6-12. The prosecutor asked the jurors to "weed through the evidence. . . . weed through the various statements" and "to put the pieces together, read between the lines, and find out the story that [the child] would tell you today, if he was still alive." R. 30, lines 16-18; 32, lines 16-19.

After Morris, the child's father, made his opening statement, R. 33-36, Phillips made hers. Her counsel stated, "My client is innocent because she didn't do anything. She was simply a grandmother taking care of her grandkid." R. 39, lines 2-4.

Honeycutt, the child's mother, immediately began suggesting Morris or Phillips committed the crime while the child was in their custody. Counsel argued Honeycutt

"was handed her child Sunday evening with some congestion." She put the child to bed. When the child was not responsive, Honeycutt "call[ed] 911." R. 40, lines 17-25.

B. Evidence presented at trial by the State.

On Monday, March 17, 2008, EMS responded to Honeycutt's home, found the child unresponsive in his crib, "scooped him up," provided emergency treatment, and took the child to Baptist Easley Hospital. Upon arriving at the home, Julie Sailors, a paramedic for 15 years, asked Honeycutt for the child's medical history. Honeycutt's responses were "not clear answers." Initially, Honeycutt admitted, "***We*** gave him something for his cold." When asked, "[W]hat did you give him," Honeycutt said, "Oh, no, I didn't, ***"his dad did."*** Honeycutt initially claimed that child was returned to her "early this morning," but "then that ended up being, No, that was last night." Honeycutt denied checking on her child but then claimed she had changed his diaper two hours earlier. Sailors had to tell the hospital the child was down for an "unknown" period of time. Sailors considered Honeycutt's answers "incredible." She "couldn't use any of it. It was just too sketchy." Honeycutt did not ask to ride with her son to the hospital. R. 50, line 1 – 52, line 22; 77 lines 1-9 (emphasis added).

Kathy Purdessy, who has twenty-eight years experience in healthcare, was the child's primary care nurse at the Baptist Easley Hospital Emergency Room. When the child arrived at the hospital, he did not have a pulse and was not breathing. Purdessy testified it was unusual for a parent not to accompany a child to the emergency room. When Honeycutt finally arrived, she "seemed to act inappropriate." "Her answers were so vague. She wasn't crying." "She was not even standing near" her child. Purdessy

testified the child's urinalysis came back positive for opiates.[3] The Easley Hospital transferred the child to Greenville Memorial Hospital by helicopter. R. 79, line 22 – 88, line 25.

Stacy Garman, M.D., was one of the physicians that treated the child at Greenville Memorial Hospital. Dr. Garman noticed "a red rash around the child's bottom" that could be consistent with a bed sore resulting from lack of movement for a long period of time. R. 103, line 9 – 109, line 1.

Patrice Johnson of Pickens County Department of Social Services went to the hospitals in both Easley and Greenville in response to the child's death. She located the three co-defendants in the waiting room at Greenville Memorial Hospital. Honeycutt told Johnson the child returned from visitation with his father on Sunday evening between 6:30 and 7:00 p.m. The child "was a little bit fussy, and he went to sleep." Honeycutt said when she "went into the room at about 8:00 that morning, he was still asleep. She changed his diaper." According Honeycutt, the child "slept through the diaper change." Honeycutt "went back to sleep." When Honeycutt woke up again "between 10:00 and 10:30" the child "wasn't responsive." Honeycutt "called for her boyfriend, Brandon Roper" and 911. R. 43, line 5 – 48, line 9.[4]

Detective Rita Burgess of the Pickens County Sheriff's Office interviewed Honeycutt at Baptist Easley Hospital. Honeycutt said that child had been with his father from Friday, March 14th to between 8:00 p.m. and 9:00 p.m. on Sunday, March 16th.

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[3] William Gassman, a toxicologist at Baptist Easley Hospital, tested the child's urine and found it positive for opiates. R. 246, line 10 – 250, line 5.

[4] Johnson also testified about a voicemail Morris left for DSS on Saturday, March 15, 2008. Morris requested a Medicaid card because the child was sick that evening. R. 48, line 21 – 49, line 7.

When he arrived home, the child "was extremely sleepy and pitching a fit." Honeycutt "put him in his crib and closed the door." She checked on that child, who "was still fussy," "cared for him a little bit and put him to bed." Honeycutt said the child "slept all night." At "8:30 or 9:00 the next morning, that child was still sleeping." Initially, Honeycutt ***did not*** tell Burgess about changing the child's diaper. Honeycutt found the child unresponsive at 11:00 a.m. and called 911. R. 122, line 4 – 127, line 7.

Detective Burgess interviewed Honeycutt a second time at the Law Enforcement Center on March 27, 2008. After *Miranda* warnings,[5] Honeycutt said that Morris and Phillips brought the child home around 7:30 to 7:45 p.m. on March 16th. Morris told Honeycutt the child "was sick and needed to go to the doctor, because he was congested." Morris gave Honeycutt "the Medicaid card." Honeycutt said the child "sounded congested," "had a runny nose," and "was crying, pitching a fit." Honeycutt said she changed the child's diaper at 8:00 a.m. but the child did not wake up. Honeycutt wrote a statement. In her statement, Honeycutt described finding the child and calmly asking Brandon Roper for assistance:

> I go to get the child up, and he wouldn't respond. So I was like Brandon, come here, something is wrong. Child is not responding. Brandon comes in and is like, Oh, my God. He's not breathing, call 911. So I do.

R. 127, line 8 – 136, line 8.

Kathy Hartzell, the child's guardian *ad litem*,[6] spoke to Honeycutt in July 2008. Regarding Sunday evening, Honeycutt said the child "came home and that she put him to

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[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[6] Nancy Rogers, a volunteer for the guardian *ad litem* program also spoke to Honeycutt. Honeycutt said she set her alarm for 10:00 a.m. Monday morning because she had to be at work at 11:00 a.m. R. 308, line 11 – 309, line 13.

bed about 8:00 p.m. And he was sort of pitching a fit." About 8:30 a.m., Honeycutt "gave him a sippy cup of milk. And he took a few sips and quit." Honeycutt "put him down for bed." Regarding Monday morning, Honeycutt checked on the child at 8:00 a.m., "and he was sleeping fine." She changed his diaper "in the dark, and went back to bed." At 10:00, the child was unresponsive. R. 297, line 21 – 299, line 7.

Detective Burgess interviewed Phillips at Grenville Memorial Hospital. Phillips said the child had a hard time sleeping on Friday night. The child had "frightmares" where he would wake up crying. Phillips said Morris gave the child "some children's Tylenol" for coughing, "but she did not know how much of a dose he had given." Phillips told the investigator that she and her sister take Lortab, and she hoped the child didn't get any of those.[7] R. 136, line 9 – 138, line 5.

Detective Burgess interviewed Phillips a second time on April 10, 2008 at the Law Enforcement Center. After *Miranda* warnings, Phillips wrote a statement. She and Morris picked up the child from Honeycutt's house around 1:30 or 2:00 p.m. on Friday. Phillips noticed that Honeycutt did not have a baby monitor. Although the child had nightmares, Morris woke up the child "on schedule both mornings." "He had a runny nose and started getting congested by Sunday." Honeycutt and Morris returned the child to Honeycutt on Sunday evening. Phillips talked to Honeycutt about "him being sick and needing to go to the doctor," but Honeycutt "acted like she wasn't listening." Morris gave Honeycutt "the Medicaid card to take him to the doctor." Phillips and Morris went to the emergency room. She acknowledged that she "had Lortab, but I didn't think the child could have gotten it." R. 138, line 6 – 145, line 25.

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[7] There is no evidence that Lortab caused the child's death.

Investigator Charlie Lark interviewed Phillips on June 4, 2008. Phillips told him about keeping medication in a pumpkin in her closet. Although she had taken the pumpkin out of the closet while the child was in her home, "she did not see the child get any of the medication." R. 286, lines 1-16; 289, line 13 – 291, line 2.

Detective Burgess interviewed Morris at Greenville Memorial Hospital. Morris acknowledged giving the child "one dropper full of infant Tylenol."[8] She interviewed Morris a second time on April 4, 2008 at the Law Enforcement Center. After *Miranda* warnings, Morris "described the child's breathing like he may be having pneumonia." Morris said the child "started acting ill and crying" on Sunday afternoon around 3:00 or 3:30 p.m. Morris gave the child children's Tylenol. When Morris returned the child to Honeycutt, he "gave her his Medicaid card and told her to get him to the doctor. . . . very soon because his breathing sounded bad." R. 146, line 1 – 152, line 8.

Investigator Lark interviewed Morris on May 29, 2008. Morris acknowledged giving the child "two droppers full" of the Equate Brand Children's Tylenol. Morris knew that Phillips had a prescription from hydrocodone that she usually kept in her purse. Morris did "not see his mother give the child any medication during the weekend." Phillips is also prescribed Tussionex, which she keeps "in a pumpkin in her closet." Morris did not see Phillips give the child any of this medication either. R. 286, line 1 – 289, line 12.

[8] This medication is also referred to as Equate Brand in the transcript.

Phillips provided Detective Burgess with the bottle of children's Tylenol.[9] R. 152, line 10 – 153, line 18. On May 9, 2008, Phillips gave a bottle of Tussionex to Sergeant J.T. Albrecht, an evidence collection technician with the Pickens County Sheriff's Office.[10] R. 188, line 1 – 189, line 18. Phillips had a prescription for Tussionix. R. 201, line 2 – 202, line 7.

Jeffery Hollifield, owner of Micro Analytical, a private chemical laboratory, examined the Tussionix bottle. He determined the bottle contained "two drug substances, one was hydrocodone and the other was chlopheniramine," which are consistent with Tussionix. R. 221, line 18 – 227, line 15.

Robert Foery, a forensic toxicologist at AIT,[11] examined the child's blood and urine. Hydrocodone, an opiate, was present in the child's blood. Hydrocodone, hydromorphone, and chlorpheniramine were present in the urine. Chlorpheniramine is an anti-Tussin. The body metabolizes hydrocodone into hydromophone. The urine also contained salictlate, which is aspirin. "There was only enough blood to confirm the presence of hydrocodone. There was not enough blood to confirm the presence of

[9] Phillips actually gave the medicine to Kristy Leopard of the Pickens County Sheriff's Office, who placed it in an envelope for Detective Burgess. R. 236, line 24 – 239, line 13.

[10] Lieutenant Robinson, an evidence technician with the Pickens County Sheriff's Office, examined the Tussionex bottle for fingerprints, but did not find any, which he did not consider unusual. Lieutenant Robinson also delivered the Tussionex bottle to Jeff Hollifield at Micro Analytical. R. 199, line 5 – 200, line 17.

[11] Dr. Michael Ward, M.D., Chief Medical Examiner for Greenville County, testified that the blood drawn from the child upon his admission to Greenville Memorial Hospital on March 17, 2008 and the urine sample obtained earlier in the day at Baptist Medical Center Easley were sent to AIT. R. 309, lines 20 – 314, line 23.

chloropheniramine."[12] Hydrocodone and chlorpheniramine are found in Tussionex. R. 316, line 11 – 327, line 12.

Dr. Michael Ward, M.D., Chief Medical Examiner for Greenville County, testified about the autopsy performed by Dr. Eric Christensen on March 21, 2008 under Dr. Ward's direction. He testified the child died as a result of "hydrocodone overdose." R. 360, line 3 – 365, line 8; 374, lines 14-25.

Dr. Ward testified about his autopsy findings, in addition to the toxicology findings. The child had a "pressure ulcer" on his lower back, meaning "the superficial skin layer and then the underlying lawyer components of the skin are beginning to die, because they are without blood flow for a period of time." This finding is "frequently seen in comatose patients where they lay in one position for a prolonged time without moving." The child also had "a fairly large amount of firm knot-like stool" that is "consistent with a period of constipation." Constipation can result from multiple doses of a narcotic medication. Hydrocodone is a narcotic. R. 375, line 1 – 378, line 17.

C. Evidence presented at trial by co-defendant Morris.

Morris called William Brewer, who has a Ph.D. in Chemistry and teaches forensic chemistry, including forensic toxicology, at the University of South Carolina. Dr. Brewer agreed that the cause of death was hydrocodone overdose. Dr. Brewer, however, opined that if the child was fine at 8:00 a.m. on Monday morning, then the fatal dose could not

[12] Cross-examination by Morris called into question the validity of the toxicology report. Dr. Kriger—not Dr. Floey—actually performed the testing. The toxicology report was actually negative for hydromorphone and chlorpheniramine in the blood, but Dr. Foley claimed this was an error. R. 333, line 22 – 339, line 23.

have been administered while the child had visitation with Morris. R. 398, line 19 – 414, line 13.

Karen Renee Shelton, Morris' stepmother from her first marriage, testified the child was Morris' "whole world." "He loved that baby." Morris and Phillips brought the child to Shelton's house on Saturday, March 15th. While there, the child ate a good meal. There was nothing wrong with the child, except for "a little bit of a runny nose." He was not coughing or lethargic. He was "active." R. 430, line 22 – 434, line 10.

Morris testified in his own defense. He and Phillips picked up the child at 1:30 on Friday, March 14th for visitation. Morris testified the child as not sick on Saturday or Sunday, although he was "showing signs of a runny nose" and "had a little cough every now and then" on Sunday. Morris denied giving his child any medicine, except for "Tylenol, two droppers full" on Sunday. Morris did not see Phillips give the child any medicine either. According to Morris, neither he nor Phillips gave the child Tussionex. Morris and Phillips returned the child to Honeycutt around 7:30 p.m. on Sunday, March 16th. R. 439, line 12 – 447, line 14.

Ronnie Anders, a friend of Morris and Phillips, testified she saw the child at their house on Sunday, March 16th for about two and one-half hours. The child was plying outside on John Deere toy tractor. Later on, the child played with Play-Doh inside the house. Anders did not give the child any medication. Nor did she see anyone give the child any medication. R. 489, line 22 – 495, line 13.

D. Evidence presented at trial by Phillips.

Phillips called two witnesses in her defense. Both witnesses responded to Honeycutts' defense, foreshadowed during her opening statement, that Phillips and Morris returned a sick child that already had been fatally medicated with Tussionex.

The first witness was Phillips' daughter that was eleven years old at the time of the child's death and fifteen at the time of trial. R. 501, lines 5-12; 505, lines 18-24. She was present at her mother's house the entire weekend Phillips and co-defendant Morris had custody of the child. R. 501, lines 18-24. She testified the child was "fine. . . . act[ing] like a normal baby." When Phillips and Morris returned the child to Honeycutt, he was "awake," and "he seemed fine like a normal kid, other than maybe coughing. . . . [H]e didn't act sick like he would have something that needed to [be] checked right away." R. 504, lines 2-9. She also testified about Honeycutt's strange behavior at the child's funeral, showing "no emotion." R. 504, lines 20-24.

Phillips testified in her own defense. When she and Morris got the child from Honeycutt on Friday, he was "awake," "alert," and "seemed to be fine." R. 543, lines 14-24. She did notice the child had "a little runny nose." R. 548, lines 6-7. While the child was with Phillips and her son, he had difficult sleeping, waking up with "nightmares" and "would start crying." R. 550, lines 14-20. She testified that while the child was with them, he was "crying" and "fussing." *E.g.* R. 563, line 5; 564, lines 11-14; 565, lines 16-17; 566, lines 9-12. Phillips testified that she did not give the child any Tussionex. R. 553, line 24 – 554, line 24; 562, lines 2-8; 568, lines 17-21; 572, line 12 – 574, line 5. When Phillips and Morris returned the child, Morris told Honeycutt the child "was crying

and he could be getting sick." The child was "a little wheezy," "might be getting congested," and "his nose was running." R. 578, line 22 – 579, line 4.

E. Evidence presented at trail by co-defendant Honeycutt.

Honeycutt called Kayla Roper. Roper claimed she overheard a statement by Phillips in the waiting room at the hospital. Roper clamed she "heard [Phillips] say that she had gave [sic] him some cough medicine over the weekend and 'surely to God that's not what is wrong.'" R. 616, lines 9-19. The prosecution seized on this testimony, not asking Roper about anything else. R. 614, line 10 – 615, line 15. Co-defendant Morris also emphasized this portion or Roper's testimony. R. 615, line 20 – 616, line 4. Phillips did not cross-examine Roper. R. 619, lines 5-6.

Brandon Roper testified Honeycutt moved in with him because Morris, who also had a pornography addiction, was abusive to Honeycutt.[13] The child has visitation with Morris from Friday, March 14th until Sunday, March 16th. When Morris took custody of the child, Roper was aware the child "might have had an ear infection." When he saw the child again on Sunday evening, the child was crying. "He did have a runny nose, he was congested – not to the point where you would jump up and rush him to the E.R." Roper prepared a sippy cup of milk, which Honeycutt gave to the child. "He did drink a couple of drinks and then he did set it off to the side." Roper "did not see signs of a lethal dose of anything." Roper recalled Honeycutt getting up at 8:00 a.m. Monday morning, but he fall back asleep. He woke up again to Honeycutt's screams when Honeycutt found the

[13] After two pages of improper character testimony, *see* Rule 404, SCRE, Morris' counsel finally objected, and Judge Hill instructed the jurors to "disregard all the testimony. It's not relevant to the case, it not part of the evidence in this case." R. 623, lines 18-24.

child unresponsive. He told Honeycutt to call 911 and attempted CPR on the child until EMS arrived. R. 620, line – 641, line 1.

At the hospital, one of the medical providers "whispered that they found opiates in the child's system." Thirty seconds later, Brandon Roper claims Phillips "done got Jamie [Morris] by the arm and is dragging him out the back door of the hospital." R. 647, lines 4-16.

Honeycutt testified in her own defense. On March 16th, Morris and Phillips returned the child to Honeycutt. Morris said the "child had a good weekend, he played all weekend. You know, he's tired, and I think he is coming down with a [cold]. You may want to take him to the doctor. Here's his Medicaid card." Honeycutt testified, "He actually has a doctor's appointment for that Wednesday. But I felt like if his cold progressed by Monday morning, I would make an earlier appointment." According to Honeycutt, "He sounded a little congested. He had a runny nose, he acted sleepy and fussy." Honeycutt asked Brandon Roper to make the child a sippy cup of milk. The child drank a little bit but set it aside. She had put the child to bed by 9:00 p.m. The child woke up three or four times in the night. "[H]e didn't sound quite as congested." R. 683, line 1 – 693, line 22.

Honeycutt testified she checked the child's diaper around 8:00 a.m. Monday morning. The room was dark, and she did not want to wake the child because he might have a cold. Honeycutt did not notice anything out of the ordinary. She went back to bed. Later that morning, she went into the child's room to check his diaper. He did not

response. She screamed for Brandon Roper.[14] Honeycutt called 911, and Brandon Roper administered CPR to the child. EMS arrived and placed the child in an ambulance. R. 695, line 18 – 702, line 21.

F. Closing Arguments.

The State relied on Kayla's Roper's testimony—which was actually presented by Honeycutt—during its closing argument, R. 812, lines 1-3, and in its brief to the Court of Appeals, at p. 29.

G. Argument.

Phillips moved for a directed verdict both at the close of the State's case and the close of all evidence. At the close of the State's case, Phillips based her directed verdict motion on two grounds. First, she argued, "There's been no evidence to show whatsoever that she gave any drugs to anybody." R. 395, lines 6-7. Second, she argued there has been no showing of "extreme indifference." R. 395, lines 22-23. The trial court judge denied this motion based on the lethal dose of drugs and associated symptoms—not whether the State had presented evidence that Phillips administered the lethal dose of medication with willful indifference to the child's safety. R. 396, line 7 – 397, line 1.

Phillips renewed her directed verdict motion at the close of all evidence and stated, ***"The State*** has not proven by substantial circumstantial evidence that anybody did anything in this case." R. 740, lines 4-8 (emphasis added).

Phillips filed her initial brief with this Court on August 23, 2013.[15] This Court decided *Hepburn* on December 11, 2013. By letter dated September 3, 2014, Phillips

[14] Honeycutt and Brandon Roper's claims of Roper waking up to Honeycutt's screams is contradicted by Honeycutt's statement to Detective Burgess that she calmly called Roper to come see what was wrong with the child. *See* p. 7, *supra*.

called the Court of Appeal's attention to *Hepburn*. A. 26. Pursuant to the limitation contained in Rule 208(b)(7), SCACR, Phillips did not include any argument in her letter. This Court's only reference to *Hepburn* is in footnote 2 of its written opinion, A. 7, which stated:

> The State also asserts Phillips' failure to seek medical care after giving the child multiple doses of Tussionex constituted child abuse or neglect. *See* §16–3–85(B) (defining "child abuse or neglect" as "an act *or omission* by any person which causes harm to the child's physical health," and stating "harm" includes the "fail[ure] to supply the child with adequate ... health care" that causes a "condition resulting in death" (emphasis added)). We need not address this argument because we find the State presented direct evidence that Phillips committed child abuse by giving the child multiple doses of Tussionex. *See State v. Hepburn*, 406 S.C. 416, 428 n. 14, 753 S.E.2d 402, 408 n. 14 (2013) (declining to decide other issues when the determination of one issue was dispositive).

The Court of Appeals, therefore, overlooked or misapprehended the central holding in *Hepburn*, as well as that holding's implications for Phillips' case. *Hepburn* addressed the applicability of the "waiver rule" and the exceptions to that doctrine of law. That case involved two defendants—Ashley Hepburn and Richard Brandon Lewis[16]—and "the State chose to prosecute them as co-defendants in a joint trial." *Hepburn*, 406 S.C. at 418, 753 S.E.2d at 403. "Neither party accused the other of any wrongdoing at th[e] time" of the police investigation. *Id.* 406 S.C. at 422, 753 S.E.2d at 405. At the end of the State's case, Hepburn moved for directed verdict. Her

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[15] *See State v. Donna L. Phillips*, Case Number 2012-212663 (found at http://ctrack.sccourts.org/public/caseView.do?csIID=51744) (last viewed March 1, 2015).

[16] The Court of Appeals reversed Lewis' conviction. *State v. Lewis*, 403 S.C. 345, 743 S.E.2d 124 (Ct. App. 2013). This Court granted the State's petition for writ of *certiorari* on January 31, 2014 and convened oral arguments on March 4, 2015.

> counsel argued, the State's evidence merely rose to a suspicion that [she] committed the crime, and this mere suspicion was insufficient to survive a directed verdict motion, in that the State had only proven that [Hepburn] was in the home when the victim sustained the fatal injuries. While [her] counsel conceded that the State had proven that the child died from homicide by child abuse, he argued that the State had not proven that the child abuse was inflicted by [Hepburn]. Finding it could be logically deduced from the circumstantial evidence that one of the two defendants violently shook the victim causing her injuries, the court denied [Hepburn's] motion for directed verdict. The trial judge stated that the jury would be given a "mere presence" charge, would have the opportunity to evaluate the witnesses' credibility, and could ultimately conclude that either defendant was not guilty.

Id. 406 S.C. at 424, 753 S.E.2d at 406.

Hepburn's "testimony largely corroborated the State's evidence." *Id.* She "testified that Lewis was the only person awake in the house at the time the victim sustained her injuries and was the only person who could have harmed the victim." *Id.* 406 S.C. at 425, 753 S.E.2d at 407. "On the other hand, Lewis's defense painted a markedly different version of events." *Id.* 406 S.C. at 426, 753 S.E.2d at 407. Lewis claimed

> he heard the victim "faintly crying" and then "heard [Hepburn] get up and stomp into the room, I actually felt her footsteps." Lewis testified, "I can remember hearing [Hepburn] stomp into the room I heard her go into the room and I can remember [the victim] crying a little bit. And then she wasn't crying and [Hepburn] went out of the room." Lewis testified that the victim's cries were different from her normal cries. He testified he heard "short pauses in between [the victim's] cry and it just, it sounded to me like she could have been shaken." Lewis testified that the crying then stopped and [Hepburn] left the victim's bedroom.

Id. 406 S.C. at 426-27, 753 S.E.2d at 407. Lewis claimed "he withheld this version of events in previous statements because he loved [Hepburn] and wanted to protect her." *Id.* 406 S.C. at 427, 753 S.E.2d at 408.

In addition to his own testimony,

> Lewis re-called an investigating officer to the witness stand, who testified that after Lewis's second statement was shown to [Hepburn] later in the afternoon on October 13, she allegedly exclaimed "oh my god all of this is true but I don't remember hurting my baby."

Id. 406 S.C. at 428, 753 S.E.2d at 408.[17]

At the close of all evidence, Hepburn renewed her motion for directed verdict. She appealed to the Court of Appeals, but this "Court certified [her] case for review pursuant to Rule 204(b), SCACR." *Id.*

At the beginning of the discussion about the "waiver rule," this Court noted its

> decision depends on *what* evidence we deem appropriate for consideration at the appellate stage of review to assess whether the State presented any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused sufficient to overcome [Hepburn's] **mid-trial motion for directed verdict.** In turn, this issue hinges on whether or not we accept the so-called waiver rule.

Id. 406 S.C.at 429-30, 753 S.E.2d at 409 (internal quotations and citations omitted) (italics original; bold added). Under this rule, a defendant that presents evidence waives her directed verdict motion made at the end of the State's case. "If a defendant renews his motion for judgment of acquittal at the end of all the evidence, the 'waiver doctrine' requires the reviewing court to examine all the evidence rather than to restrict its

[17] In addition to his own testimony, Lewis actually called eight witnesses during his defense case. *See Hepburn* Record on Appeal (found at http://ctrack.sccourts.org/public/caseView.do?csIID=49979 (last viewed November 30, 2014)). In addition to her own testimony, Hepburn called three witnesses. *Id.*

examination to the evidence presented in the Government's case-in-chief." *Id.* 406 S.C. at 430 (fn. 15), 753 S.E.2d at 409 (fn. 15).

After reaffirming the applicability of the "waiver rule" in our state, *Hepburn* outlined significant exceptions to this doctrine. "Most courts that recognize the waiver rule also acknowledge its inapplicability to co-defendant testimony." *Id.* 406 S.C. at 434, 753 S.E.2d at 412. Recognition of the nature of our adversarial system forms the foundation for the "waiver rule."[18] "[T]he decision of a codefendant to testify ***and produce witnesses*** is not subject to the defendant's control like testimony the defendant elects to produce in his own defensive case, nor is such testimony within the government's power to command in a joint trial." *Id.* 406 S.C. at 435, 753 S.E.2d at 412 (emphasis added).

Additionally, the waiver rule recognizes that "if the defendant's case does not provide a missing link in the Government's evidence or rectify any deficiency in the State's case, then the presentation of a defense does not operate as a waiver of the right to

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[18] Important policy considerations related to the "waiver rule" arise from Solicitors and criminal defense lawyers' respective roles in our adversarial system. "[P]rosecutors . . . are ministers of justice and not mere advocates. Their special responsibility carries with it specific obligations to see the defendant is accorded procedural justice." *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001) (internal quotes and citations omitted) (citing *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) and Comment, Rule 3.8 of Rule 407, SCACR). A criminal defense lawyer's obligation is to advocate for the client. "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. . . . Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision." *Von Moltke v. Gillies*, 332 U.S. 708, 725-26 (1948). The defense lawyer, not restricted by any of the additional special duties of prosecutors, is free to advocate every advantage for the client. *See also Amicus Curie* Brief of The South Carolina Association of Criminal Defense Lawyers in *Hepburn*, pp. 16-17 (found at http://ctrack.sccourts.org/public/caseView.do?csIID=49979 (last viewed November 30, 2014).

have an appellate court review the mid-trial denial of a motion for directed verdict on the State's evidence alone." *Id.* 406 S.C. at 436, 753 S.E.2d at 412.

Hepburn, therefore, held "that the waiver rule is operative" but "because Appellant's co-defendant testified and implicated her and because Appellant's testimony merely rebutted this testimony, [the appellate court] will not consider either testimony in assessing the propriety of the trial court's denial of Appellant's mid-trial directed verdict motion." *Id.* 406 S.C. at 438, 753 S.E.2d at 413.

Returning to the facts of this case, Phillips' defense at trial did not dispute any of the medical evidence. Rather, she testified that she did not give the child any medication. Phillips' daughter confirmed Phillips' testimony. In her brief before the Court of Appeals, Phillips argued, "The [State's] evidence merely raised a suspicion that Phillips was guilty of homicide by child abuse," at p. 15. And, "The State only presented a mere suspicion that Phillips gave the child cough medicine," at p. 16.

The Court of Appeals acknowledged that Kayla Roper's testimony—which was actually presented by co-defendant Honeycutt—was the ***only*** evidence presented during the trial that provided any evidence tending to prove that Phillips committed child abuse by providing the child Tussionex. A. 6, 7. The Court of Appeals then concluded, "This evidence, when combined with the medical testimony that the cough medicine had to be Tussionex and the child died from receiving multiple doses of it, establishes that Phillips "cause[d] the death of [the] child ... while committing child abuse." A. 7. Under *Hepburn*, the Court of Appeals erred by considering evidence presented by Honeycutt.[19]

[19] To the extent the Court of Appeals relied on Brandon Roper's testimony, *see* A. 6, *Hepburn* forecloses consideration of that evidence because co-defendant Honeycutt called him to the witness stand.

The State might argue—as it did in its Response to Phillips Petition for Rehearing, A. 37—that Phillips testimony "was not merely responsive to testimony elicited by her co-defendant." Although Phillips presented her case before co-defendant Honeycutt presented her case, this consideration is not relevant. In *Hepburn*, Hepburn actually presented her case before co-defendant Lewis presented his case. *See Hepburn* Record on Appeal (found at http://ctrack.sccourts.org/public/caseView.do?csIID=49979 (last viewed November 30, 2014)). Despite this sequence of testimony, this Court held:

> We find this rationale persuasive. Here, [Hepburn] did not dispute the State's contention that the victim died from homicide by child abuse inflicted by one of the two defendants. Instead, her testimony rebutted Lewis's contention that she killed the victim. Thus, 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 [Hepburn] that is responsive to Lewis's testimony, for purposes of determining whether the State presented substantial circumstantial evidence sufficient to survive [Hepburn's] mid-trial motion for directed verdict.

Hepburn, 406 S.C. at 436, 753 S.E.2d at 412 (citing *United States v. Belt*, 574 F.2d 1234, 1236–37 (5th Cir.1978). More importantly, Phillips denial that she gave the child any medication is directly responsive to Honeycutt's defense—that Honeycutt presented through Kayla Roper—that Phillips gave the child the Tussionex.

The Court of Appeals pointed out, "[T]o prove Phillips acted with extreme indifference to the child's life, the State was required to prove Phillips intended to give the child Tussionex with the knowledge that doing so would create a risk to the child's life." A. 8. As seen, Kayla Roper's testimony was the only evidence Phillips gave the child Tussionex. Consideration of Kayla Roper's testimony, however, departed from the applicable standard of review under *Hepburn*.

Consideration of Kayla Roper's testimony was also necessary for the Court of Appeal's conclusion about Phillips' mental state: "From this combination of direct and circumstantial evidence, a jury could infer Phillips acted with extreme indifference to the child's life." A. 10. The Court of Appeals found Phillips own "testimony to be direct evidence that Phillips knew giving the child her prescription medication created a risk to the health of the child." A. 9. Under *Hepburn's* application of the "waiver rule," including the exceptions to the rule, the Court of Appeals also erred by considering Phillips own testimony.

Thus, applying *Hepburn*, there is no reviewable evidence that Phillips gave the child Tussionex, let alone with extreme indifference for his life.[20]

The Court of Appeals further erred by concluding, "From this combination of direct and circumstantial evidence, a jury could infer Phillips acted with extreme indifference to the child's life." A. 10. The only direct evidence relied upon by this Court in reaching this conclusion was the testimony of Kayla Roper and Phillips. Under *Hepburn*, the Court of Appeals should not have considered either. Once this direct evidence is removed from consideration, only circumstantial evidence remains.

Once Phillips' case is viewed as a circumstantial evidence case, the need to reverse the Court of Appeals and direct a verdict of acquittal becomes apparent. The State failed to present substantial circumstantial evidence of Phillips' guilt of homicide by child abuse. As she pointed out in her brief to the Court of Appeals, at p. 15, "The evidence merely raised a suspicion that Phillips was guilty of homicide by child abuse. *State v. Cherry*, 348 S.C. 281, 559 S.E.2d 572 (2000)." "A defendant is entitled to a

[20] *See also* Brief of Appellant, at pp. 14-17.

directed verdict when the state fails to produce evidence of the offense charged." *Cherry*, 361 S.C. at 593, 606 S.E.2d at 478; *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009).[21] Not only did the State not present substantial circumstantial evidence of Phillips' guilt, but also that evidence did not exclude "every other reasonable hypothesis," *i.e.* that someone other than Phillips gave the child the lethal dose of medication. *Id.* 382 S.C. at 626 (fn. 2), 677 S.E.2d at 606 (fn. 2).

Conclusion

This Court should grant the writ, apply the exceptions to the "waiver rule" as outlined in *Hepburn*, reverse the Court of Appeals, and direct a verdict of acquittal.

Respectfully Submitted,

By _____

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March 9, 2015
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[21] *See also State v. Ewards*, 298 S.C. 272, 379 S.E.2d 888 (1989) and *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2012).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY

D. Garrison Hill, Circuit Court Judge

Supreme Court Appellate Case Number 2015-000351
Court of Appeals Appellate Case Number: 2012-212663

The State — Respondent,

v.

Donna Lynn Phillips, — Petitioner.

Certificate of Service

I certify that I have served the Petition for Writ of *Certiorari* on the State of South Carolina, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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March 9, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: State v. Danna Lynn Phillips
Court of Appeals Appellate Case Number: 2012-212663

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Appellants' Petition for Writ of *Certiorari* and one bound and one unbound copy of the Appendix booklet containing the Court of Appeals opinion, petition for rehearing and other relevant documents.

Also enclosed please find the original and six copies of the Petition to Extend Time to File the Record on Appeal and Briefs to the Court of Appeals. This request is necessary due to an error at the printer.

Thank you for your attention to this matter. If you have any questions or require additional information, please do not hesitate to contact me.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: J. Benjamin Aplin, Esquire
S.C. Court of Appeals (one copy of petition for Writ of *Certiorari*)