THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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S.C. 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.

Brief of Petitioner

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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, S.C. Code Ann. § 16-3-85(A)(1), for the death of her grandson (hereinafter "child"). Record on Appeal (hereinafter "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, S.C. Code Ann. § 16-3-85(A)(2). Supplemental Record on Appeal (hereinafter "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.

[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 in the Court of Appeals, 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 Appeals' attention to *Hepburn*. Appendix (hereinafter "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 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.

Phillips petitioned this Court for a writ of *certiorari* to review the Court of Appeals opinion. By written order dated July 2, 2015, this Court granted the writ. This brief follows.

Applicable Legal Standards

> On appeal from the denial of a directed verdict, [this Court] must review the evidence in the light most favorable to the State. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [the reviewing court] must find the case was properly submitted to the jury. Accordingly, a trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.

State v. Buckmon, 347 S.C. 316, 321-22, 555 S.E.2d 402, 404-05 (2001) (internal citations omitted). *See also State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2012); *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011); *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009); *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004); and *State v. Ewards*, 298 S.C. 272, 379 S.E.2d 888 (1989).

The appellate court "rel[ies] solely on evidence from the State's case-in-chief in order to avoid any of the directed verdict issues that can arise when jointly tried codefendants blame each other in their defense cases." *State v. Palmer*, Shearouse Advance Sheets No. 29 (S.C.S.Ct. Opinion No. 27552) (Filed July 29, 2015), at 1 (citing *State v. Hepburn,* 406 S.C. 416, 753 S.E.2d 402 (2013) (waiver rule bars consideration of codefendant's evidence in reviewing denial of mid-trial directed verdict motion).

Argument

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.

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 this Court should reverse the Court of Appeals and direct a verdict of acquittal.

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." 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. Her 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 and found the child unresponsive in his crib. 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 initially denied checking on her child but subsequently 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.

Patience 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 told Johnson the child "slept throughout the night." 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

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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.

from Friday, March 14th to between 8:00 p.m. and 9:00 p.m. on Sunday, March 16th. 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. So she was trying to calm him down an put him to bed." Honeycutt told Burgess "she got him to bed. And he, ***finally***, went to sleep, and that he never woke up." 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 (emphasis added).

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

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 bed about 8:00 p.m. And he was sort of pitching a fit." About 8:30 p.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 "that Sunday, he was coughing and congested and that Jamie had given him only Tylenol, some children's Tylenol. But she did not know how much of a dose he had given."[7] Phillips told the investigator that she and her sister take Lortab, and she hoped the child didn't get any of those. There is no evidence that Lortab caused the child's death.[8] 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

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[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.

[7] In fact, from Investigator Burgess' account of the interview, there is no evidence that Phillips actually saw Morris give the child medicine as opposed to Morris giving medication to the child, telling Phillips about it, and Phillips repeating Morris' account of the events.

[8] According to Dr. Foery, the prosecution's toxicologist, "Lortab contains hydrocodone and acetaminophen." And, "In this particular case we did not find acetaminophen in either the blood or the urine. So acetaminophen wa not ingested by the child." R. 332, line 17 – 333, line 1.

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 having nightmares, the child woke up "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." As seen in fn. 8, *supra*, and at the testimony of Dr. Foery, discussed on p. 14, *infra*, there is no evidence that Lortab caused the child's death. R. 138, line 6 – 145, line 25.

Phillips told Investigator Burgess about two conversations she had with Honeycutt. At the Greenville hospital, Honeycutt told Phillips and Morris that the child "went to sleep about 15 minutes after [the two] left on Sunday night" and "slept all night." "The next day [Phillips] asked Latasha [Honeycutt] if the child had any of those frightmares. And she said, yes, he woke up three times." At the funeral home, Brandon Roper told Phillips and Morris that the child "woke up four times that night." R. 144, line 8 – 145, line 4.

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."[9] 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." Morris knew Phillips has a prescription for 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.

Phillips provided Detective Burgess with the bottle of children's Tylenol.[10] 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

[9] This medication is also referred to as Equate Brand in the transcript. According to Dr. Foery, "Tyloenol is the brand name for a drug called acetaminophen." Forensic testing "did not find acetaminophen in either the blood or the urine. So acetaminophen was not ingested by the child." R. 232, line 3 – 233, line 1.

[10] 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.

Sheriff's Office.[11] 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, examined the child's blood and urine.[12] 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 chloropheniramine."[13] Hydrocodone and chlorpheniramine are found in Tussionex. R. 316, line 11 – 327, line 12.

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[11] 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.

[12] 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.

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

Dr. Foery further testified, "[T]he data indicates that the concentration of the drug in the blood is somewhere between two and a half and five times higher than it should be for a therapeutic dose, if it were given to an adult." R. 346, line 22 – 347, line 2. Based on the concentration, Dr. Foery opined "more than one dose was given" but could not "say how many doses or when" the doses where given. R. 347, lines 3-7. Dr. Foery, therefore, could not "state unequivocally that it was a repetitive dose." R. 331, lines 19-20. *See also* R. 341, lines 7-20 (Regarding repetitive dosing, Dr. Foery "can't rule it in or rule it out.").

Regarding the timing of the fatal dose(s), Dr. Foery testified, "Based on the half life of the drug, I would say it was probably given sometime between midnight on [Saturday going into] Sunday up until the time in which the baby was found. So approximately 24 to 36 hours before the blood was drawn." R. 331, lines 7-10. Dr. Foery later hypothesized about the specific timing of the fatal dose(s):

> [T]he child begins to exhibit some unusual symptoms starting Sunday afternoon, as I recall from the [statement] from the father. And the child is cranky, ornery, falls asleep, fighting sleep, wakes up again. . . . The child is in some sort of distress. It seems obvious to the father that the child is in some sort of distress.
>
> ***And then the child gets something from the father.*** And then the child goes home. And the child is somewhat cranky, goes home, but, eventually, goes to bed at 9:00 at night and seems out of it. And it seems like out of it immediately, and the baby didn't want to eat anything. I think the mohter's [statement] was that she wanted to give the baby some milk. And the baby didn't drink from the sippy cup, put the sippy cup down, and then basically was out of it.
>
> And so from 9:00 on Sunday night until the baby was discovered Monday morning, the was out of it. . . . I'm thinking the baby received the drug prior to that. . . .

> The baby did not wake up when the baby was changed [at 8:00 a.m. Monday morning]. And then at 10:00, I think the baby had severe respiratory distress. And so I'm thinking that one of the reasons the baby was in some kind of distress on Sunday afternoon was that ***possibly*** the baby had received that drug as early as Sunday afternoon.

R. 348, line 9 – 349, line 15 (emphasis added).

In addition to testifying about the presences of the components of Tussionix, Dr. Foery testified about the presence of aspirin and the ***absence of Tylenol and Lortab.*** "Aspirin is a salicylate."[14] According to Dr. Foery, "in this case, a small amount of salicylate was found, a small amount of aspirin was found." By contrast, "no acetaminophen was found." In addition to Tylenol being the brand name for acetaminophen, "Lortab contains hydrocodone and acetaminophen." "[I]f someone had taken [Lortab], you would expect to find hydrocodone, hydromorphone, and acetaminophen in the blood and in the urine." R. 231, line 25 – 233, line 1.

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.[15]

Dr. Ward testified about the other autopsy 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

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[14] http://www.drugs.com/aspirin.html (last viewed August 2, 2015).

[15] Dr. Ward based his opinion "on the review of the file" in the medical examiner's office, which included the autopsy report, microscopic slides, toxicology findings, investigative reports. R. 387, lines 8-18.

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.

Regarding the time of the fatal dose(s), Dr. Ward opined it was "before the description of [the child's] actions at the time they put him to bed, which is when he was sleepy, near lethargic, irritable, and without significant appetite." He further opined that the child was in a comatose state by 8:00 a.m. on Monday morning when Honeycutt changed his diaper. R. 382, line 10 – 385, line 10.

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 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 was 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 he 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 he 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 Honeycutt's defense, foreshadowed during her opening statement, that Phillips and Morris returned a sick child that already had been overmedicated with a fatal dose of hydrocodone.

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.[16] The child had 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 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 claimed Phillips "done got Jamie [Morris] by the arm and is dragging him out the back door of the hospital." R. 647, lines 4-16.

On cross-examination, Brandon Roper acknowledged getting the crying child out of his crib, taking him into the living room, and comforting him until he stopped crying. When Roper tired to put the child back to bed, he started crying again. Roper again comforted the child until he stopped crying. Around 9:00 p.m. Sunday evening,

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[16] 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.

Honeycutt prepared a sippy cup for the child. Roper testified that Honeycutt got out of bed three to four times that night. R. 660, line 4 – 667, line 20.

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.[17] 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.

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[17] 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. 8, *supra*.

F. Closing Arguments.

Honeycutt, not surprisingly, relied on Kayla Roper's testimony: "If [the child] was under the influence of Tussionex when Donna Phillips, or the father, returned the child Latasha [Honeycutt] had absolutely no way of know that." And, "If only Mrs. Phillips had spoke up. I think she realized that [the child] was beginning to have a bad reaction to the Tussionex that she had given him." R. 773, line 11 – 775, line 4.

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

Of course, the ***only*** evidence that Phillips gave the child Tussionex was the testimony of Kayla Roper during Honeycutt's case-in-chief.

G. The Court of Appeal's Opinion.

The Court of Appeals, in fact, acknowledged that Kayla Roper's testimony 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 (emphasis added). 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.

The Court of Appeals further 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 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." [18] 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.

The Court of Appeals further concluded, "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.

H. Argument.

Phillips moved for a directed verdict both at the close of the State's case and at 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***

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[18] "For purposes of the [homicide by child abuse] statute, 'extreme indifference' has been defined as 'a mental state akin to intent characterized by a deliberate act culminating in death.'" *McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (citing *State v. Jarrell,* 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct.App.2002).

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 the Court of Appeals on August 23, 2013.[19] This Court decided *Hepburn* on December 11, 2013. By letter dated September 3, 2014, Phillips 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. The Court of Appeal's only reference to *Hepburn* is in footnote 2 of its written opinion, A. 7, which states:

> 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 reviewing Phillips' mid-trial directed verdict motion.

Phillips' defense at trial did not dispute any of the medical evidence. Rather, she testified that she did not give the child any medication. As seen, the Court of Appeals acknowledged that Kayla Roper's testimony—which was actually presented by co-

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[19] *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).

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 (emphasis added). Under *Hepburn*, the Court of Appeals erred by considering evidence presented by Honeycutt.[20]

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*. Thus, applying *Hepburn*, there is no reviewable evidence establishing that Phillips gave the child Tussionex, let alone with extreme indifference for his life.[21]

The only direct evidence relied upon by the Court of Appeal in reaching this conclusion was the testimony of Kayla Roper and Phillips.[22] Under *Hepburn*, the Court

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[20] 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.

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

[22] The State might argue, as it did in its Return to the Petition for Writ of *Certiorari*, at p. 12, "[T]here was absolutely noting preventing the State from calling both Kayla and Brandon in reply, at which point the prosecution could have elicited the very same information." But this is exactly the point—the prosecution ***did not*** call these witnesses, and the standard of review in joint trials limits the evidence to what was the State presented in its case-in-chief. 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,

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)."

This Court's recent opinion in *Palmer, supra*, supports Phillips' position, provides guidance about what constitutes substantial circumstantial evidence, and merits discussion. In that case, the State jointly prosecuted Julia Gorman and Robert Palmer, "who lived together but were not married," "for the death of Gorman's seventeen month-old grandson." *Id.* at 1. This Court held "there [was] sufficient evidence to uphold the Court of Appeals' ruling that the motion for a directed verdict on homicide by child abuse charge was properly denied as to Gorman, but [held] there is no evidence to support the denial of Palmer's motion." *Id.* at 6.

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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).

The nature and timing of the small child's injures were significant to this Court's analysis in *Palmer*. "The State's evidence place[d] Gorman alone with the victim at 4:00 pm when she first returned home and again at 6:00 pm when the victim was found in grave distress." *Id.* Furthermore, "[t]he medical evidence would support a finding that Gorman inflicted the fatal blow when she first returned home and that when she and Palmer checked on the child from the doorway at 4:15 pm, the victim's injuries may not have been apparent to a layperson. Alternatively, there was evidence that the blow(s) must have been inflicted immediately preceding the expression of symptoms, which is evidence from which a jury could conclude that Gorman injured the child when she went alone to check on him at 6:00 pm." *Id.*

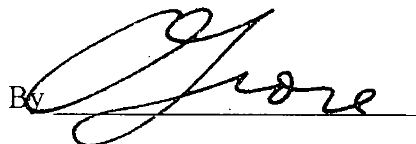
Here, the child death resulted from an overdose of medication—not traumatic injuries that were involved in *Palmer* and *Hepburn*—making it much more difficult to determine the timing of the abuse causing the child's death. Viewed in a light most favorable to the State, the mid-trial evidence establishes (1) the child died from an overdose of hydrocodone, (2) hydrocodone was given to the child between midnight Saturday going into Sunday and when the child was found comatose on Monday morning, and (3) two people—Honeycutt and Morris—admitted giving the child medication. From this circumstantial evidence, the jurors could infer two possible scenarios, neither of which implicates Phillips. First, based on Dr. Foery's testimony, the jurors could conclude Morris gave the child medication—that was not Tylenol, possibly Tussionex—that coincided with the onset of the child's symptoms consistent with taking hydrocodone. Investigator Burgess' testimony about Phillips knowledge of Morris giving the child Tylenol did not establish that Phillips actually witnessed it as opposed to

Morris telling Phillips about it. Second, based on a combination of Dr. Foery and Dr. Ward's testimony, the jurors could infer that Honeycutt gave the child medication before she put him to bed on Sunday night or during the night when the child had difficulty sleeping and Honeycutt got up three-to-four times. Under this scenario, the jurors could Honeycutt gave the child medication so that her own sleep would not be disturbed. Phillips, of course, was not present at Honeycutt's house during either of these times.[23]

Conclusion

The Court of Appeal's did not follow *Hepburn*. Applying Hepburn, there is no direct or substantial circumstantial evidence that Phillips gave the child the hydrocodone that caused his death. This Court, therefore, should reverse the Court of Appeals, and direct a verdict of acquittal.

Respectfully Submitted,

By 

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[23] Based on Honeycutt's admission to Julie Sailors, the paramedic—"***We*** gave him something for his cold," R. 50, line 22—the jurors could infer Brandon Roper's role in giving the child hydrocodone. Honeycutt's admission against interest, introduced during the State's case-in-chief, supports the trial judge denying Honeycutt's mid-trial directed verdict motion under *Hepburn*.

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

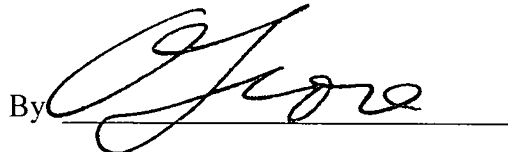
The State, Respondent,

v.

Donna Lynn Phillips, Petitioner.

Rule 211(b), SCACR Certification

I certify that the Final Brief of Appellants complies with Rule 211(b), SCACR. Because this matter is before this Court on a writ of *certiorari* to the Court of Appeals, there was not an initial brief.

By 

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Certificate of Service

I certify that I have served the Brief of Petitioner 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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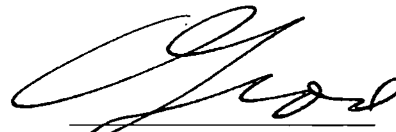

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