

STATE OF SOUTH CAROLINA

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IN THE SUPREME COURT

JUN 18 2018

S.C. SUPREME COURT

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge
Appellate Case No. 2014-000764

THE STATE,

Respondent,

vs.

STEPHANIE IRENE GREENE,

Appellant.

**RETURN TO PETITION FOR
REHEARING**

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

180 Magnolia Street, Third Floor
Spartanburg, SC 29306

ATTORNEYS FOR RESPONDENT

ARGUMENT

The Respondent now makes this return in opposition to Petitioner Stephanie Greene's petition for rehearing. Respondent respectfully submits the following:

1. Greene complains about this Court's observation that evidence supported the cause of death as the result of a synergistic effect of morphine and other prescription drugs. Of course, Alexis' blood level of morphine was well within the lethal levels and the evidence established the only source was through breastmilk. Evidence supports that morphine caused the death.

However, this Court also rightly observed that Greene ignored evidence of the synergistic effects morphine would have with other drugs Greene consumed. The record is replete with this evidence. Dr. Wren concluded the death was the result of respiratory insufficiency secondary to synergistic drug intoxication, and noted "all of these drugs essentially lead to respiratory depression." ROA. p. 419, lines 15-16. Wendy Bell, an expert in forensic toxicology involving drugs and alcohol, explained medications like morphine and Klonopin "are central nervous system depressants, which means it's going to slow the respiratory system, the breathing, the heart rate. And they can act together synergistically to have effects on each other." ROA. p. 246, lines 8-12. Kaushik Kotecha, qualified as an expert in pharmacy, confirmed that the medications taken together may create a detrimental synergistic effect that would cause a child to stop breathing. ROA. p. 308. SLED forensic toxicologist Quintus Young also confirmed that the combination of morphine and other medications could have a synergistic effect on each other. ROA. p. 134. Dr. Eagerton testified Alexis had toxic levels of morphine. He also noted Clonazepam or Klonopin is a benzodiazepine that is very potent. Dr. Eagerton testified these medicines can have a synergistic effect on each other.

ROA. pp. 332-336. Dr. Wren concluded that Alexis died as a result of respiratory insufficiency secondary to synergistic drug intoxication. Dr. Wren explained, "I could just as easily have said morphine intoxication, lawyers like to split hairs, and so I included them all." ROA. p. 419, lines 18-22. Dr. Wren noted "all of these drugs essentially lead to respiratory depression." ROA. p 419, lines 15-16.

Greene's response to this Court's observation of evidence supporting the synergistic effect is to claim it somehow contradicts evidence that morphine led to Alexis' death. The bottom line is morphine levels were sufficiently high for the jury to find Alexis' death was the result of Greene's illicit morphine consumption, but the synergistic effect of morphine with other drugs exasperated the respiratory failure ending Alexis' short life. These are not contrary theories.

2. Greene claims she was not abusing morphine because Dr. Kovacs testified the prescription allowed the morphine to be taken "as needed." The actual testimony was the medicine could be taken "every eight hours or just as needed," implying the patient may take less than three a day, but the ceiling is three a day. ROA. p. 169, lines 9-11. However, because Greene received the prescription by hiding her pregnancy and by hiding that she was breastfeeding a child, Greene was subjecting Alexis to morphine without supervision of a doctor. ROA. p. 164, lines 16-19; p. 165, lines 6-13; ROA. p. 174. Therefore, the "as needed" clause does not counter the evidence she caused the death of her child or alters the considerable evidence of her intent to be taking the numerous medications while breastfeeding in total disregard of the safety of her child. "By any standard the delivery of a controlled substance to a child, not under the direction of a physician in regard to dosage, is an act that is inherently dangerous." State v. Taylor, 626 A.2d 201, 202 (R.I. 1993).

3. Greene complains, "The record in this case establishes as a matter of fact that the .52 level found in Alexis could not have come through breast milk." Pet. p. 2. Greene's own expert, Dr. Karch, admitted that a baby could achieve a morphine level as high as .52mg/Liter from breast milk. ROA. pp. 490-91. The jury was not required to disbelieve Greene's own expert and therefore, a rational juror could find that the blood level was achieved from morphine passed through Greene's breastmilk.

Alexis died with lethal levels of morphine in her system. As Dr. Wren noted, no needle marks appeared on Alexis. State v. Stephanie Greene, Op. No. 27802 (filed May 23, 2018). Dr. Eagerton refuted the possibility the morphine pills were ingested orally, either in whole or crushed up. ROA. pp. 384-85. Scientific evidence established, as Greene admits, that morphine and other opioids do pass through breastmilk. Greene consumed a considerable amount of morphine and other opioids which may result in a synergistic effect combined together. As Dr. Wren explained, an infant cannot metabolize as efficiently as an adult and the morphine has to go somewhere. Without objection, Dr. Wren testified as to calculations showing the feasibility that levels of morphine as high as found in Alexis were possible, as noted by this Court. Dr. Eagerton described in detail, as quoted by this Court, testimony establishing that an infant lacks the ability to metabolize and excrete morphine. ROA. pp. 344-47. Greene ignores that her own expert witness, **Dr. Karch, admitted that a baby could achieve a morphine level as high as .52mg/Liter from breast milk.** ROA. pp. 490-91. Dr. Karch confirmed the mode of death from morphine is to stop respiration. ROA. p. 496, lines 20-21. For a chronic accumulation, Dr. Karch testified he would expect the child to be unable to gain weight. ROA. p. 505, lines 8-19. In fact, at the time of death, Alexis lost five ounces since

her two week check-up. ROA. p. 511, lines 11-15.

So the morphine would just build up, day after day, until it is simply too much and respiratory failure set in. A reasonable juror could conclude beyond a reasonable doubt, based on the evidence, that this exactly what happened. This evidence is sufficient alone for a reasonable juror to conclude that Alexis' death was caused by her consumption of morphine through breastfeeding.

4. As discussed in the first section, several witnesses testified about the synergistic effect of drugs, including Dr. Wren, who testified as to the cause of death. "After the trial court properly has determined a witness is competent, the resolution of the credibility of the witness is within the province of the jury." State v. Needs, 333 S.C. 134, 144, 508 S.E.2d 857, 862 (1998). While Greene's reference to Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996) offers surface appeal in light of Alexis' unique death, the law did not lead science, science explained how morphine passes through breast milk and accumulates in an infant whose metabolism rates are lower than adults. Science explained Alexis died of respiratory failure and predicted the weight loss that would accompany that cause of death. Granted, controlled tests of morphine consumed by breastfeeding mothers involved smaller, more acute doses of morphine. But Dr. Wren was able to show how large amounts of morphine would accumulate with consumption of morphine in a chronic treatment setting.

5. Greene complains that State's exhibit 67, the warning published by Dr. Eagerton, was published in July 2012. However, it is evidence supporting the cause of death and was therefore relevant. The relevance of State's exhibit 67 was not challenged on appeal. It is an example of science leading the law. Dr. Eagerton noted studies giving qualified approbation to the use of

morphine for breastfeeding mothers were addressing the use of short-term acute treatment with morphine and that studies did not recommend the use of sustained release morphine products. ROA. pp. 343-44. Regardless of the warning, plenty of other evidence supports morphine and other drugs as the cause of death. Greene continues to ignore the significant distinctions between use of morphine for acute treatment versus extended long-term use of slow release morphine products at higher doses.

6. Greene complains about a reference to a LactMed article warning that use of oral narcotics may cause "infant drowsiness, central nervous system depression and even death." Greene, at 23. This again is a weight issue, but shows that the scientific community recognized the dangers of infant ingestion of narcotics.

Dr. Eagerton published a portion of LactMed pertaining to the use of morphine, as follows:

Epidural morphine given to mothers for postcesarean section analgesia results in trivial amount of morphine in their colostrum and milk. Intravenous or oral doses of maternal morphine in the immediate postpartum period results in higher milk levels than with epidural morphine. . . . Maternal use of oral narcotics during breastfeeding can cause infant drowsiness, central nervous system depression and even death.

ROA. p. 390, line 18 – p. 391, line 1. This Court is concerned with the existence of evidence and this evidence shows the medical and scientific community was well aware that a mother's ingestion of morphine could endanger a breast-fed child. The possibility of death was not mythical, it was predicted. This is what killed Alexis as a rational juror could find. In this case twelve rational jurors concluded morphine passing through breastmilk killed Alexis.

Dr. Eagerton acknowledged studies concerning acute treatment of breastfeeding mothers with

morphine, but noted those same studies did not recommend the use of sustained release morphine products. ROA. pp. 343-44. The amounts in those studies pale in comparison to Greene's consumption of morphine in the present case. Evidence shows Greene consumed 78 30 mg MS Contin pills in the last twenty-four days of Alexis' life. ROA. pp. 309-10. That amounts to **2,340 mg of morphine**. The subjects in the studies Greene references took cumulative amounts of 50 or 60 mg. ROA. pp. 441-42. **Greene continues to ignore the vast differences between the short-term low dose treatment in controlled studies and Greene's significant chronic use of slow-release morphine during Alexis' life span.** See Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 770 (Tex. 2007) ("One of toxicology's central tenets is that 'the dose makes the poison.' This notion was first attributed to sixteenth century philosopher-physician Paracelsus, who stated that '[a]ll substances are poisonous – there is none which is not; the dose differentiates poison from a remedy.'" (citations omitted and brackets in original)).

7. Incredibly, Greene complains the lack of scientific tests showing the effects of thousands of milligrams of morphine on a child over several weeks. Obviously no such tests would ever be conducted because it would be unethical. The test **Greene chose** to subject to Alexis to is unprecedented. A homicide is not excusable because it is unique.

8. In another challenge to the weight, rather than existence, of evidence, Greene complains that the State should have been able to provide specific testimony about Alexis' metabolism rate. This is simply absurd. As Dr. Wren explained, individuals metabolize drugs at different rates, but studies show infants and children do not metabolize narcotics as effectively as adults. ROA. pp. 438-39. Further, as Dr. Eagerton explained, forensic toxicology is not concerned with the amount of

morphine a person might survive on. People may survive on higher levels of morphine or die with less, and science does not predict that for adults any more than children. ROA. p. 371, lines 8-19. Alexis' blood level of morphine, .52mg, was well within the lethal levels, and the evidence established the only source of morphine was through breastmilk. ROA. pp. 383-85; pp. 420-21. At least as of yet, Greene has not contested that Alexis is dead. That is really the only evidence, along with the toxicology results, necessary for a jury to establish the cause of death.

9. Greene relies on a four-month old lower appellate court case from New York that pursuant to its state law, applies a standard of review completely different than federal law or our state law. People v. Carter, 158 A.D.3d 1105 (N.Y. App. Div. 2018). Relying on another jurisdiction's inapposite rules of criminal procedure, Greene argues this Court should step in and make the inferences that are within the jury's responsibilities as the fact finders. The United States Supreme Court noted the following:

[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the **responsibility of the trier of fact** fairly to resolve conflicts in the testimony, to weigh the evidence, and to **draw reasonable inferences from basic facts to ultimate facts**.

Pearson, 415 S.C. at 471 n.2, 783 S.E.2d at 806 n.2 (quoting Jackson, at 319) (italics in the original, other emphasis added); see also State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

Review of the sufficiency of the evidence in New York is done under a state procedural rule,

alien to our own standard of review, allowing for a review of the weight of evidence on appeal.

People v. Bleakely, 69 N.Y.2d 490, 493; 495, 506 N.E.2d 672 (N.Y. 1987) (Intermediate appellate courts in New York are empowered to review questions of law and questions of fact in civil and criminal cases. Even if evidence could lead a rational person to find a defendant guilty, the intermediate appellate court must then conduct its own review where it weighs the evidence like the trier of fact below). New York case law therefore is inappropriate in analysis of the present case.

State v. Bennett, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) (the reviewing court must not weigh the evidence because the reviewing court is only concerned with the existence or nonexistence of evidence) (cited in Greene, supra). This Court should refrain from Greene's invitation to act as a thirteenth juror and usurp the jury's role in weighing the evidence.

Further, as discussed in the State's Brief of Respondent, the verdict is supported by direct as well as circumstantial evidence. However, the United States Supreme Court noted the efficacy of distinguishing between the two forms of evidence:

Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1954) *cited with approval in Jackson*, at 317 n.9. The State submits this Court properly applied the correct standard in determining whether the evidence was sufficient to survive a directed verdict motion and disagrees with Greene's new argument that this Court's previous application of the directed verdict standard violates the due

process clause of the State or the federal constitution. In fact, the sage analysis in Bennett clarifies any potential misunderstanding of the applicable standard to apply in a directed verdict analysis.

10. Greene cherry-picks evidence in his favor and makes an argument better suited for a jury to challenge this Court's unanimous determination that the State proved she acted with extreme indifference. Greene claims that she would be unaware of the obvious dangers of breastfeeding while taking opioids without a doctor's supervision. Except for a reference to the standard in State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003), Greene does not cite any other legal authority in this claim.

Greene's claim a mother would be advised by medical professionals that use of morphine while breast feeding was safe is not true. Dr. Eagerton testified even prior to 2010-2011, **long term** use of morphine during breastfeeding was not recommended and was viewed as unsafe or uncertain. ROA. p. 344, lines 6-10. Bell noted the studies the defense relied on were for mothers who were not chronic users of morphine. ROA. p. 257, lines 7-19. Further, Greene avoided, rather than sought, proper medical supervision for the safety of her child. "By any standard the delivery of a controlled substance to a child, not under the direction of a physician in regard to dosage, is an act that is inherently dangerous." State v. Taylor, 626 A.2d 201, 202 (R.I. 1993).

Greene ignores the evidence that she was not just any mother, but also a former nurse. Further, she does not address evidence showing her consciousness of guilt. For instance, during the interview with the coroner's office, in which she neglected to mention she was taking morphine (State's Exhibit No. 34 (4:45-6:15), Greene told the interviewer she supplemented breastmilk with formula because she was concerned about her blood pressure medication affecting Alexis. State's

Exhibit No. 34 (13:45-14:30). A jury could reasonably conclude Greene was well-aware of the risks of breastfeeding while taking morphine and other medications and chose to disregard this risk.

As reflected by this Court's comments during oral argument, Greene's behavior was simply abhorrent and beyond the pale. "A parent has a specific and undelegable duty to serve the best interests of her child and should make every effort not to knowingly place her child in harm's way." State v. Jarrell, 350 S.C. 90, 99, 564 S.E.2d 362, 367 (Ct. App. 2002). For all Greene's complaints about the supposed lack of scientific evidence, Greene, a former nurse, chose to run an experiment on her child that was far too daring for the medical community, and she conducted it without the slightest consideration of the child's safety.

CONCLUSION

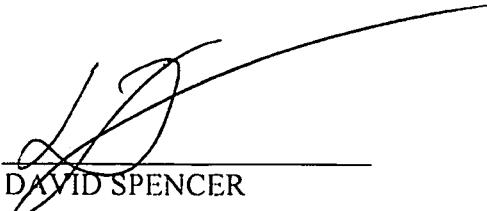
This Court should deny the petition for rehearing as Greene only cherry-picks, then disputes, inferences from evidence laying on the periphery of the abundant evidence supporting a rational juror's verdict. Greene also seeks to apply a wholly inappropriate standard of review.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

BY: 
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 15, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

JUN 18 2018

Appeal From Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No: 2014-000761

THE STATE,

Respondent,

v.

STEPHANIE IRENE GREENE,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Return to Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, C. Rauch Wise, Esquire, 305 Main Street, Greenwood, SC 29646.

I further certify that all parties required by Rule to be served have been served.
This 15th day of June, 2018.

Anne Mueller
Anne A. Mueller
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

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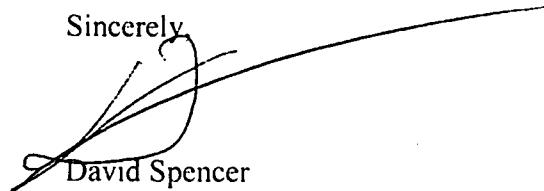
Mr. C. Rauch Wise, Esquire
305 Main Street
Greenwood, SC 29646

Re: The State v. Stephanie Irene Greene
Appellate Case No: 2014-000764

Dear Mr. Wise:

Enclosed please find two copies of the Return to the Petition for Rehearing in the above-referenced case.

Sincerely,


David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: The Honorable Jenny A. Kitchings (with original and 6 copies)
Victim Advocacy Division