No. _____

In the
Supreme Court of the United States

JEFFREY FAIRBANKS,
Petitioner,
v.
STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the judiciary violated the Ex Post Facto Clause when it created a new evidentiary holding to excuse the impermissible use of propensity evidence to affirm a conviction.

2. Whether Petitioner's Due Process rights were violated when the evidence introduced at trial only amounted to speculation that a crime was committed and not proof beyond a reasonable doubt as is required by law.

3. Whether a criminal conviction can stand when the jury may have convicted the defendant on facts that do not constitute a crime.

4. Whether the Indiana neglect-of-a-dependent statute is unconstitutionally vague where even falling asleep can be deemed leaving a child unsupervised.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State of Indiana v. Jeffrey Fairbanks*, Trial Court Case No. 49G03-1508-MR-030525, State of Indiana, Marion Superior Court (judgment of conviction entered on June 29, 2017).

2. *Jeffrey Fairbanks v. State of Indiana*, Court of Appeals Case No. 49A02-1707-CR-01675, Court of Appeals of Indiana (decision dated August 1, 2018).

3. *Jeffrey Fairbanks v. State of Indiana*, Indiana Supreme Court Case No. 18S-CR-00604, Indiana Supreme Court (opinion dated March 27, 2019).

4. *Jeffrey Fairbanks v. State of Indiana*, Supreme Court of the United States Application No. 18A1293 (extension of time to file a petition for a writ of certiorari granted on June 18, 2019 extending time to file to and including July 25, 2019).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey Fairbanks respectfully petitions for a writ of certiorari to review the decision and judgment of the Indiana Supreme Court in this case, or in the alternative, Petitioner Jeffrey Fairbanks respectfully requests that this Honorable Court summarily reverse the decision and judgment of the Indiana Supreme Court pursuant to Supreme Court Rule 16.

OPINIONS BELOW

The Court of Appeals of Indiana issued its opinion on August 1, 2018 and is reproduced at App.19-59. The opinion of the Court of Appeals of Indiana is reported at *Fairbanks v. State*, 108 N.E.3d 357 (Ind. Ct. App.), *transfer granted, opinion vacated*, 119 N.E.3d 91 (Ind. 2018), and *opinion aff'd in part, vacated in part,* 119 N.E.3d 564 (Ind. 2019). The Indiana Supreme Court granted a Petition to Transfer and issued its decision on March 27, 2019 and is reproduced at App.1-18. The opinion of the Indiana Supreme Court is reported at *Fairbanks v. State*, 119 N.E.3d 564 (Ind. 2019).

JURISDICTION

The Indiana Supreme Court issued its decision in Petitioner Fairbanks' case on March 27, 2019. On June 18, 2019, Justice Kavanaugh extended the time for filing a Petition for Writ of Certiorari up to and including July 25, 2019. Petitioner has made a timely Petition for Writ of Certiorari. App.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of the Constitution of the United States of America,

U.S. Const. art. I, § 10, cl. 1

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Amendment V, which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by

> an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV, which states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Ind. Code Ann. § 35-46-1-4,[1] which states:

> Sec. 4. (a) A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:

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[1] The full statutory text of Ind. Code Ann. § 35-46-1-4 is set forth in App.60-63. While the statute has been amended, the relevant portions that are being challenged remain unchanged.

> (1) places the dependent in a situation that endangers the dependent's life or health;….
>
> commits neglect of a dependent, a Level 6 felony.
> (b) However, the offense is:
> ….
> (3) a Level 1 felony if it is committed under subsection (a)(1), (a)(2), or (a)(3) by a person at least eighteen (18) years of age and results in the death or catastrophic injury of a dependent who is less than fourteen (14) years of age or in the death or catastrophic injury of a dependent of any age who has a mental or physical disability.

STATEMENT OF THE CASE

1. Factual and Procedural History

The high-profile case of Jeffrey Fairbanks was covered extensively by the media outlets in Indiana. Petitioner Fairbanks has maintained throughout the course of his trial that on the fateful date of May 28, 2015, he woke up from his sleep to find his three-month-old baby dead. He has always maintained that he does not know what happened to cause his child's death, but that he panicked and drove around aimlessly for hours with his lifeless baby in the car. When asked in a television interview what may have happened, Petitioner Fairbanks simply concluded - I don't know. After extensive media coverage of the case in which Petitioner Fairbanks was vilified by the media, Petitioner Fairbanks was charged with both murder and neglect of a dependent resulting in death.

Prior to the day his daughter died, on the evening of May 27, 2015, Jeffrey Fairbanks and his mate, Yolanda Rivera, went to Walmart to get food for a family dinner. Tr. Vol. III, pp. 68-69. On that evening, Yolanda's daughters, A.G. and E.M., were babysitting their three-month-old sister, Janna. Tr. Vol. III, pp. 68-69. After dinner, the family went to bed and Janna, as usual, slept next to her mother, Yolanda, on the bed. Tr. Vol. III, p. 41. Early the next morning, Yolanda went to work, but did notice that Janna never woke up to be fed and slept through her morning diaper change. Tr. Vol. III, p. 44.

Mr. Fairbanks remained home on May 28, 2015 to attend an appointment that was ultimately cancelled. Tr. Vol. III, p. 161. Thereafter, he told A.G. and E.M. that his appointment was cancelled, and he remained home. Tr. Vol. III, p. 161. Mr. Fairbanks explained that he changed the child's diaper, fed the child, and eventually went back to sleep. Tr. Vol. IV, p. 178, State's Exhibit 26. Later that day, Mr. Fairbanks found his child dead and engaged in a futile attempt to administer CPR. State's Exhibit 26. Mr. Fairbanks panicked, left the family home, and drove around with his dead daughter for hours, and finally disposed of the body in a dumpster by his family's old apartment complex. Eventually, Jeffrey Fairbanks returned to the family home around 11:00 p.m. and told them that Janna had died. Tr. Vol. IV, p. 172.

Upon being questioned by the police, Mr. Fairbanks simply explained he did not know what caused his daughter's death. State's Exhibit 26. Also, in their initial interviews, Yolanda's daughters (A.G. and E.M.)

did not implicate Mr. Fairbanks in any wrongdoing. Tr. Vol. III, pp. 148-49.

Ultimately, Jeffrey Fairbanks was charged with murder and neglect of a dependent resulting in death. Prior to trial, the prosecution filed a notice of intent to introduce 404(b) evidence – namely testimony from A.G. and E.M. that they had seen Jeffrey Fairbanks place a pillow on Janna on a few occasions. Tr. Vol. II, pp. 4, 29. Defense counsel countered with a motion in limine to preclude such evidence arguing that this was a clear violation of 404(b) evidence and this was an incredible claim by the girls whereas their initial interviews never made such a claim and Yolanda explicitly told police she had never seen a pillow placed on the child. Tr. Vol. II, pp. 4, 35-38. The trial court denied the motion and allowed the introduction of the 404(b) "pillow evidence." Tr. Vol. III, p. 3.

During the trial, the prosecution's opening statement set forth the neglect charge was based on the failure of Mr. Fairbanks to seek medical help. Tr. Vol. III, p. 16. Throughout the trial, the State speculated that Mr. Fairbanks smothered his child and made highly prejudicial claims that Mr. Fairbanks admitted to this in a video. Tr. Vol. V, pp. 27, 33. The video speaks for itself and clearly does not support this assertion. State's Exhibit 26. At trial, the 404(b) "pillow evidence" was belied by the fact that no DNA evidence was found on the pillow itself. Tr. Vol. IV, p. 244. At the close of the trial, defense counsel moved for a judgment on the evidence based on sufficiency of the evidence and prosecutorial misconduct. Tr. Vol. V, pp. 5-7. The trial court denied the motion. Tr. Vol. V, p. 8.

The jury acquitted Mr. Fairbanks on the murder charge but found him guilty on the neglect charge. The trial court sentenced Mr. Fairbanks to thirty (30) years on the neglect charge.

On direct appeal to the Indiana Court of Appeals, Mr. Fairbanks argued that: (1) the trial court erred in allowing 404(b) evidence of prior bad acts for the impermissible use of creating the "forbidden inference"; (2) Mr. Fairbanks' conviction rests solely on speculation as to what occurred behind closed doors and as to the health of the child warranting a reversal based on sufficiency of the evidence; (3) juror misconduct resulted in substantial prejudice to Mr. Fairbanks warranting a reversal; (4) the prosecution committed multiple acts of misconduct that placed Mr. Fairbanks in peril and prevented a fair trial resulting in fundamental error; and (5) Ind. Code Ann. § 35-46-1-4 is unconstitutionally void for vagueness. App.19-59. On August 1, 2018, the Court of Appeals affirmed Mr. Fairbanks' conviction. App.19-59.

Petitioner Fairbanks then sought further appellate review by the Indiana Supreme Court and filed a Petition to Transfer arguing that transfer should be granted because the Court of Appeals' decision conflicted with precedent set forth by the Indiana Supreme Court. The Indiana Supreme Court granted the Petition to Transfer. Indiana's highest court affirmed in part and vacated in part the decision of the Indiana Court of Appeals. App.1-18. In rendering its decision, the Indiana Supreme Court **shockingly changed existing evidentiary law in Indiana** in order to affirm the conviction of Petitioner and declined

to address the additional issues raised in the Petition to Transfer. App.1-18.

2. How the federal questions sought to be reviewed were raised.

On direct appeal to the Court of Appeals, Petitioner Fairbanks argued that the trial court impermissibly allowed the State to introduce propensity evidence over his objections arguing that it violated Indiana Rules of Evidence 404(b) and 403. App.34-36. Specifically, Petitioner Fairbanks argued that the law in Indiana precludes the use of propensity evidence to prove lack of accident and is only available to the prosecution after a defendant affirmatively advances a contrary claim of accident. App.36. The Court of Appeals agreed with Petitioner Fairbanks' position that the precedent established in Indiana required that a defendant must first make an affirmative claim of accident before propensity evidence is admissible. App.40. Despite reciting the correct law, Petitioner maintained the Court of Appeals applied the law incorrectly as to him and sought further appellate review in the Indiana Supreme Court. Fairbanks' Petition to Transfer to Indiana Supreme Court, pp. 8-9. The Indiana Supreme Court granted further review, but in rendering its opinion, Indiana's highest court changed the law regarding 404(b) evidence and **applied it retroactively in order to affirm Petitioner's conviction**. App.1-18. Petitioner is arguing that this change of law at the highest appellate court of the State of Indiana is a violation of the Ex Post Facto Clause and precedent set forth by this Court.

On direct appeal to the Court of Appeals, Petitioner Fairbanks argued that his Due Process rights were violated because the State presented insufficient evidence to sustain the conviction as the entire conviction is based upon a speculative version of events. App.44-45 at fn. 8. The Court of Appeals did not address the sufficiency of the evidence issue relying on its analysis on the admissibility of the propensity evidence. App.44-45 at fn. 8. Petitioner sought further appellate review on this issue from the Indiana Supreme Court, but the Court declined to entertain the issue. App.9 at fn.1.

On direct appeal to the Court of Appeals, Petitioner Fairbanks argued that the prosecution violated his Due Process rights by engaging in misconduct during the trial by confusing the jury as to its theory on the neglect of a dependent charge. App.45-48. Petitioner Fairbanks argued that the State presented to the jury two entirely different theories on the neglect charge. One theory was based upon the same pillow testimony that was submitted for the murder charge. The alternate theory was that Petitioner Fairbanks failed to seek medical help for a dead child. App.46-48. The opinion of the Court of Appeals stated that there was no rule in Indiana which prevented the State from arguing alternate theories to find the defendant guilty. App.48. Petitioner Fairbanks sought further appellate review on this issue from the Indiana Supreme Court arguing that the Court of Appeals' opinion highlights the fact that the jury was presented an alternate legal theory of failing to seek medical help for a dead child which the State acknowledged is not a crime. Petitioner Fairbanks argued that the jury may have

convicted him on facts which do not constitute a crime warranting a reversal. Fairbanks' Petition to Transfer to Indiana Supreme Court, p. 9. The Indiana Supreme Court declined to address the issue. App.9 at fn.1.

On direct appeal to the Court of Appeals of Indiana, Petitioner Fairbanks argued that the statute, Ind. Code Ann. § 35-46-1-4 which states a "person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally: (1) places the dependent in a situation that endangers the dependent's life or health" is unconstitutionally vague. App.52-53. The Court of Appeals found that the statute was not unconstitutionally vague. App. 52-54. Petitioner Fairbanks sought further appellate review from the Indiana Supreme Court, but the Court declined to address the issue. Fairbanks' Petition to Transfer to Indiana Supreme Court, p. 13; App.9 at fn.1.

REASONS FOR GRANTING THE WRIT

The Indiana Supreme Court's decision is the ideal vehicle to address whether the judiciary violates the Ex Post Facto Clause of the Constitution when it creates a new evidentiary holding to excuse the impermissible use of propensity evidence in order to affirm a conviction. Petitioner Fairbanks hereby argues that the opinion of the Indiana Supreme Court violates the precedent set forth by this Court as this Court has explicitly held that the Ex Post Facto Clause does apply to evidentiary rules and has also held that the judiciary can violate the Ex Post Facto Clause by rendering decisions that run afoul of the rule.

This case also sets forth that the Indiana courts violated Petitioner Fairbanks' Due Process rights because his conviction rests on insufficient evidence and is simply speculation. Additionally, Petitioner's Due Process rights were violated because the jury may have convicted the Petitioner based on facts that do not amount to a crime. Finally, the Petitioner argues that the statute under which he was prosecuted is void for vagueness.

I. The Indiana Appellate Courts Changed the State's Evidentiary Rules to Allow Impermissible Propensity Evidence in Order to Affirm an Unconstitutional Conviction. No Defendant Should Be Held to Such an Unlawful, Retroactive Application of the Law.

In the high-profile case of Jeffrey Fairbanks, Petitioner Fairbanks was convicted in the matter of public opinion long before he was ever arrested. In what has become a continuing trend in the past few years, media headlines vilifying an individual become an impetus to bring criminal charges. As the media created headlines demonizing Petitioner Fairbanks' erratic behavior at the loss of his child, pressure mounted to bring charges against Petitioner Fairbanks. It is these high-profile cases where the law must be followed so that individuals are afforded a fair trial. This Court has stated "[l]aw is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case." *Hurtado v. California*, 110 U.S. 516, 535-36 (1884). In Petitioner Fairbanks' case the law did

become a special rule for a particular person and a particular case.

This case also highlights the expanded use of impermissible propensity evidence to fill gaping holes in the prosecution's case in chief. The impermissible use of this type of damning testimony lightens the prosecution's historical burden of proof. This type of impermissible propensity evidence is increasingly used by the prosecution to invite the jury to convict based upon a speculative theory of events created by the introduction of historically excluded evidence. Prosecutors, as they did in Petitioner Fairbanks' case, are now asking the jury to draw the impermissible conclusion – convict because defendant did something in the past, he must be guilty now. Indeed, the prosecution in its closing argument decried "what he did before is important, the history of putting the pillow on her face, corroborated by both A.G. and E.M. They both saw it happen more than once, and they both told you that it happened when she was fussy and when she was crying. That's the only time that it happened, and it happened when Jeff was the only one home." Tr. Vol. V, p. 78. This outburst epitomizes how propensity evidence has become the illicit accelerant to secure a criminal conviction in today's era.

The law in Indiana regarding this bedrock evidentiary rule was ignored and then manipulated to pursue and then obtain a conviction. Specifically, the Indiana appellate courts issued decisions which altered existing law so Mr. Fairbanks' objections to the impermissible use of propensity evidence would not result in a reversal of his conviction. This Honorable

Court made clear in *Carmell v. Texas*, 529 U.S. 513 (2000), that altering the legal rules of evidence in order to convict a defendant violates the Ex Post Facto Clause of the Constitution. *Id.* This Honorable Court has also made clear in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), that a violation of the Ex Post Facto Clause does not solely apply to legislative actions, but also extends to judicial expansion of existing law. *Id.*

A. The Ex Post Facto Clause Applies to Evidentiary Rules as well as Judicial Construction of Those Rules.

This case presents the perfect vehicle for this Honorable Court to address whether the judiciary violates the Ex Post Facto Clause of the Constitution when a State's highest court renders a decision that modifies the existing law as to evidentiary rules in order to affirm a conviction. Additionally, this Court has not definitely decided when judicial decisions arise to an alteration of legal rules of evidence resulting in a violation of the Ex Post Facto Clause.

As to evidentiary rules, in *Carmell v. Texas*, this Court held that the Ex Post Facto Clause applied to "[e]very law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." *Carmell*, 529 U.S. at 522. The courts in Indiana clearly altered the law with regard to the admissibility of propensity evidence in order to provide the prosecution with an impermissible evidentiary avenue to present to the jury. Ultimately, the Indiana Supreme Court upended existing precedent which completely precluded the State's introduction of

propensity evidence to prove lack of accident unless this issue was first raised by the defendant. At the highest appellate level, the Indiana Supreme Court carved out a new exception to the existing rule proclaiming that the State can introduce this previously impermissible evidence if they had "reliable assurance" that a defendant may raise the issue of accident. This new "reliable assurance" exception did not exist in prior case law, but was in reality a new exception carved out to excuse the impermissible introduction of propensity evidence. Prior to this holding, the prosecution and the Court of Appeals readily acknowledged that Indiana did not have a single case "where the State admitted evidence under Evidence Rule 404(b) that the act was not a mistake or accident when the defendant had **not** made such a claim." App.40.

This Court has set forth that it is a violation of the law when "the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction." *Carmell*, 529 U.S. at 533. "There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Id.* "The Framers, quite clearly, viewed such maneuvers as grossly unfair, and adopted the *Ex Post Facto* Clause accordingly." *Id.* at 534.

Just as the legislation of the State cannot violate the Ex Post Facto Clause, this Court has held that

State Supreme Courts are prohibited from violating the Ex Post Facto Clause through judicial construction of law. This Court has stated "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie*, 378 U.S. at 353–54. This is because "'[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'" *Id.* at 351 (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

This Court reasoned that just as vague statutes violate the Fourteenth Amendment, "the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question." *Bouie*, 378 U.S. at 352, "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* "Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, s 10, of the Constitution forbids." *Id.* at 353.

A judicial Ex Post Facto violation can occur when "a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a

litigant a hearing in a pending case" depriving the litigant of his or her due process rights. *Id.* at 354. This also occurs when "a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct." *Id.* at 354-55. The Court made clear with regard to the Ex Post Facto Clause, '[t]he violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid… state statute." *Id.* at 355.

"The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute." *Id*. at 362. "While such a construction is of course valid for the future, it may not be applied retroactively… to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal." *Id.*

While there is no prohibition to the State courts in Indiana from changing their law and applying the law *prospectively*, the Ex Post Facto Clause expressly prohibits the Indiana courts from applying this new law retroactively to sustain the conviction of Petitioner Fairbanks. *Carmell*, 529 U.S. at 552–53. This Court noted "'[i]f the laws in being do not punish an offender, let him go unpunished; let the legislature, admonished of the defect of the laws, provide against the commission of future crimes of the same sort." *Id*. "The escape of one delinquent can never produce so much harm to the community, as may arise from the infraction of a rule, upon which the purity of public justice, and the existence of civil liberty, essentially depend.'" *Id*. at 553.

B. The Law in Indiana at the Time of Jeffrey Fairbanks' Trial Precluded the Use of Propensity Evidence.

On direct appeal, Petitioner Fairbanks argued that the trial court's impermissible admission of 404(b) evidence warranted a reversal under existing Indiana law. Indiana law steadfastly holds that admission of "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ind. Evidence Rule 404(b). The courts have explicitly stated that this rule excluding propensity evidence is "designed to prevent the jury from assessing a defendant's present guilt on the basis of his past propensities, the so-called 'forbidden inference.'" *Hicks v. State*, 690 N.E.2d 215, 218-19 (Ind.1997). Additionally, "the use of prior conduct evidence for this purpose introduces the substantial risk of conviction based predominantly on bad character." *Wickizer v. State*, 626 N.E.2d 795, 797 (Ind. 1993)

The law in Indiana clearly holds that when the prosecution seeks to admit 404(b) evidence, the trial court must engage in a two-part inquiry. The court must first determine whether "the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act." *Hicks*, 690 N.E.2d at 221. As an exception to the rule, prior bad acts "may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid. R. 404(b). If the evidence is offered only to produce the "forbidden inference," that

is, that the defendant had engaged in other, uncharged misconduct and that the charged conduct was in conformity with the uncharged misconduct, then the evidence is inadmissible. *Hicks*, 690 N.E.2d at 219; *see also Poindexter v. State*, 664 N.E.2d 398, 400 (Ind. Ct. App. 1996). Thereafter, the second part of the two-part inquiry involves the trial court "balanc[ing] the probative value of the evidence against its prejudicial effect pursuant to Rule 403." *Hicks*, 690 N.E.2d at 221.

At the time of Petitioner Fairbanks' trial, Indiana law had limited the intent exception and clearly set forth that prior bad acts are not permitted to prove intent in Indiana, until and unless the defendant places his intent at issue. In the seminal holding of *Wickizer*, the Indiana Supreme Court held "Indiana is best served by a narrow construction of the intent exception in Evid.R. 404(b)" and stated that this narrow construction "does not authorize the general use of prior conduct evidence as proof of the general or specific intent element in criminal offenses." *Wickizer*, 626 N.E.2d at 799. The Indiana Supreme Court reasoned that "[t]o allow the introduction of prior conduct evidence upon this basis would be to permit the intent exception to routinely overcome the rule's otherwise emphatic prohibition against the admissibility of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith." *Id.* Thus, the "admission of prior bad acts would frequently produce the 'forbidden inference' cautioned against." *Id.*

The only time this evidence becomes admissible as to intent is when the "defendant goes beyond merely

denying the charged culpability and affirmatively presents a claim of particular contrary intent." *Id.*; *Greenboam v. State*, 766 N.E.2d 1247 (Ind. Ct. App. 2002)(holding that the conviction should be reversed because the court abused its discretion when it allowed evidence of the prior bad act of previous molestation where defendant never put his intent at issue); *Thompson v. State*, 15 N.E.3d 1097 (Ind. Ct. App. 2014)(holding the court abused its discretion in allowing testimony regarding prior bad acts when the defendant never placed his intent at issue).

Further, the admission of prior bad acts to prove mistake of fact or accident **is impermissible** when the defendant does not put mistake of fact or accident at issue. *Payne v. State*, 854 N.E.2d 7 (Ind. Ct. App. 2006)(holding that the admission of prior bad acts to prove mistake of fact or accident is impermissible when the defendant does not put mistake of fact or accident at issue); *cf. Iqbal v. State*, 805 N.E.2d 401 (Ind. Ct. App. 2004)(holding that prior bad acts were admissible to prove mistake fact or accident only because the defendant raised those issues as part of his defense.)

Despite this clear and unambiguous rule, the trial court allowed the prosecution to introduce 404(b) evidence that Mr. Fairbanks on prior occasions had put a pillow on his daughter. App.28. Indeed, the prosecution's entire case centered around evidence of prior bad acts because, as the prosecution acknowledged, they needed the evidence to prove their case. Tr. Vol. II, p. 31. The State's acknowledgement is an unequivocal admission that the evidence was being proffered to prove "conformity therewith" and to

create the "forbidden inference" in direct contravention of this rule of law. Tr. Vol. II, p. 31.

Despite this explicit admission that the evidence was going to be proffered for the impermissible use of a creating a "forbidden inference," the prosecution attempted to argue that the evidence of prior bad acts fell into the exception to the rule that states that prior bad acts "may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid. R. 404(b). Specifically, in an attempt to argue that they had a permissible use despite their previous admission, the prosecution stated that they intended to use the evidence to prove intent and lack of mistake or accident. The use of these exceptions was not permitted under well-established Indiana law. In the instant action, Mr. Fairbanks merely denied the charges. Tr. Vol. II, p. 42. Mr. Fairbanks did not present any claims of contrary intent or mistake of fact or accident. Pursuant to overwhelming law, the introduction of this evidence was impermissible.

Given the fact that Mr. Fairbanks never presented any claims of contrary intent or mistake of fact or accident and the explicit admission by the prosecution that the evidence was going to be used to create a forbidden inference, the first part of the inquiry showed that no permissible exceptions to the rule applied and the prosecution was attempting to create a forbidden inference to prove its case. The inquiry should have stopped there, and the trial court should have precluded the use of this 404(b) evidence.

C. The Indiana Court of Appeals' Decision Reiterates that No Case Law Exists in Indiana Allowing the Introduction of Propensity Evidence Unless a Defendant Affirmatively Raises the Issue of Lack of Accident First.

The Court of Appeals agreed with Petitioner Fairbanks' statement of the law about when and how propensity evidence should be admitted. Although the Indiana Court of Appeals stated the law correctly, the Court of Appeals, in order to affirm the conviction, applied the law incorrectly.

The Indiana Court of Appeals agreed with Petitioner Fairbanks that "similar to intent, defendants must affirmatively claim mistake or accident before the State can admit evidence pursuant to Evidence Rule 404(b) that the act was not a mistake or accident." App.40. The Court of Appeals explained that the standard for determining when a claim of contrary intent is raised is as follows: "An accused can be said to have raised a claim of particular contrary intent through pretrial statements to police, opening statement, cross-examination of the State's witnesses, or evidence in the defendant's case in chief." App.37 (noting that "[a]bsence of mistake and lack of accident have been a more specialized application of the broader category of intent.")

The Court of Appeals noted that on appeal "Fairbanks highlights that he has consistently maintained that he doesn't know how she died." App.36. The Court further stated that "[a]s for whether Fairbanks affirmatively claimed accident during his

pretrial statements to police, opening statement, cross-examination of the State's witnesses, or evidence in the defendant's case in chief, we note that Fairbanks got very close to the line when he said he didn't know what happened to Janna and that he didn't do anything wrong." App.40.

The Court of Appeals also made clear that the State's position on appeal was that "[c]ontrary to [Fairbanks's] argument, a defendant does not need to affirmatively advance a contrary claim of accident prior to the State's introduction of prior bad act evidence." App.36. The Indiana Court of Appeals' decision noted that "the State conceded at oral argument that it had not found one case where the State admitted evidence under Evidence Rule 404(b) that the act was not a mistake or accident when the defendant had **not** made such a claim." App.40.

Despite stating the correct law, the Court of Appeals applied the law incorrectly finding that the evidence was admissible because after the evidence had been admitted in the prosecution's case in chief, the defense addressed the evidence and arguments regarding this propensity evidence raised by the prosecution in its case in chief. Of course, defense counsel had a duty to cross examine the witnesses who brought in the erroneous propensity evidence. Due to the blatant improper application of the law, Mr. Fairbanks sought further appellate review to the Indiana Supreme Court, which was granted.

D. The Indiana Supreme Court Decision Changed the Law that Precluded the Introduction of this Propensity Evidence and Retroactively Applied this New Law to Affirm Petitioner Fairbanks' Conviction.

The Indiana Supreme Court held that *Wickizer* applied in Petitioner Fairbanks' case, but then grossly changed the holding in *Wickizer* and created new law. *Wickizer* clearly states that it is the State's burden to show that the defendant has raised a claim of contrary intent requiring the **State's proffer** of evidence be accompanied by a reliable assurance that **the State** will connect it to evidence that the defendant affirmatively contested intent. *Id*. at 800 (stating "We also note that the State's proffer of prior conduct testimony was not accompanied by any reliable assurance that the State would subsequently connect it up with other evidence demonstrating that the defendant was affirmatively contesting the issue of intent.")

The *Wickizer* holding does not permit the wholesale use of propensity evidence "when the State has 'reliable assurance' that an accident defense will be raised." App.8-9. This new "reliable assurance" standard is a new law created by the Indiana Supreme Court which is at odds with existing Indiana precedent in violation of the Ex Post Facto Clause.

In fact, in Mr. Fairbank's case, the State's proffer was not accompanied by any "reliable assurance" as is required by *Wickizer*. In its proffer, the State simply stated "And because in this case, in our particular case,

the defendant has stated that he didn't know how the baby died, the baby died, he got up, he put her in his car, he drove around, and he eventually put it in a dumpster, so that negates -- that states that it's an accident. And he's -- I mean, he's implying through his actions that it was an accident. He didn't -- you know, he denied killing the child in his statement." Tr. Vol. II, p. 30.

In its closing, **the State acknowledged that Mr. Fairbanks never asserted accident** and never raised death by natural causes. The State readily stated at closing that "he never definitely said yeah this is SIDS. Yes, I rolled over on her. The detectives asked him and then even in the media interview asked him if there was any truth to the idea of a rollover and he did – he said no." Tr. Vol. V, p. 83. As such, accident and natural causes were not matters actually at issue in the case, but simply a pretext for creating the forbidden inference. The State clearly did not offer any proffer of "reliable assurance" as even its Brief in Opposition to the Court of Appeals solely argued that "[c]ontrary to Defendant's argument, a defendant does not need to affirmatively advance a contrary claim of accident prior to the State's introduction of prior bad act evidence." State's Brief to Court of Appeals, p. 21. In fact, the Court of Appeals' decision noted that the State's position was that it was not required to show contrary intent before introduction of this propensity evidence. App.36.

The law prohibiting the use of propensity evidence was to prevent the prosecution from obtaining a conviction based upon the forbidden inference.

Wickizer, 626 N.E.2d at 797. By changing the rules regarding the admission of this evidence at the last appellate level, the Indiana Supreme Court clearly "altered the legal rules of evidence, and received less, or different, testimony that the law required at the time of the commission of the offence, in order to convict the offender." *Carmell*, 529 U.S. at 522.

By changing the law, the courts in Indiana violated the Ex Post Facto Clause by allowing in different testimony than what was permitted under established precedent. Petitioner was not afforded a fair trial and his Due Process rights were violated. The rules of procedure set forth a system for a fair trial. Objections are lodged so that errors made by the trial court can be reviewed and corrected on appeal. Changing existing law at the appellate level in order to sustain the conviction upends the entire legal system. A defendant's counsel cannot have a legal strategy when the law and rules of evidence can be changed after the trial in order to have the conviction "stick." If these types of decisions are allowed to stand, then the faith in the legal system is forever destroyed as there is simply no point to appellate courts or appellate review. The law prohibits making a "special rule for a particular person or a particular case." *Hurtado*, 110 U.S. at 535-36.

II. The Prosecution Merely Speculated that a Crime Was Committed. Just as Alarming is that this Speculation was Based Upon Impermissible, Historically Excluded Propensity Evidence.

Petitioner Fairbanks' conviction violates the Due Process Clause as the conviction rests solely on speculation warranting a reversal based upon sufficiency of the evidence. Indeed, the Due Process Clause of the Fourteenth Amendment requires that a defendant be convicted by proof of guilt beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 364 (1970). The law in Indiana makes clear that the Due Process Clause requires "in every case where that issue is raised on appeal we have an affirmative duty to make certain that the proof at trial was, in fact, sufficient to support the verdict beyond a reasonable doubt." *Bunting v. State*, 731 N.E.2d 31, 35 (Ind. Ct. App. 2000). The law holds that "doubt may arise from the evidence, the lack of evidence, or a conflict in the evidence." *Id*.

The case law in Indiana clearly provided the requirement of proof beyond a reasonable doubt dictates that "[a] conviction cannot be based on speculation." *Watson v. State*, 839 N.E.2d 1291, 1294 (Ind. Ct. App. 2005); *Neville v. State*, 802 N.E.2d 516, 518 (Ind. Ct. App. 2004); *Bunting v. State*, 731 N.E.2d 31, 35 (Ind. Ct. App. 2000)(stating "the mere suspicion or possibility of guilt is not sufficient to sustain a conviction"); *Floyd v. Stat*e, 399 N.E.2d 449, 451 (Ind. Ct. App. 1980); *Briscoe v. State*, 180 Ind. App. 450, 462, 388 N.E.2d 638, 645 (1979); *Durham v. State*, 250 Ind.

555, 562, 238 N.E.2d 9, 13 (1968)(holding "[a] verdict based merely upon suspicion, opportunity, probability, conjecture, speculation or unreasonable inferences of guilty gleaned from the vague evidence…cannot be upheld and must be reversed").

The Indiana courts have also established that due process dictates that it is impermissible to make inferences from evidence that is speculative, specifically stating that "[a]n inference cannot be based on evidence which is uncertain or speculative or which raises merely a conjecture or possibility." *Neville v. State*, 802 N.E.2d 516, 518 (Ind. Ct. App. 2004); *Durham v. State*, 250 Ind. 555, 562, 238 N.E.2d 9, 13 (1968). The law holds that "the proof of a mere opportunity to commit the crime, without more, is not sufficient to sustain a conviction." *Briscoe v. State*, 180 Ind. App. 450, 462, 388 N.E.2d 638, 645 (1979); *Durham v. State*, 250 Ind. 555, 562, 238 N.E.2d 9, 13 (1968)(stating "the proof of a mere opportunity to commit the crime, without more, is not sufficient to sustain a conviction").

In this case, the State's evidence consisted solely of speculation that Mr. Fairbanks had the opportunity to commit a crime and the jury was then asked to make impermissible inferences based upon that speculation. The State requested that the jury speculate as to what occurred behind closed doors simply because the child died while Mr. Fairbanks was asleep in the room with the child. The jury was then impermissibly asked to make the forbidden inference that Mr. Fairbanks used a pillow to smother his child based upon the inconsistent and impeached testimony of two children

whose stories kept changing regarding this purported pillow evidence. Indeed, the State admitted that its entire case rested upon impermissible 404(b) evidence to speculate that Mr. Fairbanks used a pillow to smother his child.

The State, throughout its case, made the claim that the baby was healthy when she died. No proof was submitted but rather speculative testimony from a young, relatively inexperienced pediatrician who had not examined the child for three months. Tr. Vol. III, pp. 228-29. The only testimony elicited as to the health of the child was from the child's pediatrician who examined the child for fifteen minutes ten days after the child was born. This pediatrician simply adduced from the notes that the child was healthy at one month old, despite the fact that the notes indicated that the child had subconjunctival hemorrhages at one month old and an admission that the doctors did no additional testing on the child at that time. Tr. Vol. III, pp. 232, 240-41. Indeed, in *Reed v. State*, 180 Ind. App. 5, 9–11, 387 N.E.2d 82, 85 (1979), the court held that this type of testimony from a doctor that consisted of hypothetical questioning of a doctor was insufficient to sustain a conviction.

Simply put, the State's case was based on conjecture and speculation which is a violation of Petitioner Fairbanks' Due Process rights.

III. The Prosecution Argued to the Jury, During Its Opening and Its Closing, that Petitioner Fairbanks Failed to Secure Medical Treatment for an Already Dead Child. This is Not a Crime.

This Honorable Court held "while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States,* 295 U.S. 78, 88 (1935). The prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181 (1986).

It is a fundamental element of Due Process that "no person may be punished criminally save upon proof of some specific illegal conduct." *Schad v. Arizona*, 501 U.S. 624, 633 (1991). This Court has stated that "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." *Id.* Indeed, Justice Scalia explained that "[w]e would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday...." *Id.* at 651. *See also Richardson v. United States*, 526 U.S. 813, 820 (1999)(citing the *Schad* plurality opinion and Justice Scalia's hypothetical with approval).

Any jury would be confused as to what legal theory was the basis for the neglect of a dependent charge. That is, the State claimed at trial that the neglect charge was either the failure to obtain medical help for Janna on the date of her demise or the State also argued that the neglect was the placing of a pillow over the child which supposedly resulted in her death – although the jury **rejected** this theory on the murder charge. The Court of Appeals accurately noted that the State did argue that the failure to obtain medical help was part of the State's neglect argument, and the Court also noted that significant prosecutorial time was spent on the prosecution's argument that Mr. Fairbanks failed to seek medical help for Janna. App.45-48. The Court of Appeals, however, claims that the neglect charge was limited to the pillow theory by the time the prosecution's closing took place, but omitted the fact that the State, in its closing, continued to argue that the failure to seek medical care was also the basis for the neglect charge. In its closing, the State argued "he didn't do anything to seek medical care for her." Tr. Vol. V., p 32. It is important that only one theory was presented to the jury at the time of trial **wherein the State admitted in its brief** "[f]ailing to seek medical assistance after the baby is already dead could not then result in her death. Thus, in this case, the failure to seek medical help could not have been the basis for the neglect charge." State's Brief to Court of Appeals, p. 49. Yet, the State argued throughout trial that the failure to seek medical help was a basis for the neglect charge. This is palpably ridiculous, and no person should linger in prison wherein the jury may have convicted Mr. Fairbanks on a claim the State readily admits has no basis in law or fact.

In an effort to affirm this wrongful conviction, the Court of Appeals concluded "there is no rule that prevents the State from presenting the jury with alternate ways to find the defendant guilty as to one element." App.48 (citing *Baker v. State*, 948 N.E.2d 1169, 1175 (Ind. 2011)). This argument was never asserted by the State at the trial or appellate level and the appeals court's legal reasoning here is flat wrong. The *Baker* holding applies to situations where either alternate theory of culpability can establish an element of the crime charged. *Id*. In this instance, the jury may have wrongly convicted Mr. Fairbanks for failing to seek medical help **for a child who was already dead** which the State readily admits cannot establish a neglect charge because "[f]ailing to seek medical assistance after the baby is already dead could not then result in her death." State's Brief to Court of Appeals, p. 49. As a result, the Court's holding has no legal weight. In fact, the Court of Appeals' reasoning that the State was permitted to present this alternate legal theory to find the defendant guilty only highlights the fact that the jury may have convicted Jeffrey Fairbanks on a legal theory that the State acknowledges is not a crime. Due Process does not permit such a result.

IV. The Indiana Neglect Statute, Which Had Previously Been Found Unconstitutionally Vague, Remains Inherently Vague Whereas Petitioner's Conviction May Rest Upon a Criminal Theory that Falling Asleep with his Child is Somehow a Criminal Act.

Ind. Code Ann. § 35-46-1-4 which states a "person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally: (1) places the dependent in a situation that endangers the dependent's life or health" is unconstitutionally vague. Due process principles advise that a penal statute is void for vagueness if it does not clearly define its prohibitions. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551, 2556 (2015). United States Supreme Court cases clearly "establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Id.*; *Kolender v. Lawson,* 461 U.S. 352, 357–58 (1983). "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process.'" *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551, 2556–57 (2015)(citing *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926)).

The prosecution charged Mr. Fairbanks with neglect of a child resulting in death pursuant to Ind. Code Ann. § 35-46-1-4 which states a "person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally: (1) places the dependent in a situation that endangers the dependent's life or health" is guilty of criminal neglect. The prosecution argued that sleeping fits the statutory definition of neglect. Specifically, the prosecution argued: "So the child is not supervised for hours. Just because he's in the room -- if he's asleep, he can't supervise." Tr. Vol. V, p. 8. Clearly, the prosecution's argument that a parent can be prosecuted for sleeping attempts to criminalize normal behavior. The statute provides that the mere presence of an adult when a minor dies results in a criminal act. This is far too elastic of a standard for the basis of any statute in the criminal code. Indeed, here the State argued that Mr. Fairbanks sleeping with his child was a purported negligent act. Such a standard would require parents to hire a babysitter to watch an infant anytime the parents needed to sleep. The prosecution's argument highlights the vague nature of the statute which would criminalize trivial behavior which is not permitted by law. This statute is unconstitutionally vague and as a result Mr. Fairbanks' conviction must be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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