IN THE SUPREME COURT FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v. No. S-1-SC-39283

DEBORAH GREEN,

Defendant-Appellee.

DEBORAH GREEN'S ANSWER BRIEF

Direct Appeal from a Writ of Habeas Corpus
Case No. D-1333-CR-2017-00261
Case No. D-1333-CR-2018-00053
The Honorable James L. Sanchez, District Court Judge

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Oral Argument Requested

March 30, 2023

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CERTIFICATE OF COMPLIANCE WITH RULE 12-318(F), NMRA

I certify, according to Rule 12-318(F), NMRA, that this brief complies with the type-volume, size, and word limitations of the New Mexico Rules of Appellate Procedure because it contains 10,265 words, excluding all text excluded by that rule, and was prepared in size 14 Garamond font, a proportionally spaced type face, using Microsoft Word as part of Microsoft Office 365.

/s/ Nicholas T. Hart
Nicholas T. Hart

TRANSCRIPT OF PROCEEDING

Any citations to the record proper are delineated by "R.P." followed by the page number. Any citations to the transcripts are delineated by "Tr.," followed by the date of the transcript, followed by the page number, and then followed, if necessary, by the line numbers of the cited text.

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Factual and Procedural Background

I. Relevant Facts

The charge at issue arises from the mid-January 2014 death of E.M., a 12-year-old boy who had lived with his mother, Stacy Miller, in the Aggressive Christianity Missionary Training Corps ("ACMTC") on a property in Fence Lake, New Mexico. R.P. 1615. ACMTC was an intentional living community that lives together in dormitory-style housing and practices a disciplined, prayer-focused, communal and semi-cloistered, self-sufficient way of life. R.P. 1616. Everyone wakes up at 4:30 a.m., working hard throughout the day growing food, practicing carpentry and similar crafts, and selling the products of this labor at local farmers' markets and similar venues for meager amounts of money. R.P. 1617. The group originated in the Salvation Army, from which it separated in the early 1980s, and has retained the Salvation Army's loosely hierarchical structure and use of military title. R.P. 1617. The leaders of the Fence Lake community were Deborah Green and her husband, James Green. Neither Ms. Green nor Mr. Green had any criminal history before the cases brought against members of the ACMTC. R.P. 1617.

The investigation of ACMTC started in earnest in January 2016, when two women left the community and contacted the Cibola County Sheriff's Office to inform the office that a boy in the community had died from illness two years earlier and was buried on the property. R.P. 1617. Not finding records of a death matching that description, the Sheriff's Office investigated an allegedly unreported death. *Id.* The

office got in contact with Ms. Miller, who had since moved away from Fence Lake with her other children and moved to Elephant Butte, New Mexico. *Id.* Ms. Miller told the Sheriff's Office that most everyone in the community, including E.M., had gotten ill with what looked like the flu at the end of 2013. E.M. himself had not gotten sick until mid-December. She said that "[e]verybody started to get better, even [E.M., a]nd then all of a sudden he began to get really sick and he lingered for several weeks," finally dying on an unknown date in the middle of January 2014. R.P. 1618.

Shortly after, the Sheriff's Office obtained a warrant to have E.M.'s body exhumed from a burial plot on the land. The body was exhumed on February 9, 2016, and, given the "mumification" and "[s]evere putrefactive decomposition" present, the Office of the Medical Examiner could not state a specific cause of death. R.P. 1618. The Medical Examiner found that [n]o trauma or evidence of natural disease is evident," and listed nothing in the "Evidence of Injury" field. *Id.* "The organs [we]re largely absent," including the eyes, neck, heart, all organs of the digestive tract, lymph nodes, thymus, endocrine organs, and musculature and subcutaneous tissues, none of which could be examined. *Id.* There was enough remaining liver tissue present to run a toxicology screen, which came up negative for drugs and alcohol, and enough tissue left from one lung to test for "mycobacteria (a class of bacteria that can cause tuberculosis, leprosy, and other diseases)," which also came back negative. *Id.* The Medical Examiner did still conclude that the manner of death was "natural" and speculated that "probable infectious disease" was the cause (with the major caveat that the "cause of [E.M.'s]

infection remains unknown"), and it based this tentative conclusion largely on "the investigative information" and "reported history of infection and facial abscesses" given by the Sheriff's Office, but also in part on "subtle changes and areas of bone loss on the skull," which were examined by a forensic anthropologist. *Id.*

The Child Abuse charge against Ms. Green relied solely on the theory that she personally had an obligation to take E.M. in for medical treatment but did not, requiring the State to prove: (1) why Ms. Green had the legal duty (or even the right) to take E.M.—an unrelated child who lived in a separate house with his own biological mother—to the doctor; and (2) how MS. Green breached that duty despite offering to send E.M. to a doctor if Ms. Miller wanted. R.P. 1618. Ms. Miller provided a written statement asserting that she, E.M's biological mother, was present for his death. *Id.*, at 1620. She stated that she "assumed [E.M.] died of the Flu or Huntington's Disease, which is incurable, and runs in his father['s] family." *Id.* Ms. Miller also gave a videorecorded interview to Ms. Green's trial counsel, in which she gave a long narrative largely consistent with the State's theory of the case: the whole community had had the flu; E.M. had flu-like symptoms for about two weeks; and he appeared paralyzed on the right side and couldn't talk for the last week. Ms. Miller stated that E.M. had a fever for a good while before his death and that his sinuses were very swollen, but in the days just before he died the fever had gone down and pus had begun to seep out, which she believed was good because it was relieving pressure on E.M.'s sinuses. Ms. Miller also believe that E.M. "looked like he was getting better." *Id.* More importantly, she was

adamant that Ms. Green in no way interfered with her ability to procure medical care for her boy: "'The Greens came to me, and they said 'if you want to take him to the doctor, that's your decision,' and they said 'we stand by you on that decision.'" *Id.* She is emphatic that "they left that to [her] choice." *Id.* Ms. Miller, however, elected to take care of E.M. at home, rather than taking him to a doctor. *Id.* When asked "if [she] had it all to do over again--," she cut off the question, answering confidently, "I wouldn't do anything differently." *Id.* at 1620-21.

II. Procedural History

Ms. Green first proceeded to trial on separate charges, which resulted in several convictions and a 72-year sentence.[1] R.P. 1621. The same day the judgment and sentence was entered on the trial counts, Ms. Green signed the Plea Agreement at issue in this writ, through which she pled no contest to Child Abuse, agreed to the maximum statutory penalty (18 years), and the minimum good-time accrual rate (15%). *Id.* At the plea hearing, Ms. Green acknowledged that she hadn't read the Plea Agreement, and said that she "d[id]n't agree with the original document [that] said 'guilty,' but [] wanted the 'no contest.'" *Id.* at 1622. The Child Abuse Resulting in Great Bodily Harm charge to which Ms. Green pled, with the portion of the charge disclaimed at the plea hearing stricken is:

[1] Those convictions were vacated prior to the filing of the Writ of Habeas Corpus because of gross misconduct and violations of *Brady v. Maryland* by the prosecuting attorneys.

> On or between December 01, 2013 and January 29, 2014, in Cibola County, New Mexico, the above-named defendant did ~~intentionally or~~ recklessly cause or permit E.M., a child under the age of eighteen, to be placed in a situation that may endanger life or health, ~~or to be tortured, or cruelly confined or cruelly punished~~, which resulted in great bodily harm to E.M., a first degree felony, contract to Section 30-6-1(D) and (E), NMSA 1978.

Id. at 1639. *See also id.* at 1664-1668. Ms. Green then received a sentence of 18 years. *Id.* at 1661-63.

III. Hearing Regarding Writ of Habeas Corpus.

Ms. Green filed her petition seeking a writ of habeas corpus on January 12, 2021. R.P. 1612. Following the State's response, R.P. 1771, and a preliminary disposition hearing, R.P. 1889-1891, the district court held an evidentiary hearing from January 18, 2022, through January 21, 2022. R.P. 1892.

A. The testimony of fact witnesses.

Ms. Green first presented testimony from her son, Joshua Green, regarding the history of ACMTC. For example, Joshua testified that ACMTC is an intentional community that lives, works, and eats together. TR., 01/18/2022, at 53-54. Joshua also testified about the flu that went through the property and that resulted in E.M.'s death. For example, Joshua had caught the flu and recovered. *Id.* at 62. Joshua also testified that nearly everyone living on the property caught the flu, that none went to see doctors or get medical attention, and that all recovered from it. *Id.* at 63-66.

The next witness was Victoria Diaz. Ms. Diaz testified that she was born on the property and had been part of ACMTC for her entire life. Tr., 01/18/2022, at 93. Ms.

Diaz testified about E.M. and his struggle with the flu. For example, Ms. Diaz testified that E.M. caught the flu twice, that "[h]e had it and then he got over it and then he caught it again." *Id.* at 105:12-14. Ms. Diaz testified that E.M. would come down to the kitchen, say that he was feeling better and feeling great, would help in the kitchen, and that he was eating before he started to be symptomatic again. *Id.* at 106. This went on for about a week. *Id.* at 107. Ms. Diaz then testified that E.M. did not have an appetite after he caught the flu for a second time, that she would offer him food, and that he would say no. *Id.* at 108. Finally, Ms. Diaz testified that her children suffered from the same flu and that all recovered without receiving any medical care or going to the doctor. *Id.* at 108-109.

Hannah Jordan, another resident of the property, also testified about the flu that went through the property. *Id.* at 126-27. She testified that the flu she caught was hard to get over, that her symptoms improved and then get worse several times while fighting it, and that nearly everyone caught it. *Id.*

Benjamin Miller, the brother of E.M., then testified about the time at the property when everybody caught the flu. *Id.*, at 83. *Id.* Benjamin had testified that he saw E.M. on the day that he died, and he saw puss on E.M.'s head, but that he never saw puss seeping from E.M.'s head before that. *Id.* at 85, 87. Benjamin also testified that "a couple of days before [E.M.] passed away, he could move." *Id.* at 88:20-21. And Benjamin testified that E.M. had been walking around three days before passing away. *Id.* at 89:16-19.

Finally, the Court heard testimony from E.M.'s mother, Stacy Miller. Ms. Miller testified that every child that lived on the property caught the flu and recovered except for E.M. Tr., 01/19/2022, at 7:13-14. Ms. Miller also described E.M.'s flu as "usual - - he had an earache, like a lot of children get, . . . I think he had a fever," and that it did not seem serious. *Id.* at 7-8. Ms. Miller then testified that "[i]t seemed like [E.M.] was recovering and it seemed like he was getting better, so [she] though it was okay." *Id.*, at 8:14-16. Ms. Miller then testified that while E.M. did have a bump on his forehead, there was discharge coming from the bump, at which point she applied antibiotic cream, and after which E.M. "seemed more alert and happier." *Id.* at 10:17-24. Ms. Miller also stated that the bump started to shrink, and she "thought that would be the end of it and [E.M.] would get better after that." *Id.*

Ms. Miller also testified about E.M.'s general state. She testified that E.M. was eating. *Id.* at 10:25-11:2. That E.M. was able to talk with her. *Id.* at 11:17-25. That he was asking for food. *Id.* at 12:1-2. That he was asking to see people. *Id.* at 12:3-4. That it seemed like he was improving. *Id.* at 17:24-18:1. And that E.M. died suddenly. *Id.* at 12:5-8. Finally, Ms. Miller testified that Ms. Green never prevented her from caring for E.M., from giving him medicine or any treatment that he needed, and that she never asked or tried to take E.M. to the doctor but she was confident that she would have been able to do so if she so chose. *Id.* at 15-16.

B. The testimony of Dr. Lauren Dvorscak.

Dr. Lauren Dvorscak, from the Office of the Medical Investigator, testified during the hearing as an expert in forensic pathology. Her testimony mirrored the findings of her report regarding the autopsy of E.M. Tr., 01/19/2022, at 35-37. Aside from the information contained in her report, Dr. Dvorscak testified that she could not determine whether the infectious disease was viral, bacterial, or fungal. *Id.* at 37-38.; 48:13-16 And she testified that she could not state to a reasonable degree of medical certainty whether E.M. would have lived or whether E.M.'s condition would have improved if he received medical care because there was no way of forming such an opinion based on the information that had been provided and because she was not a treating physician. *Id.* at 48:13-49:7.

C. The testimony of Dr. Ronald Liss.

Ms. Green also presented testimony from her retained expert, Dr. Ronald Liss, who was recognized as an expert in emergency medicine. Dr. Liss testified that "[w]ith all the records that I have, it was pretty certain to me that nobody could identify exactly what caused [E.M.]'s demise." Tr., 01/19/2022, at 8:7-9. *See also id.*, at 8:18-19 (explaining that "there was no way to determine what actually was the cause of death"). In more detail, Dr. Liss offered the opinion that:

> The OMI came up with a conclusion of probable infectious disease as a natural death and the forensic pathologist just was able to come up with an infection process as cause because of the damage to the bony structure of the skull and face. With no adequate testimony or records of [E.M.]'s situation, the exact timing, onset of his symptoms, duration

> of symptoms, severity of symptoms, and no idea whether the drainage wounds on his face went on for a short time or a long time, or whether he, in fact, had any symptoms of Huntington's disease that was brought in as a potential complicating factor inherited from his father, possibly, there's no way to identify what the actual cause of death was, and certainly no way to be certain of whether he could have been saved.

Id., at 8:19-9:8. *See also id.*, at 9:8-14 ("A lot of hypotheses can be made, a lot of ideas can be bantered about likely causes and unlikely causes, but the bottom line is, it is impossible to tell what the actual cause was and whether any medical intervention, at what point along the path, could have possibly made a direct improvement, much less a certain save for this young man."); *id.*, at 15:8-11 ("There's no point I can put my finger on that says this was the go-no-go point that he would have been saved, and past this point he would not have been saved, at no point nobody can say that.").

Because an in issue in this case is an apparent facial abscess and what affect the facial abscess had on E.M.'s condition, Dr. Liss offered testimony about the potential causes of the abscess:

> He definitely had some sort of infection going on in his face, but those sort of draining would could be from tumors that have eroded from his facial bones, the nasal bones, the orbital bones, or it could have been something initially, something as innocuous as tripping and falling and getting some wood from a tree or something stuck under the skin, which then became infected, and then got into his system and developed a septic picture—but then, again, anything that is stipulated would all be guesswork.

Tr., 01/19/2022, at 9:25-10:19. Dr. Liss was also questioned and testified about whether the flu is the most common cause of facial abscesses in children:

> Q: Is viral influenza the most common cause in these types of abscess in children?
>
> A: No. Viral influenza is not the most common cause.

Id. at 10:10-10:20. And Dr. Liss was questioned and testified about the type of infection E.M. suffered from:

> Q: Can you tell me today whether the abscess was caused by a bacterial or viral infection?
>
> A: I cannot tell you for a certainty. It could be from a fungus; it could be from a viral source, or it could be bacterial. Without cultures of the drainage, and the biopsy of the bony abnormalities, those bony islands that they talk about on the forensic anthropology report, we can't be certain.

Id. at 12:7-12:14.

Finally, Dr. Liss was asked about the potential cause of death, and whether, in his experience as an emergency room doctor that had filled out death certificates in the past, he would have been able to identify a cause of death:

> With those combination of symptoms, there are some likely causes, but I would be very hard-pressed to fill out a death certificate with certainty to say this was an infection of a particular nature, because I would need cultures from the sites that were oozing pus and possibly even biopsy or even scrapings from the bones to be certain, and then to have detailed CT scans, angiograms or MRI of the bony anatomy and of the soft tissues to see whether he had a stroke from a septic emboli or a chunk of the bacteria or fungus that has broken loose into the bloodstream and traveled up to his brain causing paralysis and unilateral vision loss.
>
> I don't believe that I would be able to make a certain diagnosis.

Tr., 01/19/2022, at 12:15-13:10. Dr. Liss was also asked if he could determine that E.M. could have been saved if he was brought into the emergency room, and stated:

> Well, no . . . . Had they brought the child to the ER with the beginning of the influenza symptoms, then depending on whether it was within 48 hours of the onset of symptoms, whether he would get a medicine. I think in all likelihood he would have gotten symptomatic treatment, treating his cough, treating his fever, treating his aches and myalgias, muscle aches, then sent home. If you then postulate differently the way that he was brought in when he had the symptoms of a stroke, the paralysis, the vision abnormalities, he would have been hospitalized, and it would not all be certain whether he would have died from those symptoms or whether we would be able to make an intervention to save him, but it would be a very uphill battle to try and save him.

Id. at 14:1-19.

The State attempted to elicit testimony on cross-examination regarding the likelihood or certainty that E.M.'s condition would not have worsened or would have improved but elicited nothing beyond generalities about medical care. For example, the State asked Dr. Liss whether he would "expect that medical intervention would change the course of the illness," and Dr. Liss stated "[p]ossibly." Tr., 01/19/2022, at 17:15-20. Similarly, the State asked Dr. Liss there was a stage at which a medical provider "would have a better chance at saving" E.M.:

> A. Well in our philosophy, earlier treatment is better, but there is no point along that timeline where you have suggested that is a final decision point. So at any point, we want to see patients that have unusual symptoms sooner than later.
>
> Q: And is that because medical intervention at those earlier stages is the best chance to make sure that the condition doesn't worsen?
>
> A: That is what our whole medical system is based upon, yes.

Id. at 21:9-22. These generalities, however, never approached the core issue in this case: whether the State could have shown beyond a reasonable doubt that the failure to provide E.M. with medical care caused his death or worsened his condition.

Finally, the Court engaged in a brief colloquy with Dr. Liss regarding the primary issue in this case:

> Q: So within a reasonable degree of medical probability, do you have an opinion whether medical intervention could have been provided to have prevented the death of the child?
>
> A: At what point?
>
> Q: Well, just within the information that you have been given. In other words, you had the symptoms that had been presented to you, is there a point that you could say within a reasonable degree of medical probability that the death would have been prevented or not?
>
> A: Frankly, I have too little information to give you a yes; there's a reasonable chance of medical probability that—I have no idea what is cause—or what caused his death, and without knowing that, it's impossible to stipulate to a reasonable chance of medical probability of success.

Id. at 23:3-13.

D. The testimony of Dr. Karen Campbell.

The State presented testimony from its expert, Dr. Karen Campbell, who was recognized by the Court as expert in forensic pediatrics. Dr. Campbell's opinion was:

> From the cold and then the secondary infection, while there's no way that we are going to be able to say what microbe caused this or what kind of infection was resulting in his sinusitis, he then, without receiving medical attention, got worse. He also, then, the drainage from the pus from the skin, the pus also is corrosive and it actually

> eroded through bones of the skull of the face and the skull and because of his symptoms that he had and the natural history of the disease, it is my belief that there was—it affected his brain cause him to become paralyzed, unable to talk and with mental status change, leading to his death. So this is what—it sounds like it is a long-drawn-our process, but obviously it can happen over a number of weeks.

Tr., 01/21/2022, 12:19-13:7. Dr. Campbell also answered questions about the point in time in which medical attention may have benefitted E.M. *Id.* at 17:13-19:23. This portion of questioning only discussed generalities, and never touched upon whether E.M. could have lived, improved, or stayed the same had he received medical attention. For example, Dr. Campbell testified to medical probabilities:

> Q: Can you say to a reasonable degree of medical probability, given your experience with sinus infections or sinusitis that you have, that the lack of medical care caused [E.M.]'s condition to get worse?
>
> A: Based on my training and my experience, I would have to say yes.

Id. at 19:24-20:10.

While Dr. Campbell testified that she could say, "to a certain degree of medical certainty that earlier intervention would have made a difference in this case," *id.* at 24:4-8, that testimony later fell apart on cross-examination. For example, Dr. Campbell answered, "I couldn't say," when asked whether she could "say to a reasonable degree of medical certainty . . . that [E.M.] didn't have infections in any other parts of his body." *Id.* at 43:2-8. *See also id.* at 43:19-44:1 (answering "I cannot" to the question: "Could you say to a reasonable degree of medical probability that [E.M.]'s infection was limited to the sinuses"). In fact, Dr. Campbell admitted that she could not determine to

a reasonable conclusion to any degree of medical certainty the actual cause of E.M.'s condition or death:

> His brain was affected. It could have been meningitis, yes, abscess is always a possibility in these cases. We are talking about brain involvement. Now, what I can't tell you is, because if he was dehydrated, because he wasn't eating or drinking or hadn't been fed or whatever, could that also have possibly caused his death? Yes. Abnormal electrolytes can lead to death. That's the problem with dehydration. Could he have also had a raging sepsis that evolved because of the sinusitis that wasn't treated that led to these open wounds and that bacteria got into his bloodstream and also resulted in his death, yes. What we are talking about is, we know from the forensic anthropology report, the description of the woven bone that there was active bone infection at the time of his death. So, I mean, the probable infection he died from, as Dr. Dvorscak said that, I think that's because she can't completely rule out and neither can I, that he got dehydrated and abnormal electrolytes can cause the heart to stop beating.

Id. 46:5-23. And Dr. Campbell was even questioned regarding her careful selection of language, explaining to the Court why she would use "could" rather than "would" when stating her opinion:

> Q: Can you explain to the Court . . . the difference between whether something could happen versus something would happen?
>
> A: I think it goes right back down to certainty or probability of something; is that could is a lot more open to something that's probable and possible as opposed to would, which is more certain.
>
> Q: . . . [I]s it correct that you are essentially saying here today [ ] that medical attention for [E.M.] could have been beneficial, but you can't say that it would have been beneficial?
>
> A: That's correct, nobody can and we definitely can't if we never see the patient.

Tr., 01.21.2022 at 51:12-25. Dr. Campbell was then asked whether she could "say with all of this uncertainty that if [E.M.] had received medical attention, based on a reasonable degree of medical certainty, that he would have lived," to which she answered: "No one can tell you that." *Id.* at 46:24-47:6. Dr. Campbell's testimony about general testimony about medical care was also shown to provide nothing other than speculation as applied to E.M.:

> Q: So, if [E.M.] came in to see you as a pediatrician with flulike symptoms, would you absolutely have prescribed him an antibiotic, start at the beginning?
>
> A: Not at that point, no. . . . No, it would be symptomatic treatment with, again, the specific criteria for return. If you are not getting better or you get worse, come back . . . .
>
> Q: . . . And with doing all those things, can you say to a reasonable degree of medical certainty, that [E.M.], we know [E.M.] would have lived at that point?
>
> A: No one can.
>
> Q: Because even patients who get the most typical treatment do sometimes pass away?
>
> A: That's correct . . .

Id. at 39:13-21; 40:1-41:18.

IV. The District Court's Order Granting the Writ of Habeas Corpus.

On January 8, 2022, the district court issued its Findings of Fact and Conclusion of Law granting Ms. Green's petition. R.P. 1980. In that order, the district court correctly noted that "[o]f critical importance to this Court's decision on the Actual

Innocence of Petition is the nature of the alleged abuse." *Id.* at 1984. The district court also noted that the parties disputed the theory of the case, with Ms. Green asserting that the great bodily injury alleged by the State was the death of E.M., and with the state alleging that the great bodily injury was E.M.'s worsening condition which led to E.M.'s loss of vision, partial paralysis, and having a leaky abscess on his head. *Id.* at 1894-95. The district court then noted that both medical experts presented during the hearing noted that they could not say to any degree of medical certainty that E.M. would have survived or his condition would have improved because there was not sufficient information to do so. *See id.* at 1986 (noting that the defense expert, Dr. Ronald Liss, testified that "[t]here was no way to determine what actually was the cause of death . . . There's no point I can put my finger on that says this was the go-no-go point that he would have saved and past this point he would not have been saved," and that the State's expert, Dr. Karen Campbell, answered "So, of course, no, I can't say that," to the question, "Can you say to a reasonable degree of medical certainty that [E.M.] absolutely would have gotten better").

The court then found that Ms. Green was a custodian of E.M. because "she was an adult who lived with the child, and she exercised extreme control over the child's life and welfare." R.P. 1988. And the court concluded that "[t]he State did not present sufficient expert testimony on causation to support a first degree felony charge for Child Abuse Resulting in Great Bodily harm." *Id.* Based on these findings, the district court

concluded that Ms. Green was "actually innocent on the count 9 charge of Child Abuse, and that charge should be dismissed." *Id.* at 1989.

* * *

Ms. Green was released the same day the district court issued its findings and conclusions. R.P. 1990. The State timely appealed. R.P. 1994. The State then filed a Statement of Issues that limited this appeal to consideration only of the district court's order vacating Ms. Green's child abuse conviction.

Legal Argument

I. A Defendant May Raise a Claim for Actual Innocence Following a Guilty Plea.

The State first asserts that the district court's order should be vacated because Ms. Green was prohibited from asserting her actual innocence through a habeas petition. *See* BIC, at 14-15 (contending that a defendant may only make challenges to a conviction for the sufficiency of the evidence through a direct appeal). That is incorrect. The district court properly allowed Ms. Green to challenge her conviction for child abuse through the filing of a petition for a writ of habeas corpus based on her actual innocence.

A. A plea does not prohibit a defendant from seeking post-conviction relief by asserting actual innocence based on a change in the law.

The State recognizes that "the question of whether New Mexico permits the assertion of a freestanding claim of actual innocence in a habeas petition after a plea

appears to be a matter of first impression." *Id.* at 14-15. And the State recognizes that the other jurisdictions to have considered this question "have allowed Defendants to make a claim of actual innocence notwithstanding the fact that he or she entered a plea." *Id.* at 15. Yet the State asks this Court to prevent Ms. Green from challenging her conviction for child abuse by asserting that she is actually innocent of the offense. This request directly conflicts with the overwhelming majority of other courts and states.

For example, federal law allows for petitioners to seek relief from a conviction, even obtained through a plea, when a petitioner makes a claim of actual innocence. *See Bousley v. United States*, 523 U.S. 614, 623 (1998) (remanding a post-conviction petition filed after pleading guilty to an offense to "permit petitioner to attempt make a showing of actual innocence"); *United States v. Torres*, 163 F.3d 909, 913 (5th Cir. 1999) ("*Bousley* is apparently the first case in which the Supreme Court has recognized the possibility of applying the actual-innocence exception in a case in which a defendant has asked a habeas court to adjudicate a successive or procedurally default constitutional claim after his guilty plea conviction.") (Dennis, *J.* dissenting). Many states do as well. *See, e.g., Corbett v. Comm'r of Correction*, 34 A.3d 1046 (Conn. Ct. App. 2012) (considering a habeas petition asserting actual innocence of a defendant that entered three *Alford* pleas); *Ex parte Tuley*, 109 S.W.3d 388, 393 (Tex. 2002) ("[W]e will not preclude actual innocence claims because the conviction was the result of a guilty plea."); *People v. Shaw*, 143 N.E.3d 228, 240 (Ill. Ct. App. 2019) ("After careful consideration, we conclude that a freestanding actual innocence claim may be brought after a guilty plea, and that a

defendant need not challenge the knowing and voluntary nature of his or her plea to bring such a claim."); *People v. Schneider*, 25 P.3d 755, 760-61 (Colo. 2001) (en banc) (concluding that prohibiting actual innocence claims following guilty pleas would not "represent[ ] the just and fair outcome" in part because "defendants do choose to enter guilty pleas for reasons other than clear guilt"); *Schmidt v. State*, 909 N.W.2d 778, 781 (Iowa 2018) ("We now hold the Iowa Constitutional allows freestanding claims of actual innocence, so applicants may bring such claims to attack their pleas even though they entered their pleas knowingly and voluntarily." The same is true, under federal law, for petitions asserting actual innocence because of a change in the law. *See, e.g., Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (allowing, but ultimately denying, a § 2241 petition asserting actual innocence based on a change in the law).

Some states do not allow a defendant to attack their conviction on actual innocence grounds following a guilty plea, but those decisions are based on facts or law distinguishable from this case. For example, Kansas does not allow defendants to seek habeas relief after entering a plea, even when asserting actual innocence, but that is because, under Kansas law, "[a] plea of guilty is admission of the truth of the charge and every material fact alleged therein." *Woods v. State*, 379 P.3d 1134, 1141 (Kan. 2016) (citations and quotations omitted). That case, however, is distinguishable here in several ways. First, Ms. Green did not plead guilty, she pled no contest. In doing so, there is no admission by Ms. Green that the facts alleged in the case or underlying the charge were true; there was only an admission that if the case proceeded to a jury, a jury could

convict her. Second, the New Mexico courts have recognized that pleading to a charge is not an admission of the truth of the facts underlying the charge against a defendant. *See, e.g., State v. Jackson*, 1943-NMSC-049, ¶ 14, 47 N.M. 415, 143 P.2d 875 ("The plea of guilty by Jimmy Brown was sufficient to authorize the court to pronounce sentence upon him, but it was not conclusive proof of the truth of the charge against him, and particularly not admissible as to elements of the offense as against a person not a party to the proceeding. Accused persons are sometimes motivated to plead guilty to a charge rather than go to trial in the hope of acquiring leniency or some other advantage. A judicial confession does not necessarily prove that the charge is true."); *State v. Flores*, 2018-NMCA-075, ¶ 15, 430 P.3d 534 (citing with approval to *Jackson*'s conclusion that a plea does not prove the truth of the charge).

Nevada also does not allow a habeas petitioner to challenge a plea on the basis of factual innocence, but that appears to be because Nevada law allows a separate, post-conviction Petition to Establish Factual Innocence. *See* Nev. Rev. Stat. Ann. §§ 34.900-34.990. And while some states simply do not allow collateral attacks to convictions following guilty pleas, *see, e.g., Norris v. State*, 896 N.E.2d 1149, 1153 (Ind. 2008) (concluding that a "plea of guilty . . . forecloses a post-conviction challenge to the facts adjudicated by the trial court's acceptance of the guilty plea and resulting conviction"); *Yonga v. State*, 130 A.3d 486, 492 (Md. 2016) (concluding "that a person who has pled guilty may not later avail himself . . . of the relief afforded by the Petition for a Writ of Actual Innocence"), prohibiting Ms. Green from doing so would conflict with decades

of decisions seeking to protect the innocent. *See, e.g., Doe v. State*, 1975-NMCA-108, ¶ 19, 88 N.M. 347, 540 P.2d 827 (explaining that one purpose of fundamental error review is "to protect those whose innocence appears indisputabl[e]"); *Herrera v. Collins*, 506 U.S. 390, 398 (1993) ("After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent."); *In re Winship*, 397 U.S. 358, 372 (1970) ("[A] fundamental value determination of our society [is] that it is far worse to convict an innocent man then to let a guilty man go free."); *United States v. Watson*, 792 F.3d 1174, 1183 (9th Cir. 2015) ("The most hallowed principle of our criminal law [is] protecting the innocent."). The Court should reject the State's arguments and allow Ms. Green to attack her conviction based on actual innocence.

B. *Montoya v. Ulibarri* does not preclude Ms. Green from seeking post-conviction habeas relief.

The State recognizes that this Court, in *Montoya v. Ulibarri*, 2007-NMSC-035, 142 N.M. 89, 163 P.3d 476, stated that "[w]hen examining a freestanding claim of actual innocence, [it] will not be constrained by the requirements applicable to motion for a new trial. Instead, [it] examine[s] the evidence presented and evaluate[s] any reliable evidence." BIC, at 17. Yet the State still contends that Ms. Green could not have sought habeas relief, asserting that "all the reliable evidence before the habeas court indicated that the dismissal was unwarranted" because the district court found that Ms. Green received effective assistance of counsel when entering into the plea, that Ms. Green knowingly and voluntarily entered into her plea, and Ms. Green introduced no new

evidentiary facts during the hearing. *Id.* at 17-19. *See also id.* at 21 ("In summary, the trial court granted habeas relief despite the uncontroverted facts that Defendant received effective assistance of counsel, entered a knowing and voluntary plea, and introduce no new evidence at the habeas hearing."). The State instead contends that, despite *Montoya*'s clear language, that Ms. Green was not entitled to habeas relief because she did not present any newly discovered evidence to the district court. *Id.* at 19. But such a restrictive rule was not this Court's intention in *Montoya.*

In *Montoya*, this Court deviated from the federal constitutional rule that it is not unconstitutional to keep an innocent person incarcerated because the New Mexico Constitution seeks to "protect[ ] the credibility of the state judiciary." 2007-NMSC-035, ¶ 21. *See also id.* ("Thus, in view of our state interest in insuring accuracy and the superior ability of our state courts to make accurate factual findings, we find sufficient reason to depart from the federal decision not to recognize freestanding innocence claims brought by habeas petitioners."). The State asks this Court to abandon this bedrock principle; the State instead asks this Court to erect a procedural barrier to actual innocence review. Such procedural barriers are exactly what this Court rejected when determining that the New Mexico Constitution offered more protection than the United States Constitution's lack of protection for the innocent. *See id.*, ¶ 24 ("It cannot be said that the incarceration of an innocent person advances any goal of punishment, and if a prison is actually innocent of the crime for which he is incarcerated, the punishment is indeed grossly out of proportion to the severity of the crime.").

The New Mexico Supreme Court has held that, under the New Mexico Constitution, "a habeas petitioner must be permitted to assert a claim of actual innocence," even if the process that resulted in her incarceration (whether a trial or a guilty plea) was conducted entirely fairly and without any constitutional or other legal infirmity. *Montoya*, 2007-NMSC-035, ¶ 23 ("Fundamental fairness is intrinsic within the concept of due process that is provided by the New Mexico Constitution. We believe that to ignore a claim of actual innocence would be fundamentally unfair.") (citing N.M. Const. art. II, § 18). This right applies to petitioners who pled guilty just as surely as it does those who were convicted at trial. *See, e.g., State v. Nash*, 2007-NMCA-141, ¶ 18, 142 N.M. 754, 170 P.3d 533 ("[W]e conclude that it was proper for the district court to consider Defendant's collateral attack on his 1994 conviction for DWI during the sentence enhancement proceeding in this case."); *Schmidt v. State*, 909 N.W. at 794 (citing *Montoya* and noting that many state courts "permit[] freestanding claims of actual innocence even if the applicant pled guilty," and ultimately electing to do the same) (citing *People v. Schneider*, 25 P.3d at 757; *Ex parte Tuley*, 109 S.W.3d at 393). Ms. Green was therefore eligible to seek habeas relief for her conviction for Child Abuse.

II. The District Court Concluded That Ms. Green's Actions Were Not the But-For Cause of E.M.'s Conditions, Not That E.M. Did Not Suffer Serious Bodily Injury.

The State contends that the district court's conclusion that "worsening the child's condition was not great bodily harm justifying a first-degree felony charge, as a matter of law," was incorrect. BIC, at 22 (cleaned up). In doing so, however, the State is asking

this Court to reverse the district court's decision by examining one finding out 37 (not including subparts) made by the district court rather than examine the finding that "worsening the child's condition was not great bodily harm" in the context of the entire order. In reality, the district court's order first found that "[t]he State did not present sufficient expert testimony on causation to support a first degree felony charge for Child Abuse Resulting in Great Bodily Harm." R.P. 1988, at ¶ 33(E). It is only after this finding that the district court notes that "'[w]orsen, the child's conditions' is not great bodily harm justifying a first degree felony charge, as a matter of law." *Id.*, ¶ 33(G). Read together, the district court makes clear that the reason that the conviction is vacated and the charge is dismissed is because there was no evidence of causation. The district court did not, as the State suggest, vacate Ms. Green's conviction for child abuse because there was no great bodily harm. In fact, both sides agreed that there was great bodily harm before the district court. Any effort to reverse the district court based on an incorrect reading of the district court's order should be rejected.

III. There Was No Evidence That The Alleged Medical Neglect Caused E.M.'s Conditions, Injuries, or Death.

A. The New Mexico Supreme Court's causation jurisprudence in Child Abuse cases.

The Child Abuse resulting in Great Bodily Harm statute provides that "[a]buse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, *causing or permitting* a child to be: (1) placed in a situation that may endanger the child's life or health; (2) tortured, cruelly confined or cruelly punished; or

(3) exposed to the inclemency of the weather." NMSA 1978, § 30-6-1(D) (emphasis added). "'[C]ause' and 'permit' are distinct. One is active, the other passive. When the state chooses to charge under only one portion of the statute (that defendant 'caused' or defendant 'permitted' the abuse), the prosecution is limited to proving what it has charged." *State v. Leal*, 1986-NMCA-075, ¶ 14, 104 N.M. 506, 723 P.2d 977. This Court has described this distinction:

> [C]ausing child abuse is synonymous with inflicting the abuse, and permitting child abuse refers to the passive act of failing to prevent someone else—a third person—from inflicting the abuse. Put another way, causing and permitting abuse correlate with primary and secondary responsibility for the victim's injury.

State v. Nichols, 2016-NMSC-001, ¶ 33, 363 P.3d 1187. "Permitting" cases always require proof that the defendant "was a parent, guardian or custodian of the child, or . . . had accepted responsibility for the child's welfare." UJI 14-615(4), NMRA.

The statute also divides child abuse into three separate theories, each of which can be caused or permitted. At Ms. Green's plea hearing, the State unambiguously disclaimed all but the endangerment theory. *See* NMSA 1978, § 30-6-1(D)(1) (defining Child Abuse to include causing or permitting a child to be "placed in a situation that may endanger the child's life or health"). There are many recognized ways that a defendant can cause or permit endangerment. The State, however, alleged medical neglect. "Medical neglect is not defined by the child abuse statute, but [the Supreme Court[ha[s] defined it as the '[f]ailure to provide medical, dental, or psychiatric care that is necessary to prevent or to treat serious physical or emotional injury or illness.'" *State*

v. Garcia, 2021-NMSC-019, ¶ 19, 488 P.3d 585 (citation omitted). This requires proof that a defendant's "conduct, in failing to provide medical care early enough, amounted to reckless disregard for the welfare and safety of [the child." *Nichols*, 2016-NMSC-001, ¶ 48. It also requires that a defendant "was 'wholly indifferent' to [the child's] welfare and 'the consequences of his failure to act.'" *Id.*, ¶ 49. *See also State v. Bustillos*, 2014 WL 2451217, ¶ 10 (N.M. Ct. App. Apr. 1, 2014) (unpublished).

The medical neglect theory of Child Abuse is novel. *See Nichols*, 2016-NMSC-001, ¶ 45 n.4 (noting "the novelty of the State's theory of medical neglect as a form of child endangerment"). Since the theory's recognition in the appellate courts, medical neglect convictions have fared exceptionally poorly. From 2015 to 2023, all five medical neglect convictions that proceeded to appeal were overturned, usually with retrial barred.[2] *See Nichols*, 2016-NMSC-001, *State v. Martinez*, 2018 WL 2213932 (N.M. Ct. App. Apr. 30, 2018) (unpublished); *State v. Villalobos*, 2019 WL 2997007 (N.M. Ct. App. June 5, 2019) (unpublished); *State v. Casaus*, 2018 WL 6583023 (N.M. Ct. App. Nov. 21, 2018) (unpublished); *Garcia*, 2021-NMSC-019. This is because, to prove causation in a medical neglect case, the State must submit "proof beyond a reasonable doubt that the defendant's conduct was a factual, but-for cause of that child's death." *Garcia*, 2021 WL 71147, ¶ 40. This burden is high. *Id.* (noting that the burden of proof for causation in

[2] The only appellate case that upholds a conviction for Child Abuse Resulting in Death/Great Bodily Harm is *State v. Galindo*, 2018-NMSC-021, 415 P.3d 494. That case, however, was not a medical neglect case. Rather, the allegation was that the child's death was caused by "multiple blunt force injuries." *Id.*, ¶ 4.

medical neglect causes may be "an unachievable evidentiary standard") (Thomson, *J.* dissenting).

When this Court first outlined the medical-neglect causation standard in *Nichols*, it held that "th[e] medical neglect [must be] at least a significant cause of his death or great bodily injury," meaning that "the State nee[s] medical evidence that if [a defendant] had obtained medical care earlier, [the child] would have lived or at least would have had a significantly greater chance of living-evidence that the alleged neglect actually contributed to the tragic result." 2016-NMSA-001, ¶ 40 (citation omitted). In that case, the State's experts testified that the child's severe and ultimately deadly liver laceration was potentially "treatable, but [the testimony] shed[] no light on when that intervention would have been necessary to save [the child] or give him an appreciably better chance at survival." *Id.*, ¶ 43. The Court concluded:

> Clearly, a suggestion that "maybe" or "perhaps" something would or would not have happened, even if based on evidence, is not probative of anything. It is certainly not probative beyond a reasonable doubt that something would have happened . . . . Without some evidence to establish that causal connection, we are left with no more than medical neglect in a vacuum, which can constitute criminal endangerment, but not a first-degree felony.

Nichols, 2016-NMSC-001, ¶ 45 (citation omitted).

The next major causation case is *State v. Casaus*, 2018 WL 6583023 (N.M. Ct. App. Nov. 21, 2018), in which a child "had fallen off a bouncy horse" at around 2:00 p.m., causing internal bleeding, and the defendant—who lived with the child and knew that he had fallen and was unconscious, but believed the child was "faking it"—elected

to shoot up heroin rather than calling 911. *Id.*, ¶¶ 2-4. The defendant did not call paramedics until around 4:30, by which time the child had no pulse. *See id.* The child was pronounced dead just after 5:30. *Id.* The State called the Emergency Room doctor who attended to the child, who testified that the child's internal abdominal bleeding would have been very painful, the gut would have grown distended, and "eventually the pain would be so bad that he would pass out and eventually die," but was not asked and did not opine about "how long Child may have been losing blood, how long it would take for pain to develop or for Child to pass out and die from an abdominal injury with internal bleeding." *Id.*, ¶ 24. The State did, however, present testimony about the general principle of the "golden hour," which is a construct in "emergency medicine[,]when someone sustains a traumatic injury outside of a hospital, [whereby] that person's 'chance of survival is greatest if they get to the hospital within the first hour of injury,' and after that, chances of survival 'drop significantly.'" *Id.*, ¶ 26. The Court of Appeals held that this was insufficient, given that the "discussion of the 'golden rule' was purely hypothetical and present a general concept," and "[t]he State failed to present any evidence that applied that general concept to the facts of th[at] case." *Id.*, ¶ 28.

This Court then issued its opinion in *State v. Garcia*, 2021-NMSC-019, 488 P.3d 585. In *Garcia*, a 14-month-old baby sustained a severe head injury while in the custody of the defendant, who failed to call 911 for hours and then repeatedly lied about the details of what happened to the child. *Id.*, ¶¶ 8-10. Expert medical testimony established that the baby had multiple subdural hemorrhages, retinal hemorrhages, and brain

edema, as well as severe injury to the cervical spinal cord; the cause of death was known with an unusual degree of precision. *See id.*, ¶¶ 11-12. "Multiple experts opined that the ultimate cause of [the child's] death was the global hypoxic-ischemic injury or, in other words, a lack of blood and oxygen to the brain," a condition that "progress[es] rapid[ly], [and in which] 'every second that this child is not presented to immediate attention is a second that the child's brain is dying,' and [] the best way to stop this progression is 'to get the kid oxygen . . . as soon as possible.'" *Id.*, ¶ 33.

One expert "testified that patients with . . . injuries such as [the child's] generally have a seven to thirty percent chance of surviving," and that "such injuries require medical attention and that a delay in medical attention '*drastically reduce[s] . . . the chance of survival*' but [the expert] agreed that she could not say 'with any degree of medical certainty' that 'earlier medical intervention would have made a difference'" in that case. *Id.*, ¶ 35 (emphasis added). Another expert "testified more specifically that '[t]here is a very real possibility that had [the child] presented for immediate medical attention after the initial neurologic insult he would still be alive,'" and that "*the delay in medical attention 'took away that possibility*,'" bust she too clarified that "she was 'not saying it is a medical certainty' that [the child] would be alive had be received immediate medical attention." *Id.* (emphasis added).

Noting that "[m]edical expert testimony given to a reasonable degree of medical certainty or probability satisfies a 'minimal standard of probability,' approximating a preponderance of the evidence," this Court found it "simply insufficient" to prove

causation that "the medical experts in th[e] case were not even able to opine that it is more likely than not that [the child] would have lived with earlier medical care." *Id.*, ¶ 36. Reiterating that "medical opinions . . . [that] sp[eak] only in terms of 'possibilities' or 'concerns,' [ ] essentially prove[ ] nothing," *id.*, this Court held that "[e]vidence that a child's chance of survival was foreclosed by a defendant's failure to provide necessary medical care is not proof beyond a reasonable doubt that the defendant's conduct was a factual, but-for cause of that child's death. *Id.*, ¶ 40 (citation omitted).

B. The same standard applies to great bodily harm as it does to death.

The State asserts that this causation standard should not be applied here because "*Garcia* distinguished between a situation in which the failure to obtain medical care resulted in a death and one in which the failure resulted in a child's initial medication condition growing worse, ultimately inflicting great bodily injury." BIC, at 29. *See also id.* at 30 ("Does the *Garcia* standard for medical testimony, which requires proof beyond a reasonable doubt that the child would have lived had he or she received proper medical treatment, apply in the same way in this situation, one in which the facts demonstrated and the trial court found that Defendant's various failures caused E.M.'s medical deterioration and, ultimately, his physical infirmities but not his death?). Causation, however, does not change in a criminal case based on the injury.

In *Nichols*, this Court concluded that, in medical neglect cases, "the State [is] required to put forth substantial evidence that [a defendant's] neglect 'resulted in' the

child's death *or great bodily harm*, meaning that medical neglect was at least a significant cause of his death *or great bodily injury*." 2016-NMSC-001, ¶ 40 (emphasis added). *Nichols* also makes clear that the causation issue in child abuse cases is at a higher standard and requires medical certainty because "a suggestion that 'maybe' or 'perhaps' something would or would not have happened, even if based on evidence, is not probative of anything." *Id.*, ¶ 45.

Garcia confirmed that this causation standard applies universally to child abuse cases. In *Garcia*, this Court held that there is a "general requirement in criminal law that a defendant's conduct be a but-for cause of the prohibited result or, in other words, that the prohibited result would not have occurred absent the defendant's conduct." 2021-NMSC-019, ¶ 29. This language, just like that language in *Nichols*, does not distinguish death cases from great bodily injury cases. In fact, *Garcia* makes clear that this high causation standard applies to any "prohibited result." *Id.* Thus, the inquiry is the same whether Ms. Green's alleged actions were the but-for cause of E.M.'s death or were the but-for cause of E.M.'s great bodily injuries: Would E.M.'s death or great bodily injuries have occurred without Ms. Green's alleged action?

C. Ms. Green was not the but-for cause of E.M.'s conditions, injuries, or death.

Here, there was no evidence of causation that would establish that E.M. suffered death or great bodily injury because of Ms. Green. The only evidence presented by the State, disclosed to the defense, and uncovered in the investigation is that, to a reasonable

degree of medical probability, E.M. "could have" improved or "could have" avoided great bodily injury if he received different care or was taken to the hospital. But the "suggestion that 'maybe' or 'perhaps' something would or would not have happened, even if based on evidence, is not probative of anything." *Nichols*, 2016-NMSC-001, ¶ 45. Nor is it "probative beyond a reasonable doubt that" E.M. would have lived, improved, or avoided bodily injury. Thus, Ms. Green is innocent of child abuse regardless of the theory advanced by the State.

i. The food deprivation theory failed to meet the Child Abuse statute's causation standard.

The State, in one last attempt to resurrect this prosecution, and without citing to a single statute, case, or court rule, asserts that "the trial court committed error in not considering all of the evidence before it, including the food deprivation." BIC, at 28. The basis of this argument is that the district court "did not mention specifically whether it considered the food evidence." *Id.*, at 25-26. The State then doubles down on its judicial mindreading and contends that the district court did not consider the food deprivation evidence because it believed that "it was limited by the State's failure to raise the food issue until the 11th hour." *Id.*, at 26. But while Ms. Green made that argument to the district court, there is no evidence that the district court refused to consider any alleged food deprivation. In fact, this assertion directly conflicts with the transcripts and record of this case.

For example, it was the district court, and not the State, that first asked questions about the allegation that Ms. Green ordered that E.M. not receive food unless he left his room and ate at the dinner table. In fact, the district court engaged in an extensive colloquy with Dr. Campbell regarding this theory:

> Q. My concern is – I want to make sure I'm not missing something.
>
> A. Right.
>
> Q. If a child is only fed one meal in 12 days, can you say that would cause a death or not cause a death?
>
> A. It definitely could be. I mean - -
>
> Q. There's got to be a point where if you don't feed a kid, the kid is going to die.
>
> A. Or anybody. . .
>
> Q. And if you assume that with the condition that was presented to you, with the evidence forensically from the bone, can you say that because he was not fed and he had this infection that he died because he did not get food?
>
> A. Definitely. I mean - - I mean, if you aren't fed, you are going to die. So if he wasn't being fed, then, basically, he was being starved, and yes.
>
> Q. If I accept that as true, if you accept that as true.
>
> A. Okay. Based on that premise, then, yes, I can say with certainty he would die.

Tr., 01/21/2022, at 83:19 - 86:19. And the district court asked questions about this theory to counsel during oral argument. *See id.* at 109:9-14 ("No, but you had evidence that I hadn't heard before today, that she made a decision that the child should not eat

for two weeks, because the child was considered a rebel and that this was a punishment for that behavior, it was all bad behavior."); *id.* 110:15-22 ("All I'm saying is, I never heard that there was evidence of other arguable neglect until today . . . It bothers me that I would miss something completely like that, that there's a bigger picture of neglect leading to death than just the decision to go see a doctor or not."). It cannot be that a judge that questioned witnesses about an issue, including saying multiple times that he wanted to make sure he did not miss anything, and asked questions during closing argument about the same issue could be said on appeal to have not considered the issue.

Rather, the fact that the district court asked questions about the food deprivation theory establishes that the district court considered but rejected the notion that allegations of food deprivation caused E.M.'s death, condition to worsen, or great bodily injury. For example, Dr. Campbell admitted on cross-examination that, "[b]ased on all the evidence in this case, I can't say that he was starved and that's why [E.M.] died, the same way that I can't say that if [E.M.] had received medical attention, he would have lived from all the other stuff." *Id.*, 87:9-13. And Dr. Campbell admitted that she could not pinpoint a period in time where E.M. would have died if he was not eating. *Id.*, 87:23-88:2 ("No. I can't."); 88:6-11 ("[T]here are so many variables that I can't tell you that three days after he wasn't fed, he would die or six days or a week. All I'm saying that if you are not fed, you die and if your body has more metabolic demands put on it, that's going to happen sooner."). In fact, the only evidence presented was a

"reasonable probability" that if E.M.'s "condition would worsen if he wasn't fed." *Id.*, at 89:1-4. Such a statement, however, is not probative of anything in a criminal case.

It is just as likely that the district court found that E.M. was not actually deprived of food. For example, Ms. Green pointed out to the district court that there was testimony that E.M. "was out and about in the kitchen . . . and had eaten food." Tr., 01-21-2022, at 109:19-21. There was also testimony from Stacy Miller, E.M.'s mother, that "as [E.M.] got better, he was eating again." *Id.*, at 109:19-21. Thus, the district court's rejection of that theory shows that it did not accept the food deprivation theory as true; it does not demonstrate that the theory was not considered at all.

ii. The State's medical neglect theory did not include sufficient evidence of causation.

Applying this Court's well-settled causation principles for medical neglect child abuse cases, the district court correctly determined that the State's theory was not supported by sufficient causation connecting Ms. Green to E.M.'s condition, injuries, or death. For example, the Dr. Campbell was never able to give an opinion other than that the failure to get medical care for E.M. "could have" improved his condition or could have helped to "a reasonable degree of medical probability." Dr. Campbell also testified that she could not say for certain what virus E.M. suffered from, what caused E.M.'s death, and whether medical care would have improved or prevented E.M.'s injuries and death. The Office of the Medical Investigator could not determine E.M.'s cause of death. Dr. Lauren Dvorscak testified that she could not offer an opinion on

whether medical care would have improved E.M.'s condition, prevented his bodily injuries, or saved his life. Dr. Liss, who served as Ms. Green's expert, also confirmed that it was impossible to determine E.M.'s cause of death, and that no one could state whether the failure to that E.M. to receive medical care caused E.M.'s bodily injuries or death.

The State's evidence was limited to testimony that it was probable or possible that E.M.'s condition would not have worsened if he received medical attention. "[A] suggestion that 'maybe' or 'perhaps' something would or would not have happened, even if based on evidence, is not probative of anything. It is certainly not probative beyond a reasonable doubt that something would have happened." *Nichols*, 2016-NMSC-001, ¶ 45. The district court, therefore, properly vacated Ms. Green's conviction for child abuse.[3]

Conclusion

The district court's order granting the writ of habeas corpus should be affirmed.

[3] This brief did not include a discussion of the standard of review because Ms. Green agrees with the State's brief as related to the standard of review.

Respectfully submitted,

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March 30, 2023

STATEMENT REGARDING ORAL ARGUMENT

Ms. Green requests oral argument because she believes it will help the Court. The State is asking that this Court decide several issues of first impression based on novel readings of this Court's habeas and actual innocence cases. Moreover, because this is a case based on actual innocence and not ineffective assistance of counsel, there is extra reason to ensure that counsel can help the Court explore an extensive record that includes more 2000 pages and several volumes of transcripts.

CERTIFICATE OF SERVICE

I certify that Deborah Green's Answer Brief was electronically filed with the Supreme Court for the State of New Mexico through the State of New Mexico's Tyler/Odyssey E-File & Serve system on March 30, 2023. All counsel of record were electronically served through that system.

/s/ Nicholas T. Hart
Nicholas T. Hart