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INTRODUCTION

Few if any crimes attract the vitriol of society as the murder of a defenseless child. Thus it came as no surprise that the community was aghast at the case of the disappearance and presumed murder of J.S., creating a media firestorm that continues to this day.¹ Specifically, when a child mysteriously disappears from the home, parents or caregivers inevitably come under suspicion. What sets this case apart from similar child-disappearance cases is that police and prosecutors thought they should bring this case to trial at all, and that the trial court found sufficient evidence to allow this case to go to the jury.²

Amicus curiae Arizona Attorneys for Criminal Justice (“AACJ”) asks this Court to allow its participation in this matter. Although the current rules do not discuss when is the proper role for an *amicus curiae* to appear in the Court of Appeals, the rule change petition submitted by the Criminal Rules Task Force³

¹ See, e.g., <http://www.12news.com/news/what-happened-to-jhessye-shockleys-body/339929016> (last visited May 30, 2017) (post-trial, reporter describing child as not having been found, but, “at the end of this harrowing and heartbreaking case, [J.S.] did indeed receive the justice she deserved”).

² See <http://www.latimes.com/nation/la-na-jonbenet-ramsey-murder-20161229-story.html> (last visited May 30, 2017) (Although JonBenet Ramsey’s parents were indicted by a grand jury for child abuse resulting in death, the district attorney refused to sign the indictment for lack of evidence and no charges ever brought).

³ R-17-0002, available at <http://www.azcourts.gov/Rules-Forum/aft/661> (last visited June 5, 2017).

creates a new proposed Rule 31.15 that governs such participation. This new rule tracks the language of recently modified Arizona Rule of Civil Appellate Procedure 16(b)-(c). This brief is submitted within 21 days of the Reply Brief due date.

The Innocence Project, the Wrongful Conviction Clinic at the University of Arizona James E. Rogers College of Law, and Professor Jason Kreag previously filed a brief of *amici curiae* addressing the admissibility of dog sniff evidence, and shortly after that brief was filed, this court struck the *Anders*⁴ brief so that counsel could file a merits brief. *Amici* were given leave to file a new brief after the parties filed merits briefs, and they are expected to do so. For that reason, AACJ is not addressing that evidentiary question and focuses instead on the issue of sufficiency of the evidence for the convictions.

INTERESTS OF *AMICUS CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through

⁴ *Anders v. California*, 386 U.S. 738 (1967).

education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the issues presented concern the right to criminal defendants to a fair trial based on admission of proper evidence and exclusion of improper evidence and to be convicted of crimes only where the evidence is legally sufficient to justify such. The prosecutors' closing arguments conclusively demonstrate that its entire case was based in speculation as to what happened to J.S. Despite Hunter's entreaties to the jury to base their verdicts on the evidence rather than the irrelevant and prejudicial other-act evidence introduced by the State,⁵ the State's attempts to inflame the passions of the jury ultimately succeeded. As both the United States and Arizona Supreme Courts have repeatedly noted, "a properly instructed the jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *State v. West*, 226 Ariz. 559, 563, ¶ 17, 250 P.3d 1188, 1192 (2011) (quoting *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), quoting in turn *Jackson v. Virginia*, 443 U.S. 307, 317 (1979)).

⁵ Although defense counsel made this a theme of her closing argument, inexplicably, counsel filed no motion to preclude such evidence pursuant to Ariz. R. Evid. 404(b). Appellate counsel did not raise this issue as a claim of fundamental error. "[A]mici curiae ... have no right to create, extend or enlarge the issues." *Bristor v. Cheatham*, 75 Ariz. 227, 230, 255 P.2d 173, 175 (1953); see also *Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, 4 n.2, 308 P.3d 1152, 1155 n.2 (2013).

Arizona law is very supportive of Ms. Hunter's position that the circumstantial evidence in this case fails to meet the constitutional standards for criminal conviction. Yet, neither the Opening Brief nor the Answering Brief cites any case discussing sufficiency of the evidence either for child abuse likely to result in serious physical injury or death or for felony murder. Instead, both briefs rely only on the general legal standard for sufficiency of the evidence, as given in cases such as *West* and *Mathers*. As this court is duty-bound to review the claim for sufficiency of the evidence *de novo*, this court will benefit from a brief that directs it to the applicable law, because it does not ignore fundamental error when it sees it. *State v. Brown*, 191 Ariz. 102, 103, 952 P.2d 746, 747 (App. 1997) (citing *State v. Taylor*, 187 Ariz. 567, 571, 931 P.2d 1077, 1081 (App. 1996)).

Furthermore, although the Opening Brief does not make specific arguments as to the reasons for finding insufficient evidence as to the child abuse charge or the element of causal connection in the felony murder charge, it does argue generally that the “[t]here is simply no evidence ... to support the guilty verdicts in this case.” Opening Brief at 26. This general attack on all the convictions is sufficient to preserve the issue challenging both convictions on all grounds. In *State v. Glissendorf*, 235 Ariz. 147, 153-54, ¶¶ 20-22, 329 P.3d 1049, 1054-55 (2014), our supreme court held that Division Two erred in reversing only one conviction based on an instructional error, because the lack of a specific argument as to reversal of the

second conviction had no impact on the general request for “the reversal of both convictions.” Similarly, the Opening Brief’s focus on evidence related to homicide does not relieve, or even relax, this court’s obligation to weigh all the evidence and ensure that every element of every offense is supported by sufficient evidence.

This case bears all of the hallmarks of a wrongful conviction. This case exemplifies the classic phrase, “where there is smoke, there is fire.” Some of the evidence in this case is strange; ultimately, however, it fails to meet the constitutional standards for criminal conviction. AACJ asks for this Court to dispassionately view the evidence, because, even “in the light most favorable to sustaining the verdict,” *State v. Payne*, 233 Ariz. 484, 496 n.1, 314 P.3d 1239, 1251 n.1 (2013) (cites omitted), there is simply no evidence to support either charge.

ARGUMENTS

I. The evidence for both child abuse and felony murder was insufficient.

A. Standard of Review.

Ariz. R. Crim. P. 20(a) states that “the court shall enter a judgment of acquittal ... after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction.” “Substantial evidence is proof that ‘reasonable persons could accept as adequate ... to support a conclusion of defendant’s guilt beyond a reasonable doubt.’” *State v. Bearup*, 221 Ariz. 163, 167, ¶ 16, 211 P.3d 684, 688

(2009) (quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980)). “Substantial evidence is more than a ‘mere scintilla’ and is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.” *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997) (citing *Mathers*, 165 Ariz. at 67, 796 P.2d at 869). “By ‘substantial evidence’ we mean evidence that would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is presented.” *State v. Atwood*, 171 Ariz. 576, 597, 832 P.2d 593, 614 (1992). This Court will “view the evidence in the light most favorable to sustaining the verdict, and [] resolve all reasonable inferences against defendant.” *Id.* at 596, 832 P.2d at 613. Sufficiency of the evidence is reviewed *de novo*. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

Reversal of a conviction is required if “there is a complete absence of probative facts to support the verdict” such that “rational jurors could not have found the defendant guilty beyond a reasonable doubt.” *State v. George*, 206 Ariz. 436, 440, ¶ 3, 79 P.3d 1050, 1054 (App. 2003); *see also State v. Bolton*, 182 Ariz. 290, 308, 896 P.2d 830, 848 (1995). A jury may not reach a verdict of guilty beyond a reasonable doubt by relying on speculation or conjecture. *Mathers*, 165 Ariz. at 71, 796 P.2d at 873. A verdict supported by insufficient evidence violates due process. U.S. Const. amends. V, XIV; Ariz. Const. art. II, § 4; *Jackson*, 443 U.S. at 314. This court will vacate a conviction based on insufficient evidence regardless of the ground

for the motion for judgment of acquittal, because a conviction based on insufficient evidence constitutes fundamental error. *State v. Windsor*, 224 Ariz. 103, 104, ¶ 4, n.2, 227 P.3d 864, 865 n.2 (App. 2010).

On October 11, 2011, Jerice Hunter called police and reported that her daughter, J.S., went missing while under the care of her older siblings. As police began their investigation, they quickly focused, almost exclusively, on Hunter as the subject of their investigation. Despite the fact that J.S. was never found, and there was no physical evidence tying Hunter to any crime, Hunter was charged and ultimately convicted of child abuse and felony murder. The State's theory of the case was that Hunter had killed her daughter and disposed of her body in a dumpster on October 4, 2011, and waited an entire week to report J.S. missing. The prosecution relied exclusively on circumstantial evidence.⁶ Almost all of that evidence was irrelevant, misleading, speculative, based on unfounded and unreliable scientific testimony, or a combination thereof; none of it was "substantial."

⁶ On appeal the State claims "there was also direct evidence Appellant abused J.S., causing her death." Answering Brief at 41. The only direct evidence provided in the State's brief, however, was to spankings. *Id.* at 43-44.

B. No evidence was presented supporting a conviction for child abuse under circumstances likely to produce death or serious physical injury.

In this case, it is impossible to discern just what the State meant to charge as child abuse. Notably, neither the State's opening statement nor its closing arguments explained what act (or failure to act) constituted the crime of child abuse as charged in the indictment. 3/25/15 RT 28-74; 4/20/15 RT 23-76, 147-82. On appeal the State asserts the following as evidentiary bases for supporting the conviction: 1) J.S. had been spanked and/or "whipped"; 2) T.J. saw J.S. with bruises on her body; 3) T.J. saw "black stuff" coming out of J.S.'s eyes; 4) T.J. said that J.S. had been kept in their mother's closet for long periods of time; and 5) T.J. said J.S. "smelled like death." Answering Brief at 41-55. These will be addressed in turn.

The first two bases are easily shown to be meritless. A.R.S. § 13-3623(A)(1) prohibits causing any child to suffer physical injury or, having care or custody of the child, causing or permitting the child to suffer injury or have the child's health endangered, "[u]nder circumstances likely to produce death or serious physical injury." It is a lesser-included offense under § 13-3623(B)(1) to commit child abuse under circumstances not likely to produce death or serious physical injury.

To the extent that a child abuse charge is based on endangering health, the child need only be subjected to potential harm. *State v. Mahaney*, 193 Ariz. 566, 569, ¶¶ 16-17, 975 P.2d 156, 159 (App. 1999); *State v. Nereim*, 234 Ariz. 105, 110, ¶ 16, 317 P.3d 646, 651 (App. 2014). But, in the context of the greater offense of

likelihood of serious physical injury or death, “[l]ikely’ has been interpreted literally and means ‘probable’ as compared to ‘possible.’” *State v. Johnson*, 181 Ariz. 346, 350, 890 P.2d 641, 645 (App. 1995) (quoting *State v. Greene*, 168 Ariz. 104, 108, 811 P.2d 356, 360 (App. 1991)).

In the context of having illegal drugs around children, this court found in *Johnson* that there was a sufficient factual basis for a guilty plea to a charge of child abuse under circumstances likely to cause death or serious physical injury because dangerous items such as razor blades and syringes already filled with liquid cocaine were strewn around an apartment, and the objects were readily accessible to the children who were playing unsupervised in the apartment. *Johnson*, 181 Ariz. at 350, 890 P.2d at 645. The evidence was insufficient, however, to prove the likelihood of serious physical injury or death where a mother caused her children to live in absolute squalor with guns in the home, because one of the guns was jammed and no testimony was introduced either that the other guns were loaded or that the living conditions had any likely medical effect on the children. *Greene*, 168 Ariz. at 105-07, 811 P.2d at 357-59.

The State may not attempt to defend a conviction for one offense based on the sufficiency of evidence for an entirely different offense. In *Windsor*, 224 Ariz. at 104, ¶ 5 & n.3, 227 P.3d at 865 n.3, this Court noted that “Windsor appears to all but concede that had the state charged him under [the correct statute], sufficient evidence

would exist to support his conviction.” This Court proceeded to evaluate the sufficiency of the evidence for the crime for which Windsor was convicted, not for the crime for which there was neither charge nor conviction. *Id.* ¶ 6. The reasoning of *Windsor* applies even more strongly here. By relying on “direct evidence” of spankings and/or “whippings” to prove child abuse, the State is attempting to change the charged offense, from child abuse likely to cause death or serious physical injury under § 13-3623(A)(1) to child abuse not likely to cause death or serious physical injury under § 13-3623(B)(1). Similarly, to the extent that the presence of bruises are indicative of child abuse, they are unquestionably only evidence of a violation of (B)(1), not (A)(1).

If the State is attempting to alter the charges, then such violates due process and the notice requirements of the federal and state constitutions. U.S. Const. amends. V, VI, XIV; Ariz. Const. art. II, §§ 4, 24; *see also State v. Rivera*, 207 Ariz. 69, 72, ¶ 8, 83 P.3d 69, 72 (App. 2004) (quoting *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937)) (“It is axiomatic that ‘[c]onviction upon a charge not made would be sheer denial of due process.’”); *State v. Martin*, 139 Ariz. 466, 471, 679 P.2d 489, 494 (1984) (“These rules seek to give substance to the constitutional guarantees that an accused stand trial with clear notice of the crime with which he is charged.”). If, on the other hand, the State is attempting to confuse the question by injecting discussion of spankings and whippings, then the State is fooling no one. In any event,

because the spankings and whippings could not possibly support a conviction under § 13-3623(A)(1) because it is not probable that injuries from such spankings could cause serious physical injury or death.

The three remaining claims by the State are all based on the same testimony of T.J.: the “black stuff” coming out of J.S.’s eyes, her weakness to the point of needing help reaching the bathroom, and that their mother’s closet “smelled like death.” 4/2/15 RT 21-23. The first two statements are not inconsistent with recognizing illness in another person, and it was understood that Hunter had separated J.S. from the other children to protect them from the contagious ringworm. T.J. even testified that the “stuff” coming out of J.S.’s eyes appeared to be related to “pink eye.” *Id.* at 70. T.J. also explained that, when she had contracted ringworm, her mother had separated her from the other children in the same manner. *Id.* at 71-72. This testimony provides verification, not contradiction, to the defense that Hunter was trying to care for an ill child while simultaneously keeping her other children healthy.

The State is correct when it argues that, for purposes of evaluating the sufficiency of the evidence, this court does not reweigh the evidence. Answering Brief at 52. If it did, then this court would recognize that T.J. was obviously coached to testify in this manner. Nevertheless, this court still must look to the actual testimony provided by T.J. from the witness stand, not how it is represented by

attorneys representing the government. T.J. did not say the room “smelled like death” as the State claims. *Id.* On the contrary, the exchange between the prosecutor and T.J. shows that this is the prosecutor’s opinion, not that of the witness:

Q: Was there anything about the way that the room smelled that you remember?

A: I don’t know. She was -- mom was burning incense.

Q: Did you ever tell anyone it smelled like death?

A: Yes.

Q: Was that accurate? Was that right?

A: Kind of.

4/2/15 RT 23. Thus, her testimony was not that the room “smelled of death.” Rather, that statement was “kind of” accurate, which is the same as saying that it was not accurate. Furthermore, there is no foundational evidence that would show how a thirteen-year-old girl would know what “death” smells like. This is classic speculation and conjecture. No rational trier of fact would take this testimony to mean anything other than the room smelled bad. Since it is typical for a room occupied by an ill person to become malodorous, this proves nothing. Similarly, T.J. disclaimed the word “zombie” as describing J.S.’s demeanor and explained it was just a word she used at the time because she had a more limited vocabulary. *Id.* at 75-76. Yet, that setback did not stand in the way of the State arguing to the jury, falsely, that T.J. testified J.S. appeared as a zombie. 4/20/15 RT 37.

In retrospect, it is easy to say that Hunter probably should have done more to care for J.S.; but this proves nothing except that “hindsight is 20/20.” Sick children

(as well as sick adults) typically lose appetite and thus become physically weak, but they also typically get better on their own. Notably, T.J. said nothing that suggests that J.S.'s apparent illness was either caused or prolonged by Hunter's actions or inactions. There was no medical testimony concerning the likelihood of death if ringworm was left untreated. *See Greene, supra.*

Without any evidence that J.S. suffered any injuries, and without any evidence that Hunter's failure to take J.S. to the doctor put her in probable danger of serious physical injury or death, the conviction for child abuse, serious physical injury or death likely, cannot stand.

C. No evidence was presented supporting a conviction for felony murder.

1. *No evidence of homicide.*

With regard to the theory under which Hunter was convicted of first-degree murder, the jury was instructed only as to felony murder under A.R.S. § 13-1105(A)(2), which requires proof that "the person commits ... child abuse under section 13-3623, subsection A, paragraph 1 ... and, in the course of and in furtherance of the offense ... the person or any other person causes the death of any person." As shown above, there is no evidence of child abuse under § 13-3623(A)(1), but there is also a lack of evidence that J.S. died and that her death occurred "in the course of and in furtherance of the offense."

The State makes much ado about a small blood stain in the closet by exaggerating its size. Answering Brief at 41-42, 45, 52. The State introduced no evidence as to when that blood appeared in the closet. But in any event, there was very little blood, such that it could not possibly be evidence of J.S.'s death. The testimony of Dan Merena, the State's DNA expert, showed that the primary blood stain was significantly smaller and that the great majority of the stained carpet was diluted, which is consistent with an attempt to clean the stain with water. 4/14/15 RT 53-57; Exhibit 196 (diagram of stain). During closing arguments, the State did not contest the size and character of the stain as presented by Merena and defense counsel characterized the stain as presented in Merena's diagram as "that little V or triangular section right in the middle" as the dark blood stain, and "he labeled the outer areas, three outer layers, remember they were diluted stains." 4/20/15 RT 101. While the State's closing argument referred to a "significant amount of blood" that was not from a "nose bleed, ... cut finger or a scraped knee," *id.* at 66, it notably did not contest Merena's testimony on this point, *id.* at 39-40.

In *State v. Anthony*, 218 Ariz. 439, 440-41, ¶ 3, 189 P.3d 336, 367-68 (2008), our supreme court described evidence supporting a triple-murder prosecution of the defendant's wife and two stepchildren as entirely circumstantial because the bodies had not yet been found prior to trial. But the evidence connecting Anthony to their disappearance was strong. First, Anthony's wife bought plane tickets for herself and

children to visit family in Ohio on July 7; she clocked out at work only five hours before the plane was set to depart, but she and the children never boarded. *Id.* at 441, ¶ 7, 189 P.3d at 368. Second, Anthony had a financial motive; his wife had put \$105,000 in a separate account, but \$84,000 was moved into their joint account less than 24 hours before the three disappeared. *Id.* ¶¶ 4-6. Third, when the Ohio family could not reach Anthony and contacted local police to check welfare, Anthony did not act surprised “and did not ask the deputy to search for them,” and instead went to finalize purchase of a truck with \$39,000 from the joint account. *Id.* ¶ 8. Fourth, just before the three were scheduled to leave town, Anthony scheduled a carpet-cleaning service to come to the house on July 9, and the carpet cleaners removed a blood stain as well as a mattress with blood on it. *Id.* ¶¶ 5, 10-11. Fifth, on July 10, Anthony had house cleaners come to clean baseboards and walls, and the cleaners noticed Anthony putting on new sheets and pillowcases on the master bedroom bed. *Id.* at 442, ¶¶ 13-14, 189 P.3d at 369. With this information and having been in the house when it “looked ‘immaculate’ with a strong smell of Pinesol,” police obtained a search warrant and found traces of blood in varying places in the house. Most notably, blood had seeped through a carpet to an extent that it was found on the concrete slab underneath. *Id.* ¶ 19. Yet, despite the blood found throughout the house, the State’s blood expert testified “that the volume of blood discovered in the house was too small to prove either that the victims had died or the cause of any

death.” *Id.* at 443 ¶ 22, 189 P.3d at 370.

At trial, Hunter focused on the lack of evidence of murder based on no substantial evidence that a death had occurred. The State introduced evidence through T.J. that J.S. was no longer in the home about a week before the police were called about J.S. being missing, and it also introduced evidence from a neighbor about a drive to Tempe to throw out a bag for which the contents cannot reasonably be said to be J.S.’s body. Yet the State introduced no evidence, through T.J. or any other witness, explaining how Hunter might have moved the body from the apartment to the neighbor’s car during the light of day. A small blood stain, smeared through normal cleaning efforts with water, is insufficient to establish death.

Finally, the State paraded countless witnesses about neighbor Somia Abdelgadir driving Hunter to a Tempe dumpster and the exhaustive search of 96,000 tons of garbage at the Butterfield landfill by hundreds of volunteers over several months. The State apparently convinced the jury of its belief, as stated in closing argument, that J.S.’s body was still in that landfill. 4/20/15 RT 23-24. This is the textbook definition of speculation and conjecture. *See* Answering Brief at 45. There was never any actual evidence that the bag that Somia saw Hunter put in a Tempe dumpster was J.S.’s lifeless body; in fact, all the other physical evidence (such as the DNA testing of Somia’s trunk) contradicts that.

2. *Felony murder requires proof that the death occurred “in the course of and in furtherance of” the predicate felony.*

Even if there is substantial evidence both that Hunter committed child abuse and that J.S. died, however, there is no evidence that J.S. died as a result of Hunter’s child abuse. This court decided in *State v. Fernane*, 185 Ariz. 222, 914 P.2d 1314 (App. 1995), that there was substantial evidence supporting child abuse convictions, and by implication suggested, but did not affirmatively hold, that the sufficiency of the child abuse convictions necessitated a finding that the felony murder conviction was also supported by substantial evidence. Our supreme court explained the false assumption in *Fernane*:

In *Fernane*, a jury convicted the defendant of one count of felony murder and two counts of child abuse, the first for leaving the child with someone she knew to be dangerous and the second for failing to seek medical care for the child. *Fernane* challenged the sufficiency of the evidence to support her convictions. In reviewing this claim, however, the court of appeals discussed only whether sufficient evidence supported the two child abuse convictions.

The opinion in *Fernane* seems to assume that the mere conviction for child abuse supports a conviction for felony murder. That assumption is incorrect. Conviction for the underlying felony does not automatically support a conviction for felony murder; the State must also prove that the child abuse caused the victim's death. Unlike *Fernane*, Bennett was charged only with child abuse based on her delay in seeking medical treatment for Greyson and not for child abuse based on leaving Greyson with someone she knew to be dangerous. Here, the child abuse conviction establishes that Bennett’s delay in seeking medical care for Greyson endangered his health, but does not itself establish that his death “would not have happened” in the absence of that delay. Thus, we need not defer to the superior court's ruling on the sufficiency of the evidence in this case. We do not decide the issue

ourselves because the superior court has not yet had a chance to apply the correct legal standard, and the court of appeals has never addressed the issue.

Bennett, 213 Ariz. at 568 ¶¶ 27-28, 146 P.3d at 69 (citing *Fernane*, 185 Ariz. at 223-24, 914 P.2d at 1315-16).

In *Bennett*, the defendant was charged with child abuse and first-degree felony murder for failing to seek timely medical care for her infant son, who ultimately died. *Id.* at 564-65, ¶¶ 4-5, 146 P.3d at 65-66. Although the child victim's body was examined, and abuse even proven, our supreme court remanded the case for a new hearing on ineffective assistance of appellate counsel as to the first-degree murder count because appellate counsel failed to argue sufficiency of the evidence for defendant's felony murder conviction. The State had relied solely on the equivocal testimony of a doctor that the delay in seeking treatment "may or may not" have caused the child's death. *Id.* at 567-68, ¶ 24 & n.3, 146 P.3d at 68-69 & n.3. Thus the testimony about the delay in medical care "endangered [the victim's] health but does not itself establish that his death 'would not have happened' in the absence of the delay." *Id.* at 568, ¶ 28, 146 P.3d at 69.

The authorities on which *Bennett* relied, *see id.* at 567-68, ¶ 24, 146 P.3d at 68-69, similarly require such a causal connection between the child abuse and the death. *Ex parte Lucas*, 792 So.2d 1169, 1171 (Ala. 2000) ("If the State did not introduce evidence that medical treatment would have saved or prolonged the child's

life, then the State did not prove that Lucas’s failure to provide the child with medical treatment actually caused, or resulted in, the child’s death.”); *State v. Muro*, 695 N.W.2d 425, 432 (Neb. 2005) (“to establish that Muro’s unlawful conduct was a proximate cause of Vivianna’s death, the State was required to prove beyond a reasonable doubt that but for Muro’s delay in seeking medical treatment, Vivianna would have survived her preexisting traumatic head injury. We agree with the dissenting judge that the State did not meet this burden.”). Other states also impose this requirement. *E.g.*, *Commonwealth v. Pugh*, 969 N.E.2d 672, 688 (Mass. 2012); *Patel v. State*, 60 N.E.3d 1041, 1053-54 (Ind. App. 2016); *State v. Thornton*, 720 S.E.2d 572, 584-85 (W.V. 2011).

In the absence of a body, the State’s job is made more difficult to establish proof that any child abuse caused death. The State seems to think that this absolves it of having to prove every element of each offense beyond a reasonable doubt. Yet, due process requires no less. *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson*, 443 U.S. at 313-14. The State has offered nothing but speculation and conjecture. This court should vacate the convictions.

CONCLUSION

The State actually invokes Lady MacBeth in claiming that Jerice Hunter's guilt is proven by cleaning a blood spot in her house. Answering Brief at 46. This is not Shakespeare. In courts of the United States, the government cannot obtain its convictions through prognostications of three witches. It must present substantial evidence to twelve rational jurors who must find guilt proven beyond a reasonable doubt. These protections exist precisely for cases such as this, where, poetic flourish aside, the State could muster only speculation and conjecture. For these reasons, AACJ asks this court to vacate the convictions in this case.

RESPECTFULLY SUBMITTED this 8th day of June, 2017.

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