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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 179

JENNIFER JORGENSEN,

Appellant.

20 Eagle Street
Albany, New York 12207
September 08, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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1 CHIEF JUDGE LIPPMAN: Number 179, People v.
2 Jorgensen.

3 Counsel, would you like any rebuttal time?

4 MR. MISCHEL: Maybe two minutes, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes; you're
7 on. Go ahead.

8 MR. MISCHEL: Thank you, Your Honor. Good
9 afternoon; may it please the court. My name is
10 Richard E. Mischel. I represent the defendant,
11 Jennifer Jorgensen.

12 On this case - - -

13 CHIEF JUDGE LIPPMAN: Counsel is the - - -
14 is the crime that the defendant is accused of in
15 relation to the fetus, is that a possible crime in
16 New York? Has there ever been anyone held - - -

17 MR. MISCHEL: What - - - our introduction,
18 Your Honor, to this - - - to this argument is this
19 case, in the State of New York, is unprecedented.

20 CHIEF JUDGE LIPPMAN: Is it a crime - - -

21 MR. MISCHEL: It - - -

22 CHIEF JUDGE LIPPMAN: - - - impossible to
23 commit?

24 MR. MISCHEL: - - - it is impossible - - -

25 CHIEF JUDGE LIPPMAN: Why?

1 MR. MISCHEL: - - - to commit this crime?

2 CHIEF JUDGE LIPPMAN: Why - - - why? Tell
3 us.

4 MR. MISCHEL: Because at the time that the
5 acts that are alleged to be reckless were engaged in
6 by my client, the purported victim was not in
7 existence at the time, in a legal sense.

8 JUDGE PIGOTT: Didn't we have a case where
9 someone recklessly shot a pregnant woman and killed
10 the fetus, and he was - - -

11 MR. MISCHEL: Yes, Your Honor.

12 JUDGE PIGOTT: - - - convicted of that?

13 MR. MISCHEL: And - - - and the basis for
14 that case is, is that it was a third party who did
15 it, and not the - - - and not the - - -

16 CHIEF JUDGE LIPPMAN: So you could have
17 this crime if it was a third party?

18 MR. MISCHEL: Yes, absolutely.

19 CHIEF JUDGE LIPPMAN: Does the ba - - -

20 MR. MISCHEL: And the reason is - - - and
21 the reason - - -

22 CHIEF JUDGE LIPPMAN: - - - does that baby
23 have to be born alive to have that?

24 MR. MISCHEL: The baby has - - - ultimately
25 is born alive and then dies. But the dif - - -

1 CHIEF JUDGE LIPPMAN: So in that
2 circumstance, with a third party, there is such a
3 crime?

4 MR. MISCHEL: Yes, there is. But not when
5 the natural mother - - -

6 CHIEF JUDGE LIPPMAN: Why - why - - why not
7 in this case?

8 MR. MISCHEL: Because at the moment - - -

9 CHIEF JUDGE LIPPMAN: Common law, or what
10 is it? Derogation of common law? What's - - -

11 MR. MISCHEL: That is correct.

12 CHIEF JUDGE LIPPMAN: - - - what's your
13 argument?

14 MR. MISCHEL: Because under - - - under the
15 born alive rule, at the moment - - - at the moment
16 that the third party engages in the conduct, Your
17 Honors, at that very moment, whether it's directed at
18 the unborn baby or at the mother, it's a crime. The
19 defendant pulls out a gun and shoots the mother. The
20 mother is injured, the baby is born later and dies,
21 but is born alive. A crime has been committed.

22 JUDGE PIGOTT: Did that happen?

23 JUDGE ABDUS-SALAAM: Does the mother - - -
24 I'm sorry.

25 JUDGE PIGOTT: Pardon me.

1 JUDGE ABDUS-SALAAM: No, you start.

2 JUDGE PIGOTT: It did happen in the case of
3 the shooting?

4 MR. MISCHEL: Yes.

5 JUDGE PIGOTT: The baby was born alive?

6 MR. MISCHEL: The baby - - - in the Hall
7 case, the baby was born alive, Your Honor, and then
8 subsequently died from the injuries of the gunshot.

9 JUDGE ABDUS-SALAAM: Is the difference
10 here, counsel, that the mother is doing something to
11 her own body - - -

12 MR. MISCHEL: Correct.

13 JUDGE ABDUS-SALAAM: - - - and that's not a
14 crime? Is that what you're saying?

15 MR. MISCHEL: She - - - she - - - she, with
16 very limited exceptions here, Your Honor, under
17 Article 125, cannot commit a crime - - - a reckless
18 crime against herself, at least none that I'm aware
19 of that's defined in the Penal Law. That being the
20 case - - - that being the case, there is no
21 derivative right that the fetus has until such time
22 as the baby is born and is born alive.

23 If there were any acts engaged in by Ms.
24 Jorgensen after the baby was born, I wouldn't be
25 standing here arguing this to Your Honors.

1 JUDGE PIGOTT: Well, the baby - - - the
2 baby was injured. It was born alive, and it died
3 seven days later?

4 MR. MISCHEL: Yeah, but the ba - - - when
5 the baby was injured, Your Honor - - - and this is
6 critical - - - the baby was not born. And - - - and
7 - - - and - - -

8 CHIEF JUDGE LIPPMAN: So the mother - - -
9 so let me understand the distinction. The mother, if
10 she committed the act to the baby, after the baby was
11 born, different case?

12 MR. MISCHEL: Absolutely.

13 CHIEF JUDGE LIPPMAN: So whatever - - -
14 what you're saying, whatever she did beforehand:
15 drugs, reckless driver, whatever you might hang it
16 on, it doesn't matter. You can't - - - you can't
17 commit that crime?

18 MR. MISCHEL: You can't - - - you can't -
19 you can't commit - - -

20 CHIEF JUDGE LIPPMAN: You can't be
21 prosecuted for that crime - - -

22 MR. MISCHEL: Well, you - - - you can be
23 pro - - -

24 CHIEF JUDGE LIPPMAN: - - - before the - -
25 - no, no, but you can't be guilty of the crime.

1 MR. MISCHEL: - - - you - - - you can't be
2 convicted of manslaughter in the second degree, Your
3 Honor, because at the time Ms. Jorgensen allegedly
4 drove that car recklessly, this baby was not a person
5 within the le - - - within the meaning of the law.

6 JUDGE RIVERA: So if there had been no C-
7 section - - -

8 MR. MISCHEL: Correct.

9 JUDGE RIVERA: - - - and the baby then - -
10 -

11 MR. MISCHEL: Died.

12 JUDGE RIVERA: - - - dies in utero, she's
13 not liable - - -

14 MR. MISCHEL: She's not - - -

15 JUDGE RIVERA: - - - for any criminal act?

16 MR. MISCHEL: No. The only crime that she
17 would be liable for - - -

18 JUDGE RIVERA: Is it because of the C-
19 section here, and the baby was removed and survived
20 for a period of time.

21 MR. MISCHEL: Right. So - - -

22 JUDGE FAHEY: Let me ask you this.

23 MR. MISCHEL: Yes, Your Honor.

24 JUDGE FAHEY: This argument, I find it to
25 be a difficult argument and challenging argument, I

1 think. But was this ra - - - is this preserved?

2 MR. MISCHEL: Your Honor, it was not ra - -
3 - it was - - - no, it was Inot raised. It was not
4 raised in the Appellate - - - we're raising it as a -
5 - -

6 JUDGE FAHEY: Okay.

7 MR. MISCHEL: - - - jurisdictional defect.

8 JUDGE FAHEY: All - - - all right. Then
9 let - - - let me go to a - - - because there are some
10 other points here. You know, as I - - - as I went -
11 - - two things that leap out at me. First off, the -
12 - - the argument that you make that the prescription
13 drug history that came in, I - - I - I think that
14 needs to be addressed, which - - - because that was
15 properly preserved and properly objected to. And
16 then the prosecutorial misconduct argument that you
17 made in relationship to the probation statements,
18 that was also specifically asked. And - - - and it
19 doesn't require us to deal with the thorny question
20 of - - - of the personhood of the child that
21 eventually died.

22 MR. MISCHEL: That - - - that's - - - that
23 - - - certainly the case can be resolved on that
24 basis. But Your Honor, if you resolve it on that
25 basis, and you send it back for another trial, where

1 are we then?

2 And if I may just address, then, for Your
3 Honor's satisfaction, why this case doesn't fall
4 within the preservation Hawkins rule and comes within
5 the jurisdictional rule, I'll just take thirty
6 seconds of your time for that.

7 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

8 MR. MISCHEL: The reason for it is simple,
9 Your Honor. If you believed all of everything that
10 the prosecutor offered in this case, no question
11 about it, everything that's to be believed, the
12 argument remains the same. There's nothing that a -
13 - - that an objection can cure at this point.

14 JUDGE PIGOTT: Well, I don't know. The - -
15 - the indictment, at 125.15.1 says "recklessly caused
16 death of the child who was in utero at the time."
17 And nobody objected to that, and she went to trial on
18 that, and she got convicted of that.

19 Now, no court has had an opportunity to
20 address that, except now, us. And you're going to
21 ask us to make certain factual determinations, I
22 suppose.

23 MR. MISCHEL: There are no factual
24 determinations, Your Honor. The - - - the only - - -
25 the only issue in this case is whether or not the

1 baby that was born alive was a victim.

2 JUDGE PIGOTT: Right.

3 MR. MISCHEL: There - - - there - - - there
4 - - there are no factual issues in that construct.

5 JUDGE PIGOTT: Well, sure. But - - - but I
6 mean, isn't it conceivable that a court, either a
7 nisi prius court an intermediate appellate court may
8 say we think that a child who is within three weeks
9 of birth is, in fact, a child, and - - - and it is
10 manslaughter second.

11 MR. MISCHEL: Then that would be in
12 violation of the statute.

13 JUDGE PIGOTT: What statute?

14 MR. MISCHEL: 125 - - - Article 125.

15 JUDGE PIGOTT: It not what this says. Not
16 - - - not if - - -

17 MR. MISCHEL: Well, if - - - Judge - - -
18 Your Honor, with all due respect, there's the
19 definition in 125.05.1, which says that a person is a
20 human being who is born and is alive.

21 JUDGE PIGOTT: Okay.

22 CHIEF JUDGE LIPPMAN: And - - - and
23 counsel, let me understand one thing. Let's clarify
24 this. So in the state that says by statute - - - and
25 there are a few in the country, that - - - that the

1 fetus is a person, then you could have a crime - - -
2 it is possible to commit a crime in that state, if
3 that's the definition of the fetus. Right or wrong?

4 MR. MISCHEL: It - - - it - - - you're
5 absolutely correct, Your Honor. And what's
6 interesting is, is that the District Attorney - - -
7 they cite this proposed legislation where it's clear
8 from the proposed legislation that what the
9 legislation is attempting to do is modify the
10 definition of person so as to include - - - so as to
11 include a viable fetus.

12 JUDGE PIGOTT: Is it - - - is it
13 endangering - - -

14 MR. MISCHEL: Viability is not an issue - -
15 -

16 JUDGE PIGOTT: - - - let me - - -

17 MR. MISCHEL: - - - here.

18 JUDGE PIGOTT: - - - let me ask you this.
19 Is it endangering the welfare of a child if you - - -
20 if you abuse yourself such that a child is born
21 defective or - - -

22 MR. MISCHEL: I - - - I respectfully submit
23 to this court that reckless endangerment or - - -

24 JUDGE PIGOTT: No, no. no.

25 MR. MISCHEL: - - - endangering the welfare

1 of - - -

2 JUDGE PIGOTT: Stick with me. Stick with
3 me. I - - - I'm saying a child is born drug
4 addicted.

5 MR. MISCHEL: Right.

6 JUDGE PIGOTT: Has the - - - has the mother
7 endangered the welfare of a child by taking drugs
8 during pregnancy?

9 MR. MISCHEL: No.

10 JUDGE PIGOTT: That's not a crime in this
11 state?

12 MR. MISCHEL: That's not a crime in this
13 case.

14 JUDGE PIGOTT: No, in this state?

15 MR. MISCHEL: In this state it is not a
16 crime.

17 CHIEF JUDGE LIPPMAN: Okay, counselor.
18 Thank you. You'll have your rebuttal. Let's hear
19 from your adversary.

20 MS. LATO: Good afternoon, Your Honors.
21 I'm Assistant District Attorney Karla Lato.

22 CHIEF JUDGE LIPPMAN: Counsel, where's the
23 crime under our statutory framework?

24 MS. LATO: Under our - - - under Penal Law
25 125, we are recognizing the victim of a homicide can

1 be a fetus of at least twenty-four weeks gestation.
2 Under 125.05, we're recognizing that a person who is
3 a victim must be born alive.

4 JUDGE PIGOTT: Has that happened a lot
5 here? Have we seen a lot of these cases?

6 MS. LATO: No, Your Honor, this is a case
7 of first impression - - -

8 JUDGE PIGOTT: Okay.

9 MS. LATO: - - - with regard to the
10 homicidal acts being perpetrated by the mother. The
11 - - -

12 JUDGE STEIN: Isn't it - - - isn't it sort
13 of an incongruous result that if - - - if this
14 defendant had intentionally committed self-abortion,
15 for example, she could be convicted of a misdemeanor,
16 however, now we're talking about reckless conduct,
17 and it turns into a felony?

18 MS. LATO: Under the self-abortion statute,
19 the intent is to miscarry. And - - -

20 JUDGE STEIN: All I'm saying is, is in
21 either event, you end up - - - you don't end up with
22 a live person. One act is intentional, the other is
23 reckless. Wouldn't we treat intentional more
24 seriously than we would reckless?

25 MS. LATO: But Your Honors, the self-

1 abortion statute, there is never a child born. And
2 that's where - - -

3 JUDGE PIGOTT: Well, in this case - - - in
4 this case, you're saying that her - - - her error was
5 in consenting to her C-section.

6 MS. LATO: I'm not saying that's an error,
7 Your Honor.

8 JUDGE PIGOTT: Well, suppose she hadn't?

9 MS. LATO: If she had not consented to a C-
10 section the - - - there would not be any crime which
11 we could have prosecuted her under.

12 JUDGE RIVERA: If she had been even more
13 reckless, and the baby had just not been born alive?

14 MS. LATO: I'm sorry, Your Honor?

15 JUDGE RIVERA: If she'd have been even more
16 reckless, and the child had not been viable outside
17 of the uterus?

18 MS. LATO: Then - - -

19 JUDGE PIGOTT: So you're saying - - -

20 MS. LATO: - - - then again, there would
21 not be a crime.

22 JUDGE RIVERA: There's not a criminal actor
23 in those examples, under your rule?

24 JUDGE PIGOTT: Let - - - let - - - can I
25 ask you - - -

1 MS. LATO: Yes.

2 JUDGE PIGOTT: - - - about - - - at one
3 point you make - - - you say that this is a
4 compromised verdict because the jury wanted to show
5 compassion or something?

6 MS. LATO: Yes, we - - - we believe that
7 the verdict was a result of jury nullification, which
8 is sacrosanct.

9 JUDGE PIGOTT: Suppose - - - suppose - - -
10 could they have said, well, we think she's guilty of
11 a - - - of a - - manslaughter with respect to the
12 passenger in the other car, but not with respect to
13 the driver in the other car, and therefore convict
14 her with respect to Mr. Kelly and not Mrs. Kelly.
15 Would that be - - - would that be a verdict that we
16 could let stand?

17 MS. LATO: No, Your Honor.

18 JUDGE PIGOTT: Well, aren't you picking and
19 choosing, then?

20 MS. LATO: No, Your Honor, we're not.
21 Because the - - - the reckless acts which we had, the
22 base reckless acts, which were speeding, running a
23 red light, driving on the wrong side of the road,
24 failing to brake as - - -

25 JUDGE PIGOTT: Right.

1 MS. LATO: - - - she was headed toward
2 another car, having - - -

3 JUDGE PIGOTT: Cell phone, drugs.

4 MS. LATO: Yes.

5 JUDGE PIGOTT: Acquitted of the drugs,
6 though.

7 MS. LATO: She was acquitted of the drugs,
8 Your Honor. However, she was acquitted of being
9 impaired by the combination of the alcohol and the
10 Clonazepam. The jury could have found that she had
11 one or the other in her system, which could have - -

12 -

13 JUDGE FAHEY: Well, how if she's could - -

14 -

15 MS. LATO: - - - affected her.

16 JUDGE FAHEY: - - - how, if she's acquitted
17 - - - and this is the fair trial argument - - - on
18 the Clonazepam and the alcohol - - - the alcohol
19 level she had was .06, which wouldn't even - - -
20 doesn't even mandate an impaired. The Clonazepam was
21 so low that normally it would be reported as negative
22 - - - I believe that's what the expert said - - - and
23 that there would be - - - and the only - - - but it
24 has a long half-life, so it was taken somewhere
25 between twenty to sixty hours beforehand.

1 So in that context, where - - - where the
2 evidence is so weak, how do - - - how can you
3 possibly argue that the - - - that that evidence
4 should have been admissible, number one, and that - -
5 - and that if it is admitted, that it's fatal error,
6 not harmless error?

7 MS. LATO: Your Honor, that evidence went
8 directly to the synergistic effect that that alcohol
9 and the Clonazepam had upon each other. And when
10 combined it enhanced the side - - -

11 JUDGE FAHEY: The jury made a determination
12 - - -

13 MS. LATO: - - - effects - - -

14 JUDGE FAHEY: Let me just stop you for one
15 second, and then I'll let you answer the question. I
16 don't mean to interrupt you. But the jury made a
17 determination that it wasn't an intox here. Is - - -
18 am I wrong about that?

19 MS. LATO: That it wasn't impaired by the -
20 - -

21 JUDGE FAHEY: Okay, it wasn't impaired.

22 MR. MISCHEL: - - - com - - - the combined
23 - - - the combine - - - the combination effect of the
24 alcohol and the Clonazepam, yes.

25 JUDGE FAHEY: All right. So then this

1 entire case, then, is premised on the fact that she
2 got into an accident and didn't have her seatbelt on?
3 Because if she's not an impaired, what are we left
4 with?

5 MS. LATO: We are left with the speeding,
6 driving on the wrong side of the road, failing to - -
7 -

8 JUDGE FAHEY: Speeding - - -

9 MS. LATO: - - - brake.

10 JUDGE FAHEY: - - - okay, the speeding?
11 Right. You're right.

12 MS. LATO: With - - - getting back to Your
13 Honor. But with regard to the infant, we have the
14 added factor of failing to wear her seatbelt.

15 JUDGE PIGOTT: Let's talk about added
16 factor, because the DA argued any one of them is
17 sufficient to convict. Is that the appropriate
18 standard?

19 MS. LATO: No, it's not, Your Honor. And
20 the court gave curative instruction to the jury that
21 the court alone would instruct them as to the
22 standard, and they were to disregard what she said
23 with regard to the law.

24 JUDGE ABDUS-SALAAM: Counsel, could I go
25 back to something that Judge Fahey asked your

1 adversary, which is about this argument concerning
2 the fetus. Was that preserved below? And what's
3 your position on that?

4 MS. LATO: No, Your Honor, it was not
5 preserved below. The - - - the defense counsel only
6 raised an issue with regard to endangering the
7 welfare of a child and whether or not the baby in
8 this case could be a victim under that statute.

9 CHIEF JUDGE LIPPMAN: Does it matter, if
10 it's impossible to commit the crime?

11 MS. LATO: Your Honor - - -

12 CHIEF JUDGE LIPPMAN: Does - - - does it
13 matter if it's impossible to commit the crime?

14 MS. LATO: Your Honor, no. We have under -
15 - -

16 CHIEF JUDGE LIPPMAN: It - - - it doesn't
17 matter?

18 MS. LATO: I'm sorry - - -

19 CHIEF JUDGE LIPPMAN: Okay so then - - - go
20 ahead, what's your answer? I'm sorry.

21 MS. LATO: I'm sorry, Your Honor. It is
22 possible to commit this crime because the - - -

23 CHIEF JUDGE LIPPMAN: I know that's your
24 argument. I'm saying if it's impossible to commit
25 the crime, does it matter whether it was preserved?

1 MS. LATO: No, Your Honor, it doesn't.

2 CHIEF JUDGE LIPPMAN: Okay.

3 JUDGE ABDUS-SALAAM: Can we consider your
4 adversary's other argument that we don't have
5 jurisdiction?

6 MS. LATO: Yes, Your Honor, you may.

7 CHIEF JUDGE LIPPMAN: Okay, thanks,
8 counselor.

9 MS. LATO: Thank you, Your Honors.

10 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

11 MR. MISCHEL: I must confess, Your Honor, a
12 great deal of terrain was covered here. I don't know
13 where to begin, but I want to make su - - - I want to
14 make it clear, because the prosecutor in her brief
15 refers to viability several times. The issue here is
16 not viability. They get the viability issue from the
17 twenty-four weeks in - - in - - in what is defined in
18 homicide - - - what - - - what constitutes a
19 homicide. And - - -

20 JUDGE STEIN: You agree that here that - -
21 - that was met?

22 MR. MISCHEL: Pardon?

23 JUDGE STEIN: That - - - you agree that
24 here, that - - - that was met?

25 MR. MISCHEL: Oh, absolutely.

1 JUDGE STEIN: Correct?

2 MR. MISCHEL: But I'm saying - - - I'm
3 saying, most respectfully, that that has nothing to
4 do with the case, because the argument, Your Honor,
5 would be very much - - - she would be making the very
6 same argument if it were twenty-two weeks, if it were
7 fifteen weeks, and the baby survived the reckless
8 conduct supposedly engaged in by my client sitting
9 back there, the argument would be the same that if
10 the baby is born alive and survives and then dies, my
11 client is subject to prosecution.

12 JUDGE PIGOTT: Well, the - - -

13 MR. MISCHEL: It has nothing to do with
14 viability.

15 JUDGE PIGOTT: Listen to you. I mean,
16 you're making this argument, and - - - and it has a
17 lot of substance to it. But it comes out - - - I
18 mean, you've got all these other arguments, and
19 you're not making any of them. The - - - I mean, the
20 - - - the DA, I thought, in her summation, was - - -
21 you know, was a little over the top.

22 MR. MISCHEL: Right.

23 JUDGE PIGOTT: I didn't know - - - but
24 there was no - - - there was no - - - I was surprised
25 that her doctor testified. I didn't know where the

1 physician-patient privilege got waived. And - - -
2 and - - - and it took thirteen months for them to
3 bring the misdemeanors, which then all got thrown
4 out.

5 MR. MISCHEL: Correct.

6 JUDGE PIGOTT: And then - - - and yet the
7 evidence came in in one shape or form with respect to
8 the manslaughter. And you've moved all of those off,
9 and you just want to talk about an - - - a - - - an
10 issue of first impression here. And shouldn't we be
11 focused on some of the other ones, just in the event
12 that we don't want to address the issue you're
13 raising?

14 MR. MISCHEL: I - I - I - - I agree. And
15 that's why I prefaced my remarks. Because I said
16 that an awful lot of terrain was covered in the
17 questioning of the District Attorney.

18 JUDGE PIGOTT: In rebuttal.

19 MR. MISCHEL: But - - -

20 JUDGE FAHEY: Particularly, because it's
21 such a profound issue, I think, of almost national
22 importance, and it's not been properly briefed or
23 addressed by the courts below. And you have
24 legitimate fair trial arguments. I don't know if
25 they're winning arguments, but they're certainly

1 legitimate arguments.

2 MR. MISCHEL: Well, certainly - - -
3 certainly, the admission of a volume of - - - of - -
4 - of evidence pertaining to seven months of
5 prescription drug history, when the - - - when the
6 court specifically, at the very beginning, limited
7 what this evidence was going to be admitted for. It
8 was going to be admitted because of the experience
9 from the first trial about the synergistic effects of
10 dr - - - of a combination of drugs and alcohol, and
11 it was going to be - - - and tolerance and cross
12 tolerance, which was offered by the District
13 Attorney, by the People. That was part of their main
14 case.

15 The second thing came from - - -

16 CHIEF JUDGE LIPPMAN: Finish off,
17 counselor.

18 MR. MISCHEL: All right.

19 CHIEF JUDGE LIPPMAN: Your time is up.

20 MR. MISCHEL: What - - - the purposes for
21 which it was admitted, which was never explained to
22 the jury - - - never explained to the jury - - - on
23 summation, the prosecutor uses every conceivable po -
24 - - every - - - every - - every - - possible use for
25 it to ex - - - to discuss with the jury that - - -

1 that Ms. Jorgensen is self-medicated, is drug-
2 addicted, is using these drugs, is a bad mother, and
3 at the very end, which was objected to, she takes
4 Petraco's testimony, the OB-GYN, which was objected
5 to by defense counsel, at page 542, and says poor
6 Baby - - - Baby blank. She was born with an Apgar
7 score of - - - of 1. She was put on life support.
8 Was it because - - - was this due to prematurity or
9 due to the drugs which we know affects the - - - the
10 outcome of the - - - of the birth.

11 CHIEF JUDGE LIPPMAN: Thank you.

12 MR. MISCHEL: We will never know, she says.
13 That, I submit to the court, changed - - - not only
14 changed the theory of the prosecution as to what the
15 cause of - - - what the cause of death was, but was a
16 tacit admission by the prosecutor that she couldn't
17 prove cause of death.

18 CHIEF JUDGE LIPPMAN: Okay, thank you.

19 Thank you both. Appreciate it.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Jennifer Jorgensen, No. 179 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

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Date: September 13, 2015