



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TAHA EL-ABBADI, )  
)  
Defendant-Below, )  
Appellant, )  
)  
v. ) No. 364, 2022  
)  
STATE OF DELAWARE )  
)  
Plaintiff-Below, )  
Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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# TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS .....	ii
NATURE AND STAGE OF THE PROCEEDINGS .....	1
SUMMARY OF THE ARGUMENT.....	2
STATEMENT OF FACTS.....	3
ARGUMENT	
<b>I.    THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED EL-ABBADI’S REQUEST FOR INSTRUCTIONS ON THE LESSER INCLUDED OFFENSES OF MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE.</b> .....	14
<b>II.    THE TRIAL COURT VIOLATED EL-ABBADI’S RIGHTS TO CONFRONTATION, CROSS-EXAMINATION AND TO PRESENT A DEFENSE WHEN IT PRECLUDED CROSS-EXAMINATION OF A STATE WITNESS AND DIRECT EXAMINATION OF EL-ABBADI ON AN ISSUE THAT WENT DIRECTLY TO THE HEART OF HIS DEFENSE.</b> .....	21
Conclusion.....	28
February 8, 2022 Oral Decision Sustaining the State’s objection to Cross Examination.....	Exhibit A
February 14, 2022 Request for Instruction on Lesser Included Offense Of Manslaughter.....	Exhibit B
September 23, 2022 Sentence Order.....	Exhibit C

## TABLE OF AUTHORITIES

### Cases:

<i>Alexander v. Shannon</i> , 163 F. App'x 167 (3d Cir. 2006) .....	26
<i>Clark v. O'Leary</i> , 852 F.2d 999 (7th Cir. 1988).....	25
<i>Cseh v. State</i> , 947 A.2d 1112 (Del. 2008).....	14
<i>Davis v. Alaska</i> , 415 U.S. 308(1974) .....	24
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986) .....	24, 27
<i>Deshields v. State</i> , 879 A.2d 591 (Del. 2005) .....	17
<i>Johnson v. State</i> , 925 A.2d 504 (Del. 2007) .....	17
<i>Lee v. Illinois</i> , 476 U.S. 530 (1986) .....	24
<i>Maryland v. Craig</i> , 497 U.S. 836 (1990) .....	24
<i>Parker v. State</i> , 981 A.2d 551 (Del. 2009).....	14, 15
<i>Smith v. State</i> , 913 A.2d 1197 (Del.2006) .....	23
<i>State v. Cochran</i> , 239 P.3d 793 (Ct. App. 2010).....	17
<i>State v. Handy</i> , 2019 WL 3976583 (Del. Super. Ct. Aug. 20, 2019).....	18
<i>State v. Lancaster</i> , 631 A.2d 453 (Md. Ct. App. 1993) .....	17
<i>State v. Miller</i> , 841 N.W.2d 583 (Iowa 2014).....	16
<i>United States v. Augustine</i> , 189 F.2d 587 (3d Cir. 1951).....	24
<i>United States v. Lynn</i> , 856 F.2d 430 (1st Cir. 1988).....	25
<i>United States v. Roan Eagle</i> , 867 F.2d 436 (9th Cir. 1989).....	25
<i>United States v. Whitmore</i> , 359 F.3d 609 (D.C. Cir. 2004) .....	24
<i>Washington v. Texas</i> , 388 U.S. 14 (1967).....	24
<i>Webb v. Texas</i> , 409 U.S. 95 (1972) .....	26
<i>Weber v. State</i> , 457 A.2d 674 (Del. 1983) .....	17
<i>Weber v. State</i> , 971 A.2d 135 (Del. 2009) .....	15
<i>Williamson v. State</i> , 707 A.2d 350 (Del. 1998).....	21
<i>Wright v. State</i> , 25 A. 3d 747 (Del. 2011).....	21

### Constitutional Provisions:

U.S. Const., Amend. VI .....	23
Del. Const., Art. I, § 7 .....	23

### Statutes:

11 Del.C. § 206 (b).....	16
11 Del.C. § 231 .....	18
11 Del.C. §631 .....	19

11 Del.C. §632 .....	17
11 Del.C. §634 .....	15
11 Del.C. §901 .....	15, 16

## NATURE AND STAGE OF THE PROCEEDINGS

Taha El-Abbadi, (“El-Abbadi”), was indicted on Murder by Abuse or Neglect First Degree.<sup>1</sup> At a jury trial, the State presented testimony by medical providers, including a child abuse pediatric specialist, who assessed a child’s physical injuries which were believed to have been caused by El-Abbadi. On direct examination, the specialist referred to a prior occasion when, while treating the same child for flu symptoms, she had noted possible supervisory neglect. The defense sought to cross examine her on this testimony. But, the judge prevented the questioning upon finding the evidence unfairly prejudicial and not relevant. He later cautioned the jury not to speculate as to El-Abbadi’s involvement in the suspected neglect.<sup>2</sup>

At the end of trial, the judge denied El-Abbadi’s request for a lesser-included instruction for, among others, the offense of Manslaughter.<sup>3</sup> The jury convicted El-Abbadi of the indicted charge based on a finding of neglect, but not abuse. The judge sentenced him to 30 years in prison followed by probation.<sup>4</sup> This is his Opening Brief in support of a timely-filed appeal.

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<sup>1</sup> A1

<sup>2</sup> February 8, 2022 Oral Decision, Ex. A. A181-184, 2011-209, 228-233

<sup>3</sup> February 14, 2022 Denial of Lesser Included Offense Instruction, Ex. B. A661-667; A695-696

<sup>4</sup> September 23, 2022 Sentence Order, Ex. C.

## **SUMMARY OF THE ARGUMENT**

1. El-Abbadi was charged with Murder by Abuse or Neglect and requested instructions on the lesser included offenses of Murder by Abuse or Neglect Second Degree, Manslaughter and Criminally Negligent Homicide. The court provided an instruction on the “second degree” offense but denied the request as to the other offenses. A rational trier of fact could have acquitted El-Abbadi of Murder by Neglect First or Second and, instead, convicted him of Manslaughter by finding that he recklessly caused Julian’s death through conduct that falls within a broader definition of negligence that defined in the indicted offense. Similarly, the jury could have found him guilty of criminally negligent homicide based on a reduced level of mens rea than the judge contemplated.

2. The trial court severely damaged El-Abbadi's presentation of his defense when it shut down his cross examination of a key State witness and direct examination of El-Abbadi himself. The summary preclusion of cross-examination on an area which went to the heart of El-Abbadi's defense violated his rights of confrontation and a fair trial under the United States and Delaware Constitutions. Reversal is now required.

## STATEMENT OF FACTS

In March 2019, Taha El-Abbadi, (“El-Abbadi”), who worked at Casanova Auto Body Shop, began a relationship with Meagan Alvarez, (“Alvarez”).<sup>5</sup> Almost immediately, Alvarez, 6-7 years El-Abbadi’s senior, invited him to move in with her, her 8-year-old daughter, J.C.,<sup>6</sup> and her 3-year-old son, Julian.<sup>7</sup> El-Abbadi provided Alvarez with money and other items as needed. For example, he gave her a car to use after she “totaled” her own. He also enjoyed a good relationship with her children and occasionally babysat them.<sup>8</sup> If he had to correct their behavior, he revoked privileges. Both Alvarez and El-Abbadi each stated that he never hit the children.<sup>9</sup>

### *Alvarez’s Frustration With Julian*

Unfortunately, by August 2019, the couple’s short-lived relationship was in trouble. El-Abbadi informed the jury that, by that time, he was planning to move out due to verbal and physical abuse by Alvarez.<sup>10</sup> Throughout the weekend of August 17 and 18, 2019, the couple exchanged text messages that reflect their irritation with each other. In one particular

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<sup>5</sup> A511-513

<sup>6</sup> A pseudonym has been assigned to Alvarez’s daughter. Delaware Supreme Court Rule 7 (d).

<sup>7</sup> A409-411, 471; A513,555,559,650

<sup>8</sup> A514-516

<sup>9</sup> A474; A573

<sup>10</sup> A411, 413-418; A556-557

message, Alvarez accused El-Abbadi of yelling at her children and scaring them.<sup>11</sup> Yet, while he was out and about that weekend, she called him multiple times and complained about Julian and his lack of progress in potty training.<sup>12</sup> She later told the jury that Julian had “accidents” that weekend and, as was her habit, she “spanked his butt” in response.<sup>13</sup>

El-Abbadi did not return from his weekend activities until the early hours of Monday, August 19<sup>th</sup>. He fell asleep on the sofa and was awakened around 7:00 a.m. by the sound of screaming and yelling.<sup>14</sup> He went to the master bedroom and found a red-faced Julian, without a diaper, crying. Alvarez complained that Julian had “peed the bed again” and El-Abbadi responded, “[w]hatever you did, just stop doing it, it takes time and patience for the child.”<sup>15</sup>

### *Alvarez’s Deviation From The Usual Daycare Routine*

Ordinarily, Alvarez took both of her children to daycare on Mondays. However, on August 19<sup>th</sup>, shortly after her exchange with El-Abbadi about her lack of patience with Julian, Alvarez took J.C. with her to work.<sup>16</sup> In fact, they left much earlier than necessary. They grabbed something to eat,

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<sup>11</sup> A412, 420-421

<sup>12</sup> A498, 550-558

<sup>13</sup> A426, 428, 430, 475; A496-497, 517

<sup>14</sup> A518, 570

<sup>15</sup> A519, 571

<sup>16</sup> A431; A567-570



shopped at the Dollar Store then waited in the parking lot for about 50 minutes before Alvarez finally reported to work.<sup>17</sup> One of Alvarez's co workers testified that she had never before seen J.C. at work.<sup>18</sup> Meanwhile, Alvarez kept Julian home with El-Abbadi to work on potty training rather than taking him to daycare which was paid for by the State.

***El- Abbadi Babysits Julian***

Around 8:34 a.m., Christian Cabrera, ("Cabrera"), arrived at the apartment and visited with El-Abbadi.<sup>19</sup> The two men spent time on the patio smoking marijuana while Julian stayed inside "playing with" an iPad and phone.<sup>20</sup> The three of them also at together at one point.

At 10:23 a.m., El-Abbadi sent Alvarez, via text message, a picture of Julian. Alvarez complained about how Julian was dressed.<sup>21</sup> She also commented that it looked like Julian had been crying. El-Abbadi said "no" he had "not really" been crying.<sup>22</sup> He later testified that part of his reason for sending the picture was to show Alvarez a mark and swelling on Julian's

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<sup>17</sup> A424, 431-433

<sup>18</sup> A370

<sup>19</sup> A262

<sup>20</sup> A342; A577

<sup>21</sup> A405, 439

<sup>22</sup> A437-439; A522

left cheek.<sup>23</sup> Alvarez claimed that, while she did not see any marks on Julian, she grew concerned for her son.<sup>24</sup> Yet, her response was to remain at work.

Shortly thereafter, at 10:51 a.m., Cabrera ended his visit and went to work.<sup>25</sup> El-Abbadi, with Julian tagging along, left around the same time to drop off a car dealer tag. El-Abbadi testified that Julian was reluctant to go with him because he thought he was taking him to Alvarez.<sup>26</sup> Surveillance video reveals that the two returned home around 11:34 a.m.<sup>27</sup> However, they were delayed in getting in the building as El-Abbadi lost his key and the leasing office would not assist him.<sup>28</sup> Eventually, after they waited outside, someone let them in the building. Nothing in video of their movements indicates that Julian was physically compromised.<sup>29</sup>

Just a bit later, around 12:00 p.m., El-Abbadi called Lisa Velez, (“Velez”), a woman who worked at the auto shop and whom he thought of as a mother.<sup>30</sup> He testified that the two discussed car parts that he needed. However, Velez claimed that he told her that Julian had fallen while playing at a friend’s house. She said that during a second call, which followed

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<sup>23</sup> A583-585

<sup>24</sup> A439

<sup>25</sup> A262; A561, 577

<sup>26</sup> A522-528, 589

<sup>27</sup> A262, 263

<sup>28</sup> A523-524

<sup>29</sup> A136

<sup>30</sup> A323; A562

immediately after the first, El-Abbadi expressed concern because Julian would not wake up. So, she told the jury, she advised El-Abbadi to take Julian to his mother.<sup>31</sup>

Throughout the day, El-Abbadi and Alvarez spoke by phone. Around 1:30 p.m., they spoke via Facetime.<sup>32</sup> Alvarez testified that during this call, Julian, who was also present, was unresponsive to her questions. El-Abbadi told her that Julian was just tired. El-Abbadi testified that he told Alvarez to come get Julian due to the marks on his face and butt.<sup>33</sup> She testified that her concern for her son grew, yet she remained at work.

***Alvarez's Conduct Was Inconsistent With Concern With El-Abbadi's Supervision Of Julian***

Alvarez eventually left work between 2:41 p.m. and 3:00 p.m. But, instead of going to Julian, she asked El-Abbadi to extend his supervision of Julian. El-Abbadi agreed. Because he needed to go to the shop, he took Julian with him at about 3:00 p.m.<sup>34</sup> As surveillance video shows, El-Abbadi carried Julian to the car because, as El-Abbadi explained, Julian was tired.<sup>35</sup> When they got to the shop, El-Abbadi went inside while Julian

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<sup>31</sup> A326-327

<sup>32</sup> A406, 440

<sup>33</sup> A524, 621

<sup>34</sup> A365, 369, 436-440, 443, 476; A521, 525, 621

<sup>35</sup> A264-265; A622

waited in the car with the air conditioning running to avoid exposure to paint fumes and other chemicals.<sup>36</sup>

Ironically, Alvarez stopped by the apartment rental office around the same time in order to get a copy of her lease. She then took the lease with her and registered J.C. for school. After that, she and J.C. went to her sister in law's house to pick up some hand-me-down winter clothes for Julian. They stayed there for about an hour while J.C. swam in the backyard with her cousins.<sup>37</sup>

Alvarez and J.C. finally returned home around 5:24 p.m. Alvarez called and texted El-Abbadı because he was not home. He told her that he went to the shop and would be home soon.<sup>38</sup> Alvarez claimed that he also told her that Julian had an accident at the shop and that he would explain later.<sup>39</sup> El-Abbadı testified that what he actually told her was that Julian fell asleep in the car and would not wake up. She then instructed him to bring him home and she would wake him up.<sup>40</sup> At that time, he did not realize the seriousness of Julian's injuries.

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<sup>36</sup> A527

<sup>37</sup> A373, 377, 378, 444-447

<sup>38</sup> A265; A376-377, 449-452

<sup>39</sup> A452-453

<sup>40</sup> A528

### *Alvarez Delayed Calling 911*

About a half hour later, Alvarez was laying down on her bed when El-Abbadi came home and carried Julian to a bed in the children's room.<sup>41</sup> She claimed that he told her that Julian accidentally hit his head on a car lift while running in the auto shop and that he gave Julian medicine to help him sleep.<sup>42</sup> Alvarez got up and shook Julian a couple of times in an effort to wake him. She told the jury that he was snoring abnormally loud and that she saw a red mark on his cheek.<sup>43</sup> But, she chose to "give him a little bit of time to wake up" before taking any further action.<sup>44</sup> El-Abbadi testified that he urged Alvarez to call 911 and admit what she did to Julian either that morning or over the weekend.<sup>45</sup>

Another 45 minutes passed before Alvarez decided to do something. But, instead of calling 911 or a doctor, she called Krista Hsu, ("Hsu"), a friend who had suffered concussions in the past. Hsu told her to call a pediatrician.<sup>46</sup> When Alvarez was unable to reach anyone, Hsu gave her a different phone number. This time, Alvarez got through to someone who

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<sup>41</sup> A265; A442, 452, 478, 480; A626

<sup>42</sup> A453; A553

<sup>43</sup> A453-455; A630

<sup>44</sup> A453-454, 478-479

<sup>45</sup> A530, 634

<sup>46</sup> A382-385

transferred her to 911 – about 1 and ½ hours after Julian got home.<sup>47</sup> El-Abbadi left the apartment because he had outstanding capiases.<sup>48</sup> He also asked Alvarez not to give his name to police.<sup>49</sup>

### *Julian's Physical Injuries*

Paramedics got to the apartment around 8:00 p.m. and police followed closely behind. According to police, Alvarez appeared calm, was not crying and exhibited no signs of distress. She told police that Julian was with her boyfriend that day and accidentally hit his head at the auto shop. However, she did not give them his name or contact information.<sup>50</sup> Shortly thereafter, Julian was flown by helicopter to A.I. du Pont hospital.<sup>51</sup>

Julian arrived at the hospital with head trauma and brain swelling.<sup>52</sup> A forensic nurse also documented bruises and marks, including those on his buttocks, that led to the suspicion of abuse. She acknowledged that the appearance and coloration of bruises progress over time.<sup>53</sup> A treating physician opined that Julian's head trauma was the result of high velocity force being applied to the head. The surgeon spoke with Alvarez at the

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<sup>47</sup> A56; A267; A385, 387, 458, 459, 480; A539

<sup>48</sup> A266; A538, 635, 637

<sup>49</sup> A462-463

<sup>50</sup> A50-52, 53-57; A461-463

<sup>51</sup> A59, 60, 62, 65, 66; A13, 14; A160, 161, 167-172

<sup>52</sup> A117-123

<sup>53</sup> A79-86, 89-90, 134

hospital and with El-Abbadi by phone.<sup>54</sup> The couple told the doctor that Julian accidentally hit his head on a metal object at the auto shop.<sup>55</sup> The surgeon rejected this as the cause of Julian's injuries. He opined that such trauma can be created by an adult man hitting a child, he provided no testimony as to what or who caused the trauma in this case.<sup>56</sup> After an unsuccessful surgery, Julian died from a combination of effects from the initial head trauma and the damage caused by a delayed treatment.<sup>57</sup>

### ***El-Abbadi's Statements To Police***

Later that same night or early the next morning, El-Abbadi learned that police were looking for him. He contacted the Chief Investigating Officer by phone then, about 20 minutes later, he turned himself in.<sup>58</sup> Police interrogated him once, had him perform a reenactment of events at the auto body shop, then interrogated him again. He was in custody that entire time - about 12 hours.

El-Abbadi has only an 11<sup>th</sup> grade education.<sup>59</sup> He told police that he had been diagnosed with ADHD when he was younger and that he had been in special education. Further, at the time he gave his statement, he was under

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<sup>54</sup> A638

<sup>55</sup> A630, 638-639, 642

<sup>56</sup> A131

<sup>57</sup> A146

<sup>58</sup> A277; A538-541

<sup>59</sup> A511-513

the influence of marijuana and alcohol. He was shocked, stressed and depressed. And, while in custody, he had only 10-15 minutes of sleep.<sup>60</sup>

As he acknowledged at trial, El-Abaddi offered police different explanations for Julian's injuries.<sup>61</sup> Throughout the first interrogation, the reenactment and much of the second interrogation, he maintained that he did not cause Julian's injuries. He maintained that Julian was injured at the auto body shop.<sup>62</sup> While Julian did complain of a headache, El-Abbadi did not know how seriously Julian was injured.

El-Abbadi had given some inconsistencies in reciting the auto body shop story,<sup>63</sup> but a major shift occurred well into the second interrogation. He told police that both he and Alvarez had spanked Julian that morning.<sup>64</sup> He also took responsibility for the bruises on his butt.<sup>65</sup> He then offered a set of facts to explain the other injuries. First, he said that he took Julian to a friends' house to watch because he had to confront someone who had been threatening him.<sup>66</sup> Next, he provided a variation of these facts when he

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<sup>60</sup> A541-542, 578-581, 610-613, 652

<sup>61</sup> A567-570

<sup>62</sup> A642-643

<sup>63</sup> A593-594, 616-618

<sup>64</sup> A571-573

<sup>65</sup> A598

<sup>66</sup> A644-646



claimed that Julian actually went with him to the confrontation and that he accidentally got hurt at that time.<sup>67</sup>

El-Abbadi next claimed that he and Julian had a “pillow fight” and that he accidentally hit Julian too hard which caused him to fall and hit his head on the floor.<sup>68</sup> Finally, after the detective said that Julian’s injuries were not from a pillow fight, El-Abbadi claimed that he actually “smacked him” in the face which caused him to fall to the floor.<sup>69</sup>

At trial, El-Abaddi made it clear that he did not cause Julian’s injuries. He said that his statements to police were part of a misguided effort to cover up for Alvarez who was the one who came up with the “auto shop story” to give to police.<sup>70</sup> He stressed that it was his testimony that was the truth.<sup>71</sup>

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<sup>67</sup> A646-647

<sup>68</sup> A647

<sup>69</sup> A602

<sup>70</sup> A542

<sup>71</sup> A542, 595, 648-649

**I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED EL-ABBADI'S REQUEST FOR INSTRUCTIONS ON THE LESSER INCLUDED OFFENSES OF MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE.**

***Standard of Review***

This Court conducts a *de novo* review of a trial court's refusal to provide a requested lesser-included-offense instruction.<sup>72</sup>

***Question Presented***

Whether Manslaughter and/or Criminally Negligent Homicide are lesser included offenses of Murder by Abuse or Neglect when Manslaughter criminalizes a broader array of the conduct required in Murder by Abuse or Neglect and when Criminally Negligent Homicide involves a broader definition of “neglect” than does Murder by Abuse or Neglect.<sup>73</sup>

***Argument***

“A defendant is entitled to an instruction on a lesser included offense if there is any evidence fairly tending to bear upon the lesser included offense, however weak that evidence may be.”<sup>74</sup> Here, El-Abbadi was charged with Murder by Abuse or Neglect and requested instructions on the lesser included offenses of Murder by Abuse or Neglect Second Degree,

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<sup>72</sup> *Cseh v. State*, 947 A.2d 1112, 1113 (Del. 2008).

<sup>73</sup> A661-667, 673

<sup>74</sup> *Parker v. State*, 981 A.2d 551, 553 (Del. 2009).

Manslaughter and Criminally Negligent Homicide. The court provided an instruction on the “second degree” offense. However, he denied the request as to the other offenses. El-Abbadi was entitled to either one or both of the other two instructions<sup>75</sup> because “the evidence presented at trial supported” an acquittal of Murder by Abuse or Neglect, First or Second Degree, and a conviction of Manslaughter or Criminally Negligent Homicide. Thus, the trial court’s failure to provide the rejected instructions requires this Court to reverse El-Abbadi’s conviction.

A conviction of Murder by Abuse or Neglect requires proof, beyond reasonable doubt, that the defendant “recklessly cause[d] the death of a child ... [t]hrough an act of abuse and/or neglect of such child.”<sup>76</sup> The terms “neglect” and “abuse” are specifically defined for this offense. Here, to establish “abuse,” the State was required to prove that El-Abbadi caused “physical injury to [Julian] through unjustified force, torture, negligent treatment, sexual abuse, exploitation, maltreatment, mistreatment, or any means other than accident.”<sup>77</sup> On the other hand, to establish “neglect,” the other way in which the crime is committed, the State was required to prove that El-Abbadi

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<sup>75</sup> *Id* (quoting *Weber v. State*, 971 A.2d 135, 141 (Del. 2009)).

<sup>76</sup> 11 Del.C. §634.

<sup>77</sup> 11 Del.C. §901(1); 2/14 54.

was responsible for the care, custody, and/or control of [Julian]; ha[d] the ability and financial means to provide for the care of the child; and fail[ed] to provide necessary care with regard to: food, clothing, shelter, education, health, medical or other care necessary for the child's emotional, physical, or mental health, or safety and general wellbeing.<sup>78</sup>

In our case, the jury rejected a finding of “abuse” and, instead, found El-Abbadi: 1) “recklessly cause[d] the death of a child;” 2) through an act of “neglect of such child[.]”<sup>79</sup> By rejecting Murder by Abuse Second Degree, the jury rejected a finding that he was “criminally negligent” when he caused the death “through an act of abuse or neglect.”

“[A]n offense may be a lesser included offense even though an element of [that] offense is phrased differently and may be committed in a broader array of factual circumstances so long as the narrower element contained in the greater offense cannot be committed without committing the broader element in the lesser included offense.”<sup>80</sup> Here, a conviction of Manslaughter requires proof, beyond reasonable doubt, that the defendant “recklessly cause[d] the death of another person [which includes

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<sup>78</sup> 11 Del.C. §901(18). 2/14 54.

<sup>79</sup> A769-770

<sup>80</sup> *State v. Miller*, 841 N.W.2d 583, 589 (Iowa 2014). See 11, § 206 (b) (defining a lesser included offense in part as one that “involves the same result but differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission”).

children].”<sup>81</sup> This offense “is a relatively broad offense covering a wide range of conduct” while Murder by Abuse “(because of the additional elements) is a narrower offense covering the specific type of conduct engaged in by the defendant.”<sup>82</sup>

In other words, Manslaughter criminalizes all reckless homicide, but each degree of Murder by Neglect identifies “certain actions which rise to a greater degree of offense and warrant a more substantial punishment.”<sup>83</sup> Accordingly, the trial court erred when it concluded that the age of the victim was the only distinction between the instructed offenses and either Manslaughter or Criminally Negligent Homicide. The distinction is the breadth of the “neglect” in which El-Abbadi engaged.<sup>84</sup>

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<sup>81</sup> 11 Del.C. §632.

<sup>82</sup> *State v. Lancaster*, 631 A.2d 453, 471 (Md. Ct. App. 1993).

<sup>83</sup> *State v. Cochran*, 239 P.3d 793, 795–96 (Ct. App. 2010). This Court has similarly found that Murder Second Degree is a lesser included offense of Felony Murder even though both offenses require ‘reckless causation’ because Murder Second requires proof “that the defendant’s actions indicated a ‘cruel, wicked, and depraved indifference for human life.’” See *Deshields v. State*, 879 A.2d 591, 593-94 (Del. 2005); *Weber v. State*, 457 A.2d 674, 687-88 (Del. 1983).

<sup>84</sup> This scenario is unlike that addressed in *Johnson v. State*, 925 A.2d 504 (Del. 2007) where the elements necessary to sustain a conviction on rape second degree are identical to those required to convict of rape fourth degree. There, both offenses required (i) the intentional act (ii) of sexual intercourse with (iii) a victim under the age of 16.” Both offenses required a finding as the precise conduct of the defendant – without consent. By statutory definition, if the child is under 16, there has been no consent. When the jury found the victim was under the age of 16, the jury necessarily

The trial court failed to appreciate the difference between the precise definition of “neglect” for purposes of either degree of Murder by Neglect and the broader definition of both “criminal negligence” and “negligence” as provided in 11 Del.C. §231. Section 231 defines “negligence” as occurring when a “person fails to exercise the standard of care which a reasonable person would observe in the situation.”<sup>85</sup> A defendant acts with “criminal negligence” when he fails to perceive a risk “that the element exists or will result from his conduct” and that failure “constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.”<sup>86</sup>

Here, a rational trier of fact could have acquitted El-Abbadi of Murder by Neglect First or Second and, instead, convicted him of Manslaughter by finding that he recklessly caused Julian’s death through conduct that falls within the broader definitions of “negligent” or “criminally negligent” but does not fall within the narrow definition of neglect applicable to Murder by Neglect.<sup>87</sup>

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found there was no consent. So, proving the lesser offense necessarily proved the greater offense.

<sup>85</sup> 11 D.C. § 231 (d).

<sup>86</sup> 11 D.C. § 231 (a).

<sup>87</sup> See *State v. Handy*, 2019 WL 3976583, at \*2 (Del. Super. Ct. Aug. 20, 2019) (noting that jury was instructed, where defendant was charged with Murder by Abuse or Neglect First Degree, on the lesser-included offenses of

Similarly, a proper appreciation of the various definitions of “neglect” required the judge to instruct the jury on Criminally Negligent Homicide. For a defendant to be convicted of Criminally Negligent Homicide, the jury must find that “with criminal negligence,” he “caused the death of another person.”<sup>88</sup> While, at first blush, it appears the jury rejected the *mens rea* of criminal negligence when it rejected Murder by Neglect Second degree, there was harm in the court’s failure to instruct the jury on Criminally Negligent Homicide as the jury did find El-Abbadi’s conduct amounted to negligence. That conduct falls within the broader definition of Criminally Negligent Homicide.

The record includes El-Abbadi’s testimony and statements to police. Depending on which facts the jurors chose to believe, it could have rationally concluded, for example, either: 1) Julian’s injuries occurred prior to or while he was in El-Abbadi’s care, custody and/or control and El-Abbadi was unaware that the injuries required more medical attention than his administration of ibuprofen or other medicine to Julian; or 2) delay in treatment leading to Julian’s death was a result of Alvarez’s neglect after El-Abbadi returned Julian to her care, custody and/or control.

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Manslaughter, Murder by Abuse or Neglect in the Second Degree, and Criminally Negligent Homicide).

<sup>88</sup> 11 Del. C §631.

In either of the above scenarios, the jury could still have found El-Abbadi recklessly or with criminal negligence caused Julian's death through conduct that does not satisfy the narrow definition of "neglect" for purposes of Murder by Neglect First or Second. Further, it is rational to conclude that, had the jury been instructed that the definition of "neglect" falls within the broader definitions of "negligence" and "criminal negligence," it may have found El-Abbadi culpable of either the lesser included offense Manslaughter or Criminally Negligent Homicide. Accordingly, the court should have provided an instruction for those offenses. Its failure to do so requires this Court to reverse El-Abbadi's conviction.



**II. THE TRIAL COURT VIOLATED EL-ABBADI'S RIGHTS TO CONFRONTATION, CROSS-EXAMINATION AND TO PRESENT A DEFENSE WHEN IT PRECLUDED CROSS-EXAMINATION OF A STATE WITNESS AND DIRECT EXAMINATION OF EL-ABBADI ON AN ISSUE THAT WENT DIRECTLY TO THE HEART OF HIS DEFENSE.**

*Standard of Review*

While decisions to permit or deny cross-examination of a witness are generally subject to a harmless error analysis,<sup>89</sup> this Court reviews constitutional claims *de novo*.<sup>90</sup>

*Question Presented*

Whether the trial court committed reversible error and violated El-Abbadi's constitutional rights of confrontation and presenting a defense when it prevented him from cross examining a witness and questioning El-Abbadi regarding evidence that went to the heart of his defense.<sup>91</sup>

*Argument*

In its case in chief, the State introduced the testimony of Dr. Stephanie Deutsch, a child abuse pediatric specialist at Nemours Children's Hospital.<sup>92</sup> The prosecutor questioned Deutsch extensively about her observations of

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<sup>89</sup> *Wright v. State*, 25 A. 3d 747 (Del. 2011).

<sup>90</sup> *Williamson v. State*, 707 A.2d 350, 354 (Del. 1998).

<sup>91</sup> A201-202

<sup>92</sup> A174

Julian after he arrived at the hospital on August 19, 2019. In responding, Deutsch relied on records she had from that night as well as from an assessment of Julian she happened to conduct on February 2019 when she treated him for the flu as part of her pediatric practice. She testified that her records reveal a concern for supervisory neglect was noted at that time.<sup>93</sup>

Naturally, defense counsel sought to cross examine Deutsch on the nature of her documented concern for supervisory neglect.<sup>94</sup> However, the State objected, arguing that the evidence was not relevant and was unfairly prejudicial. Specifically, the prosecutor told the judge:

We provided defense counsel with a prior report involving the mother, Meagan Alvarez, in April of 2019. She left her daughter, Jasmine, at the decedent home alone in the apartment while she went out to Philadelphia to a club and police were called. Julian had flu-like symptoms, he was taken to A.I. and was treated for that. The mother was charged with endangering the welfare of a child, which she got probation before judgment. There was a DFS investigation and DFS was actively involved in her life when Julian was murdered.<sup>95</sup>

Defense counsel explained that he had no intention of delving into Alvarez's record. Rather, the State opened the door as to Deutsch's prior assessment of Julian and he sought to cross examine her on that specific testimony.<sup>96</sup> The judge sustained the objection after finding the evidence unfairly prejudicial

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<sup>93</sup> A184

<sup>94</sup> A201

<sup>95</sup> A202

<sup>96</sup> A201-202

and not relevant. Thereafter, upon reflection, he cautioned the jury not to speculate as to El-Abbadi's involvement in that suspected neglect.<sup>97</sup>

Later, El-Abbadi exercised his right to testify. On direct examination, he was asked about Alvarez's reluctance to call 911. He responded that she was hesitant "because she was on probation for a prior conviction with the kids[.]" Again, the State objected.<sup>98</sup> El-Abbadi, not counsel, told the judge that he brought it up because Dr. Deutsch brought it up on her direct examination by the State. In an attempt to explain why that evidence was not relevant, the judge told him that "[t]here's a distinction that was made between neglect versus what's alleged have transpired in this case, okay?"<sup>99</sup> The judge then barred the testimony and instructed the jury "to disregard Mr. El-Abbadi's last statement, [as] it has no bearing or is not germane to the issues in this case."<sup>100</sup>

An accused in a criminal trial is guaranteed the right of confrontation by both the federal and state constitutions. U.S. Const, amend. VI; Del. Const, art. I, § 7.<sup>101</sup> The rights guaranteed by the Confrontation Clause are secured in two ways: (1) the right to cross-examine the government's

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<sup>97</sup> A209; 232-233

<sup>98</sup> A530

<sup>99</sup> A535

<sup>100</sup> A534, 537

<sup>101</sup> *Smith v. State*, 913 A.2d 1197 (Del.2006).

witnesses; and (2) the “right to present a defense, the right to present the defendant's version of the facts.”<sup>102</sup> However, “[t]he main and essential purpose of confrontation is to secure... the opportunity of cross-examination.”<sup>103</sup> The rights to confront and cross-examine a witness are not only important to the defendant but to the proper functioning of the criminal justice system as a whole<sup>104</sup> as they “promote[] reliability in criminal trials [and] force[] the witness to submit to ... the greatest legal engine ever invented for the discovery of truth.”<sup>105</sup>

Because the trial court improperly limited appropriate cross examination, El-Abbadi's rights were significantly trampled upon. When the trial court improperly limited appropriate cross examination of Dr. Deutch, and improperly struck El-Abbadi's explanation for Alvarez's decision to delay medical treatment after Julian was back in her care, custody and control, it denied El-Abbadi his right to present a defense. This limitation on the cross-examination violated his constitutional right.<sup>106</sup>

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<sup>102</sup> *Washington v. Texas*, 388 U.S. 14, 19 (1967). *Accord Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

<sup>103</sup> *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974).

<sup>104</sup> *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

<sup>105</sup> *Lee v. Illinois*, 476 U.S. 530, 540 (1986).

<sup>106</sup> *See, e.g., United States v. Whitmore*, 359 F.3d 609, 621 (D.C. Cir. 2004) (district court abused its discretion when it limited cross-examination of a key witness); *United States v. Augustine*, 189 F.2d 587, 590--91 (3d Cir. 1951) (ordering new trial in light of prejudice to defense in restricting cross-

As discussed in Argument I above, based on his testimony, the jury could have acquitted El-Abbadi of Murder by Neglect First or Second Degree and found him guilty of either Manslaughter or Criminally Negligent Homicide. For example the jury could have rationally concluded either: 1) Julian's injuries occurred prior to or while he was in El-Abbadi's care, custody and/or control and El-Abbadi was unaware that the injuries required more medical attention than his administration of ibuprofen or other medicine to Julian; or 2) delay in treatment leading to Julian's death was a result of Alvarez's neglect after El-Abbadi returned Julian to her care, custody and/or control. Thus, Alvarez's conduct was a relevant issue. Under either of these findings, El-Abbadi's conduct have been found to be criminally negligent or reckless even if it did not meet the narrow definition of "neglect" for purposes of Murder by Neglect First or Second.

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examination of key government witness); *United States v. Roan Eagle*, 867 F.2d 436, 443-44 (9th Cir. 1989) (error to bar cross-examination of witness concerning plea to lesser charge, rejecting district court's argument that jury would have been unduly prejudiced by testimony about potential sentences), *cert. denied*, 490 U.S. 1028 (1990); *United States v. Lynn*, 856 F.2d 430, 432 (1st Cir. 1988) (complete bar of cross-examination concerning witness' polygraph test violated Confrontation Clause, recognizing that court's discretion to limit cross-examination "becomes operative only after the constitutionally required threshold level inquiry has been afforded the defendant") (citation omitted); *Clark v. O'Leary*, 852 F.2d 999, 1005-08 (7th Cir. 1988) (Confrontation Clause violated when defendant not permitted to question key witness regarding prejudice against defendant resulting from witness' membership in rival street gang).

The judge was incorrect when he told El-Abbadi that this case was not about neglect. El-Abbadi's defense was that he did not cause or delay treatment for Julian's injuries. He explained that Alvarez was responsible to one degree or another. Thus, whether a doctor treated Julian under circumstances pointing to neglect by Alvarez was very relevant. And, given that the State introduced the evidence, any claim that the cross examination would have been unfairly prejudicial is simply wrong.

Further, in support of its theory that El-Abbadi caused a delay in Julian's treatment, the State was permitted to introduce evidence that he left the apartment when Alvarez called 911 because he had warrants out for arrest. However, El-Abbadi testified that Alvarez was the one who was hesitant and that he urged her to call 911. He attempted to explain her hesitation. This evidence was as equally relevant to El-Abbadi's case as his warrants were to the State's case. Indeed, so critical was this evidence and therefore so profound was the court's error, that it compromised El-Abbadi's right to present a defense, which, "encompasses a defendant's rights to rebut the state's evidence through cross-examination."<sup>107</sup>

The prejudicial effect of the trial court's ruling cannot be overstated. It gutted El-Abbadi's ability to fully and fairly cross-examine on matters

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<sup>107</sup> *Alexander v. Shannon*, 163 F. App'x 167, 174 (3d Cir. 2006) (citing *Webb v. Texas*, 409 U.S. 95 (1972)).

directly related to the heart of his defense. El-Abbadi had the right to demonstrate to the jury that he should be acquitted of Murder by Neglect First or Second Degree and instead guilty of either Manslaughter or Criminally Negligent Homicide. Under these circumstances, it can hardly be disputed that if “the damaging potential of the cross-examination was fully realized,” the result of the trial might have been different.<sup>108</sup>

The limitations on the cross-examination were sufficiently disconcerting and substantively improper to warrant reversal on constitutional grounds. Moreover, El-Abbadi should have been allowed to have a full opportunity to present his defense ensuring due process. Accordingly, this Court must reverse his convictions.

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<sup>108</sup> *Van Arsdall*, 475 U.S. at 680.

## CONCLUSION

For the reasons and upon the authorities cited herein, El-Abbadi's conviction must be reversed.

Respectfully submitted,

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