

**Fifth Circuit Court of Appeal  
State of Louisiana**

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No. 26-K-100

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STATE OF LOUISIANA

*versus*

ALEXIS CALLERO

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**IN RE ALEXIS CALLERO**

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE DONALD A. ROWAN, JR., DIVISION "L", No. 23-285

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TRUE COPY

May 22, 2026



LINDA TRAN  
DEPUTY CLERK

Panel composed of Judges Fredericka Homberg Wicker,  
John J. Molaison, Jr., and Scott U. Schlegel

**WRIT DENIED**

Defendant, Alexis Callero, seeks review of the trial court's January 12, 2026 ruling that denied her motion to quash filed pursuant to La. C.Cr.P. art. 532(1) and (5). In her motion, defendant asked the trial court to dismiss the indictment for second degree murder filed against her. For reasons explained more fully below, we deny defendant's writ application.

On May 4, 2023, a grand jury indicted defendant of second degree murder in violation of La. R.S. 14:30.1 and obstruction of justice by tampering with evidence in violation of La. R.S. 14:130.1. According to defendant, the State has alleged that on December 30, 2022, she obtained a quantity of narcotics which she assumed to be heroin. Defendant consumed a portion of the narcotics, and left the remaining narcotics in the bedroom she shared with her 18-month old child. That evening, defendant and the child went to sleep in the bedroom. At some point that night or the following morning, the child gained access to the narcotics and consumed a lethal dose. Defendant discovered the child dead when she woke up in the morning. Autopsy results confirmed that the child had a toxic level of fentanyl in his system. Officers field-tested items in the bedroom and found cotton that tested positive for fentanyl and residue in a blue baggie that tested positive for

cocaine. Defendant's toxicology screening indicated that she had several narcotics present in her system, including fentanyl.

On February 26, 2025, defendant filed a motion for a bill of particulars seeking information, *inter alia*, regarding whether the State intended to prosecute her under the felony murder provision of La. R.S. 14:30.1(A)(2), and if so, she asked the State to specify the enumerated criminal offenses that it intended to pursue. According to defendant, the State asserted in response that it did not have an obligation to formally respond to the bill of particulars in writing because it provided open file discovery.

On October 3, 2025, defendant filed a motion to quash the second degree murder indictment pursuant to La. C.Cr.P. art. 532(1) and (5). Defendant argued that based on the discovery provided by the State, the only provision of the second degree murder statute that could possibly apply in this case is the felony murder doctrine set forth in La. R.S. 14:30.1(A)(2). And the only enumerated felonies that could arguably apply were cruelty to juveniles (La. R.S. 14:93(A)) or second degree cruelty to juveniles (La. R.S. 14:93.2.3).<sup>1</sup> Defendant argued that the discovery and evidence provided by the State suggested that the death was an accidental overdose. She noted that at the preliminary examination, the testifying officer admitted that he had no evidence that she intentionally gave the child fentanyl or any controlled dangerous substance. Defendant further asserted that the State argued at the preliminary examination that the defendant was engaged in the perpetration of either cruelty to a juvenile or second degree cruelty to a juvenile based on her criminally negligent mistreatment or neglect of a child who died as a result of negligence in her care for the child.

Based on these representations, defendant asserted that the cruelty to juvenile charges could only be based on her alleged negligent lack of supervision of the child. Citing to the Louisiana Supreme Court's decision in *State v. Small*, 11-2796 (La. 10/16/12), 100 So.3d 797, defendant argued that the second degree murder indictment must be quashed because the *Small* court held that the State must assert a direct act by a defendant that caused the child's death and the criminally negligent act of failing to supervise is not a direct act, but rather a negative act or a failure to act.

In its opposition filed in December 2025, the State first argued that defendant's arguments went to the merits of the State's case and were not appropriate for a motion to quash. The State argued that in *Small, supra*, the Louisiana Supreme Court made its decision with a fully developed record on

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<sup>1</sup> The offense of La. R.S. 14:93 cruelty to juveniles does not necessarily require an intentional act, but may also be committed by a criminally negligent act. La. R.S. 14:93(A)(1) provides in pertinent part as follows with respect to the crime of cruelty to juveniles:

A. Cruelty to juveniles is:

- (1) The intentional or criminally negligent mistreatment or neglect by anyone seventeen years of age or older of any child under the age of seventeen whereby unjustifiable pain or suffering is caused to said child.

La. R.S. 14:93.2.3(A)(1) defines second degree cruelty to juveniles as follows:

- A. (1) Second degree cruelty to juveniles is the intentional or criminally negligent mistreatment or neglect by anyone over the age of seventeen to any child under the age of seventeen which causes serious bodily injury or neurological impairment to that child.

direct appeal after the defendant was convicted, and here, there had not yet been a trial nor a fully developed record to facilitate an appropriate judgment as to whether the case fell within the authority of *Small*. The State argued that factual development was necessary here, and defendant would have an adequate remedy on appeal if convicted.

The State alternatively argued that the instant matter was legally distinguishable from *Small*.<sup>2</sup> It argued that defendant's conduct in the instant matter was far more egregious than the defendant's conduct in *Small* and constituted the "direct act" that resulted in the victim's death. The State further argued that there was no intervening act in the instant matter as there was in *Small* with the fire that started in the mother's absence. The State argued that here, defendant's action of leaving lethal and illegal drugs out in the bedroom where they could be accessed by her child directly caused his death. The State further argued that whether defendant committed a direct act that caused the child's death was a factual issue for trial.

Following oral argument on January 12, 2026, the trial court denied defendant's motion to quash based on its finding that the facts supported an argument that defendant's act of bringing the drugs that caused the child's death into the home was a direct act. On March 12, 2026, defendant filed a timely writ application with this Court.

La. C.Cr.P. art. 532 provides general grounds for a motion to quash in relevant part as follows:

A motion to quash may be based on one or more of the following grounds:

(1) The indictment fails to charge an offense which is punishable under a valid statute.

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(5) A bill of particulars has shown a ground for quashing the indictment under Article 485.

La. C.Cr.P. art. 485 provides:

If it appears from the bill of particulars furnished under Article 484, together with any particulars appearing in the indictment, that the offense charged in the indictment was not committed, or that the defendant did not commit it, or that there is a ground for quashing the indictment, the court may on its own motion, and on motion of the defendant shall, order that the indictment be quashed unless the defect is cured. The defect will be cured if the district attorney furnishes, within a period fixed by the court and not to exceed three days from the order, another bill of particulars which either by itself or together with any particulars appearing in the indictment so states the particulars as to make it appear that the offense charged was committed by the defendant,

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<sup>2</sup> In *Small*, the defendant mother left her six and seven-year-old children alone in the house asleep at 10:00 P.M. so she could go drink at a friend's home. A fire started on the stove while she was gone, and one of the children was unable to escape and died.

or that there is no ground for quashing the indictment, as the case may be.

The time for testing the sufficiency of an indictment or a bill of information is before trial by way of a motion to quash or an application for a bill of particulars. *State v. Bernard*, 25-461 (La. App. 5 Cir. 10/15/25), 426 So.3d 50, 52, *writ denied*, 25-1306 (La. 10/16/25), 419 So.3d 798. A motion to quash is a mechanism by which to raise pretrial pleas of defense that do not go to the merits of the charge. *State v. Dufrene*, 02-1083 (La. App. 5 Cir. 4/8/03), 846 So.2d 46, 48. It is treated much like an exception of no cause of action in a civil suit. *Id.* In considering a motion to quash, a court must accept as true the facts contained in the bill of information, and determine as a matter of law and from the face of the pleadings, whether a crime has been charged. *Id.* While evidence may be admitted, it is limited to procedural matters. *State v. Byrd*, 96-2302 (La. 3/13/98), 708 So.2d 401, 411, *cert. denied*, 525 U.S. 876, 119 S.Ct. 179, 142 L.Ed.2d 146 (1998). The question of factual guilt or innocence of the offense charged is not raised by the motion to quash. *Id.*

While a motion to quash does not serve as a vehicle for asserting a defense on the merits, an exception to this rule exists where the State had alleged or admitted facts under which a lawful conviction for the charged offense is not possible. *State v. Clark*, 12-1296 (La. 5/7/13), 117 So.3d 1246, 1249. When the issue presented in a motion to quash is exclusively a question of law, appellate courts review the ruling *de novo*. *State v. Odeh*, 21-657 (La. App. 5 Cir. 12/23/21), 335 So.3d 977, 986, *writ denied*, 22-148 (La. 3/15/22), 334 So.3d 396. Generally, the trial judge's denial of a motion to quash should not be reversed in the absence of a clear abuse of the trial court's discretion. *Id.*

In her writ application, defendant contends that the trial court made a reversible legal error by denying her motion to quash. She contends that the exception in *Clark, supra*, applies here, because in *Small*, the Louisiana Supreme Court established, as a matter of law, that a cruelty to juveniles offense arising from the negligent lack of supervision cannot serve as an enumerated felony under the felony murder doctrine. The *Small* court reasoned that the felony murder doctrine requires more than just proximate causation, and instead requires a direct act by the defendant that causes the victim's death: "[w]here a second degree murder is based on the underlying crime of cruelty to juveniles or second degree cruelty to juveniles, and that conduct involves the criminal negligence of lack of supervision, there is no 'direct act' of killing; instead the act is a negative act." *Small*, 100 So.3d at 809.

Defendant argues that her actions were not a direct act of killing but constitute a failure to supervise just as in *Small*. Thus, defendant contends that because the State failed to allege a direct act by her that caused the death of the victim, the second degree murder charge must be quashed. Defendant further argues that in order to be a direct or intentional act, she must have caused the child to ingest the drugs, and there is no evidence to support that she intentionally caused the child to ingest the drugs. She argues that the child's act of accessing and ingesting the drugs on his own is an intervening event similar to the fire in *Small* that renders the application of the felony murder doctrine improper.

The *Small* court concluded that neglect in the form of lack of supervision cannot supply the direct act of killing needed for a second degree murder conviction. However, at the same time, it emphasized that “neglect takes many forms” and that a direct act of negligence can serve as a basis for an enumerated felony of cruelty to juveniles under the felony murder doctrine. *Id.* at 810-11. We do not find that the trial court abused its discretion by concluding that the facts alleged in the present matter are distinguishable from the lack of supervision situation in *Small*, and that these allegations could constitute a direct act by defendant that caused the death of the victim. The State has alleged that defendant purchased illegal and lethal narcotics and left them in the bedroom she shared with the child in a manner that was accessible to the child. These allegations involve actions by defendant that surpass a mere lack of supervision. More importantly, this inquiry involves a factual question of guilt or innocence for the jury to decide and does not constitute proper grounds for a motion to quash.

Accordingly, this writ application is denied.

Gretna, Louisiana, this 22nd day of May, 2026.

**SUS**  
**JJM**

**Fifth Circuit Court of Appeal**  
**State of Louisiana**

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NO. 26-K-100

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STATE OF LOUISIANA

*versus*

ALEXIS CALLERO

**WICKER, J., DISSENTS**

I respectfully dissent from the majority’s opinion denying Relator’s writ application. In her application, Relator, Alexis Callero, seeks review of the trial court’s denial of her motion to quash the May 4, 2023 indictment, in which she was charged with the second-degree murder of her twenty-month-old baby boy. While it goes without saying that the death of baby L.C. is a terrible tragedy, in my opinion, under the undisputed seminal facts presented here, this indictment is based on “an allegation of fact which cannot conceivably satisfy an essential element of the charged crime and therefore must be quashed as defective.” *State v. Byrd*, 96-2302 (La. 3/13/98), 708 So. 2d 401; *State v. Legendre*, 61,719 (La. 9/5/78), 362 So.2d 570, 571 (La. 1978); *State v. Smith*, 14-213 (La. 4 Cir. 12/17/14), 156 So.3d at 1231, *writ denied*, 1594 (La. 11/30/15), 182 So. 3d 43.

In this case, the indictment sets forth no factual basis for the second-degree murder charge.<sup>1</sup> The Arrest Warrant contains no particulars of the crime. The Affidavit for Arrest Warrant prepared by Detective Nicholas Engler states only that drug paraphernalia was found in the bedroom shared by Relator and L.C., left unsecured and within the reach of children. On that basis, Detective Engler sought an arrest warrant charging Relator with second degree cruelty to juveniles, second degree murder, possession of drug paraphernalia and possession of a Schedule I Controlled Dangerous Substance.

Detective Engler also testified at the April 19, 2023 preliminary examination that he had uncovered no evidence indicating that: (i) Relator intentionally gave L.C. any fentanyl or other controlled dangerous substance, or (ii) Relator ever intended to cause L.C. to suffer harm or death. Further, the State informed the court during the preliminary examination that:

[T]his occurred when [Relator] was engaged in the perpetration of either cruelty to a juvenile or second degree cruelty to a juvenile and the second degree [murder] statute that she’s also charged with involves the criminally negligent mistreatment or **neglect of a child**

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<sup>1</sup> The indictment states simply that on or between December 30, 2022, and December 31, 2022, Relator committed second degree murder of L.C., in violation of La. R.S. 14:30.1.

that results in serious bodily injury or neurological impairment and, tragically, **the [decedent] died as a result of [Relator's] negligence in her care for him.** (Emphasis added).

Defense counsel filed a Motion for Bill of Particulars, in accordance with La. C.Cr.P. art. 484.<sup>2</sup> The trial court ordered the State to provide a written response to Relator's Motion for a Bill of Particulars by March 17, 2023. The State declined to answer Relator's Motion for Bill of Particulars, citing open file discovery. Thereafter, Relator filed a Motion to Quash Indictment pursuant to La. C.Cr.P. art. 485, on the ground that a lawful conviction could not be entered on the crime as charged.<sup>3</sup> At the hearing on Relator's Motion to Quash, the State erroneously represented that it had not been ordered to respond to Relator's Motion for Bill of Particulars, but offered that it would do so after the hearing if so ordered by the court. The court did not issue a further order to the State to answer Relator's Motion for Bill of Particulars in writing. As discussed herein, however, while the State did not answer the Defendant's Motion for Bill of Particulars, it did, on two occasions, during the April 19, 2023 Preliminary Hearing, and on January 12, 2026, during the hearing on Relator's Motion to Quash the Indictment, inform the court that the basis for the second degree murder count was Relator's perpetration of either cruelty to a juvenile or second degree cruelty to a juvenile.

The January 12, 2023 Affidavit for Arrest Warrant, Detective Engler's testimony offered by the State during the April 19, 2023 preliminary examination, the State's representations to the court during the preliminary examination and during the January 12, 2026 hearing on the instant motion to quash the indictment, render it uncontested that the basis for this indictment is the baby's death after he accidentally ingested a lethal dose of fentanyl contained in a baggie Relator had left on top of a bureau in the bedroom she shared with him. Further, as discussed above, based upon Detective Engler's testimony during the preliminary examination, there appears to be no evidence that Relator intentionally gave her baby any illegal drugs or had any intent to injure or kill her baby.

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<sup>2</sup> La. C.Cr.P. art. 484 provides, in pertinent part: "A motion for a bill of particulars may be filed of right in accordance with Article 521. The court, on its own motion or on motion of the defendant, may require the district attorney to furnish a bill of particulars setting forth more specifically the nature and cause of the charge against the defendant."

<sup>3</sup> La. C.Cr.P. art. 485 states:

If it appears from the bill of particulars . . . together with any particulars appearing in the indictment, that the offense charged in the indictment was not committed, or that the defendant did not commit it, or that there is a ground for quashing the indictment, the court may on its own motion, and on motion of the defendant shall, order that the indictment be quashed unless the defect is cured. The defect will be cured if the district attorney furnishes, within a period fixed by the court and not to exceed three days from the order, another bill of particulars which either by itself or together with any particulars appearing in the indictment so states the particulars as to make it appear that the offense charged was committed by the defendant, or that there is no ground for quashing the indictment, as the case may be.

The majority rests its decision on two findings:

1. The inquiry here involves a factual question of guilt or innocence for the jury to decide and does not constitute proper grounds for a motion to quash.
2. On the facts present here, this case is distinguishable from the factual basis present in *State v. Small*, 11-2796 (La. 10/16/12), 100 So.3d 797, wherein the Louisiana Supreme Court reversed Ms. Small's conviction for the second degree murder of her child, holding that in order to hold a defendant criminally culpable for setting in motion a chain of events that ultimately resulted in the death of another, defendant or his accomplice must have engaged in a direct act which caused the death of the victim.

I disagree on both accounts. In my humble opinion, in light of the *Clark* case, as well as the *Small* and *Smith* cases, which are discussed below, and given the above facts, based upon which the trial court was required to decide as a matter of law whether a crime had been charged, the trial court erred when it denied Relator's motion to quash the indictment. *See State v. Clark*, 12-1296 (La. 5/7/1), 117 So. 3d 1246; *Small, supra*; and *Smith, supra*.

LSA-R.S. 14:30.1 provides, in pertinent part:

A. Second degree murder is the killing of a human being:

- (1) When the offender has a specific intent to kill or to inflict great bodily harm; or
- (2) When the offender is engaged in the perpetration or attempted perpetration of . . . cruelty to juveniles [or] second-degree cruelty to juveniles . . . even though he has no intent to kill or to inflict great bodily harm.
- (3) When the offender unlawfully distributes or dispenses a controlled dangerous substance listed in Schedules I through V of the Uniform Controlled Dangerous Substances Law,<sup>1</sup> or any combination thereof, which is the direct cause of the death of the recipient who ingested or consumed the controlled dangerous substance.

In my opinion, given the uncontested attestations discussed above, the only provision of La. R.S. 14:30.1 which could conceivably apply in this case is La. 14:30.1(2): the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of . . .cruelty to juveniles [or] second-degree cruelty to juveniles . . . even though he has no intent to kill or to inflict great bodily harm.

As pointed out by the majority, a motion to quash a bill of indictment is properly granted when the indictment fails to charge an offense which is punishable under a valid statute and also when, accepting the facts contained in the indictment and bill of particulars as true, a ground exists for quashing the

indictment under La. C.Cr.P. art. 485; La. C.Cr.P. Art. 532 (1) and (5);<sup>4</sup> *Smith*, 156 So.3d at 1231, *citing State v. Franklin*, 13-488 (La. App. 4 Cir. 10/9/13), 126 So.3d 663, 667; *State v. Schmolke*, 12-406 (La. App. 4 Cir. 1/16/13), 108 So.3d 296, 298.

Both the State, in its opposition to Relator's motion to quash, and the majority here, opine that "this inquiry involves a factual question of guilt or innocence for the jury to decide and does not constitute proper grounds for a motion to quash." It goes without saying that a motion to quash is not the proper forum to address a defense on the merits and the question of guilt or innocence is not properly raised by a motion to quash. *State v. Perez*, 464 So.2d 737, 739-40 (La. 1985); *See also State v. Lauff*, 06-717 (La. App. 5 Cir. 2/ 13/07), 953 So.2d 813, 818; *State v. Jordan*, 06-187 (La. App. 5 Cir. 9/26/06), 938 So.2d 805, 807-808.

However, an exception to this rule exists where the state has alleged or admitted facts under which a lawful conviction for the charged offense is not possible. *State v. Legendre*, 362 So.2d 570, 571 (La. 1978) (pre-trial motion to quash appropriate remedy if charges are based "upon an allegation of fact which cannot conceivably satisfy an essential element of the crime"). *Clark*, 117 So. 3d at 1249. When an indictment fails to charge a punishable offense under a valid statute – *i.e.*, where the indictment is based on an allegation of fact which cannot conceivably satisfy an essential element of the charged crime – it is defective and should be quashed. *Byrd*, 708 So.2d at 411; *Legendre*, 362 So.2d at 571; *Smith*, 156 So.3d at 1231.

Here, the State has not alleged that the Relator had specific intent to kill or inflict great bodily harm on the victim. Although the victim died as the result of an overdose of fentanyl, the State has not alleged that the substance was distributed or dispensed to the victim by Relator. Thus, Relator is appropriately charged with second degree murder only if the victim died while she was engaged in committing cruelty to juveniles or second-degree cruelty to juveniles.

In pertinent part, La. R.S. 14:93(A), defines cruelty to juveniles as:

- (1) The intentional ***or criminally negligent mistreatment or neglect*** by anyone seventeen years of age or older of any child under the age of seventeen whereby unjustifiable pain or suffering is caused to said child. Lack of knowledge of the child's age shall not be a defense.

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<sup>4</sup> La. C.Cr.P. art. 532 (1) and (5) provide:

A motion to quash may be based on one or more of the following grounds:

- (1) The indictment fails to charge an offense which is punishable under a valid statute;

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- (5) A bill of particulars has shown a ground for quashing the indictment under Article 485.

(Emphasis added).

La. R.S. 14:93.2.3(A)(1) defines second-degree cruelty to juveniles as “the intentional *or criminally negligent mistreatment or neglect* by anyone over the age of seventeen to any child under the age of seventeen which causes serious bodily injury or neurological impairment to that child.” (Emphasis added). No intentional act on the part of Relator has been alleged by the State. Instead, the State is relying on “criminally negligent mistreatment or neglect” to support its felony murder charge against the relator.

Criminal negligence exists when “although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender’s conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.” La. R.S. 14:12. The charge against Relator in this case arises from criminal negligence, as the State has expressly admitted. The manner in which Relator was allegedly criminally negligent could only have been her failure to properly monitor and supervise the victim to keep him away from harmful substances that were present in the house.

In *Small*, a mother left her two children alone in their apartment while she went to a friend’s house to drink. While the mother was away, a fire started in the kitchen of the apartment and one of the children ultimately died from smoke inhalation. The mother was charged with, and convicted of, second degree felony murder based on the underlying felony of cruelty to juveniles. In reversing her conviction for second degree felony murder, the Louisiana Supreme Court found that the basis of the charge was that the defendant had been criminally negligent for leaving her young children unsupervised, which ultimately resulted in the death of her daughter; because, however, the defendant’s act in leaving the children alone was not a direct act of the defendant causing the death of the child, she could not be guilty of second degree murder. 100 So.3d at 805-06. The Court stated:

[T]his Court has interpreted the felony murder rule to require that a ***direct act of a defendant*** or his accomplice ***cause the death of the victim and has refused to hold persons criminally culpable for setting in motion chains of events that ultimately result in the death of others.*** . . . In the context of felony murder, this issue arises most often when death results from the responses of third parties fleeing, resisting, or pursuing a defendant. In [*State v.*] *Garner*, [238 La. 563, 115 So.2d 855 (1959)], this Court adopted the ‘agency test,’ which . . . restricts criminal culpability to deaths directly caused by the defendant and co-felons, and rejected the ‘proximate cause’ test, which holds the defendant responsible for all deaths that foreseeably result from the acts of defendant and co-felons.

100 So.3d at 806-07. (Emphasis added; citations and footnote omitted).<sup>5</sup>

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<sup>5</sup> In *Garner*, the defendant was not guilty of felony manslaughter where the victim was killed by a shot fired by a bartender who was shooting at the defendant in self-defense but instead killed the victim. *Garner*, 115 So.2d at 857. In *State v. Kalathakis*, 563 So.2d 228 (La. 1990), the victim was shot and killed by officers during a raid on a trailer in which methamphetamine was being manufactured after the victim ran from the trailer and fired at the officers, who returned fire while, at the same time, Kalathakis remained in the trailer and pointed

The Court went on to find that where a second degree murder charge is based on the underlying crime of cruelty to juveniles or second degree cruelty to juveniles involving the criminal negligence of lack of supervision “there is no *direct act of killing*; instead, the act is a negative act.” *Id.* at 809. (Citation omitted). The Court observed that the use of the term, “offender,” in the second degree murder statute means that the “physical element may only be shown by proof that the defendant or an accomplice performed the direct act of killing.” *Id.* A defendant cannot be guilty of second degree murder merely because she set in motion a series of events that resulted in a death foreseeably caused by her conduct. *Id.* at 807-08.

The Court found support for its position in La. R.S. 14:2(B)(3), which lists second degree murder as a “crime of violence.” A crime of violence is one that has as an element the use, attempted use, or threatened use of physical force against the person or property of another and involves a substantial risk that physical force will be used in committing the offense. *Id.* It stated:

Cruelty to juveniles and second degree cruelty to juveniles are the *only* crimes included in the felony murder rule’s list of enumerated felonies that can be committed by an act of neglect. All of the others involve physical force or the substantial risk of the use of physical force. While neglect can be interpreted to include a lack of supervision, to use the cruelty to juveniles statutes to extend second degree felony murder into the realm of lack of supervision removes the use of any ‘physical force’ or the ‘substantial risk of physical force’ that these crimes of violence entail.

*Id.* at 209-210. (Italics in original; footnote omitted).

In the *Smith* case, a mother left her five-year old daughter unsupervised in their residence while she went to the grocery store. When she left, the child was watching television. When she arrived home, the mother found the child lying on the closet floor with a gunshot wound to her head and a firearm lying next to the child on the floor. Evidence showed that the defendant lived at the residence with her cousin and the victim. The defendant’s cousin admitted that he kept a firearm in the apartment, claiming that it was kept underneath clothing on the top shelf of the closet where the victim could not reach it. He believed that the victim had seen the handgun previously but did not believe that she knew where he kept the gun. Prior to the incident, the victim had told other family members that she had seen a gun in the residence underneath the cousin’s pillow. Based on this information, the defendant was arrested and charged with cruelty to juveniles. When the child subsequently succumbed to her injuries, the defendant was charged second degree felony murder, with the underlying offense being cruelty to juveniles.

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a pistol at officers as another accomplice attempted to dispose of chemicals in the bathroom. Kalathakis was charged with felony murder of the victim who was shot by police. The Louisiana Supreme Court found that Kalathakis could not be held liable for felony murder because the shooting was too attenuated for defendant’s criminal acts in manufacturing narcotics to be considered the legal cause of the victim’s death. *Id.* at 233. Kalathakis had set into motion a series of events that proximately caused the death of the victim but committed no direct act causing the victim’s death. *See also State v. Myers*, 99-1849 (La. 4/11/00), 760 So.2d 310, 315-16, wherein the Louisiana Supreme Court again rejected the proximate cause theory and reaffirmed the agency theory, wherein a defendant can only be guilty of felony murder when the victim’s death is caused by the direct act of the defendant or his co-perpetrators.

Defendant filed a motion to quash the indictment on the grounds that under *Small, supra*, she could not be charged with second degree felony murder based on her negligent failure to supervise her child. She alleged that the indictment and the bill of particulars failed to allege any direct action on her part that caused the victim's death. As it does here, the State contended that the ground for the motion to quash was merits-based and not a proper basis for a motion to quash. The trial court granted the motion to quash and the State appealed.

Based on the decision of the Louisiana Supreme Court in *Small*, the Fourth Circuit Court of Appeal upheld the trial court's decision to quash the indictment for second degree murder. As is the case here, the indictment did not specify which provision of La. R.S. 14:30.1 formed the basis for the second degree murder charge. The defendant filed a bill of particulars, but the State simply referred the defense to the police report, which referred to the child being left unsupervised in a residence where a firearm was present. The Fourth Court determined that the predicate felony upon which the State relied to support the charge was cruelty to juveniles by negligent supervision which, under *Small*, could not form the predicate for a felony murder charge. The Louisiana Supreme Court denied writs in the *Smith* case.

In this case, in light of the multiple occasions in which the Louisiana Supreme Court has reiterated the requirement of a direct act of killing by the offender in similar situations, as discussed above, in my opinion, under the foregoing authorities, and in the absence of a bill of particulars setting forth the factual basis of the charge of second degree murder against Relator, the Indictment in this case fails to charge Relator with a punishable crime under the second degree murder statute. While the death of baby L.C. is deeply tragic, his mother's acts of sleeping with her twenty month old child in the room where drugs and drug paraphernalia were present and unsecured, and in failing to monitor or supervise her child to prevent him from accessing those dangerous items, may amount to horrifying criminal negligence; they do not, however, constitute a direct act by Relator causing the death of her child within the contemplation of *Small*. In my opinion Relator's writ application should have been granted, the Indictment should have been quashed, and the State should have been ordered to amend the charge to criminally negligent homicide, a violation of La. R.S. 14:32(A)(1).

Alternatively, as the State declined to answer the Motion for Bill of Particulars, yet twice informed the court that the basis for the second degree murder charge was the offender's perpetration of either cruelty to a juvenile, or second degree cruelty to a juvenile, I would remand this matter to the trial court to order the State to answer Relator's Motion for Bill of Particulars and, thereafter, to reconsider the Motion to Quash the Indictment in light of the State's answer.

For the foregoing reasons, I respectfully dissent.

FHW

