

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Richland County
Alison Renee Lee, Circuit Court Judge

Brenda Gail Cutro,

Petitioner,

vs.

State of South Carolina,

Respondent.

Appellate Case No. 2012-212782

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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ISSUES PRESENTED

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II. The PCR court did not err in denying the PCR application on the grounds that counsel should have requested the trial court to more thoroughly answer the jury's questions regarding the intent required to convict for homicide by child abuse.

III. The PCR Court did not err in finding counsel was ineffective for failing to call Dr. E. Selman Watson as a witness where counsel made a reasonable strategic decision not to call the doctor, where Dr. Watson's testimony would have been mostly cumulative to other defense witnesses' testimony, where Cutro was not prejudiced by such deficiency and where not calling a twenty-ninth defense witness in this case does not constitute performance below professional norms.

IV. The PCR court did not err in finding that Cutro failed to prove that counsel was ineffective in their advice as to whether or not Cutro should have accepted an Alford plea.

STATEMENT OF THE CASE

Petitioner Gail Cutro was indicted in Richland County for murder and homicide by child abuse for the death of Child 3. Cutro was tried and convicted by a jury on these charges that year, but the convictions were reversed by this Court in State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998).

During the December 1998 term of court, Cutro was indicted for murder and homicide by child abuse for the death of Child 1 and for assault and battery with intent to kill and assault and battery of a high and aggravated nature for the injuries inflicted on Child 2. Cutro was tried in 1999 for all these charges before the Honorable James C. Williams, Jr., and the trial ended with a hung jury (according to testimony at the PCR hearing, with a vote of 11-1 for conviction).

Cutro was tried again on June 12 – July 2, 2000, before Judge Williams. Cutro was represented by Douglass Strickler, Beattie Butler, and April Sampson, Esquires. Cutro was convicted of homicide by child abuse for the deaths of Child 1 and Child 3. However, she was acquitted of murder for both children, and for the charges related to Child 2. Judge Williams sentenced Cutro to life imprisonment.

This Court affirmed the convictions after appellate counsel Joseph L. Savitz, Robert M. Dudek, and Butler submitted an eight-issue brief. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005).

Cutro filed a PCR application on September 21, 2006. Cutro filed an amended PCR application on May 7, 2009. On May 14, 2009, an evidentiary hearing was held before the Honorable Alison Renee Lee. The record remained open for depositions of

Dr. Selman Watson and April Sampson, which were taken on July 29, 2009. Judge Lee denied the PCR application by order dated July 5, 2012.

Cutro appealed the denial of relief and filed her petition for writ of certiorari.

This return follows.

STATEMENT OF FACTS

The facts presented to the jury are well summarized in this Court's opinion in State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005), which is reproduced (with the deceased and injured victims' names redacted) below as follows:

Appellant and her husband Josh Cutro operated a home daycare in Irmo, South Carolina. Between January and September of 1993, two infants, Child 1 and Child 3, died at the Cutros' home. A third infant, Child 2, became ill while at their home and was subsequently diagnosed with serious brain damage. The State produced evidence that all three infants were victims of Shaken Baby Syndrome. Appellant was convicted of two counts of homicide by child abuse and sentenced to concurrent life sentences for killing Child 1 and Child 3, she was acquitted of the assault and battery charge regarding Child 2.

The State's theory of the case was that appellant's actions were motivated by Munchausen Syndrome by Proxy (MSBP), which the State's medical experts defined as a form of child abuse in which the perpetrator harms a child in order to garner sympathy and attention for herself.

Child 1

Child 1 was almost five months old when he was found dead in his crib at the Cutro home on January 4, 1993. According to his parents, Child 1 was a healthy baby and had no health problems that morning. His mother dropped him off at the Cutros' daycare at about 7:30 a.m. At 1:57 p.m., emergency personnel received a call to the Cutro's home. When they arrived at 2:11 p.m., child 1 was not breathing. He was rushed to the hospital where he was declared dead.

Child 1's mother testified that appellant told her the following regarding Child 1's death:

A: She told me that Child 1 was taking a nap. She went in and checked on him. He was asleep. She went in the kitchen, reached up in the cabinet to get his food down. Josh came in behind her and screamed, Child 1 is not breathing, call 9-1-1.

....

Q: After she left the room where Child 1 was and went into the kitchen, how long a period of time did she indicate it was before Josh entered the room and screamed?

A: The way she explained it to me was she checked on Child 1 walked in the kitchen, and reached in the cabinet. Josh walked in behind her and screamed, Child 1 is not breathing, call 9-1-1 – however long it takes to get from the living room into the kitchen and reach into a cabinet, a few seconds. And her kitchen was right beside the living room.

Q: So according to Gail Cutro, who was the last person who had contact with your son, Child 1, before Josh Cutro found him not breathing?

A: Gail.

After an autopsy, the coroner's office reported Child 1's cause of death as Sudden Infant Death Syndrome, or "SIDS" which is the diagnosis given when an infant's cause of death cannot be identified. Dr. Daniel, who performed the autopsy, did note the presence of petechial hemorrhages in the cortical section of Child 1's brain which she testified was unusual in a SIDS case.

In July 1994, Child 1's body was exhumed and re-autopsied. Dr. Ophoven, who reviewed the autopsy report, concluded that the presence of the petechial hemorrhages in Child 1's brain and a sub-dural hemotoma, which had not been discovered in the original

autopsy, indicated Child 1 died a traumatic death caused by shaking and asphyxia. Dr. Gilbert-Barness testified that Child 1 died of Shaken Baby Syndrome which damaged the medulla causing the heart and respiration to stop.

Other medical testimony indicated that Shaken Baby Syndrome can occur with no external sign of trauma. Because a baby's brain is not fully developed, violent shaking damages the vital center of the brain that controls breathing which can cause death by asphyxiation. The presence of petechial hemorrhages indicates asphyxia. Expert testimony further indicated that the symptoms of Shaken Baby Syndrome manifest immediately after the shaking – head injury occurs within seconds and a baby might die immediately.

Child 2

Child 2 was four months old when he began daycare with the Cutros on June 7, 1993. A couple of days after beginning daycare, Child 2 became irritable and stopped sleeping through the night. He was fussy on June 23 when his mother dropped him off at the Cutros' at about 7:30 a.m. Between 10:30 and 10:50 a.m., Child 2's mother received a telephone call at work from appellant stating that the baby was "inconsolable" and suggesting she pick him up and take him to the doctor. When Child 2's mother arrived at the Cutros' a short time later, the baby was already in his car seat and they immediately handed him to her. Child 2 remained in his car seat until he was in the doctor's office. When Child 2's mother removed him, she discovered Child 2 was limp and unable to control his neck. Another child's parent had seen Child 2 that morning in daycare and testified he was moving normally at that time.

Dr. Alexander, who reviewed Child 2's medical records, testified in his opinion Child 2 had been the victim of two shaking episodes. An MRI and CT scan revealed old and new blood in his brain indicating an earlier episode, probably two weeks previous, that had healed to some extent. Child 2 also exhibited retinal hemorrhages indicative of Shaken Baby Syndrome.

Child 3

Child 3 was about two months old when she began daycare with the Cutros in June 1993. Child 3 was in daycare for about only two hours a day while Child 3's mother worked part-time. On September 9, 1993, Child 3's mother dropped Child 3 off at the Cutros' at noon. A picture of Child 3 taken earlier that day shows she was a healthy and normal baby, a description her parents corroborated.

When Child 3's mother left work at 2:30 p.m., she went to pick Child 3 up at the Cutro's home. She pulled up as EMS personnel were arriving. Josh Cutro came out of the house and told Child 3's mother that Child 3 was dead.

Child 3's mother testified that appellant told her that she, appellant, found Child 3 was not breathing and Josh was out of the house at that time. Another parent testified appellant told her Josh went to pick up their children from school and that she, appellant, was the only adult in the room when Child 3 stopped breathing.

Other parents of the Cutro's daycare children also testified. One parent testified Josh told her he had just returned home when appellant came outside to tell him about the baby. Another testified that appellant told her that she, appellant, "was in the room with Child 3 when she died . . . and that she couldn't believe that she didn't notice that [Child 3] stopped breathing."

Dr. Reynolds, who autopsied Child 3's body, testified petechial hemorrhages were present in her brain, which he had never seen in a SIDS death. Because he could not determine the cause of death, he concluded it was SIDS.

Child 3's body was exhumed and re-autopsied in July 1994. Dr. Ophoven testified that Child 3's brain had a subdural hematoma which, in addition to the petechial hemorrhages, indicated she had died of trauma and asphyxia. Dr. Gilbert-Barness concurred and stated that these injuries indicated Shaken Baby Syndrome.

Evidence of [Munchausen Syndrome by Proxy]

As proof of motive, the State introduced evidence of appellant's attention-seeking behavior regarding the purported SIDS deaths of the two infants who died in her daycare. She kept their obituaries, photos, and items of clothing, as well as frequently visiting their gravesites and emotionally discussing their deaths repeatedly with others. Appellant also fabricated that she had lost one of her own children and that a baby had died in her care in 1992. The State's medical experts opined that the injuries to the three infants and appellant's behavior indicated a pattern of child abuse identified as MSBP.

ARGUMENT

I.

The PCR court did not err in finding Cutro failed to meet her burden of proving her appellate counsel ineffective where appellate counsel raised eight stronger issues in lieu of the forsaken issue of whether the trial court erred in admitting expert testimony regarding Munchausen Syndrome by Proxy (MSBP), and where the expert testimony was admissible and relevant towards explaining motive, and where its prejudicial effect did not substantially outweigh its probative value.

Cutro argues that appellate counsel was ineffective for not raising the issue of whether the trial court erred under State v Council, 335 S.C. 1, 515 S.E.2d 508 (1999) and Rule 702, SCRE, in allowing the prosecution to present expert testimony on Munchausen Syndrome by Proxy (MSBP). Probative evidence supports the PCR court's finding that appellate counsel was not ineffective for failing to raise this issue, as the record reflects that appellate counsel sagely chose eight stronger issues in lieu of this issue and that the trial court did not err in admitting the testimony, especially under the standard for admission under the law at the time of trial and appeal.

Cutro attempts to circumvent the appropriate standard of review of this claim, arguing that the issue should be reviewed de novo and that if the issue would be a successful appeal issue, then she was entitled to relief. These propositions of law are incorrect. Appellate counsel appointed to represent an indigent defendant in his appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983). Indeed, an indigent defendant has no constitutional right to compel appointed counsel to press

non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. Id. Appellate counsel's representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Furthermore, under the two part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), an applicant must show not only that counsel's performance was deficient, but that this deficiency prejudiced his defense.

In the instant case, this Court would be looking at the same cold record as the PCR court to determine the prejudice prong of Strickland. But for the first prong of Strickland, this Court should defer to the PCR court's ruling as testimony at the PCR hearing indicates the decision not to raise the issue on appeal was a matter of strategy. One of the public defenders representing Cutro at trial, Beattie Butler, Esquire, testified on whether this issue should be raised. Butler provided assistance to the two other appellate attorneys, Robert Dudek, Esquire, and Joseph Savitz, Esquire. Butler felt the issue should have been raised, but admitted he did not have their level of appellate experience and that they disagreed with him. App. pp. 4586-4587.

Accordingly, the PCR court's findings should be affirmed because appellate counsel made a reasonable choice in raising eight other issues that appear to be much stronger than the issue Cutro now promotes in this allegation. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (stating the PCR court's findings should be affirmed if supported by probative evidence).

Contrary to Cutro's claims, MSBP is a valid medical theory concerning a type of child abuse that is taught in medical schools. Testimony regarding the syndrome was relevant towards explaining Cutro's motive: how a seemingly doting mother of three and caretaker of children murdered two infants and injured a third within an eight month period at her daycare center.

Cutro claims that the testimony was prejudicial because without testimony regarding MSBP, joinder of the charges would be impossible. This is simply not the case. As this Court has already noted in its opinion from the direct appeal of her convictions: "[T]he State's theory of the case was that appellant killed the victims to gain sympathy and attention for herself" State v. Cutro, 365 S.C. 366, 377, 618 S.E.2d 890, 895 (2005) (affirming the admission of babies' memorabilia seized from Cutro's home as properly admitted to show motive). While expert testimony regarding MSBP was helpful to the jury, the evidence showing her motive, including fabricating deaths of children in her home, collecting her victims' paraphernalia such as the babies' clothes, visiting and laying on her victims' graves, joining and participating in SIDS support groups, and a story she wrote, "SIDS, a Babysitter's Story", all were admissible under the State's theory of the case and tied together the three separate events occurring in her daycare within eight months.

The admission of expert testimony is within the sound discretion of the trial court. State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). Rule 702, SCRE addresses the admissibility of expert testimony as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

All expert testimony, whether scientific, technical, or otherwise, must meet the requirements of Rule 702. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

The admissibility of scientific evidence is dependent on whether the experts relied on scientifically and professionally established techniques. State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). Under Council, the trial court must consider the following concerning expert testimony for scientific evidence: “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality of control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.” 335 S.C. at 19, 515 S.E.2d at 517.

The admissibility of scientific evidence is dependent on whether the experts relied on scientifically and professionally established techniques. Jones. This standard is designed to prevent jurors from being misled by an aura of infallibility surrounding unproven scientific methods. State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997) *overruled by* State v. White, 372 S.C. 364, 642 S.E.2d 607 (S.C. Ct. App. 2007).

But not all expert testimony is subject to a Jones challenge. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). At the time of trial, “[i]f the expert’s opinion [did] not fall within Jones, questions about the reliability of an expert’s methods go only to the **weight, but not admissibility**, of the testimony.” Morgan, 326 S.C. at 513, 485 S.E.2d at 118 (emphasis added). For instance, this includes the testimony of behavioral science experts. Id. Likewise, in finding that expert testimony on eyewitness reliability was admissible, the

South Carolina Supreme Court rejected the necessity of a Jones analysis for that type of evidence to show that the field was a recognized area of expertise. Whaley, supra. “As the Whaley court indicated, when a proper foundation is established, a Jones analysis is not warranted if expert testimony is based on specialized skill or knowledge rather than on scientific techniques.” State v. White, 372 S.C. 364, 642 S.E.2d 607 (S.C. Ct. App. 2007). Thus, Cutro’s reliance on Council and Jones puts her analysis of the issue on the wrong track at the onset of her analysis.

In finding that expert testimony on eyewitness reliability was found admissible, the South Carolina Supreme Court found the testimony distinguishable from “scientific” evidence such as DNA test results, blood splatter interpretation, and bite mark comparisons. An eyewitness identification witness gives expert opinion evidence similar to the type given by **doctors** or psychiatrists.” Whaley, 305 S.C. at 142, 406 S.E.2d at 371-372 (emphasis added).

In the instant case, arguments about the reliability application of the MSBP testimony are questions of weight, not admissibility, based on the law in existence at the time of trial and appeal. At the time of appeal, a number of other jurisdictions would allow evidence of MSBP provided there is an adequate foundation presented for its admission. People v. Phillips, 175 Cal. Rptr. 703, 711-14 (Cal. App. 1981); Reid v. State, 964 S.W.2d 723, 725-34 (Tx. Ct. App. 1998); In the matter of Jessica Z., 515 N.Y.S.2d 370 (N.Y. Fam. Ct. 1987); Stratton v. Orange County Department of Social Services, et al., 628 N.Y.S.2d 818 (A.D.2d Dept. 1995); Dolin on Behalf of N.D. v. West, 22 F.Supp.2d 1343 (M.D.Fla. 1998); In re Dylan C., 699 N.E.2d 107 (Oh. App. 1997); In re S.R., 599 A.2d 364 (Vt. 1991); Matter of Tucker, 578 N.E.2d 774 (Ind. App. 1991);

Vivian P. v. State of Alaska Department of Health & Social Services, Division of Family & Youth Services, 78 P.3d 703 (2003); Fessler v. Dept. of Human Resources, 567 So.2d 301 (Ala. Civ. App. 1989); In the Interest of M.A.V., 425 S.E.2d 377 (Ga. App. 1992) *overruled on other grounds by* In the Interest of J.P., 480 S.E.2d 8 (Ga. 1997); State v. Hovcevar, 7 P.3d 329 (Mont. 2000).¹

“The existence, nature, validity, and applicability [of facts] of the phenomenon characterized as ‘Munchausen syndrome by proxy’ are all matters sufficiently beyond common experience that expert opinion would assist the trier of fact” Phillips, at 712.

In finding the testimony admissible, the court in Phillips rejected the appellant’s arguments that MSBP is an “unrecognized illness not generally accepted by the medical profession,” and arguments premised on the fact that the syndrome was not listed or discussed [at the time of trial] as a form of mental illness in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders. The Phillips court noted its case law recognizing “battered child syndrome” as “an accepted medical diagnosis” based on medical literature. Phillips, at 713-714.

In assessing the admissibility of testimony on MSBP, the Montana Supreme Court noted: “expert testimony regarding MSBP is neither novel nor scientific. The term ‘Munchausen Syndrome By Proxy’ has appeared in medical literature since at least 1977.” Hocevar, at 342 (also noting a search on Westlaw using the term “Munchausen

¹ The prosecution argued during the pre-trial hearing that not one case in the county has held MSBP is per se inadmissible. App. p. 23.

syndrome by proxy” found the term appeared in forty state and federal cases since Phillips).

The expert witness in that case was Dr. Randall Alexander, who testified in the instant case as well. The Montana Court noted:

that the State established sufficient foundation to show that Alexander was qualified to testify on MSBP and that he had adequate knowledge on which to base an opinion in this case. The record shows that the State sufficiently established Alexander’s medical training and experience, specifically his experience with MSBP. As a Professor of Pediatrics, Alexander had written and taught on the subject. The State also established that Alexander had adequate knowledge about the Hocevar family situation on which to base his diagnosis of MSBP.

Hocevar, at 342.

The Texas Court of Appeals found MSBP testimony admissible, noting:

In considering the question of relevancy, it is worthy of note that although a prosecutor ordinarily need not prove motive as an element of a crime, the absence of an apparent motive may make proof of the essential elements of a crime less persuasive. That is certainly the case here. In the absence of a motivational hypothesis, and in light of other information which was before the jury concerning appellant’s demeanor, personality and character, including the fact that she was the mother of the child, without other relevant and reliable evidence, the conduct ascribed to appellant was incongruous and apparently inexplicable. MSBP testimony would, if accepted by the jury, bridge that gap.

Reid, 964 S.W.2d at 730.

The State was properly allowed to present its evidence of MSBP. The State’s theory of the case was that there was an enormous amount of sympathy and attention given to both Suzanne Pope and the parents of Elizabeth Lightfoot, following her 1991

death in the daycare center run by Pope at Cutro's church. Both the parents and Ms. Pope were members of Cutro's church and when Cutro's house was searched by law enforcement, church bulletins concerning the deaths of Child 1, Child 3, and Elizabeth Lightfoot were recovered from Cutro's home. App. p. 2439. In the early spring, 1992, Cutro fabricated a SIDS death in her home for the purpose of gaining sympathy from a parent visiting her daycare² and she also fabricated the death of one of her own children.³

2 Rose Bozard, a member of River Hills Baptist Church, testified she found out in 1992 that Cutro allegedly had a death in her daycare and told Cutro she was sorry for Cutro's loss. Rather than correct her, Cutro said thank you. Bozard recommended Cutro to Renee Barefoot when Barefoot was seeking child care, but did advise Barefoot of the supposed SIDS death in Cutro's home. Bozard found out later that no such death occurred in 1992. App. pp. 2350-62. Renee Barefoot testified she was looking for a daycare in 1992 and Bozard recommended Cutro but advised that there had been a SIDS death in the daycare. Barefoot went to Cutro's as a prospective daycare and was shown around the home. It was then that Cutro told Barefoot about the supposed SIDS death in her home, specifically that she found the baby dead in the crib. Cutro seemed upset. App. pp. 2374-2379.

3 Suzanne Pope testified she went to the same church as Cutro, the River Hills Baptist Church. Pope testified that when the Lightfoot child died in her daycare of SIDS, there was a tremendous outpouring of love and support from the church. Pope was contacted by a River Hills pastor shortly after the death of Child 1. App. pp. 2305-2309. Pope testified she was surprised to find that the daycare was still open the day after Child 1's death. She testified that she attempted to console Cutro, relating the following:

I remember telling her that it was the hardest thing that I had ever been through other than the loss of my own child, that with God's help she would get through it.

And her comment to me was that she understood because she too had lost one, that two of her daughters had been placed on a heart monitor, and that she understood.

App. p. 2310, lines 15-25.

In subsequent conversations, Cutro told Pope that she would go to Child 1's grave and lie on it. She testified she needed to go to the grave and went there daily. App. p. 2314, lines 21-24. She indicated that she kept some of Child 1's clothes and liked to smell them. She also told Pope she had a place where she kept pictures, clothes, "that type of thing." App. p. 2315, lines 10-13.

When Child 3 died, she was called again by River Hills and proceeded to go to Cutro's to provide comfort. Cutro told her that Cutro did not call 911 or perform CPR; she just waited for her husband, Josh, to come home. App. p. 2317. At a meeting with SLED

Unable to obtain the necessary attention from these fabricated deaths, it is the State's position that she began a pattern of direct physical abuse against infants which began with Child 1 and ended with the death of Child 2 on September 9, 1993.

Dr. Janice Ophoven – a forensic pediatric pathologist whose primary interest over the past thirty years has been in the area of child abuse and neglect, MSBP, and other matters pertaining to the nature of injuries suffered by children – testified that MSBP is “a form of child abuse or injury to children that occurs in the circumstance where the person who is doing it fabricates the story so it's misleading to the people who are caring for the child.” Dr. Ophoven noted this is an accepted diagnosis by the American Medical Association in both the United States and other countries and she testified she is published on the topic of MSBP as a diagnosis of a pattern of child abuse. App. pp. 1185-1192.

Dr. Ophoven testified that MSBP is “a real entity that has caused serious harm and death to many children.” She further explained that the pattern of child abuse is a diagnosis of more than one event which requires looking at the information about the harm to the individual and the history and additional information provided. By virtue of the pattern that is found, she can draw “fairly accurate conclusions about the nature and character of how those injuries took place.” The pattern could include child abuse against only one child over a period of time or it could involve child abuse against multiple children over a period of time. The diagnosis of MSBP “appears to have attached to it” that the abuser has some gain from perpetuating the abuse. Sympathy

prior to the 1999 trial, Pope was shocked to discover that Cutro never had one of her own children die of anything, much less a heart ailment. App. p. 2325.

and attention were the first gains noted in MSBP cases, but other forms of personal gain may also be present. Also, it is to gain sympathy and attention from “whomever it is that the sympathy and attention is focused on.” App. pp. 1290-1296.

Dr. Randall Alexander also testified on MSBP. He testified about his qualifications as follows:

Well, I've published on Munchausen Syndrome by Proxy I think three of four articles. I've written book chapters on Munchausen Syndrome by Proxy. I've lectured at state and national conferences on Munchausen Syndrome by Proxy. I co-chair a national task force on Munchausen Syndrome by Proxy for the American Professional Society on the Abuse of Children. I'm consulted by T.V. networks on Munchausen Syndrome by Proxy, by people from around the country, defense attorneys and prosecutors from around the country on cases.

App. p. 1517, lines 7-16. Dr. Alexander agreed that MSBP is a medical diagnosis. After reviewing various materials, he came to the conclusion that the case was consistent with a diagnosis of MSBP. App. pp. 1517-1520.

When being cross-examined, Dr. Alexander noted: “Psychiatrists aren't the only ones that find out about motives, . . .” App. p. 1555, lines 21-24. He elaborated when he disagreed that only a psychiatrist was qualified to render an opinion about psychiatric conditions:

That's not true in all fifty states. Every physician is licensed to make those sorts of diagnoses. And psychiatrists are the ones who specialize and spend most of the time doing that, but in the same way that physicians are all trained in pretty much all the specialties, we make diagnoses that the psychiatrists may say are their diagnoses. And they are also overlapped with other diagnoses that other professionals make as well.

App. p. 1556, lines 5-12.

Child 1's mother, Lindy Colson, testified that after Child 1's death, both Colson and Cutro became involved in SIDS support groups, SIDS related charity events and did interviews concerning SIDS on television together. Colson testified that Cutro visited Child 1's gravesite often and put flowers, cards and trinkets on the gravestone. Through Colson, the prosecution entered a story written by Cutro entitled "SIDS, a Babysitter's Story". Colson explained a number of falsehoods in the story. Colson testified that Cutro kept Child 1's clothes. She did not know that Cutro had requested Child 1's autopsy report. App. pp. 2551-2560. Child 1's father, Gary Colson, testified that Cutro seemed to intentionally bring attention to herself at the casket at Child 1's funeral. App. p. 2596.

Missy Daniel, Child 3's mother, testified that the Cutro's house was across from her mother's house. Daniel and her husband stayed overnight at her mother's the day Child 3 died, and the next day, Cutro came across the street and approached Daniel when Daniel was outside. App. pp. 2621-22. Daniel testified that Cutro said "she was glad that she could take this burden from me of finding – that she found my child and not me finding her." App. p. 2622, lines 13-16. Later when Daniel had the nerve to discuss what happened the day Child 3 died, Cutro claimed the baby was making cooing noises with another child in adjoining car seats and got tired, and Cutro then laid Child 3 down and Child 3 fell asleep. Daniel then knew something was wrong because Child 3 was a colicky baby and never in the child's four and a half month life was Daniel able to simply lay the baby down and the baby fall right asleep. App. pp. 2624-25. Davis Daniel, Child 3's father, also found Cutro's version suspect because the Daniels could never just

put Child 3 down to sleep. They had to rock Child 3 for hours or drive Child 3 through the neighborhood, “she had to be moving to go to sleep.” App. pp. 2603-08 (direct quote, App. p. 2605, lines 20-21).

Daniel testified that Cutro told her she visited Child 3’s grave a lot. Cutro also told her she would smell Child 3’s clothes. When Daniel visited Child 3’s grave, she found cards and trinkets left by Cutro. Cutro asked Daniel for a photograph of Child 3, but Daniel did not give her one. Daniel did not know how Cutro acquired the photo of Child 3 that she had. Cutro also asked for an item of Child 3’s clothing, and Daniel gave Cutro a piece of clothing that she had received as a gift. Child 3 never actually wore that piece of clothing. But Cutro told Daniel that she would smell it and look for pieces of Child 3’s hair. App. pp. 2629-2631. During a conversation about a week after Daniel sent Cutro the clothing, Cutro asked Daniel, “Don’t you hate when you go to the grocery store and you see other babies and things, and doesn’t it remind you of your daughter and things like that?” App. p. 2631, lines 21-23. Daniel added that Cutro was the one who would initiate and make comments like that. App. pp. 2631-32.

Cutro later complained to Daniel that “due to the investigations with SLED and D.S.S. and everything that they could not – were not allowed to – they could not properly grieve my daughter’s death.” App. p. 2632, lines 12-15.

Evidence of MSBP is tied to the evidence of Cutro’s fixation on death and attention-seeking behavior because it provides a medical diagnosis of a pattern of child abuse in which the perpetrator inflicted abuse in order to obtain a gain, sympathy and attention.

In Reid, the Texas Court of Appeals concluded expert testimony on MSBP was proper, noting the following:

. . . the MSBP testimony was not received for character conformity purposes. Rather, . . . the testimony was necessary to show the basis for the diagnosis of a recognized medical condition, i.e., MSBP, and was directly related to the facts of the case. The relationship between appellant and her children's apnea episodes were part and parcel of, and were necessary to show, the medical reasons for the diagnosis. The diagnosis and appellant's connection to it were directly related to the murder charge against her. Thus, the expert testimony did not fall within the ambit of abstract generalities about a character trait that might lead to an inference of guilt, the vice proscribed

964 S.W.2d at 733.

In the instant case, the MSBP testimony was admissible under Whaley and Morgan, and relevant because it tied into evidence of Cutro's motive, bizarre attention seeking behavior, which Cutro gained from the deaths of Child 1 and Child 3, accompanied by a strange fixation on death. Appellate counsel's performance was not deficient nor was Cutro prejudiced by the failure to raise this issue on appeal because the trial court did not abuse its discretion in allowing this testimony.

Further, Cutro was not prejudiced by the supposed trial court error. The trial court gave explicit limiting instructions on the purpose of the testimony, instructing the jury prior to Dr. Ophoven's testimony as follows:

Ladies and gentlemen, you are about to hear some testimony about Munchausen Syndrome by Proxy. Now, this testimony is being admitted for a limited reason, which means you can consider this testimony for some things but not for other things.

Now, this testimony is being admitted. And you can consider this testimony, concerning Munchausen Syndrome by Proxy, only for the limited purpose or

purposes of assisting you in considering the motive of the defendant if any, the plan of the defendant if any, the absence of illness, mistake, or accident, if any.

You may not consider evidence of Munchausen Syndrome by Proxy, if any, as a substitute for proof that the defendant committed the crime or crimes charge, nor may you consider this testimony as proof that the defendant has a criminal personality if any or bad character if any, only for the limited purposes for whatever weight you think it deserves in considering motive, plan, that absence of mistake, illness, or accident.

App. (R p. 934, line 13 – 936, line 6). Jurors are presumed to follow the trial court's instructions. State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975).

Additionally, the record is replete with evidence of Cutro's attention-seeking behavior that ties in with a motive that does not necessarily require a diagnosis to recognize, as depraved and unusual a motive it was. Cutro made up the death of her own child and the death of a fictitious child, sought attention and exhibited bizarre behavior following Child 1 and Child 3's deaths, and sought to establish herself as a martyr in the aftermath of both their deaths. Evidence of motive is extensive, regardless of the expert testimony discussing MSBP. Far more critical was testimony regarding the autopsies and injuries in both of the dead children, particularly the petechial hemorrhages. The jury, by its verdicts, obviously believed the State's evidence that the deaths were not SIDS deaths but the result of child abuse.

Certiorari should be denied as probative evidence supports the PCR court's findings.

II.

The PCR court did not err in denying the PCR application on the grounds that counsel should have requested the trial court to more thoroughly answer the jury's questions regarding the intent required to convict for homicide by child abuse.

Cutro argues the PCR court erred in finding counsel was not ineffective for failing to request or object to the trial court not charging additional language on the criminal intent required to be guilty of homicide by child abuse when the trial court responded to a question from the jury. The trial court charged the following:

A person is guilty of homicide by child abuse who causes the death of a child under the age of 11, while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life.

Child abuse or neglect occurs when the parent, guardian, or other person responsible for the child's welfare inflicts or allows to be inflicted upon the child physical injury or fails to supply the child with adequate food, clothing, shelter, education, supervision appropriate to the child's age and development or health care though able to do so, and the failure has caused physical injury.

Physical injury, obviously, means death, disfigurement, or impairment of any bodily organ.

What then are the elements of the offense the state must prove beyond a reasonable doubt? First, the death of a child under the age of 11; second, the child was subjected to child abuse or neglect as I just defined that term for you; and, third, the circumstances surrounding the death showed an extreme indifference for the life of the child.

Is that sufficient? You don't need me to read it again?

Forelady: No we got it.

App. p. 4334, line 17 – p. 4335, line 21. The language is essentially the same instruction the trial court originally gave to the jury. App. p. 4284, lines 9-25.

Counsel affirmatively stated he had no objection to the additional instruction (he reserved his earlier objection as to the recharge on reasonable doubt). App. p. 4337, lines 3-4.

Cutro relies on McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008).

However, the PCR court sagely and correctly noted the following:

McKnight is distinguishable because in McKnight, the trial court included a special charge on criminal intent which discussed negligence, recklessness or indifference. McKnight argued that the charge improperly allowed the jury to convict if it found negligence, recklessness, or indifference when the Homicide by Child Abuse statute required a finding of extreme indifference to human life. McKnight held “that the trial court’s recitation of the general criminal intent charges **alone** in response to the jury’s inquiry only served to further confuse the jury by referencing mere negligence and otherwise failing to clarify the particular mental state required for a conviction of homicide by child abuse.” [661 S.E.2d at 361] (Emphasis added).

App. p. 4749. The error in McKnight simply did not occur in this case.

A jury instruction is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990). State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (noting the substance of the law, not any particular verbiage, must be charged to the jury); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (finding reversal is not warranted where the charge given is substantially correct and covers the applicable law).

In the instant case, the trial court correctly instructed the jury on the law and did not give the jury any confusing or misleading charges as in McKnight. Accordingly, the PCR court did not err in finding counsel was not ineffective for failing to request any further instructions.

III.

The PCR Court did not err in finding counsel was ineffective for failing to call Dr. E. Selman Watson as a witness where counsel made a reasonable strategic decision not to call the doctor, where Dr. Watson's testimony would have been mostly cumulative to other defense witnesses' testimony, where Cutro was not prejudiced by such deficiency and where not calling a twenty-ninth defense witness in this case does not constitute performance below professional norms.

For the purposes of seeing the forest despite the trees, Respondent would note that the defense called no less than twenty-eight witnesses at trial and successfully attained acquittal on two murder charges and acquittal for the charges stemming from the injuries to Child 2. Nonetheless Cutro claims her defense team of three attorneys, who called multiple experts as witnesses at trial, was ineffective for failing to call one more to testify: Dr. E. Selman Watson, who evaluated Cutro in 1994 and would have concluded that she did not exhibit characteristics consistent with MSBP. Dr. Watson was present at trial but not called to testify. App. p. 4494.

Even assuming that the colossal efforts of defense counsel should not be enough to establish sufficient representation under the Sixth Amendment, the denial of relief on this issue was proper as April Sampson, Esquire, articulated reasonable trial strategy when she testified to the following during her deposition:

What the State could do, and what they ended up doing, was listing all of the different things that Ms. Cutro did that they believed led to her having Munchausen syndrome by proxy, but they were not allowed to bring in an expert to say she had it. They could just talk about the things that she did and leave the – and leave the idea that she had it, but they never could say it.

Therefore we could not do the converse. We could not say she didn't and we could not put out anything saying

that she didn't. We could just say that all of the things that were pointing to her having Munchausen by proxy could be indicators of other things or show where they came from.

Based on that we decided not to use Dr. Watson because he could not say she didn't have Munchausen syndrome by proxy.

The other problem we had with Dr. Watson, and not that anything wrong with what he had – his diagnosis or what he had to say, but because he would not say – he, as he stated today, would never with a hundred percent say she didn't have it. So he was a little bit of a loose cannon in that if asked the wrong question he would say, as he did today, "Well, I'm not going to say she doesn't have it either." So there was just too many problems with him, especially since we couldn't mention her having or not having it, so we just chose not to use him at all.

App. p. 4712, line 18 – p. 4713, line 21. That decision was also made with due respect to the abilities of the prosecutor (Johnny Gasser) and his ability to effectively cross-examine expert witnesses as demonstrated throughout the record. The defense simply did not want to slip up with a bad witness.⁴ App. p. 4715. Sampson explained further on cross-examination: "But again, part of our concern is if you asked him a question, he may answer it . . . as a lot of experts do, with more information than you actually asked for in the question and therefore go off in a direction that we didn't intend him to go off in." App. p. 4726, line 21 – p. 4727, line 3.

Sampson agreed that Dr. Watson would have added little to the defense's presentation in light of the other testimony presented, when she testified as follows:

Q: You said that the state's witnesses and I'm referring to just your last answer here – that the state's witnesses covered what Dr. Watson would have testified to based on

⁴ Ms. Sampson testified that she was there for all the strategy sessions and it was a cognizant and purposeful decision of the defense team to not call Dr. Watson as a witness. App. p. 4722.

what you saw today, but is it also true that your own witnesses also covered everything else?

A: What little they could say, which was that there was no history of mental illness, mental disease, mental defect by Ms. Cutro. The state's experts said that and agreed to that. Our experts said that, what little they could. So adding another one to say the – that there's no problem, no psychosis, no mental problem with Ms. Cutro, I don't think helped any when you have to weigh it against the negatives of he's a little by[sic] of a loose cannot[sic] and, you know, you ask him the wrong question, you're going to get the wrong answer.

App. p. 4734, line 19 – p. 4735, line 10. Sampson testified that she did not think having an additional doctor testify for the defense would have helped at all. In hindsight, when speaking with jurors after the trial, the jurors indicated to her that “there were so many experts who couldn't agree on anything that my – they disregarded the experts and went on gut instinct anyway.” App. p. 4736, lines 4-12. She agreed with the assertion that they had turned off their ears at that point anyway. App. p. 4736, lines 13-15.

“Judicial scrutiny of counsel's performance must be highly deferential.” Strickland, at 689. In order to prove a claim of ineffectiveness, “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id. Counsel's articulation of valid trial strategy defeats a claim of ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546; 419 S.E.2d 778. “Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 417

S.E.2d 529 (1992).

In the instant case, Dr. Watson added little, if anything, to the defense of the case, given the other witnesses called by the defense, but his testimony was unpredictable, so he could have caused a lot of damage to the defense. Since counsels' trial strategy was reasonable, Cutro failed to prove counsels' performance was deficient.

Additionally, Cutro was not prejudiced at trial by the lack of Dr. Watson's testimony. Dr. Geoffrey McKee, the twenty-first witness for the defense, gave similar, but superior testimony on most of the points discussed by Dr. Watson. See App. pp. 3838-3867. Dr. McKee, after a review of materials, opined that MSBP was not present in this case. App. p. 3867.

Accordingly, the PCR court did not err in denying relief on this allegation as Cutro was not prejudiced by the alleged deficiency.

IV.

The PCR court did not err in finding that Cutro failed to prove that counsel was ineffective in their advice as to whether or not Cutro should have accepted an Alford plea.

Cutro alleges the PCR court erred in finding counsel was not ineffective in regards to their advice to Cutro about a guilty plea offer that would have required her to serve only an additional two years imprisonment and plead under Alford v. North Carolina, 400 U.S. 25 (1970). However, the claim can quickly be dispensed with because Cutro never testified that had she understood the distinction between a typical guilty plea and an Alford plea, she would have accepted the State's offer. Even this assumes there actually was an offer by the State under Alford and that it was not explained to Cutro. Lafler v. Cooper, 132 S.Ct. 1376 (2012) (in order to establish prejudice from a claim that counsel misadvised his client regarding a plea offer there must be a showing that the defendant would have accepted the plea but for counsel's deficient performance).

Further, Strickler testified that Cutro was ready to accept the offer after he conversed with her, but she changed her mind the next day because her husband, Josh Cutro, did not want her to take the offer. Strickler testified that considering Cutro was maintaining her innocence all along, he believes that she was going to take the plea because of Alford (which means Strickler explained Alford even if he did not use the term). He advised Cutro to accept the offer. App. pp. 4614-4615. Accordingly, evidence in the record supports that Cutro did not meet her burden of proof. Cherry.

Accordingly, the PCR court did not err in denying this allegation as probative evidence supports the PCR court's findings. Cherry.

CONCLUSION

For the above stated reasons, the petition should be denied. If this Court sees fit to grant this petition for writ of certiorari, respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON
Attorney General

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BY: 

ATTORNEYS FOR RESPONDENT

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August 2, 2013



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S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

August 2, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Brenda Gail Cutro v. State of South Carolina
Appellate case No.: 2012-212782

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari and Motion to Relax Rule 242(f)** in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

David Spencer
Assistant Deputy Attorney General

DS/tb
Enclosures

cc: David Alexander, Esq. (2 copies with all the attachments)