STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Alison Renee Lee, Circuit Court Judge

BRENDA GAIL CUTRO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212782

REPLY TO THE RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Issue 1: Ineffective Assistance of Appellate Counsel for Failing to Appeal the Admissibility of Munchausen as the basis for improper joinder.

A *de novo* standard of review applies to this claim. The State admits that "this Court would be looking at the same cold record as the PCR court to determine the prejudice prong of Strickland." State's Ret. p. 9. Therefore, the State admits that the PCR court was in no better position to determine the prejudice prong of Strickland as this Court. Since the PCR court did not need to make credibility determinations or decide issues of fact with respect to this issue, no need for a deferential standard of review exists. The State's admission can mean nothing other than in an ineffective assistance of appellate counsel case, the prejudice prong of Strickland swallows the deficient performance prong and only one real test exists: whether the omitted issue would have resulted in reversal.

It is certainly true that appellate counsel is in control of an appeal and has no duty to raise every non-frivolous issue. Jones v. Barnes, 463 U.S. 745 (1983). However, omitting a winning issue—especially when the other issues raise did not prevail on appeal—cannot be a reasonable strategy. In this case, Cutro won her first appeal by raising whether a jury was allowed to hear evidence related to all three alleged crimes. State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998). This Court ruled that such evidence was not admissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

In the second appeal, appellate counsel failed to present the winning issue from the first appeal to this Court. An appellate court cannot decide issues which are not raised. The State does not argue that the issue of the ability to use Munchausen to avoid this Court's ruling in Cutro I was

not preserved for appeal. Instead, it cites appellate and trial counsel Butler's testimony claiming that a strategic decision was made to forego this issue. App. 4586, l. 7 – 4598, l. 25. In fact, during the PCR hearing Butler gave a passionate and reasoned explanation of why Munchausen was the most important legal issue in the case. App. 4586, l. 7 – 4597, l. 25. Butler never testified why appellate counsel did not include this issue, he only said he assumed it was because appellate counsel did not "think it was as good of a legal issue as I did." App. 4597, ll. 20 – 25. When asked whether he "would have definitely raised Munchausen," Butler responded, "Without a doubt." App. 4597, ll. 12 – 16.

The State did not call appellate counsel Dudek or Savitz to explain their decision–making process. But again, Dudek and Savitz' testimony is irrelevant. If, in analyzing the prejudice prong this Court determines that this issue would have required reversal, no claimed strategy for failing to raise it could be reasonable. An examination of this issue using this framework would not subvert Jones v. Barnes and would not remove an appellate lawyer from control of an appeal because there is a large difference between a winning issue and a non-frivolous issue. This Court should proceed immediately to the prejudice prong of Strickland and, as conceded by the State, examine the record *de novo* on this prong. A finding in petitioner's favor obviates any further analysis and would require new trials on each of Cutro's two convictions separately.

As for the merits of the State's argument, it cites a number of cases from other jurisdictions for the proposition that Munchausen is reliable and was a scientific basis for joinder in this case. State's Ret. p. 12-13. The most recent of these cases is from 2003, which is before Munchausen's founder, Dr. Roy Meadow, was discredited in 2005. See Bruce MacFarlane, Convicting the Innocent: A Triple Failure of the Justice System, 31 Manitoba L.J. 403, 458-64 (2006).

The other compelling difference in the cases cited by the State and Cutro's case is that the evidence in Cutro's case was admitted through an out-of-state **pathologist**, not a psychiatrist. The State had the pathologist claim that Munchausen, which cannot be described without a discussion of behavioral problems with the alleged perpetrator, was "a diagnosis of child abuse" to avoid this App. 203, l. 22- 204, l. 1. In child abuse cases, it logically follows that pathologists will testify what injuries the child suffered. Pathologists do not testify regarding the motives or behavior of a perpetrator. Pathologists testify that a child died from a skull fracture or internal injuries.

Showing the importance of exposing the State's expert's game of words is the fact that in most of the cases cited by the State, **psychiatrists** were the experts used to discuss Munchausen. In some of the cases cited by the State, the issue of the admissibility of Munchausen was not even raised in the case. People v. Phillips, 175 Call. Rptr. 703, 708-09 (Cal. App. 1981) ("the prosecution, over the objections of defense counsel, presented evidence relating to the so-called 'Munchausen's syndrome by proxy' through the testimony of Dr. Martin Blinder, a psychiatrist.") (emphasis added); In the Matter of Jessica Z, 515 N.Y.S.2d 370 (N.Y. Fam. Ct. 1987) (gastroenterologists and board certified psychiatrists testified in this non-appellate, non-criminal family court case regarding child placement); Straton v. Orange County Dep't Soc. Servs., 628 N.Y.S.2d 818, 819-20 (medical malpractice case where the admissibility of Munchausen was not an issue before the court); Dolin on Behalf of N.D. v. West, 22 F.Supp.2d 1343, 1346 (M.D. Fla. 1998) (granting a motion to dismiss on behalf of multiple defendants in a 42 U.S.C. § 1983 action where the admissibility of Munchausen was not discussed); In re Dylan C., 699 N.E.2d 107 (Ohio App. 1997) (child custody case where admissibility of Munchausen was not at issue); In re S.R., 599 A.2d 364 (Vt. 1991) (termination of parental rights case where

psychologist diagnosed mother with Munchausen and admissibility was not at issue); Matter of Tucker, 578 N.E.2d 774, 777 (Ind. App. 1991) (termination of parental rights case where pediatrician speculated that mother "could have" Munchausen, other medical witnesses testified regarding mother's other, severe mental illnesses, and issue of admissibility was not addressed); Vivian P. v. Alaska Dep't Health & Soc. Servs., 78 P.3d 703, 706 (Alaska 2003) (termination of parental rights case where psychiatrist testified regarding Munchausen and its admissibility was not an issue in the case); Fessler v. State Dep't Human Resources, 567 So.2d 301 (Ala. Ct. Civ. App. 1989) (termination of parental rights case where admissibility of Munchausen was not an issue in the case); In the Interest of M.A.V., 425 S.E.2d 377 (Ga. Ct. App. 1992) (termination of parental rights case where child psychiatrist testified regarding Munchausen where admissibility was not an issue in the case).

Furthermore, in every case cited by the State in support of the supposed recognition of Munchausen, the mother was the alleged abuser. In none of these cases was a caretaker or daycare worker alleged to suffer from Munchausen. The testimony of Dr. McKee in this case made the point about Munchausen's primary applicability to mothers and the repeated attention-seeking of doctors and how none of these factors were present in this case. App. 298, l. 19 – 306, l. 9. This shows that the reliability and relevance of Munchausen to this case was nearly nonexistent. Had appellate counsel presented this issue to the Court, the result would have been the same as Cutro I and her conviction would have been reversed.

Issue 2: Trial Counsel Failed to Ensure that the Jury's Question Regarding Negligence was Answered

The State asserts that because the jury charge as a whole was correct, the trial judge's failure to answer the jury's question regarding negligence should have gone unchallenged.

State's Ret. at 23. The State admits trial counsel did not object to the trial judge's failure to explain that negligence should not be considered. State's Ret. at 23. This failure constituted deficient performance.

The State failed to rebut the evidence of prejudice demonstrated at the PCR hearing. Members of the jury clearly convicted Cutro because they thought she was negligent. App. 5246. Negligence cannot sustain a conviction for homicide by child abuse. State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (2002); McKnight v. State, 378 S.C. 33, 47–49, 661 S.E.2d 354 (2008). Had trial counsel adequately objected and obtained an answer from the court regarding whether they could consider negligence, it is highly probable that Cutro would not have been convicted.

Issue 4: Cutro Demonstrated Prejudice from Trial Counsel's Failure to Explain an Alford Plea

The State's argument essentially is that Cutro had to say the magic words that she would have accepted the State's offer of an Alford plea had it been explained to her. Cutro specifically testified that she had never heard of an Alford plea before PCR counsel explained it to her. App. 4500, l. 19 – 4501, l. 2. Cutro testified that the only reason she did not accept the Alford plea was because she was not guilty. App. 4501, ll. 19 – 20.

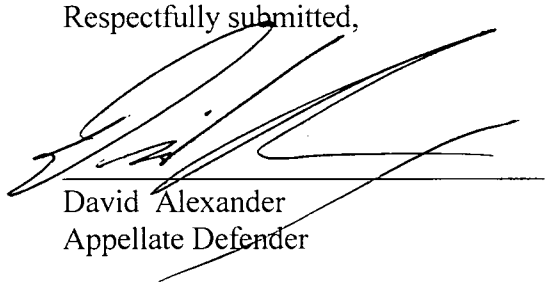
The State concludes that Strickler explained an Alford plea to her. State's Ret. p. 29. What Strickler actually said was, "I have no independent recollection of whether I discussed Alford with her or not." App. 4617, ll. 6 – 20. Strickler's testimony shows that the State offered an Alford plea, but does not support the assertion that he adequately explained it to her. App. 4617, ll. 6 – 20. Butler said that he did not know if the term "Alford" was explained to her. App. 4561, ll. 11 – 18.

For these reasons, the PCR court's holding is without support. The Court should not impose a "magic words" test in this case because it is clear from the evidence and relief being sought that Cutro would have accepted such a plea had it been adequately explained to her.

CONCLUSION

For the foregoing reasons, the Court should grant the petition with the ultimate relief of a new trial or allowing Cutro to enter an Alford plea with a sentence for time-served.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of September, 2013.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on David Spencer, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 3rd day of September, 2013.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of September, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.