

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. 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

BRIEF OF PETITIONER

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ISSUES PRESENTED¹

1.

Whether appellate counsel was ineffective in derogation of petitioner's Sixth Amendment rights by failing to appeal the issue of the admissibility under Rules 702 and 703 of unreliable and unscientific testimony regarding Munchausen Syndrome by Proxy as the basis for the trial court's improper joinder of the charges against petitioner?

2.

Whether trial counsel was ineffective in derogation of petitioner's Sixth Amendment right to counsel because they failed to call Dr. Selman Watson as a witness at trial?

¹ Petitioner raised four issues in her petition for certiorari. The Court granted the petition as to Issues 1 and 3, but denied the petition as to Issues 2 and 4. For simplicity's sake, Petitioner has renumbered the issues on which the Court granted certiorari from the original petition.

STATEMENT

On July 13, 1994, Gail Cutro² was indicted in Richland County for murder and homicide by child abuse related to the death of the infant, Child 3. App. 5488 – 89. On August 31, 1998, her conviction was reversed by this Court in State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998) (hereinafter, “Cutro I”). On December 16, 1998, Gail Cutro was indicted for murder and homicide by child abuse related to the death of the infant, Child 1. App. 5484. On December 16, 1998, she was also indicted for assault and battery with intent to kill and assault and battery of a high and aggravated nature related to the infant, Child 2. App. 5491. In 1999, she was tried on all three of these charges before the Honorable James C. Williams, Jr. and a jury. This trial ended in a mistrial because of a hung jury. App. 4739, n.3.

On June 12 – July 2, 2000, Cutro was again tried before Judge Williams. App. 356. Jonathan S. Gasser, Christine O. Sloan, and Donald N. Sorenson represented the State. App. 356. Douglas S. Strickler, Beattie Butler, and April Sampson represented Cutro. App. 356. These same attorneys represented the parties in the 1999 trial. The jury acquitted Cutro of all charges related to Child 2. App. 4342, 1. 15 – 4343, 1. 1. The jury acquitted Cutro of murder, but convicted her of homicide by child abuse as to Child 1 and Child 3. App. 4342, 1. 15 – 4343, 1. 1. Judge Williams sentenced Cutro to life imprisonment on both convictions. App. 4361, ll. 2 – 12.

On August 15, 2005, this Court affirmed the convictions. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005) (hereinafter, Cutro II). Senior Assistant Attorney General William Edgar Salter represented the State on appeal. Id. Acting Chief Attorney Joseph L. Savitz and Assistant

² In October 2011, petitioner divorced her husband, Josh Cutro, and has reverted to her maiden name, Gail Hallman. Lexington County Case No. 2011-DR-32-2098. Because of her long history before this Court and for ease of reference, this brief will continue to refer to her as “Cutro.”

Appellate Defender Robert M. Dudek of the South Carolina Office of Appellate Defense represented Cutro on appeal. Id. Butler also represented Cutro on appeal. Id.

On September 21, 2006, Cutro filed a PCR application. App. 4427. On May 7, 2009, Cutro filed an amended PCR application together with a memorandum in support. App. 4438- 4480. Edward E. Saleeby, Jr. and Terence A. Quinn represented Cutro in her PCR and filed the memorandum in support on her behalf. App. 4445. Brian T. Petrano represented the State. App. 4445. On May 14, 2009, a hearing was held before the Honorable Alison Renee Lee. App. 4481. At the conclusion of the hearing, Judge Lee allowed the record to remain open and on July 29, 2009, the depositions of April Sampson and Dr. E. Selman Watson were taken and made a part of the record. App. 4670; 4707. On July 5, 2012, Judge Lee denied Cutro's application. App. 4738.

Petitioner timely filed a petition for certiorari, raising four issues. On April 9, 2015, this Court granted certiorari with respect to two of petitioner's four issues. This brief now follows raising the two issues on which certiorari was granted.

ARGUMENT

1.

Appellate counsel was ineffective in derogation of petitioner's Sixth Amendment rights by failing to appeal the issue of the admissibility under Rules 702 and 703 of unreliable and unscientific testimony regarding Munchausen Syndrome by Proxy as the basis for the trial court's improper joinder of the charges against petitioner.

Introduction

Gail Cutro's case is now before this Court for the third time. The essential question now before the Court is the same as presented the first time, but not correctly presented the second: Could Gail Cutro receive a fair trial if the jury heard about all three children?

The Court now has the opportunity to explain a mystery in this State's jurisprudence: the seemingly opposite results in Cutro I and Cutro II. As this Court is well aware, this case concerns the deaths of two infants in Gail and Josh Cutro's daycare and crippling injuries to a third infant. In Cutro I, this Court ruled that evidence regarding the other two children was inadmissible in her trial for the death of one child. Seven years later, this Court reached the opposite result: all three cases could be joined together.

The answer to why this Court reached a different result in Cutro II lies in a bedrock principle of appellate jurisprudence: this Court is limited to addressing the issues raised by appellate lawyers. It can only decide the case or controversy before it. Appellate counsel in Cutro II failed to give this Court the opportunity to reach the same issue on which it reversed in Cutro I. The failure of appellate counsel to correctly raise the issue of joinder explains the starkly different results in the two decisions. In both cases, this Court answered the questions asked by appellate counsel. Had

appellate counsel asked the right question in Cutro II, this Court would have given the correct answer—that joinder was improper.

The State and Defense Theories at Trial

The State had two major hurdles to overcome in its three prosecutions³ of Gail Cutro. First, the State had to prove a crime had been committed. It was necessary for the State to retain out-of-state expert witnesses to refute the testimony of the in-state pathologists who performed the initial autopsies. The original pathologists concluded the infants died of Sudden Infant Death Syndrome (“SIDS”). Second, the State had to prove that if a crime was committed, Gail Cutro (and not her husband, Josh Cutro) was the perpetrator. This Court reviewed the evidence with respect to each child in Cutro I. Cutro I at 103-06, 504 S.E.2d at 325-27. This Court concluded “the evidence is insufficient to establish that appellant was the actor in [Child 1’s] death or [Child 2’s] injuries.” Cutro I at 104, 504 S.E.2d at 325-26. This Court noted that Josh Cutro and Child 2’s mother⁴ could not be excluded from being the perpetrator of Child 2’s injuries, nor Josh Cutro from Child 1’s death. Id. at 105-06, 504 S.E.2d at 326-27.

It is clear from a review of the State’s scant evidence that the State’s real hope was that no one would believe that two children would die and a third would be injured in the same daycare by accident. It sounds incredibly unlikely. But how a situation sounds and what the evidence actually

³ After the reversal of Cutro I, the second trial resulted in a hung jury. In the State’s statement of the case in its return to the petition for certiorari, it mistakenly tabulates the vote as 11-1 for conviction in this trial. In fact, the vote was 11-1 in favor of acquittal on one charge and 9-3 on the other. App. 172, l. 24 – 173, l. 3. Cutro II actually stems from her **third** trial in which she was acquitted of all charges related to Child 2 and acquitted of murder as to Child 1 and Child 3.

⁴ According to third-chair trial counsel April Sampson, who is now employed as a solicitor in the office that prosecuted Cutro, DSS determined that the mother shook Child 2. App. 4719, l. 11 – 4720, l. 5.

shows frequently differ. To understand the prejudice from joinder, a review of the medical testimony is necessary.

Child 1's Original Autopsy

Dr. Beverly Daniel ("Daniel"), a board-certified pathologist, performed the original autopsy of Child 1 on January 5, 1993. App. 943, ll. 5 – 12. App. 948, ll. 19 – 21. She followed standard procedures when she examined the head. App. 948, ll. 19 – 21. This meant she cut the scalp and pulled it from the skull, sawed off the top of the skull, and completely removed the brain from the head. App. 946, ll. 3 – 13. App. 958, ll. 3 – 23. To remove the brain, Dr. Daniel used a knife to cut through the spinal cord and the vessels at its base. App. 959, l. 21 – 960, l. 15. Dr. Daniel then sliced the brain "like you would section a loaf of bread." App. 960, ll. 11 – 20.

Dr. Daniel found no evidence Child 1 had been shaken. App. 1023, ll. 12 – 13. The only abnormalities Dr. Daniel noted in Child 1's brain were "some little red dots that I thought were unusual." App. 962, ll. 9 – 15. She described these as "very small petechial hemorrhages" deep in the brain's cortical section. App. 962, ll. 9 – 15. Dr. Daniel described a hemorrhage as "blood outside the vessel" and "petechial" as "a very tiny hemorrhage, pinpoint." App. 955, ll. 21 – 25. On cross-examination, Dr. Daniel was asked what the petechial hemorrhages were "diagnostic of." App. 1003, ll. 4 – 8. She replied that "maybe" they could be diagnostic of "very minor head trauma," or they could just be "coincidental" and not "diagnostic of anything." App. 1003, ll. 4 – 8. She added, "I did not feel certain that they were diagnostic of anything." App. 1003, ll. 4 – 8.

Dr. Daniel originally believed pneumonia was the cause of Child 1's death because of inflamed tissues she found in his lungs. App. 965, l. 18 – 966, l. 15. The lung culture was positive for staph. App. 1009, ll. 5 – 12. She consulted with other pathologists at Lexington Hospital. App.

1009, ll. 13 – 15. Two of the doctors agreed the inflammation in the lung was significant and supported listing bronchopneumonia as the cause of death. App. 1009, l. 16 – 1012, l. 15.

She then sent slides of Child 1's lungs to a doctor in Florida because Child 1's parents said he was not congested. App. 966, l. 13 – 968, l. 13. The Florida doctor's opinion was that the degree of inflammation was not necessarily abnormal in a child of that age and was not enough to be listed as a cause of death. App. 968, l. 14 – 969, l. 3. She admitted, however, that Child 1 had a history of congestion. App. 1004, ll. 20 – 22.

Based on the Florida doctor's opinion, Dr. Daniel then changed the cause of death to SIDS. App. 970, ll. 13 – 18. The State asked whether an infant could be smothered and show no signs of trauma at an autopsy. App. 986, l. 8 – 993, l. 4. Dr. Daniel agreed that it took very little force to smother an infant and that it was impossible to differentiate between smothering and SIDS at an autopsy. App. 986, l. 8 – 993, l. 4. This meant that in any SIDS death, no evidence would exist to exclude smothering as the cause of death. App. 986, l. 8 – 993, l. 4.

Child 3's Original Autopsy

Dr. James Reynolds ("Reynolds") was the director of pathology at Richland Memorial Hospital. App. 1077, l. 17 – 1078, l. 3. Dr. Reynolds was board certified in anatomic and clinical pathology and had been performing forensic autopsies for Richland County since 1979. App. 1078, l. 18 – 1079, l. 4. Dr. Reynolds performed the original autopsy on Child 3 on September 10, 1993. App. 1080, ll. 18 – 24.

Dr. Reynolds found "no evidence of trauma or any other unusual circumstances." App. 1082, ll. 14 – 15. Dr. Reynolds opened Child 3's skull, removed the brain, and sectioned it with a knife. App. 1084, ll. 3 – 9. With respect to the brain, Dr. Reynolds again stated he "observed

no evidence of abnormality nor trauma.” App. 1085, ll. 15 – 19. Dr. Reynolds observed no hemorrhage on Child 3’s brain. App. 1090, ll. 19 – 21.

Dr. Reynolds did find “limited petechial hemorrhages” in the frontal regions of the brain. App. 1099, ll. 2 – 7. He also found petechial hemorrhages in Child’s 3’s thymus which is “a classic finding” in a SIDS case. App. 1101, ll. 3 – 13. He also found petechial hemorrhages in Child 3’s lungs and the lining of the heart. App. 1101, l. 8 – 1182, l. 4. Finding these hemorrhages above the diaphragm “is classical for hypoxemic death, a presumed mechanism – one of many presumed mechanisms involved with Sudden Infant Death Syndrome.” App. 1105, ll. 5 – 23. Dr. Reynolds agreed that a pathologist cannot tell the difference between SIDS and what he called a “soft suffocation.” App. 1107, ll. 16 – 23. However, in some suffocation cases, the frenulum will be torn or there will be some bruising “of the nasal A-line.” App. 1114, ll. 6 – 18. Dr. Reynolds found no such evidence. App. 1114, ll. 6 – 18. He found no petechial hemorrhages in the eyes, which can be a sign of suffocation. App. 1115, ll. 1 – 13. There was “[n]o doubt whatsoever” in Dr. Reynolds’ mind that Child 3 did not die from brain trauma or violent shaking. App. 1109, l. 20 – 1110, l. 11. Dr. Reynolds classified Child 3’s cause of death as “undetermined, presumed Sudden Infant Death Syndrome.” App. 1121, l. 25 – 1122, l. 2. The petechial hemorrhages he found were “diagnostic of nothing.” App. 1122, ll. 3 – 6.

Dr. Reynolds referenced SIDS research by the same Florida doctor who consulted with Dr. Daniel on Child 1’s autopsy. App. 1122, l. 7 – 1125, l. 24. According to the doctor’s research, petechial hemorrhages occur in 16-17% of SIDS cases and 17% of non-SIDS cases. App. 1122, l. 7 – 1125, l. 24. Relying on this work, Dr. Reynolds explained that petechial hemorrhages “may not be as significant as one might anticipate” and could be simply the result of the process of dying. App. 1122, l. 7 – 1125, l. 24. Dr. Reynolds was not aware of any

scientific literature that said if petechial hemorrhages were found in the brain, it could not be classified as a SIDS death. App. 1126, ll. 1 – 7.

Dr. Reynolds had no doubt Child 3 had no hemorrhage on the brain or a subdural hematoma. App. 1093 ll. 6 – 1094, l. 25. Dr. Reynolds said, “I didn’t see it, nor did anyone that I showed it to.” Appendix 1094, ll. 3 – 6. Dr. Reynolds showed Child 3’s brain and the inside of the skull to the assistant coroner at the autopsy and he did not see any hemorrhages or subdural hematoma. App. 1116, l. 14 – 1117, l. 5. On cross-examination, Dr. Reynolds agreed that medical students or even someone not trained in medicine could spot a subdural hematoma. App. 1120, l. 19 – 1121, l. 2.

The Autopsies After Exhumation

In May 1994, SLED called Dr. Gilbert-Barness (“Barness”) to consult on the Cutro case. App. 1578, l. 22 – 1579, l. 1. Dr. Barness was originally from Australia. App. 1574, ll. 1 – 2. She worked as a pathologist and professor at the University of South Florida. App. 1570, ll. 20 – 24. She initially reviewed the autopsy reports of Dr. Daniel and Dr. Reynolds, the tissue samples from the autopsy, and their conclusion that SIDS was the cause of death. App. 1585, l. 25 – 1586, l. 3. Dr. Barness testified, “I didn’t accept that diagnosis.” App. 1586, ll. 4 – 8.

In July 1994—**nineteen months** after the original autopsy of Child 1 and **ten months** after the autopsy of Child 3—the State exhumed their bodies so Dr. Barness could examine them. App. 1586, ll. 19 – 25. Both had been embalmed. App. 1587, ll. 6 – 13. The bodies were taken to her laboratory in Florida during the heat of summer by SLED agents. App. 1591, ll. 17 – 23. The bodies had “a lot of mold” on them. App. 1592, ll. 3 – 8. The eyes “were so decomposed and shriveled up that” they could not be adequately examined. App. 1592, ll. 13 –

21. She looked in both cranial vaults, but of course the brains had been removed. App. 1592, l. 22 – 1593, l. 1.

Despite the condition of the bodies and the lack of brains, Dr. Barness claimed she found evidence of subdural hematomas in both Child 1 and Child 3's skulls. App. 1594, l. 21 – 1595, l. 6. App. 1596, l. 21 – 1597, l. 12. At the suggestion of a professor from England, she used a "special stain" on the dura that led her to believe "absolutely 100 percent" that these subdural hematomas occurred before death. App. 1601, ll. 1 – 23. She testified that shaking a baby can produce petechial hemorrhages and subdural hematomas and that both children died as a result of being shaken. App. 1603, ll. 2 – 13. App. 1624, l. 13 – 1625, l. 10. Dr. Barness believed that Dr. Daniel and Dr. Reynolds missed the subdural hematomas because they did not strip the dura from the skull. App. 1614, ll. 4 – 17. However, she was forced to admit on cross-examination that, by definition, a subdural hematoma would be on the side of the skull cap that would be seen once the skull cap was removed and **not** the side of the dura that would be seen by stripping it. App. 1660, l. 22 – 1661, l. 11. She admitted "you can see it without stripping it." App. 1661, ll. 2 – 11. She also admitted that she found no axonal injuries in the slides of their brains which would be consistent with the children having been shaken. App. 1663, l. 9 – 1665, l. 1.

Dr. Janice Ophoven ("Ophoven"), a pathologist in private practice in Minnesota with "The Crackleberry Group," reviewed the work of Dr. Barness and agreed with her findings. App. 1179, l. 17 – 1180, l. 3. App. 1237, ll. 8 – 22. Dr. Ophoven also claimed that without a traumatic event, there would be no petechial hemorrhages in the children's brains. App. 1236, ll. 11 – 16. She testified that Child 1 and Child 3 died as a result of being shaken. App. 1248, l. 14 – 1251, l. 16. Dr. Ophoven was very critical of the original pathologists for not removing the eyes and looking for hemorrhages. App. 1196, l. 18 – 1199, l. 21. She testified that the eyes are

a “very important location for hemorrhage, that some people believe is diagnostic of shaken baby.” App. 1199, ll. 4 – 9.⁵

Dr. Daniel violently disagreed with the prosecution’s hired out-of-state experts and was adamant that no subdural hematoma existed on Child 1’s brain. App. 999, ll. 16 – 23. App. 1001, ll. 1 – 14. Dr. Daniel said a subdural hematoma is “very hard to miss.” App. 999, ll. 21 – 23. A pathologist does not need to strip the dura from the brain to see a subdural hematoma. App. 1018, l. 13 – 1019, l. 13. When asked if there was any question in her mind that no subdural hematoma existed on Child 1’s brain, she testified, “No. There is no question.” App. 1001, ll. 4 – 9. Dr. Daniel testified that while sectioning a brain with a knife does not create petechial hemorrhages, it can create artifacts. App. 1015, ll. 12 – 16. An “artifact” is something that happens as a result of the cutting process during an autopsy and not a true hemorrhage into the tissue during life. App. 3693, l. 19 – 3694, l. 4.

⁵ Dr. Ophoven apparently has had a change of heart about shaken baby syndrome. In State v. Kozisek, 961 N.W.2d 465, 471-72 (Neb. Ct. App. 2015), the court quoted Dr. Ophoven (who was testifying for the defense in a child abuse case), as opining “that no matter how hard or how long you shake a baby, the amount of force that can be generated is insufficient to cause the brain injury and retinal hemorrhaging that is so commonly seen in abused children.” The court also stated that “according to Dr. Ophoven, ‘the scientific basis for the original theory has now become controversial.’” Id. See also State v. Fisher, 805 N.W.2d 571, 575 (S.D. 2011) (“Fisher’s expert, a forensic pathologist named Dr. Janice Ophoven, offered a different opinion. Dr. Ophoven testified that shaking alone could not have caused P.V.’s injury and that the scientific community has questioned whether shaking alone can cause abusive head trauma.”); United States v. Red Bird, 450 F.3d 789, 791-92 (8th Cir. 2006) (noting in shaken baby syndrome prosecution where original pathologist testified to existence of subdural hematomas and retinal hemorrhages, Dr. Ophoven testified for the defense that “in her opinion, a child of J.B.’s age cannot suffer traumatic brain injury serious enough to develop symptoms and die by virtue of shaking alone, and that there must be evidence of impact.”)

Dr. Reynolds also violently disagreed with the finding of Dr. Barness and Dr. Ophoven. App. 1093, ll. 6 – 1094, l. 25. He believed that what Dr. Barness saw was a postmortem artifact. App. 1094, ll. 7 – 25. After hearing about Dr. Barness’s findings, Dr. Reynolds conducted an experiment with other duras and found that a subdural hematoma could be simulated. App. 1095, ll. 6 – ll. 6 – 1096, l. 18. Dr. Reynolds stated his “strong opinion” that “what happened was subsequent to autopsy.” App. 1096, ll. 3 – 18. He had performed over 1500 infant autopsies. App. 1127, ll. 9 – 10. Pediatric pathologists are not better trained to spot subdural hematomas than other pathologists. App. 1127, ll. 5 – 8. Dr. Reynolds was asked:

Q. Who is in a better position to determine whether or not there was a subdural hematoma present at autopsy—something that looks like this, either on the surface of the brain or inside the skull cap: a pathologist who performs the autopsy **or a pathologist who does the re-autopsy after exhumation 10 months later?**

A. **I think obviously the person who does it first.**

Q. What if the other pathologist claims to be specializing in pediatrics?

A. I think that’s irrelevant.

App. 1127, ll. 14 – 23 (emphasis added).

With respect to Dr. Barness’s method of stripping the dura and applying a stain, Dr. Reynolds said that was not a scientifically valid method of discovering a subdural hematoma overlooked at autopsy. App. 1144, ll. 1 – 18. He stated that what she found was a post-mortem artifact. App. 1146, ll. 2 – 3. Dr. Reynolds stated that standard medical textbooks explain that post-mortem artifacts can be misunderstood as subdural hematomas. App. 1146, l. 4 – 1147, l. 14. Using photographs he took during his autopsy, he explained how what Dr. Barness found

was likely the result of blood settling on the dura after the autopsy and causing a stain.⁶ App. 1148, l. 10 – 1154, l. 7.

When asked whether he would factor in a person’s attention-seeking behavior who had access to a child, Dr. Reynolds succinctly replied, “No. I just describe my findings at autopsy.” App. 1157, ll. 14 – 22. He stated he was “not qualified” to diagnose whether a person was engaging in attention-seeking behavior because that was “a psychiatric term.” App. 1157, l. 23 – 1158, l. 2.

Dr. Barness had published several articles on SIDS and was an advocate of doing away with the term, “SIDS.” App. 1645, l. 24 – 1647, l. 19. She agreed with defense counsel that she was on “a big campaign to try and eliminate that diagnosis.” App. 1648, ll. 2 – 10. Dr. Reynolds also spoke about SIDS and the notion that it is a diagnosis of exclusion when an infant’s death cannot be explained:

Q. As a pathologist, what role does explanation play in your job and the fact that some of these can’t be explained?

A. Well, as a pathologist, both in autopsy, surgical autopsy, or any other disciplines, I’m supposed to render a diagnoses or opinions based on all the information I have at hand. It’s something that’s inherent in the position that I have. I am supposed to render an opinion.

Q. The fact that some things can’t be explained, how does that sit with you?

A. Not well, but God didn’t grant me all that wisdom.

Q. You’re familiar with SIDS, you talked about SIDS?

A. Sure.

⁶ In another Nebraska case, Dr. Ophoven criticized a pathologist who claimed to find subdural hemorrhages. McKinney v. Okoye, 842 N.W.2d 581, 588-589 (Neb. 2014). She testified that the pathologist mistakenly credited post-mortem artifacts as hemorrhages, noting specifically that blood will pool in the skull after the brain is removed. Id.

Q. You understand that some people take the position that SIDS needs to be limited, because we should be able to explain the unexplainable?

A. Some have that opinion.

Q. What is the danger in forensic pathology of forcing an explanation?

A. Missing the truth.

App. 1158, l. 18 – 1159, l. 13 (emphasis added).

Through Dr. Ophoven, the State introduced a map of South Carolina with red and blue dots showing 276 SIDS deaths between 1993 and the trial. App. 1284, l. 10 – 1289, l. 7. Dr. Ophoven reviewed the autopsy reports of these cases and placed a blue dot on the map if the report lacked a notation of petechial hemorrhages in the brains and a red dot if the report did note a petechial hemorrhage. App. 1284, l. 10 – 1289, l. 7. There were 274 blue dots on the map and only 2 red dots—Child 1 and Child 3. App. 1284, l. 10 – 1289, l. 7. The obvious inference from this map was that Child 1 and Child 3’s deaths were not SIDS deaths because of the presence of petechial hemorrhages. The use of this map and its underlying data were the subject of a substantial issue on appeal in Cutro II. Cutro II at 377-78, 618 S.E.2d at 895-96.

The defense called Dr. Joel Sexton (“Sexton”), a board-certified forensic pathologist who is no doubt very familiar to this Court. App. 3680, ll. 22 – 25. Dr. Sexton performed 71 of the autopsies with blue dots. App. 3690, ll. 19 – 25. Dr. Sexton went a step further than Dr. Ophoven and reviewed the microscopic slides from his “blue dot” autopsies. App. 3691, l. 10 – 3708, l. 8. Dr. Sexton believed that the petechial hemorrhages on which the State placed so much weight were not hemorrhages at all, but simply artifacts of the autopsy process. App. 3691, l. 10 – 3708, l. 8. Using photographs, he showed blood patterns from these SIDS deaths that were similar to those found during the autopsies of Child 1 and Child 3, but were merely

results of slicing a brain with knife and not true petechial hemorrhages. App. 3691, l. 10 – 3708, l. 8. Dr. Sexton reviewed Child 1 and Child 3’s autopsies, the reexaminations by Dr. Barnes, and concluded that no real hemorrhages in the brain existed and that the supposed subdural hematomas were artifacts from accumulated blood during the autopsy. App. 3691, l. 10 – 3708, l. 8. App. 3740, l. 25 – 3742, l. 2.

How the Issue of Whether the Jury Would Hear Evidence Related to All Three Children Was Raised and Decided in Cutro I

From the medical testimony reviewed above, it is clear that scant evidence that a crime was even committed was presented by the State. The State’s only hope of a conviction lay in the prejudice that would result from the jury hearing about all three children. In Cutro I, the question was squarely presented to this Court under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The majority stated the issue as:

Did the trial judge err in admitting evidence of [Child 1’s] death and [Child 2’s] diagnosis of Shaken Baby Syndrome which the state offered to prove common scheme or plan pursuant to *State v. Lyle*?

Cutro I at 102, 504 S.E.2d at 325. The trial judge ruled that evidence regarding Child 1 and Child 2 would be admitted “and if the State was unable to tie the evidence together he would grant a mistrial.” Id. at 103, 504 S.E.2d at 325.

The Court relied heavily on the logic and reasoning of Lyle to conclude it was error to admit evidence relating to Child 1 and Child 2. The Court stated, “A common scheme or plan concerns more than the commission of similar crimes; some connection between the crimes is necessary.” Id. at 103, 504 S.E.2d at 325. “Evidence of other crimes must be put to a rather severe test before admission.” Id. “The acid test of admissibility is the logical relevancy of the other crimes.” Id. “The trial judge must clearly perceive the connection between the other crimes and the crimes

charged.” Id. “Further, other crimes which are not the subject of conviction must be proven by clear and convincing evidence.” Id.

Using this “acid test,” the Court found that the evidence was insufficient to allow admission of evidence related to Child 1 and Child 2 in Cutro’s trial for Child 3’s death. Id. at 103-06, 504 S.E.2d at 325-27. The Court was clearly skeptical of whether a crime occurred or whether Gail Cutro was the perpetrator. The Court’s footnotes note the disagreement between the medical experts and the fact that the original autopsies concluded the deaths were due to SIDS. Id. at n.1, n.3, n.4. The text of the opinion strongly suggests a suspicion that, if any crime occurred, it was just as likely that Josh Cutro was the perpetrator as Gail Cutro. Id. at 104-05, 504 S.E.2d at 325-27. The Court stated that on the day of Child 1’s death, “appellant’s husband provided almost all of their care.” Id. at 104, 504 S.E.2d at 326. As for Child 2, the Court noted that Josh Cutro and Child 2’s mother had access to the child during the likely time period that the injuries took place. Id. at 104-05, 504 S.E.2d at 326. The Court credited the testimony of another parent at the daycare to whom Child 2 “appeared sick when his mother” dropped him off at the daycare that morning. Id. at 104, 504 S.E.2d at 326.

A procedural dispute between the majority and the dissent in Cutro I demonstrates the necessity of appellate counsel presenting issues clearly and correctly. The majority found that the Lyle issue raised by appellant necessarily included whether the evidence of the other bad acts was clear and convincing. Id. at n.3. The dissent parsed the subject headings of appellant’s brief and concluded that no issue regarding the sufficiency of the evidence of the other bad acts was raised. Id. at 107-09, 504 S.E.2d at 327-28. The dissent stated that because that portion of the Lyle argument had not been raised and was procedurally barred, “it is improper for the Court to consider it.” Id. The dissent cited State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) for the proposition

that an “issue not argued in the appellant’s brief is deemed abandoned.” Cutro I at 107, 504 S.E.2d at 327. Because the vote in Cutro I was 3-2, petitioner came within one vote of having an issue of ineffective assistance of appellate counsel in her first appeal.

How the Issue of Joinder was Raised Together with the State’s Munchausen Theory in the Second and Third Trials

After reversal and before the second (1999) trial, the State—knowing the weakness of its case if forced to prove any singular crime was committed without evidence of all three incidents—called all of the cases for trial at the same time using the dubious theory of Munchausen Syndrome by Proxy (“Munchausen”) as its excuse for joinder. Munchausen is defined⁷ as a situation where a parent abuses a child or fabricates symptoms in a child in order “to obtain the sick role by proxy to get attention from medical professionals or perhaps to outwit or outsmart medical professionals with an illness that doesn’t seem to go away.” App. 213, ll. 1 – 10.

The State claimed it made a “tactical decision” not to introduce evidence of Munchausen during Cutro’s first trial.⁸ App. 23, ll. 1 – 8. Begging for joinder of the charges for the second trial,

⁷ Munchausen Syndrome by Proxy is a variation on Munchausen Syndrome, in which a person fabricates their own symptoms to get attention from doctors. Dr. Roy Meadow, a British pediatrician, first coined the term Munchausen Syndrome by Proxy in 1977, to describe parents who abuse their children to get repeated attention from doctors. App. 194, ll. 16 – 24. Dr. Meadow was censured by the United Kingdom’s General Medical Council, which governs British doctors, for his testimony in cases in Great Britain that led to wrongful convictions in SIDS cases. See Bruce MacFarlane, Convicting the Innocent: A Triple Failure of the Justice System, 31 Manitoba L.J. 403, 458-64 (2006) (giving a concise history of the wrongful convictions in the United Kingdom attributable to the founder of Munchausen’s discredited expert testimony). Munchausen Syndrome is also referred to as “Factitious Disorder by Proxy.” App. 197, ll. 8 – 10. For convenience, this petition shall refer to Munchausen Syndrome/Factitious Disorder by Proxy as simply “Munchausen.”

⁸ This statement was made before the 1999 trial. Arguments and pleadings from the 1999 trial were incorporated by reference into the 2000 pre-trial hearings on joinder and the admissibility of Munchausen. App. 317, l. 13 – 323, l. 5.

the solicitor stated, “There’s no way the State can just pick out one instance.” App. 26, ll. 13 – 14. He further admitted that without hearing all of the incidents that the State’s case “doesn’t make any sense. It makes no sense at all. The only sense that it makes it is if the State is allowed to go forward on all the charges, present all of their evidence. . . .” App. 26, l. 24 – 27, l. 2.

Judge Williams said that the issue of joinder and Munchausen were “pretty closely tied together” and considered the issues simultaneously. App. 49, ll. 13 – 14. Defense counsel argued Munchausen was inadmissible under Rule 702 at the 1999 pre-trial hearing. App. 87, ll. 2 – 9. Trial counsel argued that there was a difference between acceptance in the scientific community and admissibility and that admissibility hinged upon reliability. App. 92, l. 23 – 93, l. 4. Relying on State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), trial counsel argued Munchausen could not be tested or verified.

Trial counsel submitted extensive memoranda regarding the admissibility of Munchausen and that it could not be used to join the cases. App. 5043-5084. Trial counsel argued that the State’s attempt to call Munchausen a medical diagnosis of child abuse was deceptive and designed to avoid calling it a psychiatric diagnosis of Cutro. App. 5051-5055. The arguments presented in the memoranda relied heavily on Rule 702, Council, Daubert v. Merrell Dow Pharmaceutical, 509 U.S. 579 (1993), and State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

Judge Williams ruled that the evidence of Munchausen was admissible. App. 103, ll. 19 – 107, l. 10. The trial judge stated he considered Rule 403 in his decision. App. 105, ll. 1 – 14. Judge Williams then used Munchausen to decide the joinder question. App. 106, ll. 8 – 23. The trial judge said, “The fact that the Munchausen testimony in my opinion is admissible makes the joinder question a little easier to decide. It would be impossible for the state to present their

theory of the case, that Munchausen provides the motive.” App. 106, ll. 8 – 13. Even with all three cases joined and evidence of Munchausen admitted, the 1999 trial ended with a hung jury.

Prior to Cutro’s third trial, the court held an extensive hearing on June 5, 2000. App. 153. Trial counsel objected to the admissibility of Munchausen under Rule 702 and Council as a prerequisite to an attack on the joinder of the cases, arguing that using Munchausen as “motive” evidence was “an excuse to join these charges and replay the first trial.” App. 335, ll. 4 – 7. As part of its attack on its admissibility, trial counsel presented the testimony of three expert witnesses on Munchausen who testified that Munchausen had not been subjected to any kind of peer-reviewed scientific testing, was not reliable, and that even its definition would not apply to Cutro.

Disregarding the testimony of these experts, Judge Williams again ruled that Munchausen was admissible and the cases should be joined. He stated, “You know, my position is that when you add to the evidence presented in the first case, the motive evidence that comes from the introduction of the Munchausen theory, then that the evidence is clear and convincing. And that’s my rationale.” App. 351, ll. 9 – 13. Judge Williams said, “[Y]ou don’t always use exactly the same standard or the same analysis, whether you’re using Daubert or Council.” App. 352, ll. 2 – 3. He added:

You know, the inquiry the court makes has got to be different in considering evidence of something like Munchausen Syndrome than if you’re considering something like the admissibility of DNA evidence. You know, you can’t test the DNA, the validity of that, the same way you would test the validity of a Munchausen diagnosis. And I think that’s exactly what [Dr. Mart, a defense expert] was saying when he said some of these indicators don’t lend themselves to be tested for reliability.

App. 352, ll. 4 – 12. Trial counsel brought the fact that no written order had been entered after the pre-trial hearing to Judge Williams’ attention immediately before the trial. The judge stated

that his rulings were final as to joinder and the admissibility of Munchausen. App. 814, 1. 13 – 816, 1. 20.

How the Issue of Munchausen and Joinder Were Raised on Appeal and Decided in Cutro II

Appellate counsel treated the issue of Munchausen as one of character evidence and ignored trial counsel's objections based on evidentiary grounds. App. 4799-4807. The key case used in the brief was State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998), which found that evidence that the defendant was a member of the "Punky Brewster fan club" was inadmissible character evidence. App. 4806-07. Nowhere in the joinder issue did appellate counsel cite Rule 702, 703, Council, Daubert, Jones or any other case dealing with the admission of expert testimony or the concept of reliability.⁹

This mistake was crucial. The first issue in the brief should have been that raised at trial: whether Munchausen could be used at all under the rules of evidence. With evidence of Munchausen eliminated, the reason for joinder is also eliminated and Cutro II would have come out differently. In dealing with the joinder issue, the Court only answered the question it was asked. Cutro II at 373-74, 618 S.E.2d at 894. The Court found a distinction between Lyle and joinder to distinguish the need for clear and convincing evidence. Id. Applying the joinder standard, the Court held that all three incidents "clearly fit within the Lyle categories for common scheme or plan and motive." Id.

Appellate counsel again failed to address the Munchausen issue correctly and as it had been raised by trial counsel in the brief's second issue. In this issue, appellate counsel raised the issue of the admission of memorabilia kept by Cutro again as improper propensity and character

evidence. App. 4808-11. Once again, the principal case cited by appellate counsel was Nelson, a character case, and no cases concerning reliability were cited. App. 4808-11. The Court concluded the evidence was not propensity evidence and was used to show motive. Cutro II at 376-77, 618 S.E.2d at 895.

Evidence Concerning the Appeal at the PCR Hearing

Trial counsel Beattie Butler's primary responsibilities were legal issues and evidentiary issues. App. 4565, ll. 1 – 9. Butler summarized the State's strategy with respect to Munchausen. App. 4572, ll. 4 – 12. The State's position was that Munchausen was "a medical diagnosis." App. 4572, ll. 4 – 12. As Butler put it, "They called it a medical diagnosis. I can say, 'Today is Tuesday.' It doesn't make it Tuesday, but yes, they called it a medical diagnosis." App. 4572, ll. 9 – 12. Butler stated, "the State's position was that Munchausen Syndrome by Proxy was a medical diagnosis of a form of child abuse. I don't think that it's any secret that I think that's absurd. Just because you call something a medical diagnos[is]... and not a behavioral one doesn't make it so." App. 4580, ll. 14 – 19. Butler called the State's theory a "shell game." App. 4580, l. 23 – 4581, l. 2.

Butler testified regarding raising the admissibility of Munchausen on appeal:

I felt strongly the admissibility of Munchausen syndrome by proxy should have been raised. They thought otherwise. I thought strongly that it should have been raised because we fully researched it, fully briefed it, fully argued it in two trials and presented expert testimony in pretrial hearings to say that it shouldn't be admitted.

I didn't see any reason why since all the work was done, all they had to do was cut and paste the motions that we did pretrial which hopefully you have and

⁹ Even the dissent, who concluded the cases should not have been joined, expressed some confusion with appellant's position, stating, "As I understand appellant's joinder issue....." Cutro II at 379, 618 S.E.2d at 897 (Pleicones, J., dissenting).

will make part of the record, didn't understand why they couldn't just be cut and pasted and admitted, given – given the central role that Munchausen Syndrome by proxy had in the trial.

App. 4586, l. 20 – 4587, l. 8. Butler explained how they challenged Munchausen. App. 4587, l. 9 – 4591, l. 20. Their strategy was two-fold. App. 4587, l. 9 – 4591, l. 20. The defense's first challenge was that evidence of Munchausen was not scientifically reliable. App. 4587, ll. 16 – 21. They also presented evidence from expert, Matt Koval who testified that even if there was such a thing as Munchausen syndrome by proxy, Cutro's case "does not represent it." App. 4587, ll. 22 – 24.

Butler said:

What was so unfairly prejudicial about the use of Munchausen Syndrome by proxy in this case was that it was used as the primary reason to join the three – the three cases without which – you know, I say I can't speculate about what a jury would do. If they had to try these cases one at a time, there's no way they would have gotten a conviction. I am confident in saying that.

So the Munchausen Syndrome by proxy was used to join the three, the three cases, but to the jury, the Munchausen Syndrome by proxy was essentially used to prove the two things that the jury needed to find: One, the existence of a crime which was highly disputed.

App. 4589, ll. 5 – 16.

Butler explained how Roy Meadow was discredited in the United Kingdom. App. 4592, l. 4 – 4593, l. 5. Butler testified that "dozens of cases were overturned" after Meadow was discredited. App. 4593, ll. 1 – 5. Butler explained that this information came out after the trial, but while the appeal was pending. App. 4593, ll. 6 – 8. Butler testified that had he been the decisionmaker on the appellate team, he would have definitely raised Munchausen's admissibility. App. 4594, l. 23 – 4597, l. 25.

Trial counsel Doug Strickler (“Strickler”) agreed that Butler was responsible for the legal and evidentiary issues related to joinder and Munchausen. App. 4619, l. 24 – 4620, l. 10. Strickler could not “think of any reason why it was not raised on appeal.” App. 4621, ll. 3 – 4. Appellate counsel Savitz and Dudek did not testify at the PCR hearing.

The PCR Court’s Findings

The PCR court improperly denied relief because it found that appellate counsel did raise the issue of the admissibility of Munchausen. App. 4745-48. This finding by the PCR court was overly simplistic. The PCR judge wrote, “Clearly, the issues relating to MSBP were raised on appeal.” App. 4747. The PCR judge also credited the Supreme Court’s finding in Cutro II that the evidence of the memorabilia kept by Cutro was not prejudicial. App. 4748. The PCR judge erred by conflating the issue of admissibility of Munchausen as unreliable and not a basis for joinder with the evidentiary issue of the admission of memorabilia of the children kept by Cutro.

Discussion

The sole issue the Court must now decide is prejudice: the appeal within the appeal. The issue of whether appellate counsel was ineffective will almost always turn on the issue of prejudice under Strickland v. Washington, 466 U.S. 668, 686 (1984). The findings by the PCR court with respect to the issue of ineffective assistance of appellate counsel are not entitled to any deferential standard of review from this Court. The question of whether appellate counsel failed to raise an issue that was reasonably likely to succeed on appeal is wholly a question of law, which should be reviewed by this Court *de novo*. See Anderson v. State, 354 S.C. 431, 434-35, 581 S.E.2d 834, 835 (2003) (assuming *arguendo* deficient performance and turning immediately to the question of prejudice). In conducting this analysis, the Court must determine whether: (1) the issue was raised to the trial court; (2) ruled on by the trial court; (3) preserved for review; and

(4) raised as an issue by appellate counsel. Each of these determinations are questions of law that can be gleaned from the trial and appellate record. As shown above, the issue was thoroughly raised by trial counsel, ruled on by the trial judge, and preserved for appeal. Also, as demonstrated, appellate counsel did not raise the issue to this Court in Cutro II.

Appellate counsel certainly has no duty to raise every nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 751-51 (1983). However, failing to raise a winning issue is ineffective. In essence, such an issue is an appeal within an appeal and the Court's resolution of the merits controls the determination as to whether appellate counsel was ineffective. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (citing People v. Griffin, 687 N.E.2d 820 (1997) for the proposition that a petitioner "must show that failure to raise issue was objectively unreasonable and that, but for this failure, [petitioner's] conviction or sentence would have [been] reversed."). See also Evitts v. Lucey, 469 U.S. 387, 398 (1985). Petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). In the context of an appellate issue, the decision essentially turns on this prejudice prong: had the correct issue been raised, there was a reasonable probability of a reversal.

The expert witnesses presented at the pre-trial hearing conclusively demonstrated the unreliability and inadmissibility of Munchausen. "When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Council at 20, 515 S.E.2d at 518. When determining reliability, the trial judge should apply the factors from State v. Jones, 273

S.C. 723, 259 S.E.2d 120 (1979). Under the Jones test, the court must look at several factors: (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 control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council at 19, 515 S.E.2d at 517. “This type of evidence is also subject to attack for relevancy and prejudice.” Id. at 19–20, 515 S.E.2d at 517.

The experts at the pre-trial hearing conclusively demonstrated that Munchausen could not satisfy the requirements of Council, Jones, or, even assuming that it could, had any relevance to Cutro’s case. The first witness to testify was Dr. Matt Koval. App. 180, ll. 15 – 22. Dr. Koval was employed by the Medical University of South Carolina. App. 180, l. 25 – 181, l. 1. He was board certified in adult or general psychiatry and child and adolescent psychiatry. App. 181, ll. 19 – 20. He testified that it did not make sense to call Munchausen a truly medical diagnosis. App. 193, ll. 20 – 22. He testified that it made more sense for medical professionals to call injuries to a child simply “child abuse” and leave the diagnosis of the perpetrator’s illness, if any, to a psychiatrist or a psychologist. App. 197, ll. 3 – 10.

Dr. Koval explained Munchausen was in the section of the DSM-IV that indicated it required further study. App. 199, ll. 18 – 21. Concerning such a diagnosis, Dr. Koval stated:

[T]his is a diagnosis that in – has not [been] sort of rigorously studied in the sense of specific diagnostic criterion that can be relied upon again and again and again and again in order to make the diagnosis. For example, like depression that has sort of nine characteristics in the DSM. You have to have it for two weeks. It has – you know, you have to have five of the nine and so forth. It’s very regimented and how you make that diagnosis.

I think when you talk about factitious disorder by proxy, you know, they haven’t sort of rigorously looked at how this diagnosis is made.

App. 199, l. 23 – 200, l. 8. Dr. Koval described research that needed to be done in order to improve the reliability of diagnosing Munchausen. App. 200, l. 21 – 203, ll. 1. He suggested that retrospective studies or double blinded studies concerning chronically ill children needed to be done. App. 201, l. 8 - 202, l. 21. Dr. Koval was not aware of any of these kinds of studies having ever been done. App. 202, l. 2 – 203, l. 1.

Disputing the State's contention that Munchausen is reliable because it is a "purely medical diagnosis of a form of child abuse," Dr. Koval testified, "[T]hat's sort of a baffling thing to say because I don't see how just – just saying that doesn't make it so. It's still – It's still described by the conduct or behavior or the motivation of the alleged perpetrator and therefore can't be a purely medical diagnosis." App. 203, l. 22 – 204, l. 1. Dr. Koval was not aware of any medical diagnosis of one person which is defined by the motivation, conduct, or behavior of another person. App. 204, ll. 16 – 18. He stated that the fact that Munchausen Syndrome by Proxy is discussed in medical schools does not mean that it is a reliable diagnosis. App. 205, ll. 4 – 8. **No national guidelines or standard checklists exist for a Munchausen diagnosis.** App. 220, ll. 11 – 17. This lack of standards or guidelines was admitted by the State's own Munchausen expert. Dr. Janice Ophoven, on direct-examination, stated:

Q. Now, is there like a book you can go to, a checklist where you can check off a number of factors, and if you reach 10 out of 25 falls into a category of Munchausen Syndrome by Proxy? Do something like that exist?

A. Of course not. No.

Q. [Are] there any guidelines that you look at, and this has to be there or that has to be there in order for a diagnosis of Munchausen Syndrome by Proxy or does every case, Dr. Ophoven, stand on its own?

A. Well, every case stands on its own. . .

App. 1305, ll. 10 – 19.

Analyzing the factors that the State alleged were indicative of Munchausen in Cutro's case, Dr. Koval said that none of the alleged acts were consistent with the definition of Munchausen. App. 206, l. 12 – 214, l. 14. He had examined the medical records of Gail Cutro and her children and found nothing that was consistent with abuse. App. 210, l. 22 – 211, l. 5. He saw no history of exaggerated illness in Gail Cutro's medical records. App. 211, ll. 18 – 20. Dr. Koval said that in a Munchausen case, you would expect to see repeated visits to the doctor, doctor shopping, repeated phone calls to the doctor, and pathology or symptoms that do not respond to normal types of treatment. App. 211, ll. 6 – 12. He saw none of that in Gail Cutro's medical records or those of her children. App. 211, ll. 16 – 17. Dr. Koval said that a single act of abuse – such as killing an infant – would not comport with Munchausen because, by definition, the motivation is to receive attention from medical professionals. App. 206, ll. 12 – 24. Dr. Koval stated:

I mean, the fact that – that this is occurring in a single act goes counter to the whole – to the whole thing. I mean, if the child is dead, then your only attention from the medical professional would be very short. You know, there would be no – there would be no continual repeat visits to the doctor, no attention for being the brave parent who's kind of supported this very sick child, no attention from the nursing staff, no friend relationships with the doctor or the nursing staff. I mean, none of that stuff would occur.

App. 207, ll. 3 – 12. When fatalities were reported in Munchausen Syndrome by Proxy cases, they were usually by accident. App. 207, ll. 13 – 22. He stated there were no documented cases of Munchausen where the child victim was presented to medical professionals only a single time. App. 208, l. 24 – 209, l. 6.

Dr. Eric Mart, a psychologist licensed in New Hampshire, also testified at the hearing on the admissibility of Munchausen. App. 236, ll. 9 – 17. He had testified in “many hundreds” of child abuse cases and, in that capacity, had assessed cases for Munchausen. App. 238, ll. 6 – 14.

Beginning in 1995, Dr. Mart began studying Munchausen. App. 239, ll. 7 – 13. In 1998, he presented a paper on Munchausen at the annual meeting of the Eastern Psychological Association in Boston. App. 239, ll. 14 – 16. Subsequently, he published a paper in the American Journal of Forensic Psychology on problems in the diagnosis of Munchausen. App. 239, ll. 17 – 19. He presented a paper at Yale Medical School on “The Philosophical and Psychoanalytical Society on Practical Problems in the Diagnosis and Investigation of Munchausen Syndrome By Proxy.” App. 239, ll. 20 – 23. He also presented a paper to the American Bar Association entitled “Factitious Disorder by Proxy and the Federal Rules of Evidence”. App. 239, l. 24 – 240, l. 3.

Dr. Mart testified that Munchausen lacked a firm status in the DSM-IV “because of the lack of research to date into the reliability and validity of certain elements of the diagnosis.” App. 241, ll. 16 – 25. Dr. Mart expounded on what “reliability” means in a scientific context. He explained that in science, reliability meant that if different psychologists looking at the same protocol came to the same conclusions, that protocol would be reliable. App. 242, ll. 10 – 16. Dr. Mart explained that the research had not been done on Munchausen in order to establish that it was reliable and valid. App. 242, ll. 19 – 24.

Dr. Mart said that the evidence with respect to Munchausen was “overwhelmingly anecdotal” as opposed to empirical. App. 253, ll. 4 – 7. He said that while empirical testing could be done on Munchausen, it had not yet been done. App. 255, ll. 18 – 22. In attempting to come up with some of the indicators of Munchausen, Dr. Mart said that many of them were “bipolar.” Explaining this term he said, “In other words, if you’re calm you got it, if you're not calm you got it. That casts a net so wide that there – that almost everybody would meet a few of those criteria.” App. 256, ll. 11 – 16. No research had established a base rate in the general

population. App. 256, l. 5 – 257, l. 3. In explaining this, he said that empirical research would need to be done on “the reliability and validity” of certain characteristics of parents. “Nobody knew if they were in fact diagnostic of Munchausen Syndrome by Proxy and nobody knew the extent by which parents who do not have Munchausen Syndrome by Proxy or don’t perpetrate it also exhibit the same characteristics. . . .” App. 256, l. 21 – 257, l. 3. This meant that you could have false positives. App. 257, ll. 16 – 19.

Trial counsel walked Dr. Mart through the gatekeeping factors as used in Council and Daubert. Dr. Mart testified theories related to Munchausen Syndrome by Proxy “have not in any significant way been tested to this point.” App. 259, ll. 7 – 12. Even though more than approximately 300 articles had been written about Munchausen, Dr. Mart explained that the vast majority of those articles were anecdotal case studies. No other type of data had been brought into these case studies. App. 259, l. 13 – 260, l. 2. Dr. Mart said “[T]here’s the illusion that there’s been a lot of research but in fact it’s sort of like doing the same study three hundred times.” App. 259, l. 25 – 260, ll. 2. He called this a “recursivity” problem. App. 259, ll. 19 – 21.

Dr. Mart testified that there was no known error rate for Munchausen. App. 261, ll. 2 – 4. Agreeing with Dr. Koval (and the State’s expert, Dr. Ophoven), he testified that there was no standard protocol for the diagnosis of Munchausen. App. 261, ll. 5 – 12. He testified that there was not even a standardized definition. App. 261, ll. 11 – 12.

Dr. Jeffrey R. McKee, chief psychologist in the division of clinical services of the South Carolina Department of Mental Health, testified for the defense at this hearing. App. 282, l. 23 – 283, l. 10. He was a diplomate in forensic psychology with the American Board of Forensic Psychology. App. 284, ll. 7 – 11. Dr. McKee had “quite an extensive experience” with

Munchausen with respect to his consultation with children's protective service agencies in several states, including South Carolina. App. 284, l. 21 – 285, l. 5. He also agreed that there are no national guidelines or standard checklists for diagnosing Munchausen. App. 309, ll. 8 – 12.

However, in an attempt to rebut the State's expert's claims that Munchausen was present in this case, Dr. McKee used a list of factors of Munchausen obtained from an article written by other doctors in 1996. He did this analysis in an attempt to exclude Munchausen, because "it's easier to exclude a diagnosis than to make a diagnosis." App. 297, l. 14 – 298, l. 11.

Dr. McKee examined the medical records of Gail Cutro and her children and also evaluated Cutro in person. App. 286, ll. 1 – 15. Dr. McKee also reviewed the medical records of Child 1, Child 2, and Child 3. App. 287, ll. 19 – 23. He spent approximately fourteen hours interviewing Cutro. App. 288, ll. 16 – 17. He administered three psychological tests. App. 288, ll. 4 – 9.

Importantly, Dr. McKee made the obvious point that without meeting someone in person that it would be very difficult to diagnose that person. App. 288, ll. 18 – 21. He said that would affect the reliability of a scientific opinion. App. 288, ll. 22 – 25. Dr. McKee testified that the ethical standards that pertain to forensic psychologists state that they have "an affirmative duty to indicate that the reliability of our opinions might be lessened in those cases where we make public statements about persons we have not directly examined." App. 289, ll. 13 – 24.

In attempting to exclude Munchausen, Dr. McKee made the following findings:

1. There were no unusual or unexplainable illnesses in the Cutro children. App. 298, l. 19 – 299, l. 16;
2. There were no repeated hospitalizations of the Cutro children. App. 299, ll. 17 – 24;

3. The physiological parameters of the Cutro children's medical records did not suggest that the children had been struggling against an obstruction to their airways. App. 300, ll. 1 – 7;
4. The Cutro children responded to appropriate treatment. App. 300, ll. 9 – 16;
5. The vitality of the patients were consistent with the laboratory findings. App. 300, ll. 18 – 21;
6. The Cutro children's symptoms – apnea – occurred in the hospital as well as when they were with their mother. App. 300, l. 23 – 301, l. 10;
7. Cutro was not less concerned than the clinicians about the inability to identify the cause of the illness in the dead and injured infants. Dr. McKee noted that Cutro was very depressed during his examination. App. 301, ll. 12 – 21;
8. There was no evidence that Cutro “thrived in the hospital” or became unusually close to staff. App. 382, ll. 1 – 6;
9. Nothing in the records of either the deceased children or the Cutro children indicated that Cutro had refused to go home or insisted on caring for the patients herself. App. 302, ll. 7 – 13;
10. There was no evidence that Cutro was the only witness to the onset of any symptoms. App. 302, ll. 15 – 24;
11. As to whether the father was rarely encountered, the records indicated that Josh Cutro had significant involvement with the caretaking of his own children and the deceased children. App. 383, ll. 1 – 11;
12. Cutro did not have any medical or nursing education. App. 383, ll. 17 – 25;
13. Dr. McKee testified that the record was consistent with his list of Munchausen excluding factors with respect to the fact that Gail Cutro had exposure to models of the illnesses affecting the children. He said this was indicated because the Cutro children had apnea as infants and that Josh Cutro had episodes of sleep apnea as an adult. App. 304, ll. 1 – 7;
14. Dr. McKee testified that he saw no evidence that Gail Cutro described catastrophes that befell her family during hospitalization of her children. App. 304, ll. 8 – 14;
15. There was no evidence that Cutro welcomed invasive or painful tests involving her children. In fact, he noted that Cutro complained to doctors

because she felt that her daughter was getting too much dental work done and that it was unnecessary. App. 304, ll. 16 – 305, ll. 4;

16. There was no evidence that Cutro grew anxious when her children improved. App. 305, ll. 6 – 13;
17. There was no evidence that Cutro grew defensive if she was questioned or accused of lying – because there was no record that any medical staff ever confronted her in such a manner. App. 305, ll. 14 – 21;
18. There was no evidence that medical records from other hospitals were reported by Cutro to be missing. In fact, Cutro readily provided releases of information to subsequent physicians. App. 305, ll. 22 – 306, l. 3;
19. There was no evidence that the medical observations yielded information that was inconsistent with Cutro's reports. App. 306, ll. 4 – 9.

Based on these findings, and on his examination of Cutro, it was Dr. McKee's opinion that nothing about this case was consistent with a finding of Munchausen by proxy. App. 307, l. 19 – 308, l. 23. Importantly, Dr. McKee testified that this was his opinion to a reasonable degree of scientific certainty. App. 308, ll. 17 – 23.

Based on the testimony of these three experts, the trial court erred in admitting evidence of Munchausen under Rule 702 and Council. They all testified that no standard protocol existed for a diagnosis of Munchausen. The State's expert agreed with this conclusion. They testified that no studies had been done on Munchausen and that all of the literature was anecdotal. No error rate for a diagnosis of Munchausen was known. Based on this testimony, Munchausen could not satisfy the Jones factors for reliability. Finally, culling a list of factors from some of the anecdotal literature on Munchausen, and based on his own examination and testing of Cutro, Dr. McKee definitively stated that Munchausen could be excluded. Dr. McKee's analysis shows that, even assuming that Munchausen could be reliable, it had no relevance to Cutro's case.

Against the opinions of (1) a board certified psychiatrist, (2) a licensed psychologist who had published about the problems with Munchausen diagnoses, and (3) a diplomate in forensic psychology, the State offered a pathologist, Dr. Ophoven, who was testifying outside of her expertise. In contrast, the testimony of Dr. Reynolds, the pathologist who performed the autopsy the day after Child 3 died, proves this point. Dr. Reynolds testified that he was “not qualified” to make any diagnosis about whether someone engaged in attention-seeking behavior because that was “a psychiatric term.” App. 1159, l. 23 – 1158, l. 2. Dr. Reynolds said, “I just describe my findings at autopsy.” App. 1157, ll. 19 – 22.

On direct-examination, Dr. Ophoven testified she was the Chief Medical Officer at “The Crackleberry Group,” in Woodbury, Minnesota, where she practiced pediatric forensic pathology. App. 1179, l. 17 – 1180, l. 3. On cross-examination, she admitted she was the only pathologist employed at The Crackleberry Group. App. 1325, ll. 11 – 13. She was not certified in pediatric pathology, even though such a certification exists. App. 1324, ll. 12 – 17. She never testified that she was a psychiatrist or a psychologist.

Dr. Ophoven claimed that Munchausen was “a diagnosis of child abuse.” App. 1293, ll. 4 – 5. Based on her review of numerous materials in the case regarding Cutro, Dr. Ophoven offered her opinion, to a reasonable degree of medical certainty, that she had diagnosed “a pattern of child abuse, Munchausen Syndrome by Proxy.” App. 1300, ll. 7 – 23. This pathologist claimed Munchausen was not a psychological diagnosis, even though her subsequent testimony concerned Cutro’s “attention-getting behavior.” App. 1300, l. 2 – 1305, l. 9.

The State also offered several other experts who testified at trial. Dr. Randell Alexander, a pediatrician and Director of the Center for Child Abuse at Moorehouse School of Medicine, claimed he found “a medical diagnosis of Munchausen Syndrome by Proxy.” App 1520, ll. 18 –

25. The State later admitted that these witnesses “did not purport to give a psychiatric review of Mrs. Cutro. They weren’t qualified to give it. They were qualified to discern a pattern of child abuse in looking at all the evidence.” App. 3156, 1. 24 – 3157, 1. 2.

The State attempted an end-run around Rule 702 by calling Munchausen a “diagnosis of child abuse.” It used this semantic smokescreen because of the necessity of having their experts—a pediatrician and a pathologist—analyze Cutro’s behavior. The admission that their experts were not qualified to give a psychological opinion on Cutro’s behavior is immensely important because no amount of word play can obscure the fact that the effect of their opinions finding Munchausen meant that they were diagnosing a woman they had never examined as having a psychiatric disorder. Furthermore, because of the unique nature of Munchausen, it meant these experts were invading the province of the jury because it required them to identify Cutro as the perpetrator of these alleged crimes. This was highly improper.

But for the ineffective assistance of appellate counsel, petitioner’s appellate decisions would have looked much like this Court’s opinions in State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (hereinafter “Jones I”) and in State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009) (hereinafter “Jones II”). In Jones I, this Court reversed the defendant’s capital conviction, in part, because of the admission of unreliable expert testimony about barefoot insole impressions. Jones I at 571-74, 541 S.E.2d at 818-19. In an analysis based on Council (that is equally applicable to Munchausen in this case), this Court found that the “science” of barefoot insole impressions was unreliable and did not meet the requirements for admissibility under Council. Id.

Much like the solicitors in petitioner’s case, the State in Jones was undaunted by an adverse appellate decision from this Court. Jones II at 540, 681 S.E.2d at 582 (“Prior to Jones’s

second trial, the State informed the defense that it intended to introduce ‘barefoot insole impression’ evidence.”). The State doubled down on barefoot insole impressions and re-called its same expert from the first trial and subpoenaed an expert the defense consulted to refute the theory. Jones II at 550-52, 681 S.E.2d at 588-89. Even though nothing had changed about the supposed “science” or methods used to examine the defendant’s boots, the trial court admitted the evidence. Id. This Court resoundingly reversed the case again for the same exact reason: the evidence was unreliable. Id. at 556-58, 681 S.E.2d at 590-92. The Court compared the findings of Jones I and the lack of any advancement for the second trial and easily concluded barefoot insole impression expert testimony remained unreliable and inadmissible. Id.

The lesson of Jones I and Jones II is that when this Court is asked the right questions by appellate counsel, it will deliver consistently correct results. In Jones II, the appellate lawyers attacked the same issue which resulted in reversal in Jones I and altered the strategy to confront the alleged “new” information the State used as a smokescreen to get their unreliable, unscientific evidence admitted. The solicitors in Cutro II were more crafty than those in Jones II and camouflaged their disregard of this Court’s ruling in Cutro I with its new theory of Munchausen. But the practical strategy was the same: to attempt an end-run around this Court’s ruling that the jury would not hear all three cases. But for appellate counsel’s failure to use trial counsel’s evidence and arguments that unmasked Munchausen, Cutro II would have ended with the same result as Jones II: reversal.

The testimony clearly indicated that Munchausen not only did not satisfy the requirements of Council and Jones, but that it was not even relevant to this case. The trial judge’s ruling admitting Munchausen and using it to join these cases for trial was an abuse of discretion. The joinder of these cases clearly prejudiced petitioner. Had appellate counsel raised this issue, it would

have decimated the trial court's ruling with respect to joinder and given this Court the opportunity to address the real question regarding joinder and reverse. Therefore, this court should reverse the judgment of the PCR court and grant petitioner a new trial.

2.

Trial counsel was ineffective in derogation of petitioner's Sixth Amendment right to counsel because they failed to call Dr. Selman Watson as a witness at trial.

Relevant Facts

Dr. Selman Watson ("Watson") spent the majority of his career as a psychologist working at the South Carolina Department of Mental Health.¹⁰ App. 4675, l. 5 – 16. He spent most of his time working at the Bryan Psychiatric Hospital. App. 4765, l. 17 – 4676, l. 4. He supervised doctoral candidates at Bryan Hospital. App. 4765, l. 17 – 4676, l. 4. At the end of his tenure with DMH, he was the director of the Sexually Violent Predator Unit. App. 4675, ll. 13 – 16. He then retired from DMH and began full-time work as a forensic psychologist. App. 4675, l. 5 – 4677, l. 11. The State stipulated that Dr. Watson was qualified as an expert in clinical psychology. App. 4681, ll. 3 – 10.

Dr. Watson encountered approximately two dozen patients faking symptoms during his tenure at Bryan Hospital. App. 4681, l. 12 – 4683, l. 25. The doctors would diagnose the patients with factitious disorder and discharge them "because what they wanted to do was become a patient and have the staff care for them." App. 4681, l. 12 – 4683, l. 25. He never encountered a case of Munchausen by proxy. App. 4682, ll. 22 – 25.

Dr. Watson agreed that no specific checklists existed for diagnosing Munchausen by proxy. App. 4702, l. 22 – 4703, l. 4. Dr. Watson explained: "Well, it's a case-by-case analysis. There

probably are some common elements, but I don't know if everybody agrees on those elements. I think it's pretty much a case-by-case basis." App. 4703, ll. 1 – 4.

Dr. Watson was asked by Cutro's original defense team (before the first murder trial) to evaluate Cutro and her husband in 1994. App. 4683, l. 15 – 4684, l. 4. Dr. Watson refused to testify regarding his findings about Josh Cutro based on a confidentiality privilege. App. 4692, ll. 3 – 6. Gail Cutro submitted to a "lengthy clinical interview." App. 4685, ll. 7 – 12. Watson administered psychological tests. App. 4685, ll. 14 – 23. He gave Gail Cutro the: (1) Minnesota Multiphasic Personality Inventory; (2) Million Clinical Multiaxial Inventory; (3) Rorschach Ink Blot test; and (4) Rotter's Incomplete Sentences Blank. App. 4685, l. 7 – 4687, l. 4. He spent a total of five or six hours with Cutro. App. 4687, ll. 10 – 18. He stated that it is not possible to give an accurate diagnosis or opinion of someone without interviewing them in person. App. 4688, ll. 7 – 21. He characterized a forensic psychologist's interview as "the most important tool" in evaluating a subject. App. 4687, l. 19 – 4688, l. 21.

Dr. Watson concluded that he could not give Cutro any personality disorder diagnosis. App. 4698, ll. 1 – 11. He described her as possessing "average intelligence at best." App. 4699, ll. 2 – 10. Cutro was not clinically depressed. App. 4698, ll. 1 – 11. "Her reality testing was intact." App. 4698, ll. 1 – 11. "[H]er mental status was not unlike anyone you might meet on the street." App. 4698, ll. 1 – 11. According to Dr. Watson, the closest Gail Cutro had to any kind of personality disorder would be "dependent personality disorder" based on what he described as her

¹⁰ Dr. Watson did not testify at the PCR hearing, but the court left the record open by agreement to include his deposition, which was made a part of the record and included in this Appendix. App. 4664, l. 20 – 4667, l. 14. App. 4753.

“subservient role” in her relationship with Josh Cutro.¹¹ App. 4701, ll. 13 – 22. App. 4698, ll. 1 – 11.

As far as Munchausen by proxy, Dr. Watson stated that “the textbook case is a mother that induces harm in a child with the motivation being that they then revel in the attention they get from medical providers for saving the child or rescuing the child.” App. 4695, ll. 4 – 15. According to a profile that “might be” associated with Munchausen by proxy by “some forensic psychologists,” Dr. Watson did not find that Cutro met this profile. App. 4689, l. 21 – 4691, l. 22. Dr. Watson testified that under this profile, Munchausen by proxy sufferers have “a cluster of B traits.” App. 4690, ll. 5 – 20. These traits are “antisocial features, Narcicisstic features, histrionic characteristics.” App. 4690, ll. 5 – 20. Cutro had “cluster C” traits: an “emotionally dependent individual that was very subservient in her role in the marriage.” App. 4690, ll. 5 – 20.

Dr. Watson concluded that Cutro was not “Narcicisstic, antisocial or histrionic in any respect.” App. 4690, ll. 5 – 20. He described Cutro as “a lady that tends to, I think, fade into the background.” App. 4690, ll. 14 – 20. When asked whether Munchausen by proxy applied to Cutro, Dr. Watson replied that he was “not impressed that that’s a diagnosis for her simply because of her personality profile.” App. 4691, ll. 6 – 22. He did not believe that Munchausen by proxy “would be an accurate diagnosis for her.” App. 4690, ll. 5 – 20.

Dr. Watson was retained by Cutro’s attorneys for her original trial, Tom Neal and Wes Kirkland. App. 4683, ll. 15 – 24. While Dr. Watson said he sent them a copy of his report and that he talked to Cutro’s attorneys, he said he was never asked to be a witness. App. 4692, l. 10 – 4693, l. 17. App. 4704, l. 1 – 4705, l. 1. He was not sure if the attorneys ever got a copy of his file. App.

¹¹ The PCR court erroneously stated that Dr. Watson affirmatively diagnosed Cutro with a dependent personality disorder. App. 4753.

4704, l. 17 – 4705, l. 1. While he was not directly asked about contacts with Strickler, Butler, or April Sampson, Dr. Watson never mentioned speaking to any of them during his testimony.

First-chair trial counsel Strickler recalled reviewing material about Dr. Watson, but could not remember his reason for not calling him. App. 4616, ll. 2 – 17. Second-chair trial counsel Butler said Dr. Watson’s name sounded “vaguely familiar, but that’s about all I can tell you.” App. 4578, ll. 13 – 19. Butler deferred to Strickler for any decision-making about Dr. Watson. App. 4579, ll. 1 – 6.

Third-chair trial counsel April Sampson (“Sampson”), who was present during Dr. Watson’s deposition at PCR, testified that she “was familiar with his diagnosis” and that the reason Cutro’s trial team decided not to call Dr. Watson was because of the trial court’s evidentiary ruling that neither side could say whether Cutro had Munchausen. App. 4712, l. 2 – 4715, l. 24. Quoting Dr. Watson’s testimony, Sampson said “as he stated today, [Dr. Watson] would never with a hundred percent say she didn’t have it.” App. 4713, ll. 10 – 21. This referred to these earlier statements made by Dr. Watson at his deposition: “I don’t think anybody can say with an absolute certainty that that diagnosis is accurate for any one individual,” and “I can’t say with a hundred percent certainty that it’s not accurate, but she’s certainly—I can say she certainly doesn’t have any antisocial, Narcicisstic or histrionic features that would be in line with that diagnosis probably being awarded.” App. 4691, ll. 6 – 22.

Strickler agreed with PCR counsel that he “could have called him, if I wanted to, which says to me I didn’t want to. What I can’t tell you at this point in time is why I didn’t want to.” App. 4628, ll. 5 – 9. When asked if he had a duty to preserve the record on appeal and put Dr. Watson’s testimony on the record, Strickler said, “No, sir, I don’t.” App. 4629, ll. 7 – 9. Strickler then clarified, stating, “I mean, it may be the better practice but I don’t.” App. 4629, ll. 10 – 12.

The PCR Court's Ruling

The PCR court ruled that trial counsel made a strategic decision not to call Dr. Watson. App. 4754. As the basis for this strategic decision, the PCR judge stated that Dr. Watson's testimony was rendered unnecessary because of the trial judge's ruling that no expert witness could say whether Cutro had Munchausen. App. 4754. The court credited April Sampson's testimony and concluded that because the trial judge "prohibited outright testimony that she did or did not have MSBP" that Dr. Watson's "testimony was not necessary." App. 4754. The PCR judge credited trial counsel with making a strategic decision not to call Dr. Watson "in part based upon court rulings." App. 4754.

Discussion

The PCR court erred in holding Cutro could not prevail because calling Dr. Watson would have allowed a further challenge to the relevance of Munchausen and would have preserved the issue of the trial judge's bizarre compromise ruling that neither side could present evidence regarding whether Gail Cutro actually suffered from Munchausen. Crediting trial counsel with a strategic choice is tantamount to crediting them with acquiescing in the trial court making an error of law.

First, no strategic reason exists as to why trial counsel would not have called Dr. Watson at the hearings on the admissibility of Munchausen and joinder. Strategic choices of trial counsel are entitled to deference, but such decisions must be made after thorough investigation of the facts of the case. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). This Court has recognized the importance of trial counsel investigating and locating favorable witnesses. In Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 470-71 (1998), trial counsel was held ineffective for failing to call a triage nurse in a rape case. See also, Ard v. Catoe, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007).

Dr. Watson was the only mental health expert who examined Cutro near the time of the injuries and deaths of the children—in 1994. As his testimony at PCR demonstrates, he was prepared to testify that she did not have any of the personality traits purportedly associated with Munchausen. Because a key part of trial counsel’s strategy on the admissibility of Munchausen for joinder was that it had no relevance because it did not apply to Cutro, Dr. Watson’s testimony on this issue would have been crucial and consistent with that strategy. The notion that Dr. Watson was not called because of his “100 percent” comment was not testified to by either of the attorneys who made the decisions with respect to the case. Butler, whose chief responsibility was the joinder issue, testified that he did not remember Dr. Watson and only that his name sounded vaguely familiar. Strickler could not recall why Dr. Watson was not called. Had trial counsel performed an adequate investigation under Wiggins, they would have discovered the importance of Dr. Watson’s opinions. Furthermore, despite calling other experts on Munchausen, the value of Dr. Watson’s testimony could not be recreated because of his evaluation of Cutro close to the time of the incidents. Calling Dr. Watson would have been consistent with trial counsel’s strategy on Munchausen and the PCR court’s conclusion on this issue is not supported by the evidence in this case.

The PCR court also erred because, had trial counsel called Dr. Watson, it could have preserved a powerful issue for appellate review. The trial judge ruled that it would “not allow any evidence of the psychiatric condition of Ms. Cutro.” App. 169. This ruling, in effect, protected the State because its witnesses could testify about Munchausen and implant the idea that Cutro had Munchausen in the jury’s mind. The trial court’s ruling handicapped the defense because it had an expert who was prepared to testify that she did not have Munchausen and it did not apply to her.

“Generally, when testimony is excluded, a proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been.” State v. Garris, 394 S.C. 336, 350 n.12, 714 S.E.2d 888, 896 n. 12 (Ct. App. 2011) (internal quotations omitted). Trial counsel failed to proffer Dr. Watson’s testimony. Strickler testified that while proffering testimony “may be the better practice” he did not do it. App. 4629, ll. 7 – 12. This constituted deficient performance that prejudiced Cutro under Strickland.

Had Dr. Watson’s testimony been proffered, the issue of whether the defense could present evidence that Cutro did not have Munchausen would have been preserved for appeal. Considering the fact that the trial judge allowed evidence of Munchausen into the case at all, the “compromise” ruling that neither side could say whether Cutro actually had Munchausen in fact only hurt Cutro. Dr. Watson’s testimony would have been relevant under Rule 401 to rebut the State’s assertion that Munchausen provided the motive. No Council or Rule 702 objection would have been allowed by the State because the entire need for Dr. Watson was based on the trial court’s earlier (erroneous) ruling that Munchausen passed these requirements for admissibility.

Despite the State’s argument that one more expert could not have made a difference, Dr. Watson was uniquely valuable in this case because he examined Cutro in 1994 and none of the State’s Munchausen experts would have been able to provide such a temporally relevant opinion. Dr. Watson’s opinion would have given the lie to the testimony of **pathologists** like Dr. Ophoven who wanted to pretend that Munchausen was a medical diagnosis of child abuse and not a diagnosis of the mental condition of the alleged perpetrator. Had this issue been properly preserved for appeal

with the proffer of Dr. Watson's testimony, the trial judge's bizarre ruling on Munchausen would have been reversed.

CONCLUSION

For the foregoing reasons, the judgment of the PCR court should be reversed, petitioner's convictions should be reversed, and this case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 12th day of August, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Alison Renee Lee, Circuit Court Judge

BRENDA GAIL CUTRO,

PETITIONER,

V.

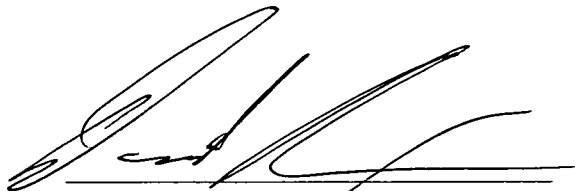
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212782

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 12th day of August, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of August, 2015.

Marie Neider (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.