STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Richland County
Alison Renee Lee, Circuit Court Judge

Brenda Gail Cutro,

Petitioner,

vs.

State of South Carolina,

Respondent.

Appellate Case No. 2012-212782

BRIEF OF RESPONDENT

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ISSUES PRESENTED

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

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

STATEMENT OF THE CASE

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

During the December 1998 term of court, Cutro was indicted for murder and homicide by child abuse for the death of Child 1 and for assault and battery with intent to kill and assault and battery of a high and aggravated nature for the injuries inflicted on Child 2. Cutro was tried in 1999 for all the charges for all three children before the Honorable James C. Williams, Jr., and the trial ended with a hung jury (according to testimony at the PCR hearing, with a vote of 11-1 for conviction). See App. p. 4615.

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

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

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

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

Cutro appealed the denial of relief and filed her petition for writ of certiorari. This Court granted the petition on the two issues discussed herein and denied the petition as to the other two issues raised by Cutro. This Brief of Respondent follows.

STATEMENT OF FACTS

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

> Appellant and her husband Josh Cutro operated a home daycare in Irmo, South Carolina. Between January and September of 1993, two infants, Child 1 and Child 3, died at the Cutros' home. A third infant, Child 2, became ill while at their home and was subsequently diagnosed with serious brain damage. The State produced evidence that all three infants were victims of Shaken Baby Syndrome. Appellant was convicted of two counts of homicide by child abuse and sentenced to concurrent life sentences for killing Child 1 and Child 3, she was acquitted of the assault and battery charge regarding Child 2.
>
> The State's theory of the case was that appellant's actions were motivated by Munchausen Syndrome by Proxy (MSBP), which the State's medical experts defined as a form of child abuse in which the perpetrator harms a child in order to garner sympathy and attention for herself.
>
> **Child 1**
>
> Child 1 was almost five months old when he was found dead in his crib at the Cutro home on January 4, 1993. According to his parents, Child 1 was a healthy baby and had no health problems that morning. His mother dropped him off at the Cutros' daycare at about 7:30 a.m. At 1:57 p.m., emergency personnel received a call to the Cutro's home.

When they arrived at 2:11 p.m., Child 1 was not breathing. He was rushed to the hospital where he was declared dead.

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

> A: She told me that Child 1 was taking a nap. She went in and checked on him. He was asleep. She went in the kitchen, reached up in the cabinet to get his food down. Josh came in behind her and screamed, Child 1 is not breathing, call 9-1-1.
>
> . . . .
>
> Q: After she left the room where Child 1 was and went into the kitchen, how long a period of time did she indicate it was before Josh entered the room and screamed?
>
> A: The way she explained it to me was she checked on Child 1, walked in the kitchen, and reached in the cabinet. Josh walked in behind her and screamed, Child 1 is not breathing, call 9-1-1 – however long it takes to get from the living room into the kitchen and reach into a cabinet, a few seconds. And her kitchen was right beside the living room.
>
> Q: So according to Gail Cutro, who was the last person who had contact with your son, Child 1, before Josh Cutro found him not breathing?
>
> A: Gail.

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

In July 1994, Child 1's body was exhumed and re-autopsied. Dr. Ophoven, who reviewed the autopsy report, concluded that the presence of the petechial hemorrhages in Child 1's brain and a sub-dural hemotoma, which had not been discovered in the original autopsy, indicated Child 1 died a traumatic death caused by shaking and asphyxia. Dr. Gilbert-Barness testified that Child 1 died of Shaken Baby Syndrome which damaged the medulla causing the heart and respiration to stop.

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

Child 2

Child 2 was four months old when he began daycare with the Cutros on June 7, 1993. A couple of days after beginning daycare, Child 2 became irritable and stopped sleeping through the night. He was fussy on June 23 when his mother dropped him off at the Cutros' at about 7:30 a.m. Between 10:30 and 10:50 a.m., Child 2's mother received a telephone call at work from appellant stating that the baby was "inconsolable" and suggesting she pick him up and take him to the doctor.

When Child 2's mother arrived at the Cutros' a short time later, the baby was already in his car seat and they immediately handed him to her. Child 2 remained in his car seat until he was in the doctor's office. When Child 2's mother removed him, she discovered Child 2 was limp and unable to control his neck. Another child's parent had seen Child 2 that morning in daycare and testified he was moving normally at that time.

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

Child 3

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

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

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

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

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

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

Evidence of [Munchausen Syndrome by Proxy]

As proof of motive, the State introduced evidence of appellant's attention-seeking behavior regarding the purported SIDS deaths of the two

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

Cutro, 365 S.C. at 369-73, 618 S.E.2d at 891-93.

Supplemental facts regarding pathologist testimony

The operative issue in this case is whether or not appellate counsel should have briefed an argument that the trial court erred in allowing expert testimony on MSBP. Much of Cutro's brief is a distraction from that issue, including the discussion of the weight of the State's pathology evidence.

In her brief, Cutro dedicates significant space to a discussion of the pathology testimony, concluding the State's case was weak. When taken in context with Cutro's bizarre behavior, the amazing unlikeliness of two unexplained deaths in the daycare, and her fictitious creation of a SIDS death in her daycare **before** Child 1 and Child 3 died, the State's pathology testimony is convincing, even if hotly contested. In simple terms, the two pathologists who did the original autopsies, Dr. Daniel, who examined Child 1, and Dr. Reynolds, who examined Child 3, both noted petechial hemorrhages in the child they examined and both denied they could have missed the existence of subdural hematomas. App. pp. 962-964; p. 984; pp. 1000-1001; pp. 1093-1094; 1098-1099. Both admitted they did not remove the eyes, which could have been examined for retinal hemorrhages,

and they failed to remove the dura. App. pp. 952-953; p. 1018; p. 1091; pp. 1126; p. 1165. Both would be criticized for their findings and work, on different points, by the subsequent State's experts and the defense experts; and they were unsurprisingly defensive of their work. The State's experts would agree with Dr. Daniel and Dr. Reynolds that there were petechial hemorrhages and opine there were subdural hemorrhages not found in the original autopsies. The defense experts would disagree there were petechial hemorrhages, insisting they were post-mortem artifacts, and also disagreed with the existence of subdural hemorrhages.

Dr. Enid Gilbert-Barness graduated from the University of Sidney Medical School in Australia in 1950. Dr. Barness is a member and past president of the Society for Pediatric Pathology and also the International Pediatric Pathology Association. Dr. Barness is board certified in Anatomic Pathology, Pediatric Pathology, and Clinical Pathology. Dr. Barness studied sudden infant deaths for approximately forty-five years. Dr. Barness performed over 4,000 autopsies and was consulted on reviewing autopsy results in other cases. Dr. Barness has been qualified as an expert in probably twenty different states. App. pp. 1571-1578.

Dr. Barness performed the autopsies on the exhumed bodies of Child 1 and Child 3. App. pp. 1586-1587. Dr. Barness explained to the jury the problems she saw with the original autopsies on Child 1 and Child 3:

> I think that it is regrettable that illustrations weren't taken, photographs were not taken. We have a rule in my department that every autopsy should be photographed. The other thing that I though was regrettable that was not done was examination of the eyes, particularly in a case like this where the eyes may be very helpful in arriving at a diagnosis. And, thirdly, that the dura, which I understand

> the jury understands what the dura is, was not stripped from the skull bone, and was not really examined.

App. p. 1580, lines 11-20. In both cases, Dr. Barness removed the eyes, but they were too decomposed for an examination. App. p. 1592.

Dr. Barness testified she observed petechial hemorrhages and noted she had not seen petechial hemorrhages in a SIDS case in his forty-five years of practice. App. p. 1581-1582.[1] Dr. Barness disagreed with defense experts that claimed the petechial hemorrhages were actually post-mortem artifacts, noting, "It is impossible to create hemorrhages after death . . . If you see petechial hemorrhages, it means that it has occurred during life." App. p. 1584, lines 10-18.

Upon examining Child 1, Dr. Barness found hemorrhage underneath the dura, which is known as a subdural hemorrhage. App. p. 1594-95. Dr. Barness noted hemorrhage in the dura, which she stripped, and a blood clot. App. p. 1596. During the autopsy of Child 3, Dr. Barness also found hemorrhage underneath the dura. Dr. Barness testified the clotted blood was pre-mortem. App. p. 1597. Dr. Barness explained that blood does not clot post-mortem, so those injuries were pre-mortem

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1 Dr. Barness testified about the article Dr. Reynolds referenced that claimed petechial hemhorrages occurred in 16-17% of SIDS cases. Dr. Barness agreed with the prosecution that this occurred prior to the American Academy of Pediatrics reissued definition of SIDS and prior to the American Academy of Pediatrics issuing a proclamation that a diagnosis of SIDS should not be made without a complete autopsy, scene investigation, and careful case review. The study was conducted between 1979 and 1987, and included cases sent by people who were not pediatric pathologists and cases that were not adequately investigated. Dr. Barness commented that many cases were included that "we believe now were almost certainly suffocation deaths." App. pp. 1589-1590 (direct quote: p. 1590, lines 10-12). Dr. Barness concluded: "She did say that there was 17 percent who had petechial hemorrhages. But that is erroneous in view of what we know today." App. p. 1590, lines 15-17. The referenced article is not probative to this case, but Dr. Reynolds' reliance on outdated research certainly is probative of Dr. Reynolds' bias as a witness.

injuries. App. pp. 1597-98. Dr. Barness sent sample to a colleague, Dr. Emery, for further testing to verify the clots were pre-mortem. App. p. 1601-1602. The tissue was stained with hemoglobin, which can only occur during life. Dr. Barness described the results as unequivocal evidence the hemorrhages were pre-mortem. App. pp. 1602-1605.

Dr. Barness explained how clots attached to the dura could be missed:

> Well, I think it's easily missed when the a pathologist removes the skull cap, there's probably a lot of fluid and blood that is present from where he has cut around the skull. And there's a pool of blood. If he doesn't mop that up and look underneath and look at the dura and strip the dura, he would very easily miss a blood clot.
>
> And then he takes the skull cap off, he looks down on the brain, and unfortunately, that's been removed, but looks down on the brain itself sitting in the base of the skull, and it looks perfectly normal.
>
> So he doesn't go any further. And it's unfortunate that the pathologists who did these autopsies, albeit they did a good autopsy as far as they went, they did not really investigate the possibility of a subdural hemorrhage.

App. p. 1614, lines 4-17. Dr. Barness testified the evidence clearly showed hemorrhages in the brain for both Child 1 and Child 3, and opined with certainty the cause of death for both children was Shaken Baby Syndrome. App. pp. 1624-1625.

Dr. Ophoven has had a practice in pediatric forensic medicine since the early 1980's. In her practice, she has been consulted by clinical pathologists and non-pediatric forensic pathologists. App. p. 1182. Dr. Ophoven explained why there is a specialty in the area of pediatric pathology:

> With pediatric forensic medicine, by focusing my practice on issues relating to children specifically by virtue of the experience, I have come in contact with some

> questions much more often than people who are practicing in a general practice. So for instance, a forensic pathologist that is doing the entire spectrum of questions may not have had as much experience with certain problems in childhood deaths of questions rise as often, so they will consult with us or with me to ask if I've had more experience or if I have more knowledge or training in helping them answer those questions.

App. p. 1183, lines 3-13. Dr. Ophoven has been qualified in the area of forensic pediatric pathology across the country hundreds of times. App. p. 1185. She has performed approximately two thousand infant autopsies. App. p. 1188.

Dr. Ophoven testified, "The removal of the eyes has become a routine part of the forensic autopsy in infants where the cause of death is not clearly natural causes." App. p. 1197, lines 6-8. One of the reasons the eyes should be removed is for the detection of hemorrhages. App. p. 1198. To determine whether a retinal hemorrhage is present or absent, it is necessary to remove the eyes during the autopsy. App. p. 1206.

Dr. Ophoven explained physical aspects of a shaken baby injury:

> Underneath the skull is a membrane that we call the dura. It's quite thick. It's dense material. [I]t's not the kind of substance that you could tear with your bare hand. It's very thick, even in little children.
>
> And it basically is like the container for the brain. It's elastic so it can change its shape a little bit if it needs to in certain areas, but it's very, very dense. So it's like the container of our brain.
>
> [T]he space that sits underneath the dura is called the subdural space, or under dura . . . And that basically sits between this membrane and the surface of the brain.
>
> . . . The shaken infant is a form of injury that we call acceleration, deceleration injury. And what that means is that the brain substance and the contents inside of the head are subjected to force that is at angles and momentum that disrupts the integrity of the tissue. So what really is behind the injury is the actual acceleration and deceleration of the head.

* * *

> What happens when that takes place is these delicate little vessels here get torn and blood accumulates in the subdural space. That's what we would call a subdural hematoma.
>
> That's not where the big damage is. These little bridging veins can bleed a little or bleed a lot, but where the real damage is in the brain substance itself. Remember I said that the baby's brain has a lot of water in it? So when the brain moves around, it's like you were shaking jello. It's kind of like that same consistency.

* * *

> So what happens to the delicate fibers inside of the brain is that they get torn apart. And they can get torn apart to the point where you lose consciousness. . . . Or they can get torn apart to the point where you stop breathing immediately.

App. p. 1203, line 24 – p. 1206, line 1.

Dr. Ophoven testified the presence of petechial hemorrhages is "an abnormality" and she had not seen it in any sudden infant death syndrome cases she dealt with. Her opinion was the presence of petechial hemorrhages took the case out of the SIDS category. App. p. 1231, lines 4-7. Dr. Ophoven testified the hemorrhages in Child 1 were indicative of some form of asphyxia. Shaking an infant can cause asphyxia. App. p. 1232. Dr. Ophoven testified that in her entire career she has not seen petechial hemorrhages in children who died suddenly and unexpectedly. She had seen petechial hemorrhages in children who have died from traumatic injuries to the brain. App. p. 1233. Based on the examination of the records before her, Dr. Ophoven testified in her opinion there was the presence of subdural blood after removal of the dura during the July 1994 autopsy of Child 1. App. p. 1237.

Dr. Ophoven testified she has examined exhumed bodies or their tissue fifteen to twenty times in her career. She noted the presence of blood in the tissue of the dura itself. This is indicative to her that the bleeding occurred during life and was not a post-mortem artifact. App. pp. 1239-1241. Dr. Ophoven testified that blood could not merely seep into the dura post-mortem, and she noted the presence of blood in the dura tissue. App. pp. 1242-1244. Dr. Ophoven testified that stripping the dura is standard for a forensic autopsy, especially those individuals dying suddenly and unexpectedly, and is routinely done in every case in many medical examiner offices. App. p. 1245.

Dr. Ophoven testified she found to a reasonable degree of medical certainty that Child 1 suffered a "trauma death" with "a component of asphyxia and a component of trauma to the head, most probably in the form of shaking." App. p. 1248, line 14 – p. 1249, line 1.

Dr. Ophoven also examined the dura tissue from Child 3 and determined there was a subdural hemorrhage that was a pre-mortem injury. She observed blood in the dura tissue. App. pp. 1250-1251. She agreed with Dr. Reynolds' observation of petechial hemorrhages in the brain, noting she observed petechial hemorrhages in the cortex and the medulla. The presence of petechial hemorrhages in the medulla was particularly important because that portion of the brain operates the breathing center of the body and the hemorrhages in the medulla suggest the mechanism for asphyxia. App. p. 1253, lines 3-25.

Dr. Ophoven explained that stripping the dura for an examination, either in an initial autopsy or after an exhumation, is an accepted technique by forensic and pediatric pathologists. App. p. 1281.

Defense witness Dr. John Smialek disputed the presence of petechial hemorrhages in both children, but agreed on cross-examination that the presence of petechial hemorrhages would take the case out of a SIDS diagnosis. App. pp. 2913-15. Dr. Smialek was unable to explain how only these two cases of the 276 SIDS deaths reported in South Carolina had reports of petechial hemorrhages. App. pp. 2920-2922.

Dr. Joel Sexton testified on Cutro's behalf and opined that no petechial hemorrhages were present and that they were post-partem artifacts. App. p. 3721. Significantly, Dr. Sexton admitted that he has never seen petechial hemorrhages listed in a SIDS death. App. p. 3797.

ARGUMENT

I.

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

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

Cutro attempts to circumvent the appropriate standard of review of this claim, arguing the issue should be reviewed de novo and if the issue would be a successful appeal issue, then she was entitled to relief. These propositions of law are incorrect. Appellate counsel appointed to represent an indigent defendant in his appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983); United States v.

Mason, 774 F.3d 824, 828-29 (4th Cir. 2014) ("Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit." (citation and internal quotation marks omitted)). Appellate counsel's representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). "We likewise **presume** that appellate counsel decided which issues were most likely to afford relief on appeal." Mason, 774 F.3d at 828 (emphasis added, citation and internal quotation marks omitted).

"[I]t is still possible to bring a [claim of ineffective assistance of counsel] based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259 (2000) (favorably quoting the following observation in Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986): "Generally, only when ignored issues are **clearly stronger** than those presented will the presumption of effective assistance of counsel be overcome" (emphasis added)).

Furthermore, under the two part test of Strickland v. Washington, 466 U.S. 668 (1984), an applicant must show not only that counsel's performance was deficient, but that this deficiency prejudiced his defense.

Another point of law being overlooked by Cutro is the established rule of contemporary assessment of counsel's conduct. Lockhart v. Fretwell, 506 U.S. 364, 372 (1993); Bell v. Cone, 535 U.S. 685, 698 (2002) ("In Strickland, we said that '[j]udicial scrutiny of a counsel's performance must be highly deferential' and that 'every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' 466 U.S. at 689, 104 S.Ct. at 2052.").

In the instant case, this Court is looking at the same cold record as the PCR court to determine the prejudice prong of Strickland. But for the first prong of Strickland, this Court should defer to the PCR court's ruling as testimony at the PCR hearing indicates the decision not to raise the issue on appeal was a matter of strategy. One of the public defenders representing Cutro at trial, Beattie Butler, Esquire, testified on whether this issue should be raised. Butler provided assistance to the two other appellate attorneys, Robert Dudek, Esquire, and Joseph Savitz, Esquire. Butler felt the issue should have been raised, but admitted he did not have their level of appellate experience and they disagreed with him: "I have to defer to them as to what – they're the appellate lawyers. I'm not, so I would defer to them as to what were the best grounds." App. pp. 4586-4587 (quote p. 4586, lines 17-19). The PCR court noted Butler's admission on this point in its order denying relief. App. pp. 4746-4747. Butler's PCR testimony reveals his analysis of the issue took the critical misstep of overlooking that Council's four-prong analysis does not apply to MSBP testimony, which is non-scientific expert testimony. App. p. 4587.

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

The Purported Mystery of this Court's Ruling in Cutro II

At the outset of her argument, Cutro claims the existence of a mystery – "the

seemingly opposite results in Cutro I and Cutro II." This is one of the easier mysteries to solve, because this Court explained the main reason why. In Cutro I, the State prosecuted Cutro only for the death of Child 3, but presented evidence of Child 1's death and Child 2's injuries under Rule 403, SCRE. This Court found the evidence that Cutro was responsible for Child 1's death and Child 2's injuries did not meet the clear and convincing standard necessary for admission.

In Cutro II, this Court rejected appellate counsel's argument that its evidentiary ruling in Cutro I was controlling, explaining, "We now clarify that in determining joinder, the trial judge need not find clear and convincing evidence of the charges." Cutro II, 365 S.C. at 374, 618 S.E.2d at 894. Therein lays the solution to the mystery.

Confusingly, Cutro claims, "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." This rewrite of history is confusing and at odds with the remainder of Cutro's brief. Cutro is now challenging the admission of expert testimony under Rule 702, SCRE, not joinder, not Lyle. Also, appellate counsel attacked joinder and the admission of behavior evidence under State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998). App. pp. 4799-4811. Contrary to Cutro's claims, appellate counsel did present joinder as a ground for reversal, and this Court's clear and understandable answer was joinder was not error.

Cutro bore the burden of showing the passed-over issue, admissibility of evidence under Rule 702, SCRE, was clearly stronger than the eight issues, including joinder, that were raised by appellate counsel. Cutro's argument is an intricately weaved dodge to the

question as to whether the issue of the admissibility of MSBP is "clearly stronger" than the other eight issues raised. Indeed, one has to go deep into Cutro's brief for an actual legal discussion on the admissibility of the expert testimony under Rule 702, SCRE. The dodge is necessary, because Cutro makes the conclusory assertion that it is scientific evidence and ignores the law on the admission of non-scientific evidence at the time of trial. Cutro must also contend with the existing out-of-state law at the time at trial, discussed below, that found this type of testimony admissible.

MSBP is reliable non-scientific evidence admissible to help understand evidence of motive presented by the State.

Contrary to Cutro's claims, MSBP is a valid medical theory concerning a type of child abuse that is taught in medical schools. See Myers, John E.B., Myers on Evidence Interpersonal Violence § 4.20 Munchausen Syndrome by Proxy ("Expert testimony is necessary to prove Munchausen Syndrome by Proxy, and courts allow such testimony"). "Munchausen Syndrome by Proxy is an accepted diagnosis. Courts hold that expert testimony on the Syndrome passes muster under *Frye* and *Daubert*, or is not subject to these tests at all." Id. Testimony regarding the syndrome was relevant towards explaining Cutro's motive: how a seemingly doting mother of three and caretaker of children murdered two infants and injured a third within an eight month period at her daycare center.

Cutro claims the testimony was prejudicial[2] because without testimony regarding MSBP, joinder of the charges would be impossible. This is simply not the case. As

2 The testimony was not unfairly prejudicial. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Owens, 346 S.C. 637, 552

this Court has already noted in its opinion from the direct appeal of her convictions: "[T]he State's theory of the case was that appellant killed the victims to gain sympathy and attention for herself . . . ." State v. Cutro, 365 S.C. 366, 377, 618 S.E.2d 890, 895 (2005) (affirming the admission of babies' memorabilia seized from Cutro's home as properly admitted to show motive). While expert testimony regarding MSBP was helpful to the jury, the evidence showing her motive tied together the three events. Some of the evidence of motive includes: (1) fabricating deaths of children in her home, (2) collecting her victims' paraphernalia such as the babies' clothes, (3) visiting and laying on her victims' graves, (4) joining and participating in SIDS support groups, (5) appearing on television and writing a story entitled, "SIDS, a Babysitter's Story," (6) calling attention to herself at Child 3's funeral, (7) making various martyr-like statements to the victims' parents, and (8) complaining the criminal investigation was interfering with her ability to grieve for one of her victims.[3] All this evidence was admissible under the State's theory of the case and tied together the three separate events occurring in her daycare within eight months.

Cutro argues the testimony should not have been admitted under State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). This argument is fundamentally flawed, because Council governs the admission of scientific testimony, and this testimony is non-scientific testimony.[4]

S.E.2d 745 (2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In the instant case, the "prejudice" Cutro complains about is the actual probative force of the evidence, which is not unfair prejudice at all.

3 See pp. 34-38 infra, for a detailed review of the motive evidence.

4 Cutro cites no authority establishing that the testimony is scientific and subject to Council analysis. Cutro just makes the conclusory assertion that it is scientific.

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

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The admissibility of scientific evidence is dependent on whether the experts relied on scientifically and professionally established techniques. State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). Under State v Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the trial court must consider the following concerning expert testimony for scientific evidence: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality of control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." 335 S.C. at 19, 515 S.E.2d at 517.

Council set out the test for **scientific** evidence as follows: "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. The trial judge should apply the Jones factors to determine reliability. . . ." Id. at 20, 515 S.E.2d at 518 (emphasis added).[5]

Appellate courts will not consider arguments or issues raised on appeal in a conclusory or unsupported manner. See, e.g., Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 252, n. 3, 734 S.E.2d 161, 164 (2012).

5 This Court rejected the standard set out in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) that allows scientific evidence be admitted only when it has attained general acceptance of the scientific community as a whole. Council, 335 S.C. at 19, 515 S.E.2d at

The admissibility of scientific evidence is dependent on whether the experts relied on scientifically and professionally established techniques. Jones. This standard is designed to prevent jurors from being misled by an aura of infallibility surrounding unproven scientific methods. State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997) *overruled on other grounds by* State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

But not all expert testimony is subject to a Jones challenge. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). At the time of trial, "[i]f the expert's opinion [did] not fall within Jones, questions about the reliability of an expert's methods go only to the **weight, but not admissibility**, of the testimony." Morgan, 326 S.C. at 513, 485 S.E.2d at 118 (emphasis added).[6] For instance, this includes the testimony of behavioral science experts. Id. Likewise, in finding expert testimony on eyewitness reliability was admissible; the South Carolina Supreme Court rejected the necessity of a Jones analysis for that type of evidence to show that the field was a recognized area of expertise. Whaley, supra. "As the Whaley court indicated, when a proper foundation is established, a Jones analysis is not warranted if expert testimony is based on specialized skill or knowledge rather than on scientific techniques." State v. White, 372 S.C. 364, 642 S.E.2d 607 (S.C. Ct. App. 2007).[7]

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517. This Court also declined to adopt Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Id. at 20, 515 S.E.2d at 518.

6 Morgan was overruled by State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009), which declared all expert testimony, whether scientific, technical, or otherwise, must meet the requirements of Rule 702, including an initial determination by the trial judge of the reliability of the expert testimony.

7 Note that in Whaley, this Court rejected the State's objection that the testimony was subject to a Jones analysis, and without mentioning any gatekeeper function or reliability

In Graves v. CAS Medical Systems, Inc., 401 S.C. 63, 735 S.E.2d 650 (2012), this Court found the trial court erred in applying Council analysis to testimony from a doctor, Dr. Wilkins, who rendered an opinion about SIDS. This Court noted "a doctor who merely applies his knowledge to every day experiences does not need to satisfy the additional foundation required by Council." Id. at 78, 735 S.E.2d at 658.

Thus, Cutro's reliance on Council and Jones fatally puts her analysis of the issue on the wrong track. If appellate counsel raised the issue as raised in Cutro's brief now, appellate counsel would not have been successful because appellate counsel would have raised the wrong test. In short, appellate counsel was not ineffective for failing to allege the trial court erred in admitting the testimony under Jones and Council because Jones and Council are inapplicable to the non-scientific expert testimony Cutro challenges. This is fatal to Cutro's current claim.[8]

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

Cutro relies heavily on the testimony of Dr. Mart, who remonstrated about the lack

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analysis under Rule 702, SCRE, found the trial court erred in suppressing the expert testimony. Whaley, supra.

8 Cutro rashly discounts the trial court's astute observations that "you can't test the DNA, the validity of that, the same way you would test the validity of a Munchausen diagnosis. . . . So you might be trying to fit the foot into the wrong shoe in that respect." App. p. 352, lines 4-14. The trial court was using the correct test, and Cutro has failed to show otherwise, jumping to the Council track without showing it is required.

of testing on MSBP and the lack of an "error rate." Dr. Mart also complained about the lack of a standard protocol for the diagnosis of Munchausen. These complaints echo the arguments rejected in the sagely written opinion by Judge Slights in State v. McMullen, 900 A.2d 103 (Del. Sup. Ct. 2006).

First, Judge Slights quoted Easum v. Miller, 92 P.3d 794, 803 (Wyo. 20004) for the observation that "'[e]ven with all the advances of medical science, the practice of medicine remains an art.' This pointed observation perhaps best illustrates the often vexing challenge confronting the judicial gatekeeper when applying a Daubert analysis to the discipline of clinical medicine as opposed to the practice of 'hard science.'" Id. at 114. Judge Slights also observed, "it is acceptable for a physician to arrive at a diagnosis by relying on examination and tests performed by other medical practitioners. Furthermore, a differential diagnosis is not considered unreliable simply because 'no epidemiological studies, peer reviewed published studies, animal studies or laboratory data are offered in support of the opinion.'" Id. at 117 (citation omitted). Judge Slights noted the following: "So long as physicians employ objective diagnostic techniques when performing a differential diagnosis, their diagnosis will be reliable under Daubert even if the conclusion is 'novel' and not widely known in the medical community." Id. at 118.

Judge Slights addressed the lack of an error rate or controlled studies with the following observation:

> Most of the literature endorsing the diagnosis of PCF and MSBP has been subjected to peer review and publication. While there is no known potential rate of error with respect to diagnosing PCF and only one (albeit unreliable) control study on MSBP and PCF, it is clear that the diagnosis does not lend itself easily to an experimental design because of the likelihood of uncontrollable confounders and the

> obvious ethical implications of intentionally inducing illness in children in order to rest the PCF diagnosis.

Id. at 120. PCF (Pediatric Condition Falsification) is a diagnostic term derived from the "umbrella" diagnosis of MSBP. Id. at 105, n. 1. Judge Slights noted in his opinion that one of the proffered experts testified PCF "is not a medical condition that easily lends itself to a controlled experimental design." Id. at 107. Another expert testified it would be unethical to have a control group since doctors cannot intentionally create a group of harmed children. Id. at 110.[9]

Further, arguments about the reliability application of the MSBP testimony are questions of weight, not admissibility, based on the law in existence at the time of trial and appeal. Whaley, supra; Morgan, supra. It is hardly surprising then that appellate counsel would not have raised a Rule 702 challenge on appeal where the end result would likely be an unpublished opinion citing Whaley and a finding the trial court did not abuse its discretion.

Indeed, based on the State's research, the term "gatekeeper" did not appear in the context of a Rule 702 analysis until Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008), which, citing Council, noted "this Court's jurisprudence emphasizes the role of the trial court as the gatekeeper in determining both the qualifications of an expert and whether the expert's testimony will assist the trier of fact." Id. at 556, 376 S.C. at 86. Note the opinion is silent on the issue of reliability.

Shortly afterwards, this Court found that the trial court must utilize its gatekeeper function for non-scientific testimony, primarily relying on Kumho Tire Co., Ltd. v.

9 Defense expert Dr. Geoffrey McKee, a forensic psychologist, agreed with the State that no psychological test can include or exclude a perpetrator of MSBP. App. p. 3904.

Carmichael, 526 U.S. 137 (1999), rather than South Carolina precedent. State v. White, 382 S.C. 265, 270, 676 S.E.2d 686 (2009). Thus, this Court determined "all expert testimony under Rule 702, SCRE, imposes on the trial courts an affirmative and meaningful gatekeeping duty." Id.

Still, even applying this new elevated test for non-scientific evidence, this Court found admission of expert testimony concerning dog tracking evidence was not an abuse of discretion because the "finding of reliability is well supported by the record." White, 382 at 271, 676 S.E.2d at 687. As will be shown below, the reliability of the expert testimony was sufficient for the jury to consider it – the trial court did not abuse its discretion.

The Court of Appeals was considering the admissibility of non-scientific evidence in State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009) when this Court issued White. The Court of Appeals reversed Tapp's convictions based on the erroneous admission of non-scientific expert evidence. This Court granted the State's petition for writ of certiorari and analyzed the Court of Appeals' substituted opinion. In the process of its analysis, this Court noted, "[T]he law at the time of this trial instructed that **the reliability of nonscientific expert testimony was a determination to be made by the jury**." State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (emphasis added).

Of course, appellate counsel is not required to be clairvoyant and anticipate changes in the law. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."); Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial); Weaver v. Palmateer, 455 F.3d 958, 966 (9th

Cir. 2006) (clairvoyance is not a required attribute of effective representation); Larrea v. Bennett, 368 F.3d 179 (2d Cir. 2004) (failure to predict state law is not ineffectiveness). Based on the law in existence at the time of appeal, the reliability of the expert testimony was an issue for the jury. Therefore, appellate counsel's performance did not fall below professional norms given that appellate counsel would be attempting to pass off an admissibility issue as one of weight if attempting to raise the issue suggested now by Cutro. Given that the reliability of the evidence was an issue for the jury at the time of Cutro's appeal, appellate counsel's performance did not fall below professional norms by not raising a Council challenge or any challenge at all to the admission of the expert testimony, especially in light of the significant out-of-state authority discussed below supporting the admission of such testimony.

Even under the current requirements that the trial judge act as a "gatekeeper," the MSBP evidence is admissible. In order for a witness to be qualified as an expert, the trial court must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011). Even under White's elevated analysis, the trial court did not abuse its discretion in admitting the testimony.

Other jurisdictions allow evidence of MSBP provided an adequate foundation is presented for its admission. People v. Phillips, 175 Cal. Rptr. 703, 711-14 (Cal. App. 1981); Reid v. State, 964 S.W.2d 723, 725-34 (Tx. Ct. App. 1998); In the matter of Jessica Z, 515 N.Y.S.2d 370 (N.Y. Fam. Ct. 1987); Stratton v. Orange County Department of Social Services, et al., 628 N.Y.S.2d 818 (A.D.2d Dept. 1995) (noting that

medical evidence was presented at the family court custody hearing that child suffered from MSBP, "a condition in which the child becomes ill because of her parent's desire for attention, manifested by her parent's persistent insistence that she is ill."); In re Dylan C., 699 N.E.2d 107 (Oh. App. 1997); In re S.R., 599 A.2d 364 (Vt. 1991) ("[MSBP] causes a parent, usually the mother, to report or cause a serious illness or injury in her child in order to gain the attention and sympathy of the medical community. This illness, recognized in the psychiatric community and by the courts . . . can be fatal to the child." (citations omitted)); Matter of Tucker, 578 N.E.2d 774 (Ind. App. 1991); Vivian P. v. State of Alaska Dept. of Health & Social Servs., Div. of Family & Youth Servs., 78 P.3d 703 (2003); Fessler v. Dept. of Human Resources, 567 So.2d 301 (Ala. Civ. App. 1989) ("Munchausen's Syndrome is a medical diagnosis that is used to refer to fictitious or made-up medical phenomenon. When the term 'by proxy' is applied to it, it means that the individual involved is not manifesting the need or the problem, but someone else is causing the need or the problem."); In the Interest of M.A.V., 425 S.E.2d 377 (Ga. App. 1992) *overruled on other grounds by* In the Interest of J.P., 480 S.E.2d 8 (Ga. 1997); State v. Hovcevar, 7 P.3d 329 (Mont. 2000).[10]

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

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

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

In assessing the admissibility of testimony on MSBP, the Montana Supreme Court noted "expert testimony regarding MSBP is neither novel nor scientific. The term 'Munchausen Syndrome By Proxy' has appeared in medical literature since at least 1977." Hocevar, at 342 (also noting a search on Westlaw using the term "Munchausen syndrome by proxy" found the term appeared in forty state and federal cases since Phillips).

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

> [T]he State established sufficient foundation to show that Alexander was qualified to testify on MSBP and that he had adequate knowledge on which to base an opinion in this case. The record shows that the State sufficiently established Alexander's medical training and experience, specifically his experience with MSBP. As a Professor of Pediatrics, Alexander had written and taught on the subject. The State also established that Alexander had adequate knowledge about the Hocevar family situation on which to base his diagnosis of MSBP.

Hocevar, at 342.

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

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

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

As demonstrated above, expert testimony on MSBP has been allowed in numerous courts and is reliable; it certainly is a subject beyond the knowledge of lay jurors. Further, as shown below, the State's two expert witnesses who discussed the syndrome were well-qualified to provide this testimony.

Dr. Janice Ophoven – a forensic pediatric pathologist whose primary interest over the past thirty years has been in the area of child abuse and neglect, MSBP, and other matters pertaining to the nature of injuries suffered by children – testified that MSBP is "a form of child abuse or injury to children that occurs in the circumstance where the person who is doing it fabricates the story so it's misleading to the people who are caring for the child." App. p. 1189, lines 8-11. Dr. Ophoven noted this is an accepted diagnosis by the American Medical Association in both the United States and other countries, and she testified she is published on the topic of MSBP as a diagnosis of a pattern of child abuse. App. pp. 1185-1192. Dr. Ophoven noted that the diagnosis is a medical diagnosis, not a psychological diagnosis. App. p. 1300, lines 2-6.

Dr. Ophoven has published books on forensic pediatric pathology which include discussion of MSBP. These writings have been peer reviewed. She has made the diagnosis of MSBP in cases she has worked on herself. App. p. 1190. Dr. Ophoven has presented advanced workshops for law enforcement, pathologists, pediatricians, and nurses on MSBP. App. p. 1190-91. She also developed a list of warning signs at the request of the Federal Bureau of Investigation (FBI). App. p. 1191. At the time of trial, Dr. Ophoven was qualified in the area of diagnosis of MSBP in various courts a dozen or more times. App. p. 1191.

Dr. Ophoven testified MSBP is "a real entity that has caused serious harm and death to many children." She further explained the pattern of child abuse is a diagnosis of more than one event which requires looking at the information about the harm to the individual and the history and additional information provided. By virtue of the pattern that is found, she can draw "fairly accurate conclusions about the nature and character of how those injuries took place." The pattern could include child abuse against only one child over a period of time or it could involve child abuse against multiple children over a period of time. The diagnosis of MSBP "appears to have attached to it" that the abuser has some gain from perpetuating the abuse. Sympathy and attention were the first gains noted in MSBP cases, but other forms of personal gain may also be present. App. pp. 1290-1296. Dr. Ophoven concluded from her review of the materials, the evidence was consistent with a diagnosis of MSBP. App. p. 1300.

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

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

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

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

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

App. p. 1556, lines 5-12.[11]

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11 This Court recognized that a physician is qualified to give an expert opinion on a patient's mental and emotional injuries. Creed v. City of Columbia, 310 S.C. 342, 426 S.E.2d 785 (1993) ("The fact that [the physician] is not a specialist goes to the weight of his testimony, not its admissibility."). See also Holbrook v. Lykes Bros. Steamship Co., 80 F.3d 777, 782-83 (3d Cir. 1995) (finding the district court erred in excluding treating physician's expert testimony rendering a diagnosis or discuss the pathology report on the basis that he was not a pathologist, oncologist or expert in "definitive cancer diagnosis" quoting the advisory notes to Rule 703, FRE, which recognizes a treating physician bases

The State was properly allowed to present its evidence of MSBP. The State's theory of the case was that an enormous amount of sympathy and attention was provided to both Suzanne Pope and the parents of Elizabeth Lightfoot, following Elizabeth's 1991 death in the daycare center run by Pope at Cutro's church. Both the parents and Ms. Pope were members of Cutro's church and when Cutro's house was searched by law enforcement, church bulletins concerning the deaths of Child 1, Child 3, and Elizabeth Lightfoot were recovered from Cutro's home. App. p. 2439. In the early spring, 1992, Cutro fabricated a SIDS death in her home for the purpose of gaining sympathy from a parent visiting her daycare.[12] She also fabricated the death of one of her own children.[13]

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his diagnosis on a variety of sources, and finding district court erred in excluding the testimony because the physician, "did not possess the exact background the court deemed appropriate").

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

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

> I remember telling her that it was the hardest thing that I had ever been through other than the loss of my own child, that with God's help she would get through it.
>
> And her comment to me was that she understood because she too had lost one, that two of her daughters had been placed on a heart monitor, and that she understood.

Unable to obtain the necessary attention from these fabricated deaths, it is the State's position she began a pattern of direct physical abuse against the infants which began with Child 1 and ended with Child 3's death on September 9, 1993.

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

Missy Daniel, Child 3's mother, testified the Cutros' house was across from her mother's house. Daniel and her husband stayed overnight at her mother's the day Child 3 died, and the next day, Cutro came across the street and approached Daniel when

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App. p. 2310, lines 15-25.

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

When Child 3 died, Pope was summoned once more by River Hills and proceeded to Cutro's to provide comfort. Cutro told her Cutro did not call 911 or perform CPR; she just waited for her husband, Josh, to come home. App. p. 2317. At a meeting with SLED prior to the 1999 trial, Pope was shocked to discover Cutro never had one of her own children die of anything, much less a heart ailment. App. p. 2325.

Daniel was outside. App. pp. 2621-22. Daniel testified Cutro said "she was glad that she could take this burden from me of finding – that she found my child and not me finding her." App. p. 2622, lines 13-16. Later when Daniel found the nerve to discuss what happened the day Child 3 died, Cutro claimed the baby was making cooing noises with another child in adjoining car seats and got tired; Cutro then laid Child 3 down and Child 3 fell asleep. Daniel knew something was wrong because Child 3 was a colicky baby and never in the child's four-and-a-half-month life was Daniel able to simply lay the baby down and the baby fall right asleep. App. pp. 2624-25. Davis Daniel, Child 3's father, also found Cutro's version suspect because the Daniels could never just put Child 3 down to sleep. They rocked Child 3 for hours or drove Child 3 through the neighborhood: "she had to be moving to go to sleep." App. pp. 2603-2608 (direct quote, App. p. 2605, lines 20-21).

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

like that?" App. p. 2631, lines 21-23. Daniel added that Cutro was the one who would initiate and make comments like that. App. pp. 2631-32.

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

Evidence of MSBP is tied to the evidence of Cutro's fixation on death and attention-seeking behavior because it provides a medical diagnosis of a pattern of child abuse in which the perpetrator inflicted abuse in order to morbidly obtain a gain in the form of sympathy and attention. By staging deaths to appear to authorities, the children's families, and church members, as SIDs deaths, Cutro gained the sympathy and attention to satisfy her abnormal needs.

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

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

964 S.W.2d at 733.

In the instant case, the MSBP testimony was admissible under Whaley and Morgan, and relevant because it tied into evidence of Cutro's motive to gain sympathy

and attention through the deaths of Child 1 and Child 3. Appellate counsel's performance was not deficient nor was Cutro prejudiced by the failure to raise this issue on appeal because the trial court did not abuse its discretion in allowing this testimony.

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

> Ladies and gentlemen, you are about to hear some testimony about Munchausen Syndrome by Proxy. Now, this testimony is being admitted for a limited reason, which means you can consider this testimony for some things but not for other things.
>
> Now, this testimony is being admitted. And you can consider this testimony, concerning Munchausen Syndrome by Proxy, only for the limited purpose or purposes of assisting you in considering the motive of the defendant if any, the plan of the defendant if any, the absence of illness, mistake, or accident, if any.
>
> You may not consider evidence of Munchausen Syndrome by Proxy, if any, as a substitute for proof that the defendant committed the crime or crimes charged, nor may you consider this testimony as proof that the defendant has a criminal personality, if any, or bad character, if any, only for the limited purposes for whatever weight you think it deserves in considering motive, plan, that absence of mistake, illness, or accident.

App. p. 1289, line 13 – p. 1290, line 6. Jurors are presumed to follow the trial court's instructions. State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975). If the jurors followed the trial court's instructions, they only considered the evidence in consideration of Cutro's motive and not for an improper purpose.

Additionally, the record is replete with evidence of Cutro's attention-seeking behavior that ties in with a motive that does not necessarily require a diagnosis to recognize, as depraved and unusual a motive it was. Cutro made up the death of her

own child and the death of a fictitious child, sought attention and exhibited bizarre behavior following Child 1 and Child 3's deaths, and sought to establish herself as a martyr in the aftermath of both their deaths. She also exhibited a strange death-fixation. Evidence of motive is extensive, regardless of the expert testimony discussing MSBP. When other properly admitted testimony reveals essentially the same information, the jury's exposure to improper evidence is harmless. State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-555 (2001).

Far more critical was testimony regarding the autopsies and injuries in both of the dead children, particularly the petechial hemorrhages that were revealed in the original autopsies and differentiated these deaths from the entire population of actual SIDS deaths in South Carolina. The jury, by its verdicts, obviously believed the State's evidence that the deaths were not SIDS deaths but the result of child abuse. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

II.

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

For the purposes of seeing the forest despite the trees, Respondent notes the defense called no less than twenty-eight witnesses at trial and successfully attained acquittal on two murder charges and acquittal for the charges stemming from the injuries to Child 2. Nonetheless Cutro claims her defense team of three attorneys, who called multiple experts as witnesses at trial, was ineffective for failing to call one more to testify: Dr. E. Selman Watson, a forensic psychologist who evaluated Cutro in 1994 and would have concluded Cutro did not exhibit characteristics consistent with MSBP.[14] Dr. Watson was present at trial but not called to testify. App. p. 4494.

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14 The proposed testimony from Dr. Watson was, in reality, misleading: "There is no psychological test that detects Munchausen Syndrome by Proxy. Nor is there a personality profile that describes the 'typical' perpetrator of this bizarre form of child abuse." Myers, John E.B., Myers on Evidence Interpersonal Violence § 4.20 Munchausen Syndrome by Proxy. The Myers article quotes the following from Marc Feldman & Mary Sheridan, FABRICATED OR INDUCED ILLNESS BY CARERS, IN CHADWICK'S CHILD MALTREATMENT: A CLINICAL GUIDE AND PHOTOGRAPHIC REFERENCE: SEXUAL ABUSE AND PSYCHOLOGICAL MALTREATMENT, Vol. 2 (David L. Chadwick, Angelo P. Giardino, Randell Alexander, Jonathan D. Thackeray & Debra Esernio-Jensen eds., 4th ed. 2014):

> The principal motive for [MSBP] appears to be a caregiver's pursuit of emotional gratification, such as a desire for sympathy and attention or a wish to control others . . . Most of our understanding about [MSBP] comes from the more than 600 published articles in the medical and mental health professional literature . . . . Overall, though, attention-seeking has often marked their lives . . . . However, perpetrators may be found to be entirely

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

> What the State could do, and what they ended up doing, was listing all of the different things that Ms. Cutro did that they believed led to her having Munchausen syndrome by proxy, but they were not allowed to bring in an expert to say she had it. They could just talk about the things that she did and leave the – and leave the idea that she had it, but they never could say it.
>
> Therefore we could not do the converse. We could not say she didn't and we could not put out anything saying that she didn't. We could just say that all of the things that were pointing to her having Munchausen by proxy could be indicators of other things or show where they came from.
>
> Based on that we decided not to use Dr. Watson because he could not say she didn't have Munchausen syndrome by proxy.
>
> The other problem we had with Dr. Watson, and not that anything wrong with what he had – his diagnosis or what he had to say, but because he would not say – he, as he stated today, would never with a hundred percent say she didn't have it. So he was a little bit of a loose cannon in that if asked the wrong question he would say, as he did today, "Well, I'm not going to say she doesn't have it either." So there was just too many problems with him, especially since we couldn't mention her having or not having it, so we just chose not to use him at all.

App. p. 4712, line 18 – p. 4713, line 21. That decision was also made with due respect to the abilities of the prosecutor (Johnny Gasser) and his ability to effectively cross-examine expert witnesses as demonstrated throughout the record. The defense

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> normal on psychiatric or psychological examination; any abnormalities revealed are not specific for [MSBP]. A critical point that is often misunderstood is that mental health evaluation cannot be used to determine whether [MSBP] has occurred.

simply did not want to slip up with a bad witness.[15] App. p. 4715. Sampson explained further on cross-examination: "But again, part of our concern is if you asked him a question, he may answer it . . . as a lot of experts do, with more information than you actually asked for in the question and therefore go off in a direction that we didn't intend him to go off in." App. p. 4726, line 21 – p. 4727, line 3.

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

> Q: You said that the state's witnesses and I'm referring to just your last answer here – that the state's witnesses covered what Dr. Watson would have testified to based on what you saw today, but is it also true that your own witnesses also covered everything else?
>
> A: What little they could say, which was that there was no history of mental illness, mental disease, mental defect by Ms. Cutro. The state's experts said that and agreed to that. Our experts said that, what little they could. So adding another one to say the – that there's no problem, no psychosis, no mental problem with Ms. Cutro, I don't think helped any when you have to weigh it against the negatives of he's a little by[sic] of a loose cannot[sic] and, you know, you ask him the wrong question, you're going to get the wrong answer.

App. p. 4734, line 19 – p. 4735, line 10.[16] Sampson testified she did not think having an additional doctor testify for the defense would have helped at all. Even in hindsight,

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

16 Note that Dr. Geoffrey McKee, another forensic psychologist, agreed with the State on cross-examination that no psychological test can include or exclude a perpetrator of MSBP. App. p. 3904. Dr. Watson did not do an independent investigation, but instead simply interviewed Cutro and her husband, and did a psychiatric evaluation. App. pp. 4585-4589; p. 4697. Dr. Watson was unaware that Cutro faked a SIDS death in her daycare in 1992 or lied about her own child suffering from a heart ailment. App. p. 4699.

when speaking with jurors after the trial, the jurors indicated to her "there were so many experts who couldn't agree on anything that my – they disregarded the experts and went on gut instinct anyway." App. p. 4736, lines 4-12. She agreed with the assertion that they had turned off their ears at that point anyway. App. p. 4736, lines 13-15.

Close examination of Dr. Watson's testimony shows how unimpressive it would have been to jurors. She dealt with Munchausen Syndrome in the past, but this was the only case Dr. Watson dealt with MSBP. App. p. 4682. In her deposition submitted at the PCR hearing, Dr. Watson did not say Cutro did not have MSBP or even disagree with the diagnosis, but claimed to not be "impressed" with the diagnosis. App. p. 4691. Dr. Watson claimed Cutro did not seem to be the sort of person that was histrionic or seeking attention. App. p. 4690. Of course, that assessment is refuted by the attention seeking behavior testified to by several State's witnesses.

"Judicial scrutiny of counsel's performance must be highly deferential." Strickland, at 689. In order to prove a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. Counsel's articulation of valid trial strategy defeats a claim of ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546; 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Strickland requires extreme deference to counsel's strategic judgments that are

adequately investigated; as Strickland explains: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . ." Strickland, 466 U.S. at 690-91.

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

Additionally, Cutro was not prejudiced at trial by the lack of Dr. Watson's testimony. Dr. Geoffrey McKee, the twenty-first witness for the defense, gave similar, but superior testimony on most of the points discussed by Dr. Watson. See App. pp. 3838-67. Dr. McKee, after a review of materials, opined that MSBP was not present in this case. App. p. 3867.

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

CONCLUSION

For the above-stated reasons, the PCR court's denial of Petitioner's PCR application should be affirmed.

Respectfully submitted,

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Attorney General

DAVID SPENCER
Senior Assistant Attorney General
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BY: _____
ATTORNEYS FOR RESPONDENT

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December 14, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 14 2015
S.C. Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable James C. Williams, Jr., Circuit Court Judge

Appellate Case No. 2012-212782

BRENDA GAIL CUTRO,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

David Alexander, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 14th day of December, 2015

JENNA CLAIRE BROWN
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
DEC 14 2015
S.C. Supreme Court

December 14, 2015

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

Re: Brenda Gail Cutro, #212971 v. State of South Carolina
Lower Court Case No. 2006-CP-40-05530
Appellate Case No. 2012-212782

Dear Mr. Shearouse:

Attached are the original and thirteen (13) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

David A. Spencer
Assistant Attorney General
SC Bar #68571

DAS/jcb

cc: David Alexander, Esquire
Trisha Allen, Victim Services