STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

BRENDA GAIL CUTRO, PETITIONER,

V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE NO. 2012-212782

REPLY BRIEF OF PETITIONER

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Issue 1

The State's principal argument is that Munchausen is not scientific evidence and the trial court's gatekeeper role under State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) and Rule 702 did not apply. Brief of Respondent at 20-33. The State now argues that petitioner's "argument is fundamentally flawed, because Council governs the admission of scientific testimony, and this testimony is non-scientific testimony." Brief of Respondent at 22. The State's argument is not only incorrect, it is inconsistent with how the State presented the case at trial.

The State's concession that Munchausen is not scientific is an effort to avoid the inescapable fact that Munchausen—especially as applied in this case—is not reliable. However, just because the subject of expert testimony is junk science does not remove it from the tests applicable to scientific testimony. As pointed out by the United States Supreme Court, the testimony of a phrenologist to explain a defendant's future dangerousness based on the bumps on his skull would be excluded as unscientific under the federal Daubert test. General Electric Co. v. Joiner, 522 U.S. 136, 153 n.6 (1997) *citing* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). Such testimony is unquestionably an attempt at science, but a failed one that is not admissible. The Munchausen testimony in this case is analytically the same. It does not get the benefit of a lesser standard because it is scientifically unreliable.

Furthermore, the State's contention on appeal is inconsistent with how the Munchausen evidence was proffered for admission by the solicitor. The solicitors expressly relied on Rule 702 and Council to support the admission of its Munchausen evidence. In

their Supplemental Memorandum of Law on the Admissibility of Munchausen Syndrome and/or Munchausen Syndrome by Proxy Evidence, the solicitors framed the issue: "Have Munchausen Syndrome and Munchausen Syndrome by Proxy (hereinafter MSBP) attained a suffient [sic] degree of scientific reliability to be admissible in this state?" App. 4970. The solicitors made the following argument:

> The admissibility of expert testimony in South Carolina is a matter within the discretion of the trial court. State v. Jones, 259 S.E.2d 120, 125 (S.C. 1979). The court in Jones indicates that **admissibility of scientific evidence depends upon whether the experts relied on scientifically and professionally established techniques.** Id. at 125
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> > In considering the admissibility of scientific evidence under the Jones standard, the Court looks at several factors, including: (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.
>
> **State v. Council,** Opinion No. 24932 (S.C. Sup. Ct. filed April 5, 1999) (citing State v. Ford, 392 S.E.2d 781 (S.C. 1990)). The South Carolina Rules of Evidence state that, "(i)f 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." **Rule 702, SCRE.**

App. 4972 (emphasis added). At trial, the solicitors cited Jones, Council, and Rule 702—precedent the State now attempts to avoid.

As shown in petitioner's principal brief and in the above selection from the solicitors' memorandum, the issue at trial revolved around the admissibility and reliability of Munchausen as scientific evidence in this case. Once the trial judge decided that

Munchausen was admissible, it became the basis for joinder. The issue was extensively argued and briefed in the lower court, but was inexplicably missing from the appeal presented to this Court. But for the ineffectiveness of appellate counsel in failing to raise the most important legal issue in the entire trial, petitioner's case would have been reversed and the outcome of Cutro II would have been the same as Cutro I.

Issue 2

The State mistakes quantity for quality. It cites the number of witnesses and experts called by the defense as evidence that trial counsel could not have been ineffective "for failing to call one more" witness. Brief of Respondent at 41. The State's argument ignores the fact that Dr. Watson was the **only** mental health expert who examined Cutro near the time of the incidents in 1994. 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 State also wholly fails to address that calling Dr. Watson would have preserved a powerful issue for appellate review. The trial court ruled that it would "not allow any evidence of the psychiatric condition of Ms. Cutro." App. 169. This erroneous ruling was premised on acceptance of the solicitor's word games that Munchausen was "a diagnosis of child abuse." The trial judge's ruling protected the State because its witnesses could testify about Munchausen and implant the idea that Cutro had Munchausen in the jury's mind.

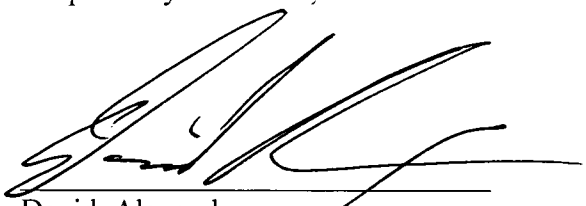
Calling Dr. Watson—even if the trial judge excluded his testimony that Cutro did not have Munchausen—was necessary as a proffer. Proffering Dr. Watson's testimony would have allowed a clear legal challenge on appeal to the trial judge's ruling that neither

side could say whether or not Cutro had Munchausen. Had the jury heard Dr. Watson testify that Cutro did not have Munchausen, the defense could have used his credentials as a psychologist and former employee of the South Carolina Department of Mental Health to further undermine the State's expert testimony about Munchausen which came primarily from a **pathologist**, not a mental health professional. Cutro proved both ineffective assistance and prejudice and this Court should reverse.

CONCLUSION

For the foregoing reasons and those contained in petitioner's principal brief, this Court should reverse and grant petitioner a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 21st day of January, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

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V.

STATE OF SOUTH CAROLINA, RESPONDENT

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Brenda Cutro, #272971, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 21st day of January, 2016.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 21st day of January, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.