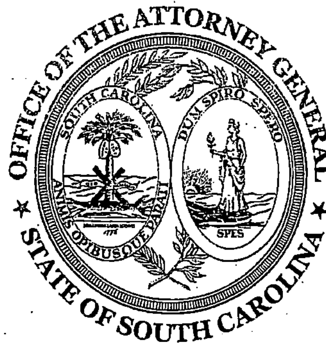


ALAN WILSON
ATTORNEY GENERAL

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APR 15 2019
S.C. SUPREME COURT

April 15, 2019

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

**RE: Erica Butts v. State of South Carolina**
**Appellate Case No.: 2018-001337**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Scott Matthews
Assistant Attorney General
S.C. Bar # 101464

SM/jj
Enclosures

cc: Wanda H. Carter, Esquire
Victim Advocacy Division

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 15 2019

S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Roger M. Young, Plea Judge
Deadra L. Jefferson, Sentencing Judge
Maite Murphy, Post-Conviction Relief Judge

Appellate Case No. 2018-001337

ERICA BUTTS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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## RESPONDENT'S STATEMENT OF THE ISSUE

### I.

**Whether the post-conviction relief court properly denied relief for the allegation that plea counsel was ineffective for failing to develop a defense based on battered woman syndrome when the defense of duress would not have been available to Petitioner had she proceeded to trial and when plea counsel nonetheless tried to present a defense of duress based on battered woman syndrome but was unable to because of lack of cooperation from Petitioner?**

## STATEMENT OF THE CASE

Petitioner Erica Butts is presently confined in the South Carolina Department of Corrections following her Alford[1] plea in Charleston County. (App. 110, 189). The victim was a three year old minor child. (App. 16). The child was from Michigan and came to South Carolina on October 22, 2009 to visit Petitioner's godmother. (App. 7). On November 3, 2009, a 911 call was placed to EMS by Petitioner's mother regarding a minor child who had fallen out of a chair. (App. 7). Once EMS arrived on the scene, the child was cold and rigor mortis had set in. (App. 7). The rectal temperature for the child was 82.9 degrees Fahrenheit. (App. 7). Contusions, burns, bruises, and swelling were found on the child's entire body, sparing only the soles of her feet and underarms. (App. 7). The pathologist determined the injuries were at various stages of healing indicating they had occurred within the preceding two weeks. (App. 7). Petitioner and her co-defendant admitted to beating the child on numerous occasions. (App. 17). Additionally, the co-defendant inflicted a gash on the back of victim's leg that she did not realize. (App. 17). Investigators conducted a search of the home and found blood on the walls and couch which matched the victim's and many broken hangers used to beat the victim. (App. 17-18).

During its June 2010 term, the Charleston County Grand Jury indicted Petitioner for homicide by child abuse (2010-GS-10-4123). (App. 105). Melisa W. Gay, Esquire represented Petitioner. Assistant Solicitor Elizabeth Gordon, Esquire of the Ninth Circuit Solicitor's Office represented the State. On August 25, 2011, Petitioner appeared in the Charleston County Court of General Sessions before the Honorable Roger M. Young, Sr. and entered an Alford[1] plea to homicide by child abuse. (App. 1-2). Judge Young suspended sentencing to a later date to allow time for the victim's family to be present in court to give statements. (App. 8). On November 3, 2011, the Honorable Deadra L Jefferson sentenced Petitioner to a lifetime term of imprisonment.

Petitioner filed a motion to reconsider the sentence on November 8, 2011. The State filed its memorandum in opposition on January 14, 2013. Judge Jefferson denied the motion to reconsider the sentence by order filed on January 14, 2013. Petitioner filed a timely notice of appeal. On December 23, 2013, the South Carolina Court of Appeals dismissed Applicant's appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. State v. Butts, S.C. Ct. App. Order fil App. 88. The remittitur was returned to the circuit court on January 8, 2014. (App. 88).

On April 17, 2014, Petitioner filed a pro se application for post-conviction relief (2014-CP-10-2518), alleging three grounds for relief: (1) ineffective assistance of counsel based on counsel submitting a defective appeal, (2) Petitioner's guilty plea was involuntary because her plea agreement was violated, and (3) ineffective assistance of appellate counsel. On October 10, 2017, Respondent served its return on March 27, 2015 and requested an evidentiary hearing on the application. An evidentiary hearing into the matter convened on January 30, 2018, before the Honorable Maite Murphy. Petitioner was present alongside counsel, Rodney Duane Davis, Esquire. Assistant Attorney General Johnny E. James, Esquire represented Respondent. The only claim for post-conviction relief raised at the evidentiary hearing was whether plea counsel was ineffective for failing to develop a defense of duress based on battered woman syndrome. Petitioner, plea counsel, Petitioner's mother, and an expert on battered woman syndrome testified at the evidentiary hearing. After taking the matter under advisement, Judge Murphy denied and dismissed Applicant's application for post-conviction relief with prejudice by written order on June 20, 2018. (App. 201-02). This appeal follows.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

### I.

**The post-conviction relief court properly denied relief for the allegation that plea counsel was ineffective for failing to develop a defense based on battered woman syndrome when the defense of duress would not have been available to Petitioner had she proceeded to trial and when plea counsel nonetheless tried to present a defense of duress based on battered woman syndrome but was unable to because of lack of cooperation from Petitioner.**

Petitioner claims the post-conviction relief court erred in denying her relief because Petitioner's plea counsel was ineffective for failing to develop a defense of duress under the battered woman syndrome. In support of her claim, Petitioner argues her plea counsel should have used expert testimony from a properly qualified interviewer to establish the defense extends to deaths involving third parties, not solely instances which involve the death of the abuser. Petitioner's argument is without merit. The post-conviction relief court properly found that plea counsel was not ineffective for failing to pursue a defense of duress based on battered woman syndrome because plea counsel did attempt to pursue such a defense but was unable to because of a lack of cooperation from Petitioner. Furthermore, the post-conviction relief court correctly held that Petitioner was not prejudiced by plea counsel's failure to pursue a defense of duress based on battered woman syndrome because duress is not a legitimate defense to the murder of an innocent third-party. Thus even if Petitioner had proceeded to trial, she would not have been able to use the defense of duress at trial. This Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that

"counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

"There is a strong presumption counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Moreover, when there is evidence counsel met with an applicant in preparation for trial and there is no evidence additional preparation on the

part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective. Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008), *abrogated on other grounds by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

**1. Deficient Performance**

Here, the post-conviction relief court correctly held Petitioner failed to prove plea counsel was deficient for failing to pursue a defense of duress when Petitioner did not assist plea counsel in pursuing such a defense despite plea counsel's desire to explore the defense. During the sentencing hearing, plea counsel told Judge Jefferson:

> Now, in my practice I tried very hard to expand on that to see if my client would open up to me about some stuff that maybe I could provide to the psychologist to help her create maybe a Battered Woman Syndrome defense. [Petitioner] would never do that. She would never tell me anything bad about Ms. Cunningham. She loves her and has loved her for years...

(App. 39-40, lines 23-3). Petitioner and plea counsel were each asked by Judge Young during Petitioner's plea hearing about pursuing available defenses. Judge Young asked Petitioner whether she wanted her lawyer to explore having a defense put up. (App. 5). Petitioner responded, "no sir." (App. 5.) Judge Young also questioned plea counsel about whether

Petitioner understood what she was doing. (App. 6). Plea counsel responded to the Judge stating, "Yes sir. We've extensively gone over the case and the defenses." (App. 6). When plea counsel was not satisfied with Petitioner's lack of disclosure to her, plea counsel had Petitioner evaluated at MUSC for competency. (App. 38). Plea counsel also had Petitioner undergo another evaluation to "see if I could get some information that she wasn't giving me." (App. 131, lines 5-6). Therefore, any deficiency in plea counsel's inability to develop a defense of duress under battered spouse syndrome would fall on the Petitioner to disclose the necessary information to her counsel. The record supports plea counsel's many attempts to investigate this defense or other defenses, but was precluded from a successful discovery based on Petitioner's uncooperative nature. Thus, there is evidence in the record to support the post-conviction relief court's conclusion that plea counsel was not deficient in her representation of Petitioner.

Petitioner maintained at the post-conviction relief hearing that her attorney maintained a plea was the best option and if she would have known about the battered spouse syndrome as a defense, she would have gone to trial. (App. 173). However, Petitioner failed to show that plea counsel was deficient in her representation and that but for plea counsel's deficiencies Petitioner would not have pled guilty and insisted on going to trial. In fact, plea counsel did everything in her power to investigate and develop a defense to assist Petitioner if she wanted to go to trial. Although plea counsel testified that if she had an available defense, she would have discussed going to trial with Petitioner (App. 134), Petitioner ultimately decided to enter an Alford plea with the understanding that she could potentially receive 20 years. (App. 173). Petitioner states that plea counsel's advice was not the only persuading factor in her decision to plea, but Petitioner's mother also advised the plea. (App. 173). The mere fact Petitioner was disappointed in the outcome of the plea does not prove that plea counsel was ineffective. The post-conviction

relief court properly determined Petitioner failed to establish a claim of ineffective assistance of counsel sufficient enough to warrant relief, and the record supports these findings. This Court should deny certiorari.

**2. Prejudice**

Even if plea counsel had pursued a defense of duress based on battered woman syndrome, the defense would have been unsuccessful at trail, because duress is not a legitimate defense to the murder of an innocent third party. Battered woman syndrome or battered spouse syndrome has been recognized as proper subject for expert testimony but not as a separate defense. State v. Hill, 287 S.C. 398, 399-400, 339 S.E.2d 121, 122 (1986). The admissibility of evidence concerning battered spouse syndrome has been codified in S.C. Code Ann. §17-23-170(A):

> Evidence that the actor was suffering from the battered spouse syndrome is admissible in a criminal action on the issue of whether the actor lawfully acted in self-defense, defense of another, defense of necessity, or defense of duress.

S.C. Code Ann. §17-23-170(A). Thus, testimony regarding battered woman syndrome can be admissible in the context of another defense such as duress.

Here, duress was the only relevant defense Petitioner could have pursued had she proceeded to trial. However, Petitioner would not have been able to assert duress as a defense because duress is not a defense to homicide. "The rationale of the defense of duress is that if the only means of avoiding greater harm is for the defendant to engage in illegal conduct resulting in a lesser harm, he should not be held criminally liable for the illegal conduct." State v. Rocheville, 310 S.C. 20, 26, 425 S.E.2d 32, 35 (1993). When the crime is the murder of an innocent person, the murder of the innocent person is at least as great as the threatened harm to the defendant; therefore, the choice of two evils rationale is unavailing. Id. "To excuse a criminal act, the degree

of coercion must be present, imminent, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done." State v. Robinson, 294 S.C. 120, 121, 363 S.E.2d 104, 104 (1987). If there is any reasonable alternative to escape the threat of harm, coercion cannot be a defense. Id. at 122, 363 S.E.2d at 104.

If Petitioner had proceeded to trial and offered proof that she suffered from battered woman syndrome, duress would be the only relevant defense she could assert. Because the underlying crime committed was homicide, Petitioner would not have been able to assert duress as a defense to that crime. Even if Petitioner had a reasonable fear of death or serious bodily injury, the level of harm that Petitioner was hoping to avoid was at least as great as the death of an innocent child. That the child suffered prolonged abuse over the course of two weeks belies any assertion by Petitioner that the threat posed to her was imminent. Petitioner would not have been able to assert a defense of duress under these circumstances. This Court should deny certiorari because Petitioner has failed to show that she was prejudiced by plea counsel's failure to explore a defense based on battered woman syndrome.

## CONCLUSION

Because the post-conviction relief court properly determined plea counsel was effective in her representation of Petitioner, and Petitioner was not prejudiced by the defense of duress not being presented, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General
S.C. Bar No. 101464

By:
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April 15, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO CHARLESTON COUNTY
Roger M. Young, Plea Judge
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Maite Murphy, Post-Conviction Relief Judge

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Appellate Case No. 2018-001337

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ERICA BUTTS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

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**CERTIFICATE OF SERVICE**

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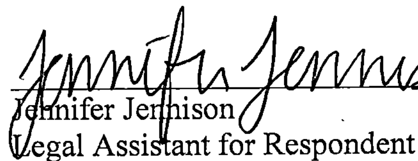
The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by hand-delivering two copies via interagency mail, addressed to:

**Wanda H. Carter, Esquire**
**S.C. Commission on Indigent Defense**
**PO Box 11589**
**Columbia SC 29201**

This 15th day of April, 2019.



Jennifer Jennison
Legal Assistant for Respondent