

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge  
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ERICA BUTTS,

ORIGINAL  
RECEIVED  
JAN 30 2019  
S.C. SUPREME COURT  
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001337  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
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WANDA H. CARTER  
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ATTORNEY FOR PETITIONER

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<sup>1</sup>In State v. Grubbs, 353 S.C. 374, 577 S.E.2d 443 (2003), the Court reversed where the trial judge did not admit the proffered testimony of Lois Veronen regarding the battered woman syndrome.

### **ISSUE PRESENTED**

Trial counsel erred in failing to develop a defense of duress under the battered woman syndrome for petitioner via the use of expert testimony from a properly qualified interviewer such as Dr. Lois Veronen<sup>2</sup>, who testified at petitioner's PCR hearing, in order to establish that this defense applied not only in cases that involved the death of an abuser, but also in other cases such as the instant case that involved the death of a third party as well.

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<sup>2</sup>In State v. Grubbs, 353 S.C. 374, 577 S.E.2d 443 (2003), the Court reversed where the trial judge did not admit the proffered testimony of Lois Veronen regarding the battered woman syndrome.

## STATEMENT

Petitioner Erica Butts pled guilty to homicide by child abuse at the August 2011 term of the Charleston County General Sessions Court before Judge Roger M. Young, Senior. App. 1-8. Petitioner was sentenced by Judge Deadra L. Jefferson to life without parole during the November 2011 term of the Charleston County General Sessions Court. App. 10-58. Melissa Gay represented petitioner at both proceedings in the case, and Assistant Solicitor Elizabeth Gordon appeared on behalf of the state during both proceedings also. Judge Jefferson denied the motion to reconsider by Order filed January 14, 2013. See Supp App. p. 1; Supp App. 8-14. Petitioner appealed, but on December 23, 2013, the Court of Appeals dismissed the appeal after review of the appeal explanation.

On April 17, 2014, petitioner filed a PCR application with the Charleston County Office of the Clerk of Court. App. 60-109. The respondent filed a return dated March 27, 2015, requesting that a hearing be held in response to petitioner's PCR application. App. 110-115.

A PCR hearing was convened on January 30, 2018, at the Charleston County Courthouse before Judge Maite Murphy. Petitioner was present at the hearing and represented by Rodney Duane Davis, and Assistant Attorney General Johnny E. James appeared on behalf of the State. App. 116-186.

On June 20, 2018, Judge Murphy signed an Order of Dismissal in the case. Petitioner appealed and this petition follows.

## ARGUMENT

Trial counsel erred in failing to develop a defense of duress under the battered woman syndrome for petitioner via the use of expert testimony from a properly qualified interviewer such as Lois Veronen<sup>3</sup>, who testified at petitioner's PCR hearing and in order to establish that this defense applied not only in cases that involved the death of an abuser, but also in cases as in the instant case that involved the death of a third party as well.

In this case, petitioner and Shanita Cunningham, both of whom were in a relationship and lived together, had been babysitting the minor child at their residence beginning on October 22, 2009. By November 3, 2009, the minor child, who was beaten over time, was dead. Both Cunningham and petitioner were charged with homicide by child abuse, and both pled guilty as charged, and both were sentenced to life without parole. App.7, l. 3 - p.8, l.3. Note that petitioner was originally charged with two counts of homicide by child abuse (one for abuse and the other for neglect via aiding and abetting), but the State prosecuted petitioner under the neglect prong. App. 132, l. 24 - p. 133, l. 6.

The evidence presented at the PCR hearing established that PCR counsel erred in failing to develop a battered woman's defense in petitioner's case because of the abuse petitioner suffered at the hands of Cunningham, which in turn rendered her too submissive and frightened to neither stop Cunningham's abuse of the minor nor refuse to abuse the minor since she was in effect operating under orders from Cunningham. This meant that although petitioner was too frightened to "snitch" on Cunningham; nonetheless, the presentation of expert testimony from a

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<sup>3</sup> In State v. Grubbs, 353 S.C. 374, 577 S.E.2d 443 (2003), the Court reversed where the trial judge did not admit the proffered testimony of Lois Veronen regarding the battered woman syndrome.

properly qualified expert, coupled with the testimony of petitioner's mother and possibly the petitioner would have supported a viable battered woman's syndrome defense (acting under coercion) at trial. The fact that petitioner was too afraid to "snitch" on Cunningham prior to the plea proceeding proved the great extent to which Cunningham intimidated petitioner. The PCR testimony lended much credence to petitioner's battered woman argument.

For example, during the PCR hearing, petitioner testified that initially trial counsel wanted her to "talk against" Cunningham, but she was scared to do so and when she did give a statement about the abuse, Cunningham found out and came to her jail cell and beat her. During the two years when she and Cunningham were in the county jail they were in the same unit and Cunningham had access to her. Petitioner stated that she was involved with Cunningham since she was 17 years old and that Cunningham was threatening her about taking sole responsibility for the minor child's death, and that the abuse she suffered at Cunningham's hands was extreme. For instance, petitioner stated that Cunningham would drag her to the kitchen where knives were located, and that Cunningham would fight her savagely and give her black eyes, and that Cunningham would "snatch" patches of hair out of her head, and rip earrings out of her ears, and would threaten her family members. Petitioner added that she tried to leave the relationship, but she was fearful of Cunningham, and she was fearful of Cunningham's violence toward her and the deceased child, and that she was too afraid to stop or attempt to stop Cunningham. Petitioner added that she freely talked to PCR counsel and PCR expert Lois Veronen after Cunningham had been placed in a different facility and could not harm her. Petitioner stated she would not have pled guilty had she known that the battered woman syndrome could have been developed as a defense and presented on her behalf at trial. App. 163, l. 2- p. 175, l. 4.

PCR counsel retained D. Lois Veronen (clinical psychologist), who examined petitioner, and in light of her expertise in the PTSD of battered women, found per her examination of petitioner in August 2017 that she “suffer[ed] as a battered woman, [as] the victim of interpersonal violence at the hands of Cunningham, and suffer[ed] a wide range of psychological reactions to that,” and that her fear of Cunningham was a conditioned fear that prevented her from helping the deceased child and paralyzed her and prevented her from exposing Cunningham as an abuser, and in effect that finding the proper clinical interviewer to break through petitioner’s fear and twisted loyalty to her abuser was critical and imperative in this case. App. 147, l. 8 – p. 161, l. 3.

Trial counsel testified during the PCR hearing and admitted that petitioner was “docile” and “sweet,” but that Cunningham was “very aggressive” and “not at all docile,” and that she should have had petitioner separated during their time in the same jail because Cunningham attacked and beat petitioner excessively during that time, and that this was a problem because petitioner tried to “distance herself” from Cunningham. Counsel admitted that she learned from petitioner’s family about Cunningham’s abuse of petitioner. Counsel admitted that petitioner was too fearful of Cunningham to talk honestly about and admit what happened to her. App. 131, l. 9-23; p. 128, l. 25- p. 130, l. 23.

Counsel conceded that she erred in failing to secure an expert who would have been able to successfully interview and examine petitioner because the male (Caucasian) doctor whom she obtained to question petitioner admittedly “wasn’t the right type of person” and that “he didn’t have... the expertise or that to get to the bottom of it.” Also, counsel admitted that since petitioner had been assaulted by a male in the past, then she could not open up to the male doctor who interviewed her. App. 130, l. 19-p. 132, l. 21.

Apparently, the deceased child was beaten for urinating on the floor. App. 137, l. 15. Note that petitioner tried to kill herself while jailed. App. 134, l. 9- 14. Counsel stated that she knew that petitioner had no control over Cunningham and that petitioner was a “shell of a person” while jailed and that she (counsel) should have obtained the proper evidence to defend petitioner as a battered spouse and gone to trial with such a defense. App. 134, l. 9- p. 136, l. 19.

Petitioner’s mother, Ladawn Butts, testified during the PCR hearing also and corroborated the horrendous abuse petitioner suffered under Cunningham’s domination of her, and recalled a time when she had to break a window when petitioner was “hollering” for help because Cunningham was choking, fighting and dragging petitioner, and that previously Cunningham showed up at her house while she (Cunningham) fussed and cussed and went “crazy” and she (Cunningham) wanted to fight petitioner’s sister. App. 179, l. 5- p. 181, l. 25.

The PCR judge denied relief based on the rationale in State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993), that duress is not defense to a homicide when the crime is the murder of another person/an innocent person, and that counsel attempted to thoroughly defend petitioner and could not do so because petitioner would not open up about the abuse Cunningham inflicted on her and thus counsel was not ineffective, but rather the petitioner was unwilling to disclose.

The battered spouse syndrome was recognized in South Carolina in State v. Hill, 287 S.C. 398, 339 S.E.2d 121 (1986), and note that this defense does not **exclude scenarios where duress results in a third party death, and does not limit the defense as applying to the death of the abuser**. S.C. Code Ann. §17-23-170 reads as follows:

(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. This section does not preclude the admission of testimony on battered spouse syndrome in other criminal actions. This testimony is not admissible when offered

against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.

In State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (2003), the Court held that the trial judge erred in not allowing the battered woman syndrome expert testimony to be presented on behalf of the defense in light of the history of the batterer's abuse against Grubbs, and note that the expert that examined the battered woman in Grubbs was Lois Veronen, who also interviewed petitioner and testified during the petitioner's PCR hearing.

Since petitioner was indicted under the homicide by child abuse statute reflecting negligence based on her failure to take steps to stop Cunningham's abuse of the child under 16-3-85, then duress stemming from being battered by Cunningham, which paralyzed her from helping the child or stopping Cunningham from harming the child, meant that she had a defense in connection with the death of the child and the fact that the death landed on a third party (deceased child) did not preclude the applicability of the battered spouse defense on petitioner's behalf. Petitioner testified that she would have opted for a trial had counsel been able to secure a proper expert examiner (such as Lois Veronen), and worked to separate her from Cunningham at the pretrial stage, and develop a battered syndrome defense as defined in Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992), as follows:

A battered woman suffers from "learned helplessness" as the "repeated batterings, like electrical shocks, diminish the woman's belief that the batterer is more powerful than he actually is, and her fear of retaliation if she summons help. *People v. Day*, 2 Cal. App. 4<sup>th</sup> 405, 2 Cal.Rptr.2d 916 (1992). As a result, she ceases trying to escape even when the opportunity to do so is present. *State v. Williams*, 787 S.W.2d 308 (Mo.Ct.App. 1990) (citing L. Walker, *The Battered Woman* 47 (1979)).

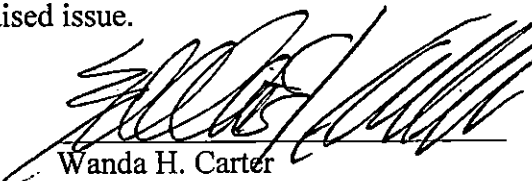
The PCR court's reliance on Rocheville, supra was misplaced as the duress argument was not presented in the context of a battered woman's self-defense claim against her abuser. See

also Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992), where the battered woman syndrome defense was couched in terms of self-defense against the abuser. The same self-defense scenario was presented in State v. Hill, 287 S.C. 398, 339 S.E.2d 121 (1986). However, here, the claim arose under the duress aspect of the battered woman's defense.

Counsel's error in failing to develop and perfect a battered woman's syndrome defense in petitioner's case was tantamount to deficient legal representation in violation of the Sixth Amendment such that but for counsel's blatant ineffectiveness in this regard, a reasonable probability exists that petitioner would have defended herself as a battered woman and exercised her right to a jury trial on the charge.

#### **CONCLUSION**

Based on the forgoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above-raised issue.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

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ERICA BUTTS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

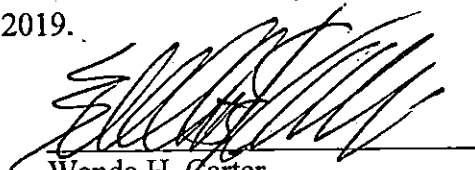
RESPONDENT

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CERTIFICATE OF SERVICE

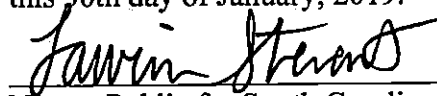
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix and a copy of the Supplemental Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix and a copy of the Supplemental Appendix have been served on Erica Butts, #348484, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 30th day of January, 2019.



Wanda H. Carter  
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 30th day of January, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.