

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

PCR

June 13, 2014

RECEIVED
JUN 16 2014
S.C. SUPREME COURT

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

RE: Miama Kromah, SCDC # 316117, vs. State of South Carolina
Appeal of Case No. 2013-CP-40-00895

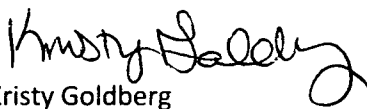
Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Ms. Kromah. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,


Kristy Goldberg

CC: Megan Harrigan
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Miama Kromah, SCDC # 316117
Graham (Camille Griffin) Correctional
Institution
4450 Broad River Road
Columbia, SC 29210

Jeanette McBride, Clerk of Court
1701 Main Street, Room 205
Post office Box 2766
Columbia, South Carolina 29202

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2013-CP-40-00895

Miama Kromah, SCDC # 316117, Appellant

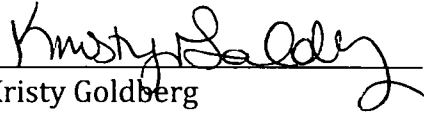
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Miama Kromah hereby appeals from the Order of the Honorable Alison Renee Lee presiding Judge for the 5th Judicial Circuit, filed June 9, 2014 in the matter of Miama Kromah v. State of South Carolina, Case No. 2013-CP-40-895.

June 13, 2014



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 301
Columbia, SC 29201
Phone (803) 252-2299
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, Megan Harrigan
Office of the Attorney General

RECEIVED
JUN 16 2014
S.C. SUPREME COURT

Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2013-CP-40-00895

RECEIVED
JUN 16 2014
S.C. SUPREME COURT

Miama Kromah, SCDC # 316117, Appellant

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

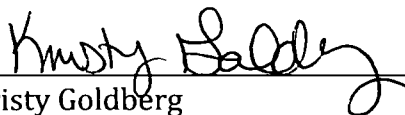
Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;

Service by mail is proper in this instance; and

She has served the NOTICE OF APPEAL on the following party on June 13, 2014 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Megan Harrigan
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.

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Phone (803) 252-2299
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Other Counsel of Record:
Assistant Attorney General, Megan Harrigan
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2013CP4000895

Miama #316117 Kromah

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 9 June 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Miama #316117 Kromah
Kristy Grafton Goldberg

Anna Rawl Good

Megan E. Harrigan

Miama #316117 Kromah
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Miama Kromah, #316117,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Docket No. 2013-CP-40-0895

ORDER OF DISMISSAL

JENNIFER M. HARRIS
C. C. R. P. C. S.

2014 JUN -9 PM 2:29

RICHLAND COUNTY
FILED

This matter comes before the Court by way of an application for post-conviction relief filed February 13, 2013; this application was completely blank and failed to state any ground on which relief was sought. Respondent made its Return and Motion to Dismiss for failure to state a claim. A Conditional Order of Dismissal was signed on July 30, 2013, giving Applicant twenty days to show why the dismissal should not become final. In response, Applicant filed an amended application, alleging ineffective assistance of counsel. An Order Vacating the Conditional Order of Dismissal and Setting the Matter for an Evidentiary Hearing was signed on September 16, 2013. Thereafter, Applicant, though counsel, filed an amended application on January 6, 2014. An evidentiary hearing into the matter was convened March 18, 2014, at the Richland County Courthouse. Applicant was present at the hearing and was represented by counsel, Kristy G. Goldberg, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during the September 2005 term of the Richland County Grand Jury for Unlawful Neglect of a Child (2005-GS-40-8139) and during the April 2006 term of the Richland County Grand Jury for Infliction of Great Bodily Injury upon a Child (2006-GS-40-2991). James P. Rogers, Esquire, represented Applicant. On June 13, 2006, Applicant proceeded to a jury trial where she was convicted as indicted on both counts. On June 15, 2006, The Honorable James W. Johnson, Jr. sentenced Applicant to eighteen years imprisonment for Great Bodily Injury upon a Child and ten years imprisonment for Unlawful Neglect of a Child, with the sentences to be served concurrently.

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Thereafter, Applicant filed a motion to reconsider her sentence and a motion for a new trial based on newly discovered evidence. A hearing on these motions was heard on December 19, 2007 before Judge Johnson. Applicant was present at the hearing and represented by Tara D. Shurling, Esquire. Judge Johnson declined to amend her sentence or grant a new trial.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Tara D. Shurling, Esquire. After briefing and argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Kromah, Op. No. 2009-UP-322 (Ct. App. filed June 15, 2009). A subsequent Petition for Rehearing was denied on August 25, 2009. A Petition for Writ of Certiorari to the Supreme Court was filed on Applicant's behalf. Following briefing and argument, the South Carolina Supreme Court affirmed the Court of Appeals ruling. State v. Kromah, 402 S.C. 340, 737 S.E.2d 490 (2013). The Remittitur was sent on February 8, 2013.

In her amended application for post-conviction relief, Applicant alleged the following claims of ineffective assistance of counsel:

1. Ineffective assistance of counsel regarding plea negotiations;
2. Ineffective assistance of counsel for failure to sufficiently place defendant on notice that the State would be proceeding against her on two indictments;
3. Ineffective assistance of counsel for failure to object to the qualification of the forensic examiner as an expert witness; and
4. Ineffective assistance of counsel for failure to object to the introduction of testimony regarding findings and custody orders by DSS and Family Court.

Applicant proceeded on these four grounds at the evidentiary hearing.

SUMMARY OF FACTS ADDUCED AT TRIAL

Applicant is the stepmother of the minor victim. In the early morning hours of August 16, 2005, Applicant gave the minor victim a bath. During his bath, the minor victim's scrotum was cut, resulting in such a severe injury that his testicle became exposed. Applicant was charged with unlawful neglect of a child and infliction of great bodily injury upon a minor as a result of the cutting of the scrotum.

Applicant took the minor victim to Lexington Medical Center's emergency room. Instead of demanding treatment, she waited in the waiting room until she was seen by the triage nurse. (Tr. p. 72-74). At trial, the triage nurse testified Applicant was calm and did not seem to

consider the injury an emergency. The nurse testified the first time Applicant showed a reaction or became anxious was when the nurse called the ER to rush the child to a room for evaluation and treatment. (Tr. p. 76-78). Applicant testified that she went to the emergency room at Lexington Medical Center and told them her child needed to see a doctor. She was instructed to give the name and then sit down and wait for them to call. She did not scream or yell. She does not know how long they waited because the waiting room was full. (Tr. P. 384-385).

Applicant told the nurses and doctors that she noticed the minor victim's scrotum was swollen when she undressed him for a bath. She put him in warm water and placed a warm washcloth on the scrotum to try and reduce the swelling. She indicated she placed pressure on the scrotum with the warm washcloth and then noticed blood. (Tr. p. 91; 136; 163; 233-234).

The minor victim was transferred to Palmetto Health Richland in order to obtain the services of a pediatric urologist and to place the minor victim in their pediatric ICU. Dr. Erin Fields-Harris testified she examined the minor victim upon his arrival to Palmetto Richland. She indicated the minor victim had a "four to five centimeter 'V' shaped clean, linear laceration" with the testicle outside the scrotum. (Tr. p. 141). She further testified that the laceration "did not appear that it was consistent with the pressure that [Applicant] had initially told me she applied." Dr. Fields-Harris indicated the laceration was consistent with "traumatic injury" and appeared "the child had been injured intentionally." (Tr. p. 148-149).

Dr. Jennifer Amrol, the attending physician in the Department of Pediatrics for the University of South Carolina School of Medicine, testified she examined the minor victim, and the most common "cause of this type of injury would be non-accidental trauma." (Tr. p. 163). She further testified that the scrotum does not just burst, but that it has to be cut in order for the testicle to come out of the scrotum. (Tr. p. 164). She also testified that a typical accidental trauma would result in a ragged edge, but the minor victim's laceration was a "clean cut, very straight line across the scrotum." (Tr. p. 164). Finally, Dr. Amrol testified the injury to the minor victim was not consistent with Applicant's story, and the injury was caused by non-accidental trauma or child abuse. (Tr. p. 166).

Dr. Anne Able, the Director of the Violence Intervention and Prevention Program in the Department of Pediatrics at the Medical University of South Carolina, was qualified as an expert in forensic pediatrics. Dr. Able examined the minor victim approximately sixteen hours after he presented with his injuries. (Tr. p. 237-238). She testified the minor victim had a large bruise on

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his abdomen which was still tender to the touch. She explained the bruise was consistent with being held down by a foot or hand. (Tr. p. 238; p. 245). Dr. Able diagnosed the injury to the minor victim's scrotum and other bruises as the result of non-accidental, physical abuse. (Tr. p. 245-246). She opined the incision was made with a sharp object such as a scalpel, razor, or box cutter. (Tr. p. 246-247). Finally, Dr. Able indicated Applicant's story regarding how the injury occurred was not consistent with the medical facts because if the scrotum had burst or popped, then it would have had a rough or star-shaped opening instead of the clean, single cut that was present. (Tr. p. 249-250).

Finally, Dr. Jeremy Ehreth, one of two pediatric urologists in South Carolina, performed the surgery to repair the scrotum of the minor victim. (Tr. p. 287-288). He noted the injury was not consistent with a pressure injury or similar traumatic event. (Tr. p. 290-292). Specifically, Dr. Ehreth testified "it looked like a scalpel incision" and that the instrument causing the laceration "had to be something sharp, and we're talking scalpel, razor blade, steak knife, something very sharp." (Tr. p. 291-292). Finally, he testified there was no possibility the injury was accidental. (Tr. p. 294).

Investigator Roy Livingston testified he took Applicant's statement. In the statement, she relayed a similar story to the one told to the medical professionals. (Tr. p. 325-326). Investigator Livingston indicated he spoke with Applicant, her husband, and the minor victim. As a result of the investigation, he testified he placed Applicant under arrest. (Tr. p. 330-331).

The minor victim did not testify at trial because he was relocated to Liberia by his father, Applicant's husband. Applicant's husband, Musa Kromah, testified he sent the minor victim to Liberia to be with Musa's mother. He stated he sent him to Liberia around May 20, roughly three weeks before trial because he "did not want him being involved in this whole case." (Tr. pp. 277-278). He testified it was a "family decision" to send the child back because it would be cheaper and because Applicant could not live with the minor victim. (Tr. p. 279).

Applicant testified consistently with her story to the medical professionals and to Investigator Livingston. She stated she noticed the minor victim's scrotum was swollen and tried to put pressure on it with a warm washcloth. (Tr. p. 378-384). Applicant said she noticed the blood and took the minor victim to the hospital. (Tr. p. 384-385).

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Applicant was convicted on both counts and was sentenced to eighteen years imprisonment for Infliction of Great Bodily Injury upon a Child and ten years for Unlawful Neglect of a Child. (Tr. p. 525-530).

SUMMARY OF TESTIMONY PRESENTED AT POST-TRIAL HEARING

Following her conviction, Applicant filed a post-trial motion for reconsideration and a new trial based on newly discovered evidence. A hearing on these motions was convened December 19, 2007 before Judge Johnson. At this hearing, Applicant testified on her own behalf. Applicant's testimony at this hearing was wholly inconsistent with her trial testimony, and she testified that it was her rough handling of the minor child that caused his injuries and in particular, that her acrylic fingernails caused the severe injury to the child's scrotum. (Dec. 19, 2007 Tr. pp. 16-19). She testified that she purposefully lied to everyone about the injuries including counsel. Specifically, Applicant testified:

Q: At the time you were getting ready to go to trial and you were working with Jimmy Rogers –

A: Uh-huh.

Q: -- Did you ever tell Jimmy Rogers the truth?

A: No, ma'am.

Q: You didn't, did you?

A: (Witness shakes head in the negative).

Q: Okay. So Mr. Rogers didn't really know what he was dealing with, did he?

A: No, ma'am.

Q: Okay. That's not his fault, is it?

A: No, ma'am.

(Dec. 19, 2007 Tr. p. 22 lines 9-20). Applicant also called her husband at the time, Musa Kromah, to testify on her behalf, as well as the minor child. Following the hearing, Judge Johnson declined to grant Applicant a new trial or amend her sentence.

SUMMARY OF TESTIMONY PRESENTED AT THE PCR HEARING

At the PCR evidentiary hearing, Applicant testified on her own behalf and presented testimony from trial counsel, James P. Rogers (hereinafter "Counsel"). This Court also had before it Applicant's trial and motion for reconsideration and/or a new trial transcripts, the records from the Richland County Clerk of Court regarding the subject convictions, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

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Applicant testified she was convicted of Great Bodily Injury upon a Child and Unlawful Neglect of a Child. She did not know that Infliction of Great Bodily Injury upon a Child required service of 85% of the sentence until she entered SCDC. She hired Counsel shortly after her arrest in the fall of 2005 for Unlawful Neglect of a Child. She did not know of any other pending charges at that time, including the Great Bodily Injury of a Child charge for which she was later indicted. She was also the subject of an on-going Department of Social Services (DSS) investigation and family court action at the same time and that Counsel represented her in those cases as well. Applicant met with Counsel in his office and during court proceedings, but that most of these meetings were only to drop off payments and not to discuss her case. Counsel reviewed discovery, including the forensic report, with her. She was the only person at home with the minor child when his injuries occurred and acknowledged that because of this, there were no additional witnesses for Counsel to interview or investigate. Defenses were discussed with Counsel and she always consistently denied causing the injuries to the child; this was the planned defense at trial.

She discussed pleading guilty with Counsel and asked Counsel to seek a favorable plea agreement with the State for a probationary sentence. Counsel told her that he spoke with the State regarding a plea offer but that the State informed him that it was seeking imprisonment and would not agree to a probationary sentence. Counsel informed her that she should proceed to trial if she did not want to accept a plea offer requiring a term of imprisonment. She moved to the United States from Liberia when she was fifteen years old and attended Columbia High School. This was her first experience with the United States legal system. She trusted Counsel and the advice he gave her, so she elected to proceed to trial. She believes counsel should have encouraged her to plead guilty and that she would have pled guilty if the State had made her a plea offer.

Shortly before trial, Counsel informed her that she had been indicted for Infliction of Great Bodily Injury upon a Child. Counsel did not discuss with her whether this new indictment was for a violent offense. She also did not discuss with Counsel re-approaching the State to seek a plea offer on this new indictment. No bond hearing or preliminary hearing for this new indictment was held. She discussed the sentencing range for the new indictment with Counsel the Friday before her trial began and was aware that she was facing up to 20 years imprisonment. Counsel objecting to the second indictment at the beginning of her trial, as well as at the close of

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the State's case. The trial court stated that it was considering this when sentencing her to concurrent time rather than consecutive terms of imprisonment.

Applicant testified that she took the stand in her defense at trial, which she had discussed with Counsel before trial. Her testimony at trial was that she was washing the child with a washcloth when she noticed blood in the water, but that her testimony at her post-trial motions hearing was completely different. At the post-trial hearing, she testified that her acrylic fingernails cut the child while she was roughly giving him a bath. She also acknowledged that at the post-trial hearing she testified that the other injuries were caused by her being excessively rough with the child. At that hearing she testified that she had previously lied to her husband, law enforcement, hospital and medical personnel, doctors, and her attorney regarding the source of the child's injuries. She acknowledged that she testified that she was never truthful with Counsel regarding how the injuries occurred. She testified that she caused all of the injuries to the minor child due to her roughness in handling and bathing him. The reason she consistently lied to all persons associated with the case, including Counsel, was because she was afraid of what might happen to her and how others' opinions of her might be negatively impacted. She testified that she is indeed guilty and did cause the injuries to the child.

During her trial testimony, she volunteered information regarding the DSS and family court action, but that she only brought up this information in response to questions asked by the State. She would not have mentioned these other actions if not questioned by the State.

Following Applicant's testimony, Jimmy Rogers, trial counsel testified. He has been practicing law for close to thirty years and is currently employed as a Federal Public Defender. He was in private practice when he was retained to represent Applicant. Approximately 99% of his practice was criminal defense at the time of Applicant's trial. He was retained shortly after her arrest in September or October of 2005. He met with Applicant and her family "many, many times" and spoke with her frequently on the phone regarding her case. He also represented Applicant on her DSS and Family Court actions stemming from the same incident. Every time he saw Applicant, he discussed her case and any new developments with her.

Counsel filed all appropriate Rule 5, SCRCrimP and Brady motions and reviewed the materials with her. The discovery consisted of investigative reports, discussions with medical personnel and doctors who treated the minor child, the forensic report and videotape. Counsel also spoke with her husband, sister, and mother regarding the case. Applicant was the only

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person at home with the minor child, there were no other witnesses to interview or investigate in preparation for trial. Applicant was consistently adamant that she had in no way whatsoever contributed to the minor child's injuries. She maintained that she only applied a washcloth while bathing the child. In preparation for the PCR evidentiary hearing, Counsel reviewed the transcript from the post-trial motions hearing, including Applicant's testimony. He was shocked to read Applicant's testimony admitting she lied to him and that her actions caused the minor child's injuries. In his thirty year career, he has never had another client admit to blatantly lying to him throughout his representation. He testified that it is harder to represent a client who is not being honest and who is purposefully deceitful.

Applicant always indicated that she was innocent and wanted to proceed forward to trial. He did speak with the State about a plea offer and sought a probationary sentence, but the State refused. When he discussed this with Applicant, she was adamant that she wanted to proceed to trial and would not accept any offer requiring prison time. His plan for the defense was "poking holes in the government's theory." He discussed with Applicant before trial her right to testify in her own defense and that it was her decision to testify.

When he was retained, Applicant was only charged with Unlawful Neglect of a Child. He learned of the second indictment for the infliction of great bodily injury upon a child a week before trial. Upon learning of the second indictment, he informed Applicant of the second indictment and reviewed the elements and possible sentence with her, as well as violent versus non-violent nature of the offenses. He thought the second indictment for Infliction of Great Bodily Injury upon a Child would replace the first indictment for Unlawful Neglect of a Child and was surprised at the start of trial when the State indicated that it was proceeding forward on both. This did not change his defense at all because the allegations were virtually the same and both covered the same conduct. He argued to the trial court that the State should not be allowed to proceed forward on both indictments, which was overruled by the trial court. This objection was renewed at the close of the State's case and at the end of the trial. The trial court noted it would not punish Applicant twice for the same crime and gave her concurrent sentences. He did not approach the State about a plea offer upon learning of the new indictment because Applicant was adamant that she had not caused the minor child's injuries and she was not willing to admit that she caused the injuries.

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Following the trial, Applicant retained Tara Shurling, Esquire, to represent her on her appeal and post-trial motions. He has not read the South Carolina Supreme Court opinion regarding Applicant's case. He did not object to the forensic interviewer's qualifications as an expert because at the time of the trial he did not believe he had any grounds to do so. He testified that now, in light of appellate opinions following Applicant's case, he would object. At the time of Applicant's trial, it was not uncommon for a forensic interviewer to be qualified as an expert. His strategy in regards to the forensic interviewer was that she should not be allowed to testify at all, as the minor child was unavailable and incompetent to testify.

Counsel testified that he also represented Applicant on her DSS and Family Court proceedings and recalled the State asking Applicant's husband about these proceedings during his testimony. He testified that he did not find the testimony to be objectionable during the trial or he would have so objected, but now thinks that he could have objected to this testimony and did not object. He testified that Applicant did volunteer information regarding DSS and family court actions during her testimony. He also testified that the testimony from several doctors revealed that the injuries to the child clearly indicated abuse and were intentionally inflicted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. This Court finds that Counsel's testimony is credible and that Applicant's testimony lacks credibility.¹ Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

¹ It is important to note that Applicant admitted that she lied previously while under oath during her trial, as well as lied to law enforcement, medical personnel and doctors involved in the case, and her own counsel numerous times.

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The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant 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. Where there is overwhelming evidence of guilt, an applicant cannot show that but for counsel's alleged errors, the result of the proceeding would have been different. Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008).

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry her burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel:

Allegation that counsel was ineffective regarding plea negotiations

Applicant alleges that Counsel was ineffective for failing to secure a favorable plea offer on her behalf and advising her to proceed to trial. The uncontroverted testimony before this Court is that before her trial, Applicant adamantly denied causing the multiple injuries to the minor child and repeatedly told Counsel that she wanted to proceed to trial. Applicant admitted both during her post-trial testimony and at the evidentiary hearing that she lied to Counsel about the cause of the minor child's injuries. (See Dec. 19, 2007 Tr. p. 22 Ins 9-20). Counsel testified that based on Applicant's repeated assertions that she had not caused the injuries and wanted to proceed to trial, he did not re-approach the State for further plea negotiations beyond the initial discussion where the State indicated it would seek imprisonment if she pled guilty. This Court finds that Counsel's performance was within the range of competency required and was prudent based on the information Counsel received from his client. This Court finds that Counsel's performance was not deficient.

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Additionally, this Court finds that Applicant has failed to establish any resulting prejudice from Counsel's alleged deficiency. Counsel's credible testimony is that Applicant repeatedly insisted that she did not want to plead guilty. Counsel testified that he informed Applicant that the State was seeking a term of imprisonment in exchange for a guilty plea and that Applicant was insistent that she would not accept a plea offer that would require the service of any term of imprisonment. However, at the evidentiary hearing, Applicant, who admitted that she had lied during previous court proceedings while under oath, now insisted that she would have pled guilty to any offer from the State, regardless of the terms. As discussed above, Applicant's testimony lacks credibility. Furthermore, Applicant could have pled guilty without any negotiation or recommendation from the State and achieved the same result. Applicant elected not to do so and proceeded to trial. Applicant has failed to prove both deficiency and prejudice, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel failed to place Applicant on sufficient notice that the State would be proceeding against her on two indictments

Applicant alleges that trial counsel was ineffective for failing to sufficiently advise her that the State would be proceeding against her on both indictments for Infliction of Great Bodily Injury upon a Child and Unlawful Neglect of a Child. The undisputed testimony before this Court is that Counsel was not informed by the State that it would be proceeding forward on the Infliction of Great Bodily Injury upon a Child indictment until a week prior to trial. Counsel testified and Applicant confirmed that Counsel reviewed the elements of this charge, the potential sentences, and the specifics of the charge (violent versus non-violent) upon learning the State would be proceeding on this indictment. Counsel's credible testimony reveals, and the record confirms, that Counsel was not informed that the State would be proceeding on both indictments until the day of trial. (See Trial. Tr. p. 8-11.) Upon learning that the State would be proceeding on both indictments, Counsel objected and renewed his objection at all appropriate times to preserve this issue for appellate review. Counsel testified that this did not affect his trial strategy, as both indictments pertained to the same conduct and required the same defense. This Court finds that Counsel's performance was reasonable in light of the circumstances of this case and finds that he performed competently in accordance with professional standards.

Furthermore, this Court finds that Applicant has failed to meet her burden of establishing any resulting prejudice from this alleged deficiency. Applicant was informed prior to trial that

the State would be proceeding on an indictment for the Infliction of Great Bodily Injury Upon a Child and advised by Counsel as to potential sentences and elements of the offense. Counsel testified that Applicant consistently insisted she wanted to proceed to trial, even in light of this new indictment. Applicant has failed to satisfy her burden of establishing that her actions would have been any different if she had been provided more notice from Counsel regarding this second indictment. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation that Counsel failed to object to qualifications of the forensic interviewer as an expert witness

Applicant alleges that Counsel was ineffective for failing to challenge the qualifications of the forensic interviewer as an expert witness. (See p. 198-200). In support of this position, Applicant relies on her South Carolina Supreme Court decision where the Court states that it “can envision no circumstance where [forensic examiners’] qualification as an expert at trial would be appropriate.” Kromah, 402 S.C. at 357 n. 5, 737 S.E.2d at 499. In making this determination, the Kromah Court cites to State v. Douglas, a 2009 case where the Court also expressed concern over the qualifications of forensic interviewers as expert witnesses. 380 S.C. 499, 500, 671 S.E.2d 606 (2009). Counsel testified that he did not object to the forensic interviewer’s qualifications as an expert because at the time of the trial he did not believe he had any grounds to do so. He testified that now, in light of appellate opinions following Applicant’s case, he would object. He testified that at the time of Applicant’s trial, it was not uncommon for a forensic interviewer to be qualified as an expert. He testified that his strategy in regards to the forensic interviewer was that she should not be allowed to testify at all, as the minor child was unavailable and incompetent to testify.

This Court finds that Counsel’s performance was reasonable in light of the case law at the time of Applicant’s trial. The South Carolina Supreme Court has stated, “[w]e have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.” Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). See also Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993); see also Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992); Arnette v. State, 306 S.C. 556, 413 S.E.2d 803 (1992); Kirkpatrick v. State, 306 S.C. 359, 412 S.E.2d 389 (1991). In the present case, Applicant was tried in 2006, well before Douglas and clearly before the Supreme Court opinion in Applicant’s own case. Both

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Douglas and Kromah, address the expert qualification of forensic interviewers as a matter of first impression for the Court and is not part of a longstanding precedent challenging such qualifications. The practice of qualifying forensic interviewers as expert witnesses was widespread and commonplace at the time of Applicant's trial. See Douglas, 380 S.C. at 503 n. 2, 671 S.E.2d at 609-610. This Court finds that Counsel's performance in regards to this allegation was competent based on professional standards and case law at the time of Applicant's trial, and therefore, he was not deficient.

Additionally, this Court finds that Applicant has failed to meet her burden of establishing any resulting prejudice from this alleged deficiency. In Kromah, the Supreme Court addresses the issue of Smith's qualification as an expert witness despite noting that no objection was made to her qualifications. Kromah, 402 S.C. at 357 n. 5, 737 S.E.2d at 499. As the Court addressed this issue, rather than simply determining that the issue was not preserved for appellate review, Applicant can show no prejudice from Counsel's failure to object. Furthermore, Applicant can show no prejudice based on the overwhelming evidence of her guilt. See Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008) (where there is overwhelming evidence of guilt, an applicant cannot show that but for counsel's alleged errors, the result of the proceeding would have been different). In Kromah, the Court determined that any errors made were harmless due to the overwhelming evidence of Applicant's guilt. Id. at 361-62, 401 S.E.2d 501. Specifically, the Court determined:

Smith testified in camera that the Child told her he had been hurt and that Kromah was the perpetrator. However, Smith's challenged testimony before the jury was that child abuse occurred in this case, the essential portion of which was outlined above, and it did not go so far as to indicate that Kromah was the perpetrator of the injuries. Rather, Smith restated what the overwhelming evidence had already indicated, that the injury was the result of physical abuse. Cf. Jennings, 394 S.C. at 480, 716 S.E.2d at 94-95 (finding error in the admission of hearsay evidence and the forensic interviewer's report making a "compelling finding" of child abuse, interpreted to mean the interviewer found the children believable; the error was not harmless where "[t]here was no physical evidence presented in this case" and "[t]he only evidence presented by the State was the children accounts of what occurred and other hearsay evidence of the children's accounts").

According to her own testimony, Kromah was alone with the Child in the bathroom when the bleeding incident occurred, and he had

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not been bleeding prior to this time. Numerous medical experts testified that the Child's genital wound could not have been caused by an accidental injury. They reached this conclusion based on the pattern of the wound and the circumstances of the Child's injury (spontaneous bleeding along with straight-edged lacerations in a V-shape that were consistent with the Child being cut by a razor, knife, box cutter, or other sharp instrument). Thus, Kromah's statements that the Child spontaneously started bleeding after she applied a warm washcloth while giving him a bath and that she had no idea how the Child's testicle came to be protruding from the Child's scrotum are inconsistent with the overwhelming expert medical evidence in the record that the wound resulted from physical abuse.

In addition, there was evidence of other injuries to the Child, such as an abrasion on the forehead, lip lacerations, and abdominal bruising, all of which were recently inflicted and indicative of physical abuse. Based on the entire record, including the physical evidence documented in this case, the challenged testimony could not reasonably have affected the result of the trial, so any error in its admission was harmless beyond a reasonable doubt.

Id. Based on the foregoing, Applicant has failed to satisfy her burden of establishing prejudice. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation that Counsel failed to object to testimony regarding the findings and custody orders by DSS and Family Court

Applicant alleges that Counsel was ineffective for failing to object to the introduction of testimony from various witnesses pertaining to the findings and custody orders by DSS and the Family Court. Specifically, Applicant alleges that any testimony or evidence indicating that Applicant was prevented from living with or having any visitation with the minor child was prejudicial to her and that Counsel was ineffective for failing to object to such testimony. Counsel testified he did not find the testimony objectionable at the time or he would have posed such an objection, but now, looking back at the testimony, could have objected to such testimony and failed to do so. He testified that Applicant did volunteer information regarding DSS and Family Court actions during her testimony. He also testified that the testimony from several doctors revealed that the injuries to the child clearly indicated abuse and were intentionally inflicted.

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This Court finds that Counsel was not deficient for failing to object to such testimony. The United States Supreme Court has warned that “every effort be made to eliminate the distorting effects of hindsight” and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, reviewing courts must be wary of second-guessing trial counsel's tactics. Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (citing Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)). Counsel testified that at the time of trial, he did not think such testimony was objectionable or he would have objected. It is only now looking back and reviewing the trial transcript that he believes such testimony to be objectionable. This Court finds that Counsel’s performance was reasonable and not deficient.

Moreover, this Court finds that Applicant has failed to meet her burden of proof of establishing prejudice. Applicant brought up the DSS and Family Court actions voluntarily during her trial testimony without any provocation from the State. (See Tr. p. 391 ln. 10-11); p. 393 ln. 3-6 & ln. 20-24; p. 394 ln. 6-7). There was also testimony from several medical experts that the injuries to the minor child were consistent with child abuse and were intentionally inflicted. (See Tr. p. 163 lns. 5-16; p. 246-247). Any reasonable juror would conclude that such intentionally inflicted injuries would require the intervention of both DSS and the Family Court. Furthermore, as discussed above in detail, there is overwhelming evidence of Applicant’s guilt. Harris, supra. Therefore, this allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant her application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a Notice of Appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on an applicant’s behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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IT IS THEREFORE ORDERED:

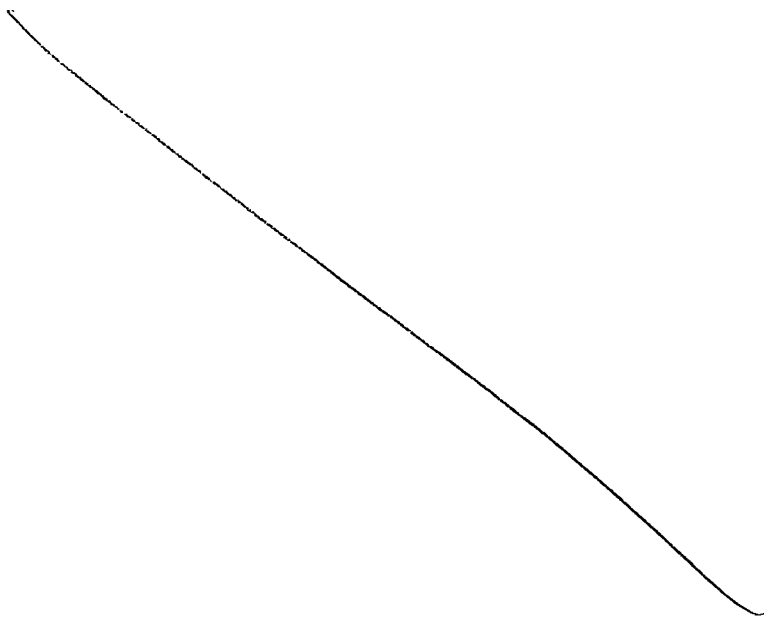
1. That the Application for Post-Conviction Relief shall be denied and dismissed with prejudice; and
2. The Applicant shall remain remanded to the custody of the State.

AND IT IS SO ORDERED.



ALISON RENEE LEE
Presiding Judge
Fifth Judicial Circuit

June 6, 2014
Columbia, South Carolina.



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