

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 2012-CP-40-4268
Appellate Case No. 2014-000374

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OCT 16 2014

S.C. Supreme Court

Andrea Person, #00338104,.....Petitioner,

v.

State of South Carolina.....Respondent.

REPLY OF PETITIONER

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Petitioner comes now in reply to “Respondent’s Return to Petition for Writ of Certiorari.” Petitioner rests on the arguments presented in her Petition, with the exception of one issue. Trial counsel was ineffective in calling Dr. Kimberly Collins to testify regarding the cause of death of Zachary Ulengchong, not only because Dr. Collins improperly considered Petitioner’s statements, but because of the way Doug Strickler, defense trial counsel, allowed her to classify those statements.

Within minutes of Dr. Collins getting on the stand, Strickler specifically asks her if she has an opinion as to the cause of death *if she considered the Petitioner’s statements*. (App. p. 777). In response, Dr. Collins references the Petitioner’s statement regarding “the smothering.” *Id.* Strickler should never have asked her about her consideration of outside statements in the first place, and knowing that she would conclude that Zachary was smothered if she considered those statements, it was prejudicial ineffective assistance for him to ask about them. That line of questioning led to damaging testimony. The jury heard Dr. Collins, the expert called to support the defense, refer to Petitioner’s statement as a confession of a “smothering.”

In fact, the evidence is clear that Petitioner admitted only to holding her hand over Zachary’s mouth for 15-20 seconds. Dr. Collins testified on direct examination that such an action would not cause death, but then on cross examination, she concluded that she would agree that Zachary was smothered if the statement was considered. (App. p. 798; pp. 822-823). These two positions are irreconcilable on their face. Essentially, Collins’ testimony can be summarized in the following non-sensical sentence: She would find smothering to be the cause of death if she considered a statement which was not actually

a confession to smothering. If defense counsel knew that Dr. Collins would testify in this manner, it was ineffective for them to call her, and the defense would have been better off not calling a pathologist at all.

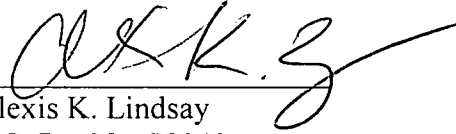
The excerpt from Doug Strickler's closing argument cited by Respondent illustrates the confusing nature of Dr. Collins' testimony. Strickler tries to dismiss the "confession," a word he should never have used in the first place, but it is clear that the cat is out of the bag, and he makes a weak argument that the jury should basically consider only half of her testimony. (App. p. 1083).

The opinions given by the State's pathologists were outside of their expertise when they relied upon the Petitioner's statement. *See State v. Commander*, 396 S.C. 254, 268, 721 S.E.2d 413, 420 (2011) and *State v. Tyler*, 852 N.W.2d 522 (Iowa Ct. App. 2014). To compound this problem, defense counsel called a pathologist to give a similarly inappropriate and inadmissible opinion based upon an alleged "smothering" statement by Petitioner. As is evident, Petitioner never confessed to any smothering, and Dr. Collins herself concluded that the Petitioner's statement to the police did not support a finding of asphyxiation.

It is beyond any reasonable belief that Kimberly Collins was going to aid the defense for Petitioner by giving evidence outside her medical expertise that supported the State's theory of the case.

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Respectfully Submitted,



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PROOF OF SERVICE

I certify that I have served the Reply to Respondent's Return to Petition for Writ of Certiorari and Appendix upon Respondent State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on October 16, 2014, addressed to its attorney of record, Megan Harrigan, Assistant Attorney General, Post Conviction Relief Section, Office of the Attorney General, Post Office Box 11549, Columbia, SC 29211-1549, and also upon Petitioner Andrea Person, Leath Correctional Institution, M2-104, 2809 Airport Road, Greenwood, SC 29649.



Christine L. Skalamera, Legal Assistant
Sowell Gray Stepp & Laffitte, LLC

October 16, 2014

October 16, 2014

VIA HAND-DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211

RE: Andrea Person #338104 v. State of South Carolina
Civil Action No.: 2012-CP-40-4268
Appellate Case No. 2014-000374
Our File No.: 0998/1702

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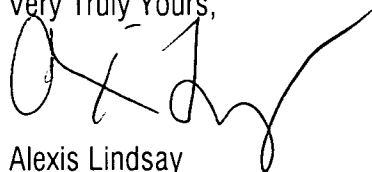
Dear Mr. Shearouse:

Enclosed please find the original and (7) copies of the Reply to Respondent's Return to Petition for Writ of Certiorari and Proof of Service.

I would appreciate your filing as appropriate and returning a copy of the Reply to Respondent's Return to Petition for Writ of Certiorari to me via our courier. By copy of this letter and as evidenced by the Proof of Service, I am serving same on opposing counsel and Andrea Person.

Thank you for your consideration in this matter. If you have any questions, please do not hesitate to contact me.

Very Truly Yours,



Alexis Lindsay

AKL:cls

Enclosures

cc: Megan Harrigan, Assistant Attorney General
Andrea Person