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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County

Alison Renee Lee, Circuit Court Judge

MIAMA KROMAH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001294

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel's failure to object to the qualification of a forensic interviewer as an expert witness constitutes ineffective assistance of counsel in derogation of petitioner's Sixth Amendment rights?

STATEMENT

On September 14, 2005, a Richland County grand jury indicted petitioner for unlawful neglect of a child. App. 629. On April 19, 2006, petitioner was indicted for infliction of great bodily injury upon a child. App. 625. On June 13, 2006, petitioner was tried before the Honorable James W. Johnson, Jr. and a jury. App. 1. Kathryn Luck Campbell and Nikki Hall represented the State. App. 1. Jimmy Rogers represented petitioner. App. 1. The jury convicted petitioner on both charges. App. 525, ll. 9 – 17. Judge Johnson sentenced petitioner to concurrent terms of eighteen years' imprisonment on the great bodily injury charge and ten years' imprisonment on the neglect charge. App. 530, l. 19 – 531, l. 3.

On December 19, 2007, Judge Johnson held a hearing on petitioner's motion to reconsider sentence and for a new trial. Supp. App. 1. At this hearing, Tara Dawn Shurling represented petitioner. Supp. App. 1. Judge Johnson declined to alter petitioner's sentence and denied her motion for a new trial. App. 609. On January 23, 2013, petitioner's convictions and sentence were affirmed by the South Carolina Supreme Court. State v. Kromah, 401 S.C. 340, 737, S.E.2d 490 (2013).

On February 13, 2013, petitioner filed a PCR application. App. 534. Petitioner subsequently amended her application through her attorney, Kristy Goldberg. Supp. App. 69. On March 18, 2014, a hearing was held before the Honorable Alison Renee Lee. App. 544. Ms. Goldberg represented petitioner. App. 544. Megan E. Harrigan represented the State. App. 544. On June 9, 2014, Judge Lee denied petitioner's application. App. 608. This petition follows.

ARGUMENT

Trial counsel's failure to object to the qualification of a forensic interviewer as an expert witness constitutes ineffective assistance of counsel in derogation of petitioner's Sixth Amendment rights.

Petitioner was tried for physically abusing her stepson ("Minor"). Petitioner took Minor to the emergency room because he was bleeding from his scrotum. App. 91, ll. 8 – 17. The emergency room doctor examined the child and saw a "tear or cut or some sort of opening" in the scrotum. App. 92, ll. 1 – 7. Minor's testicle was external to the scrotum. App. 92, ll. 8 – 10. Minor was referred to another hospital that had a pediatric urologist. App. 93, ll. 16 – 22. The emergency room doctor testified that petitioner told her she noticed Minor's scrotum was enlarged during a bath and after she applied pressure with a towel, she noticed bleeding. App. 91, ll. – 17.

Petitioner testified in her own defense and her testimony was consistent with what she told the emergency room doctor. She picked up Minor from her sister's house. App. 377, ll. 10 – 18. Minor did not want to eat, which was unusual. App. 378, ll. 4 – 11. At trial, petitioner testified that she told Minor he needed to take a bath and he told her he was in pain. App. 379, ll. 3 – 15. She noticed the child's scrotum was swollen. App. 379, ll. 3 – 15. She called her sister and her sister did not know why it was swollen. App. 379, ll. 3 – 15.

Petitioner testified on direct-examination that she put Minor in the bath to soak in the hopes that the swelling would abate. App. 379, ll. 16 – 24. She did not see blood in the water. App. 380, ll. 1 – 11. During the bath, she pressed on the swollen scrotum with a towel. App. 383, ll. 4 – 21. She then saw blood. App. 383, ll. 22 – 23. She did not see his testicle hanging out of the scrotum. App. 384, ll. 3 – 4. Petitioner dressed the child in a pull-up diaper and rushed him to the closest

hospital. App. 384, ll. 5 – 19. App. 382, l. 23 – 383, l. 3. Petitioner also testified that Minor bruises easily. App. 382, ll. 6 – 22.

The State offered the testimony of forensic interviewer Heather Smith ("Smith"). App. 198, ll. 2 – 6. The State asked the Court to qualify Smith "as an expert as a forensic interviewer of children." App. 199, ll. 23 – 25. Trial counsel did not object and the court qualified Smith as an expert. App. 200, ll. 1 – 6. Smith testified that she conducted a forensic interview of Minor. Smith was asked for her conclusion based on her "evaluation of the child." App. 201, ll. 20-21. Smith answered:

> Based on the interview that I conducted, as well as information provided by law enforcement and the child protective services worker, I made a decision that the child had given compelling—a compelling finding.

App. 201, l. 22 – 202, l. 1. Trial counsel's objection was initially overruled, but after a bench conference, the court sustained the objection and told the solicitor to rephrase her question. App. 202, ll. 4 – 12. The rephrased question from the solicitor was, "Ms. Smith, your finding was compelling for child abuse or physical abuse?" App. 202, ll. 15 – 16. Smith answered, "For child physical abuse, yes." App. 202, l. 17. Trial counsel did not renew his objection or ask any questions of Smith on cross-examination. App. 202, l. 18 – 203, l. 1.

Petitioner's decision at this Court was a landmark case dealing with forensic interviewers. State v. Kromah, 401 S.C. 340, 737, S.E.2d 490 (2013). This Court specifically noted that Smith "was qualified **without objection** as an expert forensic interviewer." Id. at 350, 737 S.E.2d at 495 (emphasis added). The Court further expounded on what this meant:

> In this case, there was no objection made to Smith's qualification as an expert, but we have previously observed that such qualification may be unnecessary. . . . In considering the ongoing issues developing from their use at trial, we state today that **we can envision no circumstance where their qualification as an expert at trial would be appropriate.**

Id. at n.5 (emphasis added). On the preserved issue before the Court—whether Smith's testimony that she made a compelling finding of abuse—the Court found error, but ultimately ruled it was harmless. Id. at 356-62, 737 S.E.2d at 498-502.

The PCR court erred in finding that the failure to object to Smith's qualification neither amounted to deficient performance nor prejudiced petitioner. App. 619-20. Strickland v. Washington, 466 U.S. 668 (1984). Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

At the PCR hearing, trial counsel stated that he did not object to the qualification of Smith as an expert because he thought it was a common practice. App. 600, ll. 6 – 16. The PCR court credited this testimony and found that trial counsel cannot be held ineffective for not being "clairvoyant." App. 619. However, trial counsel admitted that just because "something's the standard practice doesn't mean you can't object to it." App. 602, ll. 12 – 14. Indeed, objections were being made at trials that set the stage for Kromah before petitioner's case was tried. See State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (reversing the Court of Appeals' January 2006 decision, meaning that Douglas's trial occurred before petitioner's trial). Since such objections were being made—and could have been made in petitioner's trial—the PCR court erred in finding that trial counsel's performance was not deficient.

Petitioner also can show prejudice. The PCR court erroneously found that because the error regarding "compelling finding of abuse" was found to be harmless, that petitioner could not

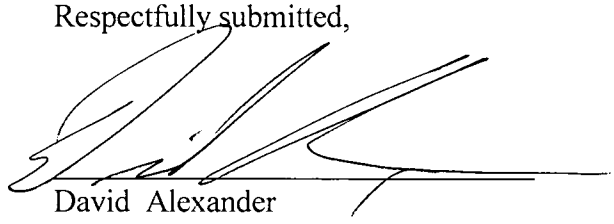
show prejudice. App. 620. A closer examination of this Court's opinion shows that had trial counsel objected to Smith's qualification, the result of petitioner's appeal would have been different. This Court said, regarding Smith's testimony, that "it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." Kromah at 357, 737 S.E.2d at 499. "The label of expert should be jealously guarded and never loosely bandied about." Id.

Had trial counsel objected, this Court could have considered the combined prejudice to petitioner of the "compelling finding" coming from an erroneously qualified expert. The combination of the qualification error and the "compelling finding" error would have defeated the State's harmless error argument and resulted in reversal. For these reasons, the PCR court erred in adopting only the harmless error analysis that resulted from the "compelling finding" ruling. Since petitioner can show deficient performance and prejudice, the PCR court erred and this Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate result of reversing appellant's convictions and granting her a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of May, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
ALISON RENEE LEE, CIRCUIT COURT JUDGE

MIAMA KROMAH,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Miama Kromah states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on March 18, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Miama Kromah.

Respectfully submitted,

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of May, 2015

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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan Jameson, Esquire and Miama Kromah, #316117, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 7th day of May, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day of May, 2015.

Miama Kromah (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.