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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari from the Court of Common Pleas
Appeal from Oconee County
Honorable Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2025-001438

JACOB D. DROTNING,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Petitioner's Statement of the Issue

I. Whether the PCR court erred by refusing to find trial counsel ineffective for failing to object to Dr. Shaver's testimony because it allowed him to improperly give his opinion on the ultimate issue of petitioner's intent and where petitioner was prejudiced by trial counsel's deficient performance?

II. Whether the PCR court erred by refusing to find trial counsel ineffective for failing to object to Dr. Shaver's testimony because his testimony exceeded the scope of his expertise, and thus, petitioner was prejudiced by trial counsel's deficient performance?

Respondent's Counterstatement of the Issue

I. Whether the PCR court properly found that Petitioner failed to prove that trial counsel was constitutionally ineffective and properly found that Petitioner suffered no prejudice flowing from the lack of objection to Dr. Shaver's expert testimony, as there was no logical reason to object considering the testimony did not constitute opinion testimony offered to show Petitioner's intent, nor did Dr. Shaver's testimony exceed the scope of his expertise?

STATEMENT OF THE CASE

On May 16, 2014, law enforcement with the Oconee County Sheriff's Office arrested Petitioner after responding to numerous 911 calls reporting a woman and a house on fire. In its July 2014 term, the Oconee County Grand Jury indicted Petitioner for attempted murder (2014-GS-37-00742), arson, 2nd degree (2014-GS-37-00743), criminal domestic violence of a high and aggravated nature (2014-GS-37-00441), and malicious injury to property (2014-GS-37-00442).

On October 17 through 20, 2016, Petitioner proceeded to a jury trial before the Honorable R. Scott Sprouse. Petitioner was represented by Gregory L. Cole, Jr., Esquire ("Trial Counsel"). Tenth Circuit Solicitors David J. Wagner, Jr. and Lindsey S. Simmons prosecuted the case. The jury ultimately found Petitioner guilty on all indictments. Judge Sprouse sentenced Petitioner to thirty years' imprisonment for attempted murder (2014-GS-37-00742), twenty years imprisonment for arson, 2nd degree, to be served consecutively (2014-GS-37-00743), twenty years' imprisonment for criminal domestic violence of a high and aggravated nature, to be served concurrently (2014-GS-37-00441), and five years' imprisonment for malicious injury to property to be served concurrently (2014-GS-37-00442). On October 28, 2016, Petitioner filed a motion for reconsideration of his conviction and sentence, which was denied by Order filed November 2, 2016.

On March 5, 2019, Petitioner filed a notice of appeal. Appellate Defender Kathrine H. Hudgins perfected Petitioner's appeal by raising the following issue:

> Did the trial judge err in allowing the State to prosecute Appellant for both attempted murder and criminal domestic violence of a high and aggravated nature when prosecution for both violates double jeopardy?

The Court of Appeals affirmed Petitioner's convictions and sentences by unpublished opinion. State v. Drotning, Op. No. 2019-UP-217 (Ct. App. filed June 19, 2019). The Remittitur was returned to the lower court on July 8, 2019.

On September 12, 2019, Petitioner filed an application for post-conviction relief[1] (PCR), alleging he was being held in custody unlawfully on the following grounds:

I. "Ineffective Assistance of [Counsel]"
   a. "Failure to investigate case. Was unprepared for trial."
II. "Prosecutorial Misconduct Due to Jury Tampering"
   a. "Prosecution's witness had direct contact with all jurors prior to trial on multiple [occasions]."

On March 5, 2020, Respondent filed a Return and Motion for More Definite Statement. On February 22, 2023, Petitioner filed an amended application supplementing his original application with the following claims of ineffective assistance of trial counsel:

1. Failure to communicate and review discovery with Applicant.
2. Failure to take exception to the jury charge that intent to kill make be inferred.
3. Failure to object to questions asking third parties what Catherine Cook meant.
4. Failure to move to strike testimony that Applicant would not waive rights.
5. Failure to object to improper opinion testimony outside the scope of the witness' expertise.
6. Failure to object to redirect beyond the scope of cross examination to bring out new matters.
7. Failure to object to Sheriff Crenshaw's comments during sentencing regarding unproven bad acts at the jail.
8. Failure to object to Catherine Cook and her family sitting in close proximity to the jury and speaking to the jury pool prior to selection.

An evidentiary hearing into the matter convened September 16, 2024, at the Anderson County Courthouse before the Honorable Kristi F. Curtis. Petitioner was present and represented by Susannah C. Ross, Esquire. Assistant Attorney General Talida Balaj represented Respondent.

[1] 2019-CP-37-00564.

At the hearing, Petitioner proceeded on the claims asserted in his original and amended PCR application. Through Petitioner's testimony, the following additional allegations were raised:

9. Failure to impeach witnesses, including Bryan Evans and Matthew Cehula.
10. Failure to advise Applicant of his right to testify at trial.
11. Failure to object against the additional charge of criminal domestic violence of a high and aggravated nature on the basis of double jeopardy.
12. Failure to object against the additional charge of malicious injury to property on the basis of double jeopardy.
13. Failure to object to witness testimony concerning Applicant's demeanor and failure to present the alleged video containing footage of his demeanor.
14. Failure to request a change of venue.
15. Failure to object to Dr. Shaver testifying to ultimate issue of Applicant's intent.

On July 3, 2025, Judge Curtis denied Petitioner's PCR application and dismissed it with prejudice. On July 18, 2025, Petitioner, through PCR Counsel, filed a timely notice of appeal of the Order of Dismissal. On September 23, 2025, Petitioner, through Appellate Defender Molly M. Keegan, filed a Petition for Writ of Certiorari and Appendix.

This Return to Petition for Writ of Certiorari follows.

STATEMENT OF FACTS

Catherine Cook (Cook) and Petitioner were married in April 2009 and moved to South Carolina in May 2013. (App. p. 110). Cook testified that by May of 2014, she and Petitioner's relationship had significantly deteriorated. (App. p. 112). Cook testified, "We were like strangers in the house. He had just lost his job. I just lost my job. Neither one of us was working, so we couldn't pay bills or rent. There was a lot of resentment." (App. p. 112). Cook stated that, as a result of an incident with Petitioner on May 16, 2014, she suffered burns to sixty percent of her body. (App. p. 115). Cook recalled the incident:

> I was in the hallway, and I looked down at my arms and they were glowing. And I was terrified. And when I looked up, I saw him standing there. And he didn't look concerned, and he didn't look worried. And he didn't even look panicked. He didn't look anything. And that's when I knew that if I was going to get help. I had to get it myself.

(App. p. 115).

Cook identified Petitioner as the individual who watched her burning on the ground. (App. p. 116). Cook subsequently ran to a neighbor's home and passed out on their porch. (App. p. 115). Cook was then airlifted and arrived at Joseph M. Still Burn Center at Doctor's Hospital in Augusta, Georgia. Upon arrival, Cook had third-degree burns on sixty percent of her body so severe that her organs went into shock and began to shut down. (App. p. 119). Cook noted her wounds "should have been fatal." (App. p. 119). Cook was placed in a medically induced coma for four months. (App. p. 119). Cook subsequently needed forty-seven surgeries for her wounds and incurred medical expenses more than ten million dollars. (App. p. 120).

On the evening of May 16, 2014, Isaac Lewis (Lewis) of the Seneca Fire Department responded to the scene of a fire. (App. p. 127). At the time of Lewis's arrival, he was told to take over responsibility for treating Cook. (App. p. 128 - 129). Lewis observed that Cook had extensive

second-degree and third-degree burns covering an area from the bottom of her head to the bottoms of her feet. (App. p. 129). Lewis stated that Cook and Petitioner were the only people at the home when he arrived. (App. p. 129). Lewis asked Cook if she remembered what happened, and, after hesitating, she replied, "Yes, I do. He set me on fire. Why would he do this to me? I'm a nice person. Why would he do this to me?" (App. p. 130). Lewis clarified that by "he," Cook was referring to Petitioner, who was her husband. (App. p. 130). While Lewis was treating Cook, Petitioner kept repeating "I'm sorry. I'm sorry." (App. p. 131). Petitioner stated Cook's injuries were caused by the grill outside flaming up while he was trying to light it. (App. p. 132).

Brandy Towe (Towe), a volunteer EMT, also responded to the scene of the fire on May 16, 2014. (App. pp. 137 - 138). Towe observed severe second-degree and third-degree burns covering sixty percent of Cook's body. (App. p. 138). Towe testified Cook was "absolutely" at risk of imminent death. (App. p. 139). Cook told Towe, "He done this to me. He blew me up." (App. pp. 139 - 140). Petitioner told Towe the fire started because he was pouring accelerant on the grill from a gas can. (App. p. 140). Towe testified that her observations at the scene did not support Petitioner's assertion that the grill was the cause of Cook's injuries. (App. p. 140).

Chief Jan Oliver (Chief Oliver) of the Seneca Fire Department was the ranking firefighter at the scene. (App. pp. 153 - 154). Chief Oliver testified he observed:

> Inside the house, once you enter the front door, just a few feet inside the door, there were burn marks on the floor. You go back a little further into the room, there is a couch turned over. And just behind and beside it, there's burn marks on the floor there. There was a rug in the kitchen that had been burnt. You go back down the hall towards the back bedroom, there is another burn mark close to one of the hall. And then at the far end where the room was, when you enter the room, to the right is a closet. The bottom half of the door had been burnt and some of the tiles in the floor.

(App. pp. 154 - 155).

Chief Oliver also noticed a gas can sitting outside the room where the fire originated. (App. p. 155). The smoke detectors located nearby were lying on the floor with the batteries removed. (App. p. 156, 158). Chief Oliver located a grill on a patio outside the home with a layer of dew on top of it. (App. p. 156). Chief Oliver testified there was no evidence that the grill was used inside the home and, in turn, started the fire. (App. p. 157). Similarly, Sergeant Scott Arnold (Sergeant Arnold) of the Oconee Sheriff's Office noted the grill was cool and there was no evidence whatsoever it had been used that night. (App. p. 175). Sergeant Arnold also noted:

> Once I entered in later, found out their bedroom, the bedroom all the way down to the end to the left, I noticed that the closet door had a lot of burns at the bottom area, and the floor had burned, had a small area burned also. And also noticed that - - we found a broken lighter in the floor.

(App. p. 177).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue 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 any probative evidence in the record supports 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. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. 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

THE PCR COURT PROPERLY FOUND THAT PETITIONER FAILED TO PROVE THAT TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE AND PROPERLY FOUND THAT PETITIONER SUFFERED NO PREJUDICE FLOWING FROM THE LACK OF OBJECTION TO DR. SHAVER'S EXPERT TESTIMONY, AS THERE WAS NO LOGICAL REASON TO OBJECT CONSIDERING THE TESTIMONY DID NOT CONSTITUTE OPINION TESTIMONY OFFERED TO SHOW PETITIONER'S INTENT, NOR DID DR. SHAVER'S TESTIMONY EXCEED THE SCOPE OF HIS EXPERTISE.

On appeal, Petitioner contends that his trial counsel was constitutionally ineffective for failing to object to Dr. Shaver's expert testimony. Specifically, Petitioner contends that Trial Counsel was ineffective for failing to object to Dr. Shaver's testimony regarding the outcome of lighting a person on fire with gasoline, as Petitioner alleges this testimony went towards his intent, and that the testimony exceeded the scope of Dr. Shaver's expertise. Petitioner asserts that he was prejudiced by Trial Counsel's constitutionally ineffective representation. However, Petitioner's claims are without merit. Respondent submits the PCR Court properly analyzed Trial Counsel's performance without the distorting effects of hindsight, finding that Trial Counsel was not ineffective for failing to object to Dr. Shaver's testimony, as there was no objectionable basis to do so. Respondent further submits that the PCR Court properly found that Petitioner suffered no prejudice, as without deficiency, prejudice cannot be reached. Therefore, this Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assist[ance] by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 685 (1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal"

of the Petitioner's conviction. Id. at 687. To obtain relief, a post-conviction relief Petitioner must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing Strickland, 466 U.S. 668). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S.at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

Petitioner bears the heavy burden of establishing both prongs of the Strickland standard. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the Petitioner must establish that, in light of all the circumstances, the acts or omissions complained of "fell below an objective standard of reasonableness" as measured by "prevailing professional norms." Strickland, 466 U.S. at 688. Reviewing courts should be deferential in this inquiry and apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

With respect to prejudice, the Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Id. When evaluating this probability, the reviewing court "should consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . the [totality of the] evidence presented to the jury." Smalls, 422 S.C. at 188,

810 S.E.2d at 843. Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

RELEVANT TESTIMONY

TRIAL

On the third day of Petitioner's trial, the State called Joseph Robert Shaver, M.D. ("Dr. Shaver"), as an expert witness. At the time of his testimony, Dr. Shaver was employed at the Joseph M. Still Burn Center at Doctor's Hospital in Augusta, Georgia, for over twenty years. At the outset of his testimony, Dr. Shaver informed the Court of his background, training, education and experience regarding medical care. Dr. Shaver was declared an expert in internal medicine and critical care without objection. (App. pp. 303 – 304).

Dr. Shaver testified on direct examination that he was personally involved in the medical care and treatment for Cook, specifically in helping manage the consequential organ failures occurring caused by the severe burns to Cook's body. (App. pp. 305 – 306). Dr. Shaver testified generally regarding the calculation of percentages for burn injuries to the body, went into depth regarding the differences between first, second, and third-degree burns, and the common injuries caused by burns and risks associated with the different degrees of burns. Dr. Shaver testified that he works in the main unit at the burn center, where the most severe burn injuries are seen, and then patients proceed to step-down units upon successful recovery. During this testimony, Dr. Shaver stated that Cook suffered burns on sixty percent of her body, and that all the burns were third-degree. (App. pp. 306 – 309). Dr. Shaver testified that Cook suffered organ failure and was placed on continuous twenty-four-hour kidney dialysis, and then generally explains why organs in the body tend to shut down when faced with severe trauma. Dr. Shaver further testified that from the

initial meeting of Cook, he was having serious conversations with Cook's family about her injuries ultimately being fatal. (App. pp. 311 – 313).

Dr. Shaver testified that burns caused by gasoline are especially hard to treat due to it being a solvent that absorbs very quickly through a person's tissue and enters the person's fat cells. The solvent present in the person's system and fatty tissues causes further necrosis of the seemingly undamaged and healthier tissue following a debridement, which can cause severe infection. Dr. Shaver further testified that gasoline harbors a variation of different germs that can contribute to infection, and that debridement with gasoline burns can be especially difficult since it often requires extreme levels of excision of the damaged tissue, such that "you are not left with normal architecture of the human anatomy." (App. pp. 322 – 324).

Dr. Shaver testified that he has treated close to five thousand burn cases in his career since 1996. He testified that within the past five years, he has treated five patients with self-inflicted burn injuries; within the past fifteen years, he has treated 180 patients with self-inflicted burn injuries. Dr. Shaver testified that Cook's burn injuries were not consistent with being self-inflicted. When asked if Cook's injuries were consistent with a grilling accident, Dr. Shaver testified that her injuries were inconsistent with that set of facts considering most burn injuries from a grilling accident result in burn injuries to the frontal portion of the body, including the face, chest and arms. (App. pp. 324 – 326).

The State then asked Dr. Shaver:

> Q. In your medical opinion, if someone is doused in gas and lit on fire, does the actor intend to kill them?
>
> A. I would think that the act would lead to death.

(App. p. 326, ll. 14 – 17).

EVIDENTIARY HEARING

At Petitioner's evidentiary hearing for post-conviction relief, Trial Counsel was asked on direct examination if he saw any objectionable basis to the expert testimony presented by Dr. Shaver regarding the use of gasoline, or the expert testimony presented by trauma nurse Allison Lamb regarding whether Cook's wounds were self-induced. Trial Counsel testified that he did not see an objectionable basis to that testimony, as both Dr. Shaver and Nurse Lamb were qualified as experts in their respective fields. Trial Counsel testified that Nurse Lamb was qualified in trauma nursing and her testimony was based on her experience in that field. Trial Counsel further testified that Dr. Shaver shared his experience with burn victims through the testimony presented at trial and based on that experience within an area which Dr. Shaver is qualified in. Trial Counsel testified that he did not see an objectionable basis to Nurse Lamb's testimony or Dr. Shaver's testimony. (App. p. 569).

Trial Counsel further testified on direct examination that he hired an arson investigator to be called as an expert for Petitioner's case. Trial Counsel stated, however, that upon the investigator's review of the evidence in full, the investigator informed Trial Counsel that the evidence completely supported the State's case and that his testimony would not be helpful to Petitioner at all. (App. pp. 569 – 570).

On cross-examination, the following colloquy occurred between Trial Counsel and PCR Counsel:

> Q: All right. And I don't want to go back through everything, but just one issue as to the – what I would argue was expert testimony as to the ultimate issue on page 326, line 14. I'm going to let you look at that. This is from the – I believe it was from the doctor. The question was, in your medical opinion, if someone is doused in gas and was lit on fire, does the actor intend to kill them. And the doctor responds, yes. That would lead to death. Correct?

A: Yes. That's a paraphrase, I believe. Yes.
Q: And you didn't object to that?
A: No, I didn't.
Q. And that was the ultimate issue in the case was assault and battery with intent to kill.
A: Well, I would agree that was the issue as to attempted murder, and specific intent to kill was an issue.

(App. pp. 577 – 578).

During closing, PCR Counsel argued that there was "opinion testimony certainly outside of the scope of expertise, especially to the ultimate issue." However, PCR Counsel only refers to the testimony presented by EMS witnesses regarding their interpretations of Cook's statements made to them, and does not make reference to Dr. Shaver's testimony. (App. p. 586 – 587).

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. An expert witness is not relegated to testifying to matters within his firsthand knowledge but may base his opinion on information made available to him prior to a hearing, so long as it is of the type of information that is reasonably relied upon in the field. Rule 703, SCRE. "An expert's opinion testimony may be based upon a hypothetical question." Gazes v. Dillard's Dep't Store, Inc., 341 S.C. 507, 534 S.E.2d 306 (Ct. App. 2000). "Even though the hypothetical question must be based on facts supported by the evidence, counsel may pose the hypothetical on any theory which can reasonably be deduced from the evidence and select as a predicate for it such facts as the evidence proves or reasonably tends to prove." Gazes, 341 S.C. at 514-515, 534 S.E.2d at 310, citing Gathers By & Through Hutchinson v. S.C. Elec. & Gas Co., 311 S.C. 82–83, 427 S.E.2d 687 (Ct. App. 1993) (internal quotations omitted).

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. "Such testimony is admissible, so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence." State v. Prather, 429 S.C. 583, 840 S.E.2d 551 (2020) (citing State v. Commander, 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011)).

Petitioner cites State v. Westmoreland[2] to support his argument. In Westmoreland, the State attempted to qualify a coroner as an "expert in determining the manner of death". Following a colloquy with the Court, the State withdrew its attempt to qualify the coroner as an expert. The coroner proceeded to testify as to his job duties, which he testified included determining any deceased person's manner of death. The coroner testified as to the definition of homicide, stating it is "the intentional act of you taking the life of another". Id. at 416. The coroner then stated that he ruled the case as a homicide. The defense objected to this, stating that the coroner offered improper lay opinion testimony. The Court overruled the objection, stating, "I think coroners are required to give rulings on death by law". Id. at 416. On direct appeal, it was argued that the coroner gave impermissible opinion testimony by a lay witness because he was not qualified as an expert, and his opinion that the victim's death was a homicide embraced the ultimate issue decided by the jury, causing extraordinary prejudice considering an accident defense was presented at trial. The Court of Appeals found that the coroner's testimony constituted improper opinion testimony that was directed at the Appellant's state of mind and guilt. Id. at 425.

[2] State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017).

The Westmoreland Court contrasted its holding with the Supreme Court's holding in Commander[3], noting, "The [Supreme C]ourt explained, under the circumstances of that case, homicide meant only that the victim died by the act, procurement, or omission of another and did not comment on the criminality of the death." Westmoreland, 421 S.C. at 420–21, 807 S.E.2d at 707.

In Commander, the State called a forensic pathologist as an expert witness, and the pathologist testified that the victim's manner of death was asphyxiation. The State asked the pathologist regarding his preliminary conclusion of the victim's cause of death. The pathologist stated that given the suspicious circumstances surrounding the victim's death, he "felt that [they] were dealing with a homicide". 396 S.C. at 259, 721 S.E.2d at 415. Defense counsel objected, asserting the pathologist's definition of homicide constituted an opinion towards a legal issue surrounding criminal culpability, which led to a discussion of the pathologist's definition of "homicide" outside of the jury's presence. Id. The Court ultimately allowed the pathologist to present his testimony to the jury regarding his definition of homicide. On cross-examination, the pathologist testified, "I'm not claiming intent. I'm claiming that [victim] died as a result of somebody's actions." Id. at 260. On appeal, it was argued the trial court erred because the pathologist's testimony was opinion not based on scientific, technical, or other specialized knowledge that would assist the jury in understanding the evidence or in determining a disputed fact. Id. at 262. The Court of Appeals ultimately held that the admission of the disputed testimony was harmless beyond a reasonable doubt in light of the overwhelming evidence of the defendant's guilt. Id. at 272.

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[3] State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011).

Our Supreme Court has held that, "it is well established in South Carolina that a medical professional, qualified as an expert, may render an opinion concerning the scientific bases of a victim's injuries or death in a criminal trial." Id. at 265. The Supreme Court has recognized that in certain circumstances, "expert medical testimony of this type has the potential to invade the province of the jury" and tends to agree with the jurisdictions that have held expert testimony addressing the state of mind or guilt of the accused is inadmissible. Id. at 268.

Petitioner also cites State v. Ellis[4] in support of his argument. Ellis involves a crime scene processor that was deemed qualified as an expert but exceeded his scope of expertise by testifying to factors in crime scene reconstruction. The processor was improperly permitted to give his conclusion to the jury as to whether the defendant was acting in self-defense based on the data he collected at the crime scene, exceeding his scope of expertise by offering opinion testimony directly to the primary issue in the case, therefore invading the province of the jury. Id. at 179.

Here, in contrast with Westmoreland, Dr. Shaver was properly qualified as an expert witness in internal medicine and critical care and based his proper opinion testimony on his vast experience with victims of burn injuries. (App. p. 303 – 304). The testimony surrounding the result of dousing a person in gasoline and lighting them on fire did not constitute opinion testimony offered to directly address the issue of Petitioner's guilt, nor did the testimony exceed Dr. Shaver's scope of expertise as he was properly qualified as an expert in this respective field. His testimony was responsive to a hypothetical question posed by the State, and was based on experience, knowledge, and training in his field, and thus, was not outside the scope of his expertise.

In contrast with Ellis, Dr. Shaver properly stayed within his scope of expertise when offering testimony based his experience, knowledge, and training in internal medicine and critical

[4] State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).

care. The crime scene processor in Ellis exceeded the scope of their expertise by opining as to the victim's cause of death based on data and evidence gathered at the crime scene when they were only qualified in processing, not reconstruction. Here, Dr. Shaver properly remained in the scope of his expertise, internal care and critical care, with ample experience caring for burn victims. When asked this hypothetical within the scope of his expertise, Dr. Shaver provided an answer based on his experience, knowledge, and training involving caring for victims of burn injuries. Dr. Shaver's answer to the hypothetical question was not directed at Petitioner's state of mind or guilt but rather addresses his expert opinion of what would typically occur if any one person were to pour gasoline on another person and light them on fire – the result likely being death. Dr. Shaver merely offered an answer to a hypothetical question posed, and his testimony did not invade the province of the jury.

For argument's sake, even if the testimony presented by Dr. Shaver was objectionable, Petitioner still fails to establish prejudice under Strickland. Petitioner cannot prove that if Trial Counsel had found a meritorious reason to object to the testimony, and then objected, that there is a reasonable probability the outcome of his trial would have changed. Id. at 669. The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a "manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847 – 848 (2006). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability that the jury's verdict was influenced by the wrongly admitted or excluded evidence." State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002). The jury in this case came to a determination of Petitioner's guilt from all the evidence put before them at Petitioner's

trial. Even if Petitioner were successful in establishing the Trial Counsel was constitutionally ineffective for failing to object to Dr. Shaver's testimony, he would fail to establish that the outcome of his trial would have been different, therefore failing to establish that he suffered prejudice under Strickland.

However, Dr. Shaver's testimony was not improper expert opinion testimony as it did not opine as to Petitioner's state of mind or guilt but rather stated the results of one individual setting another on fire with gasoline. This comment did not go towards the issue of Petitioner's specific intent in regard to attempted murder but simply testified what would occur following the set of facts presented. This testimony was presented within the scope of Dr. Shaver's expertise, and Trial Counsel properly found no reason to object to the elicited testimony.

Therefore, there was no meritorious basis for Trial Counsel to object to the witness's testimony, and Petitioner cannot establish he was constitutionally ineffective for failing to object on this basis. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully Submitted,

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