THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

Case Nos. 2012-GS-10-40032 and 2012-GS-10-40033

Op. No. 2015-UP-574

Appellate Case No. 2013-001238

The State, ... Respondent,

v.

Brett D. Parker, ... Appellant/Petitioner.

PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, Appellant Brett Parker files this petition for rehearing regarding this Court's decision in *State v. Parker*, 2015-UP-574 (S.C. Ct. App. filed Dec. 30, 2015). Mr. Parker asserts the following:

1. In finding no reversible error in the circumstantial evidence instruction, the Court may have overlooked or misapprehended the following points:

   A. Although the Court acknowledged the rule set forth in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013) should be applied retroactively to Mr. Parker's case, the Court instead applied its own cases that arguably apply pre-*Logan* law in conflict with *Logan*'s mandate. *See State v. Jenkins*, 408 S.C. 560, 759 S.E.2d 759 (Ct. App. 2014), *cert. denied* 2/4/15, and *State v. Drayton*, 411 S.C. 533, 769 S.E.2d 254 (Ct. App. 2015), *vacated in part and aff'd in result*, *State v. Drayton*, Op. No. 27599 (S.C. Sup. Ct. filed Dec. 23, 2015) (Shearouse Adv. Sh. No. 50 at 28) (Supreme Court did not address the circumstantial evidence instruction issue). The Court failed to apply the recent and controlling precedent of *Logan*, although the Court noted *Logan*'s existence in footnote 2 of the decision.

   B. *Logan* mandates a particular jury charge on circumstantial evidence beyond the charge set forth in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997) when requested by the defendant. Mr. Parker's counsel repeatedly requested a charge beyond *Grippon* but the trial court rejected those requests *solely* on the basis that it was bound by *Grippon* and the *Grippon* charge was the only charge it could or would give.

C. This Court's decision to follow *Jenkins* and *Drayton* places an unreasonable burden on criminal defense counsel who may anticipate a change in the law. That is, counsel must use exacting language when challenging the validity of a charge counsel knows is defective and believes the Supreme Court will modify, but does not know what those modifications will look like. *Logan* demonstrates the *Grippon* charge alone, given over objection, permits a jury to convict the defendant without applying the law the Supreme Court has ruled is mandatory. While this Court punished Mr. Parker and his counsel for counsel's inability to predict precisely how the Supreme Court would modify *Grippon* in *Logan*, the law has never required lawyers to anticipate or even discover changes in the law at the time of trial. *Cartrette v. State*, 323 S.C. 15, 448 S.E.2d 553 (1994) (counsel could not be required to foresee future changes in the law, citing *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993)). The Court's decision in this case stands for the proposition that when counsel *does* predict a change, then counsel better hit the pin – being close does not count. This standard is unwise and fundamentally unfair – it appears to give a premium to ignorance so that the lawyer who *does not* predict a change in the law is in a better position than a lawyer who *does* predict the change but not what that change will look like.

Mr. Parker respectfully requests that this Court revisit this issue against the backdrop of *Logan* and not in light of *Jenkins* (Supreme Court declined to

address) or *Drayton* (Supreme Court vacated on other grounds and declined to address the *Logan/Grippon* issue).

2. In finding no reversible error in the trial court permitting the State's primary expert witness to testify beyond the areas for which the trial court qualified him, the Court overlooked or misapprehended the following points:

   A. The Court relied upon Rule 402, SCRE, to state that "all relevant evidence is admissible." Ostensibly, then, the Court would always affirm the admission of *any* evidence given by an expert regardless of whether the trial court has placed limits on that expert's areas of expertise or testimony. That is, where an expert is limited to giving evidence regarding manner and means of death only, there would be no error in permitting that expert to give testimony regarding gunshot residue, distances between items, blood spatter patterns, or any other issue since that evidence could be deemed "relevant" in the end. This analysis conflicts with the procedures followed in trial courts and mandated by the Rules of Evidence. Just because evidence might be found to be "relevant" does not justify the court permitting an expert to give crucial testimony beyond the limits of that expert's qualification.

   B. The Court cited to *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) for the rule that "a trial court has discretion in deciding whether or not evidence is relevant and such a determination will not be overturned unless it abuses that discretion." Again, the Court focuses on

an aspect of this evidence that is not germane. Mr. Parker does not argue that the trial judge violated a general rule of relevancy in permitting the expert to testify beyond his qualifications on an issue that was crucial to the State's case; instead, Mr. Parker contends that the expert went well beyond the limited areas for which he was qualified, over repeated objections by Mr. Parker's counsel.

As the Court noted, an abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Here, the trial court committed an error of law by allowing the expert to give testimony that went beyond the limited areas for which the trial court qualified him.

C. The Court cited two cases that indicated the Court was affirming the trial court's express exercise of discretion in allowing the expert to expand his own expertise beyond that for which the trial court qualified him. *See State v. Harris*, 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995) ("The qualification of an expert witness and the admissibility of the expert's testimony are matters largely within the trial court's discretion."); *State v. Myers*, 359 S.C. 40, 51, 596 S.E.2d 488, 494 (2004) (holding a trial court's decision to admit expert testimony will not be reversed absent an abuse of discretion). This Court overlooked or misapprehended Mr. Parker's argument that the expert in this case vastly exceeded the areas of qualification, and the trial court committed error in permitting such

testimony.

Judges are supposed to prevent experts from opining beyond their confined areas of expertise. Otherwise, the rules describing judges as "gatekeepers" lose their efficacy, and the doors to *all* testimony from an expert, regardless of reliability, are swung open. As Mr. Parker pointed out in his brief, the concept of reliability of the expert's testimony, prior to the allowance and acceptance of consideration of this specialized evidence by the jury, is at the core of Rule 702, SCRE. *See State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) ("The familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence."); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012) (same).

D. Under *State v. White*, two threshold determinations must be made. First, the qualifications of the expert must be sufficient, and second, there must be a determination that the expert's testimony will be reliable. *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015). Mr. Parker satisfied the trial court that the State's expert did not meet the qualifications to give testimony beyond manner and cause of death, and the trial court limited the expert's testimony accordingly, without later revisiting that decision. Mr. Parker also challenged the reliability of the expert's testimony beyond those limitations. The State must demonstrate that the individual expert

> witness is able to draw reliable results from the procedures of which he or she consistently applies. *State v. Chavis*. The State proffered no such testimony, nor would it have done so given the express limitations the trial court placed on the expert's areas of testimony. Yet, over Mr. Parker's repeated objections, the court permitted the expert to give evidence that went well beyond those limitations. And it is apparent the jury found this evidence to be crucial given its express request to listen again to the testimony of the officers who first discovered Mr. Capnerhurt's body.

Mr. Parker respectfully requests that this Court revisit this issue against the backdrop of what actually happened at trial and find that the trial court erred in permitting the State's expert to testify beyond the limited areas for which he was proffered and for which the trial court found him qualified to testify.

CONCLUSION

For the reasons stated the Court should grant this Petition, rehear this matter, reverse the trial court's rulings, and remand the case for a new trial under correct circumstantial evidence instructions and without the defective expert witness evidence.

Respectfully submitted,

January 14, 2016

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Petition for Rehearing* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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Erin Bridges

January 14, 2016

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ATTORNEYS AT LAW

January 14, 2016

VIA HAND DELIVERY
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: The State v. Brett D. Parker
Case Tracking No.: 2013-001238

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of a *Petition for Rehearing* in reference to the above matter. I have also enclosed a proof of service of this document on counsel for the Respondent. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you need any additional information, please to not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: Ernest L. Dessausure, Esquire
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