

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable R. Markley Dennis, Jr., Circuit Court Judge

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**RECEIVED**  
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S.C. SUPREME COURT

**ORIGINAL**

MOSES FRASIER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000739

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PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE

\_\_\_\_\_

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Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object pursuant to Rule 701, SCRE, and Rule 702, SCRE, to testimony concerning blood spatter evidence elicited from Sergeant Kevin McGowan, who was never qualified as an expert, since McGowan’s opinion testimony required special knowledge, skill, experience, and training, and where Petitioner was prejudiced by counsel’s deficient performance because the state used McGowan’s testimony to dispute Petitioner’s defense of self-defense. ....13

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## **ISSUE PRESENTED**

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object pursuant to Rule 701, SCRE, and Rule 702, SCRE, to testimony concerning blood spatter evidence elicited from Sergeant Kevin McGowan, who was never qualified as an expert, since McGowan's opinion testimony required special knowledge, skill, experience, and training, and where Petitioner was prejudiced by counsel's deficient performance because the state used McGowan's testimony to dispute Petitioner's defense of self-defense?

## STATEMENT OF THE CASE

During the early morning hours of July 30, 2003, Kenneth Boston was beaten to death in the backyard of the apartment where he lived on Huger Street in Charleston. There were no eyewitnesses. James Gibbs, who was at Boston's home that night, discovered Boston laying on the ground outside bleeding heavily from his face and head. App. 113, ll. 4-17. All Boston could do was mumble. App. 114, ll. 6-10. Gibbs immediately went to get help and a neighbor eventually called 911. App. 115, l. 13 – 116, l. 5; App. 174, l. 2 – 176, l. 8. Patrol officers quickly responded and secured the scene until detectives arrived. App. 181, l. 11 – 183, l. 21. Paramedics ultimately transported Boston to the hospital where he was pronounced dead. App. 278, ll. 2-10. His cause of death was later determined to be blunt force trauma to the head resulting in subarachnoid hemorrhage, or bleeding in the brain. App. 249, ll. 7-17.

While at the hospital checking on Boston's status, Corporal Randy McBrayer was approached by an emergency room nurse. App. 277, l. 22 – 278, l. 10. The nurse told McBrayer that a patient "from the Huger Street area" recently came in "with a broken hand." App. 278, ll. 8-12. McBrayer contacted Sergeant Goldstein, who was assigned to investigate the case, and Goldstein responded to the hospital. App. 278, ll. 13-19.

Goldstein approached the individual with the hand injury, who was later identified as Petitioner, and asked him how he became injured. Petitioner allegedly told Goldstein that he was at a "female friend's house on Huger Street" and "five or six subjects had jumped him." App. 283, l. 16 – 284, l. 20. While Goldstein was talking with Petitioner, he noticed what appeared to be blood on Petitioner's shorts. App. 286, ll. 13-21. He asked Petitioner if he would consent to providing police with a blood sample to determine whose blood was on his shorts. Petitioner refused. App. 286, l. 17 – 287, l. 7.

Shortly thereafter, officers discovered Petitioner attempting to switch shorts with his younger brother, Kwame Frasier, behind a privacy curtain in a treatment room. App. 287, l. 19 – 288, l. 8. Sergeant Goldstein immediately placed both Petitioner and Kwame under arrest. App. 288, ll. 4-8.

Kwame Frasier testified for the state at trial. He was charged with accessory after the fact of murder. During the course of his testimony, the solicitor ultimately dismissed the charge against him and offered him immunity after Petitioner’s trial counsel raised concerns Kwame may incriminate himself. App. 349, l. 19 – 355, l. 24. Kwame explained that he was sleeping in his bedroom when Petitioner woke him up around two o’clock in the morning on July 30, 2003. App. 346, l. 22 – 347, l. 17. Petitioner “said he’d been in a fight” and appeared to have been drinking. App. 347, ll. 18-24. “He wasn’t [himself]” and seemed a “little [shaken] up.” App. 347, l. 24 – 248, l. 1. Kwame looked at Petitioner’s hand and saw it was swollen. App. 348, ll. 4-6. He thought it was broken. App. 358, ll. 9-10. Kwame asked Petitioner how he injured his hand and Petitioner allegedly said, “he kicked some guy’s ass on Huger Street by the bridge.” App. 358, ll. 11-16. Petitioner also allegedly said, “A guy played him so he kicked the guy’s ass.” App. 358, l. 17 – 359, l. 7.

Kwame and their mother eventually took Petitioner to the hospital. App. 362, ll. 18-21. Kwame admitted he tried to switch shorts with Petitioner. However, he never saw any blood on Petitioner’s shorts and did not know why Petitioner wanted to switch. He was merely following “an order from [his] older brother.” App. 362, l. 22 – 363, l. 16. The police ultimately came in and arrested them. App. 363, ll. 17-22.

The blood on Petitioner's shorts was later confirmed to be that of Kenneth Boston based on testing conducted by a forensic DNA analyst at the South Carolina Law Enforcement Division (SLED). App. 407, l. 18 – 409, l. 13.

During his defense, Petitioner presented the testimony of Jamol Seabrook, who is transgender, prefers the pronoun she, and goes by the name Jasmine or “Jaz.” Seabrook saw Boston the morning he was killed outside a store called O&M on Meeting Street. App. 435, l. 4 – 436, l. 5. Seabrook asked Boston to go inside the store and buy her a cigar since she had been banned from entering the store after she “cursed the owner out.” However, Boston refused. App. 436, l. 18 – 437, l. 14. After Boston refused, he began walking down Meeting Street towards Huger Street. App. 437, l. 20 – 438, l. 12.

After Boston walked away, Seabrook saw Petitioner and asked Petitioner to buy her a cigar. Petitioner agreed. App. 438, l. 13 – 439, l. 11. After Petitioner bought the cigar and gave it to Seabrook, Seabrook began walking down Meeting Street towards Huger Street in the same direction Boston had walked earlier. App. 439, ll. 9-25. Petitioner was a “few steps” behind her. App. 439, ll. 20-25. As she was walking, Seabrook saw Boston come out of “a crack house” on Meeting Street.<sup>1</sup> Boston began “tripping” Petitioner about “going in the store for” Seabrook. App. 440, l. 19 – 441, l. 13. Boston asked, “Why you go in the store for that punk?” App. 441, ll. 21-25.

Seabrook kept walking. She turned the corner onto Huger Street. Petitioner was behind her. Boston was behind Petitioner. App. 442, ll. 1-14. At the corner of Meeting and Huger Streets, Boston “boxed” Petitioner and stuck his hand in Petitioner's pocket, presumably to take

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<sup>1</sup> Boston had cocaine and marijuana in his blood when he died. App. 259, l. 21 – 261, l. 22. A plastic bag containing 0.4 grams of crack cocaine was on the ground where Boston was found beaten. App. 322, ll. 2-22.

whatever was inside. App. 442, ll. 15-21. Seabrook clarified that Boston punched Petitioner on the left side of his face. App. 443, ll. 2-6. Petitioner told Boston, “Chill, chill, I’ll hurt you.” App. 443, ll. 7-25.

Boston was acting “aggressive” and appeared “high.” App. 444, ll. 5-21. The three continued to walk down Huger Street. App. 445, ll. 4-22. Boston was still “tripping out Moses [Petitioner] for going in the store for [Seabrook].” App. 446, ll. 10-16. Eventually, Petitioner walked into the backyard of some brick apartments and began to urinate. App. 445, l. 23 – 447, l. 8. “That’s when Kenneth [Boston] ran across the street and grabbed a stick from out of the trash.” App. 448, ll. 2-6. Boston pushed Petitioner while he was “peeing” causing Petitioner to urinate on himself. App. 448, l. 17 – 449, l. 16. Boston then hit Petitioner with his hand. He never used the stick. App. 449, l. 17 – 450, l. 5. Petitioner put Boston in a “headlock” or a “choke hold.” App. 450, ll. 6-16. Seabrook said the two “were serious.” App. 450, ll. 17-19.

Despite the situation, Seabrook “had to go make [her] money.”<sup>2</sup> App. 450, l. 21. She told Petitioner and Boston she had to go and that they needed “to chill out.” App. 450, ll. 20-24. She then continued walking down Huger Street. App. 450, l. 25 – 451, l. 3. She found out the next day that Boston had died. App. 451, ll. 4-6. She did not think it had anything to do with what she had seen until she later saw Petitioner at the jail and found out he was incarcerated for murder. She was in jail for charges related to prostitution. App. 451, ll. 7-16.

Sergeant Kevin McGowan with the Charleston Police Department was assigned to process the scene. App. 300, ll. 3-21. He arrived during the early morning hours shortly after the altercation. He described the scene as “the rear of an apartment complex, if you will, townhouses. It was pretty much an open grassy area, not much light. There was only one

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<sup>2</sup> Seabrook worked as a prostitute. App. 432, ll. 12-13.

streetlight in between the buildings. There was like a clothesline, really the only thing in the backyard.” App. 302, ll. 7-13. He maintained there was a “big pool of blood” where Boston was found lying. App. 305, ll. 11-14. While processing the scene, McGowan found a towel with blood on it, which a neighbor had applied to Boston’s wounds, two black tennis shoes, a baseball hat, a plastic bag later confirmed to contain 0.4 grams of crack cocaine, and a pole. App. 305, ll. 15-22; App. 322, ll. 2-22. According to McGowan, the pole was “pretty much in the middle of most of the other evidence that we found, and there was some blood spatter on it.” App. 308, ll. 17-19.

McGowan asserted that there were different “types” of blood spatter, including stains, smears, and transfers, and that blood spatter varies in shape and size. App. 308, l. 23 – 309, l. 5. He asserted, “Well, these red dots are blood against the pole. And this one here you see has a teardrop kind of effect, so you can tell that the direction of travel was going towards the smaller end.” App. 310, l. 22 – 311, l. 2. McGowan ultimately went to the hospital to collect Petitioner’s shorts. App. 311, l. 12 – 312, l. 11. He opined that the blood on the shorts was “spatter,” meaning it was “not a close contact type of thing.” App. 312, ll. 12-21.

During cross-examination, Petitioner’s counsel elicited the following testimony from McGowan:

Q: And those pin-sized spots that you see on Moses’ [Petitioner’s] pants, those are significantly smaller than the blood drops that you saw on the telephone pole, right?

A: Yes, sir.

Q: And the size of the drop in blood spatter analysis is significant, right?

A: To a point, yes, sir.

Q: The shape is significant in the way that you described it, that it points in a certain direction?

A: Yes, sir.

Q: The size can also tell you how close or far away the spatter is from the source of the blood?

A: In some cases, yes, sir.

App. 321, l. 14 – 322, l. 1.

The solicitor capitalized on this testimony during redirect examination:

Q: Sergeant McGowan, are you familiar with the term “castoff?”

A: Yes, sir.

Q: What is it?

A: Basically, if you just - - if you fling something, in this case it would be blood that was flung on something, and that will give you a spatter.

Q: Is that consistent with - - that’s one way spatter could get like, say, on a pole, for instance?

A: Yes, sir.

Q: And can you get castoff from a fist?

A: Oh sure. Any - - any object that creates any kind of force.

Q: How would you get castoff from a fist?

A: Well, if you’re hitting somebody and you come back, blood can go that way.

Q: So when the fist stops, the blood comes off the hand?

A: Sure.

...

Q: Based on your impressions, whose blood was that that was on the ground?

A: It was the victim because I was told that that’s where the victim lay before he was transported.

Q: And the spatter, was that - - the spatter on the pole, was that near where the blood pool was?

A: Yes, sir.

Q: It would have been, in your opinion, would that be consistent with castoff?

A: Theoretically, sure.

App. 323, l. 25 – 325, l. 19.

Trial counsel did not object to any of this opinion testimony concerning blood spatter. In his closing argument to the jury, the assistant solicitor used McGowan's testimony to dispute Petitioner's defense of self defense. Specifically, he argued:

We know there was a struggle. We also know that the struggle was in one spot. The struggle was the struggle of a person who knows when they're being beaten to death, struggling to escape from the blow that are being landed upon his face and head and neck.

And that's what that crime scene shows. The focus on the blood, on the pole and on the ground, shows that the beating happened in one place, that Kenneth [Boston] was captive and that he struggled to get away.

What's interesting about that is Kevin McGowan said he - - he would have scanned that whole area. He would have found other drops of blood. He didn't find other drops of blood. He didn't find a stick.

*What he found there was a focused crime scene where one person struggled and one person bled in one area, and you're getting castoff blood coming off of a hand. The castoff is right where that blood is on the ground, and that's where Kenneth Boston was killed, quite frankly, where the defendant murdered him.*

App. 495, l. 14 – 496, l. 7 (emphasis added).

The solicitor later continued:

As Kenneth was being beaten, the defendant's left hand hits him in the face. His hand and his teeth leave a mark on the defendant.

*And as the defendant is beating Kenneth, his hand is coming back, and that blood is coming off his hand that was on Kenneth's mouth and going on that pole. That's where that blood spatter comes from.*

App. 508, l. 23 – 509, l. 4 (emphasis added).

A Charleston County grand jury indicted Petitioner on June 12, 2006 for the offense of murder. App. 746-747. His case was called to trial on October 2, 2006 before the Honorable James C. Williams, and a jury. App. 1. Assistant Solicitors Nathan Williams and Kim Steele represented the state. App. 1. Beattie Butler and Jason Mikell represented Petitioner. App. 1.

The trial judge charged the jury on self-defense and the lesser included offense of voluntary manslaughter. App. 521, l. 11 – 530, l. 2. After deliberating for over four hours, the jury asked to rehear the testimony of Kwame Frasier, James Gibbs, and Jamol Seabrook. App. 537, ll. 6-21. It later requested to be recharged on murder, voluntary manslaughter, and self-defense. App. 551, ll. 7-11.

On October 5, 2006, after deliberating for over six hours, the jury ultimately acquitted Petitioner of murder, but found him guilty of voluntary manslaughter. App. 564, l. 23 – 565, l. 6. Petitioner was sentenced to thirty years imprisonment. App. 574, ll. 4-7.

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Frasier, 2009-UP-052 (S.C. Ct. App. filed January 15, 2009); App. 605.

On February 27, 2009, Petitioner filed an application for post-conviction relief (PCR). App. 607-613. The state filed a return to this application dated July 7, 2009. App. 614-620. Petitioner filed an amended application on November 5, 2009 raising the claim argued in this petition. App. 621-653. An evidentiary hearing was convened on January 9, 2012 before the Honorable R. Markley Dennis, Jr. App. 654. Assistant Attorney General Matthew Friedman represented the state, and Jeffrey Yungman represented Petitioner. App. 654.

Petitioner testified at the hearing that his trial counsel failed to object pursuant to Rule 701, SCRE, to Sergeant Kevin McGowan's "highly prejudicial opinion testimony" concerning blood spatter, which is scientific evidence, since McGowan was not qualified as an expert. App.

660, ll. 4-8; App. 661, ll. 19-21; App. 663, ll. 10-16; App. 666, ll. 3-6. Petitioner explained that McGowan was the crime scene technician who was assigned to process the scene and that he testified without objection to his opinion concerning blood spatter evidence. App. 660, ll. 15-24. App. 661, ll. 8-13. Specifically, McGowan “was making comparisons with smears, transfers, and talking about the direction of travel and the force that it would take to throw a punch and have blood splatter off the hand.” App. 665, l. 17 – 666, l. 2.

Petitioner asserted that “the error of trial counsel not objecting and challenging Sergeant McGowan’s testimony was compounded by the Solicitor’s closing argument. In his closing argument, the Solicitor continually references Sergeant McGowan’s testimony.” App. 663, l. 24 – 664, l. 4. Petitioner recited a portion of the solicitor’s argument, which appears on Page 483, Line 23 through Page 484, Line 6 of the trial transcript, and is stated above. App. 664, ll. 5-16.

Lastly, Petitioner asserted that trial counsel’s failure to object to this improper opinion testimony “foreclosed” him from challenging this testimony on direct appeal and that if counsel had objected, there is a reasonable probability the outcome of his trial would have been different. App. 665, ll. 6-14.

Beattie Butler, Petitioner’s trial counsel, did not specifically recall Sergeant McGowan’s testimony. App. 671, l. 21 – 672, l. 13. However, he admitted, “if a witness gave an opinion as to how blood was transferred from one place to another and . . . if the foundation had not been laid by the State that that person was an expert and entitled to give an opinion, then I should have objected.” App. 672, l. 19 – 673, l. 1. However, Butler maintained that to him the case “wasn’t about what had happened but why it happened. There was no dispute that Moses [Petitioner] killed . . . [Kenneth Boston]. It was just a matter of whether it was self-defense.” App. 673, ll. 14-18.

At the conclusion of the testimony, PCR counsel argued, “Your Honor, Mr. Frasier [Petitioner] makes it clear that there was a witness who testified who was not qualified as an expert, and his testimony spoke to where the crime scene occurred and how the crime occurred. His testimony was enough to convince the jury to come back with a guilty verdict.” App. 681, ll. 4-11.

In response, the assistant attorney general seemed to concede trial counsel was deficient for failing to object to Sergeant McGowan’s inadmissible opinion testimony. However, he argued “there was no prejudice from counsel’s failure to object to Sergeant McGowan’s testimony . . . because there is no dispute about what happened, it was just whether it was self-defense or not.” App. 682, ll. 8-18.

By order filed February 22, 2009, the PCR judge denied Petitioner relief. App. 687-692. While the judge found trial counsel was not deficient for failing to object to Sergeant McGowan’s testimony, he provided no explanation as to why. App. 690-691. Surprisingly, the order does not even mention Rule 701, SCRE. As far as prejudice, the judge found Petitioner “was not prejudiced by counsel’s failure to object to Sergeant McGowan’s testimony regarding blood spatter” because Petitioner’s “defense was self-defense, and there was no dispute that the victim’s blood was on the pole. There was also no dispute that [Petitioner] and the victim were in an altercation and the victim died as a result of the altercation.” App. 691.

On December 17, 2015, Petitioner filed a *pro se* notice of appeal with the Supreme Court. App. 694-695. To determine the timeliness of the appeal, this Court wrote to PCR counsel, Jeffrey Yungman, in a letter dated December 23, 2015 inquiring into the date in which counsel received written notice of the order. App. 696-697. By letter dated December 31, 2015, Yungman admitted that despite receiving a copy of the order of dismissal in February 2012, he

did not file a notice of appeal nor did he send Petitioner a copy of the order until the end of 2015. App. 698-699.

Because Petitioner's *pro se* notice of appeal was not timely filed given that counsel received the order of dismissal in February 2012, this Court dismissed the appeal by order dated January 6, 2016. App. 700. On January 25, 2016, Petitioner filed a second application for post-conviction relief seeking a belated appeal from the denial of his first application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 702-712. The state filed a return to this application dated June 23, 2017. App. 713-717. An evidentiary hearing was convened on February 1, 2018 before the Honorable Maite Murphy. App. 718. Assistant Attorney General Rasheeda Cleveland represented the state, and James Falk represented Petitioner. App. 718.

By order filed April 18, 2018, the second PCR judge granted Petitioner a belated appeal from the denial of his first PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 740-745. The judge found Petitioner did not knowingly and intelligently waive his right to appeal. App. 744.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object pursuant to Rule 701, SCRE, and Rule 702, SCRE, to testimony concerning blood spatter evidence elicited from Sergeant Kevin McGowan, who was never qualified as an expert, this petition for writ of certiorari follows.

## ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object pursuant to Rule 701, SCRE, and Rule 702, SCRE, to testimony concerning blood spatter evidence elicited from Sergeant Kevin McGowan, who was never qualified as an expert, since McGowan's opinion testimony required special knowledge, skill, experience, and training, and where Petitioner was prejudiced by counsel's deficient performance because the state used McGowan's testimony to dispute Petitioner's defense of self-defense.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object pursuant to Rule 701, SCRE, and Rule 702, SCRE, to Sergeant Kevin McGowan's testimony concerning blood spatter evidence since McGowan was never qualified as an expert and such opinion testimony required special knowledge, skill, experience, and training. Petitioner was prejudiced by counsel's deficient performance because the state used McGowan's testimony to dispute his defense of self-defense.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. 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) (citing Strickland, 466 U.S. at 688). “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) (citing Strickland, 466 U.S. at 668).

Rule 701 of the South Carolina Rules of Evidence states, “If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) *do not require special knowledge, skill, experience or training.*” (emphasis added). Blood spatter analysis or interpretation requires expertise. See State v. Myers, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990) (stating the attorney for the state “conceded that the interpretation of blood stains and spatters is a matter for expert opinion; a matter outside the knowledge of ordinary jurors.”); see also State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371 (1991) (describing “blood spatter interpretation” as “scientific evidence”). Consequently, trial counsel was ineffective for failing to object to Sergeant McGowan’s testimony concerning his interpretation of the blood spatter evidence found at the scene where Boston was killed since McGowan was never qualified as an expert.

When admitting expert testimony, including the interpretation of blood spatter, pursuant to Rule 702, SCRE, the trial judge must find the expert is qualified. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1991); See Hamrick v. State, 426 S.C. 638, 647, 828 S.E.2d 596, 600-601 (2019). Rule 702, SCRE provides: “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.” In Petitioner’s case, the state did not even attempt to lay a foundation for McGowan’s qualification as an expert nor did the trial judge make the necessary findings required by Rule 702. Therefore, again, trial counsel should have objected to McGowan’s interpretation of the blood spatter evidence and was ineffective for failing to do so.

In Hamrick, a belated direct appeal from Hamrick’s conviction for felony driving under the influence, this Court held the trial judge abused his discretion by allowing a law enforcement officer to testify concerning accident reconstruction, which requires expertise, when the officer was not qualified as an expert. Id. at 648-649, 828 S.E.2d at 601. The Court held the trial judge erred by incorrectly characterizing the officer’s testimony as lay opinion under Rule 701, SCRE. Id. The judge also failed to make the necessary findings required by Rule 702, SCRE, to qualify the witness as an expert. Id. at 649, 828 S.E.2d at 601. Holding the error could not be harmless, this Court reversed Hamrick’s conviction and remanded for a new trial. Id. at 650, 828 S.E.2d at 602.

Petitioner was prejudiced by counsel’s deficient performance because, as Petitioner asserted during his PCR hearing, if counsel had properly objected, Petitioner could have raised the issue on direct appeal, and similar to Hamrick, the Court of Appeals or this Court would have held the trial judge erred by admitting Sergeant McGowan’s opinion testimony without making the necessary findings pursuant to Rule 702, SCRE, again since blood spatter interpretation requires expertise. Petitioner was also prejudiced by counsel’s failure to object because the state used McGowan’s interpretation of the blood spatter evidence to dispute Petitioner’s defense of self-defense. The assistant solicitor extensively discussed McGowan’s testimony during his closing argument asserting the blood spatter was evidence of malice, that Petitioner used excessive force, and that the altercation between Petitioner and Boston occurred only in one spot near the pole. See App. 495, 1.

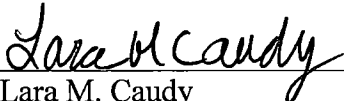
14 – 496, l. 7; App. 508, l. 23 – 509, l. 4. Certainly, the outcome of Petitioner’s trial would have been different if counsel had properly objected to this inadmissible opinion testimony.

Respectfully, this Court should hold the PCR judge erred by finding trial counsel was not ineffective and that Petitioner was not prejudiced, reverse Petitioner’s conviction and sentence, and remand for a new trial.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented. Petitioner ultimately requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully Submitted,

  
\_\_\_\_\_  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of November, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County  
Honorable R. Markley Dennis, Jr., Circuit Court Judge  
\_\_\_\_\_

MOSES FRASIER,

PETITIONER

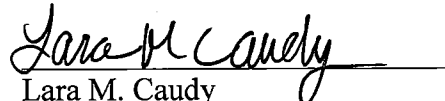
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari Pursuant to Austin v. State in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari Pursuant to Austin v. State has been served upon Moses Frasier, #317940, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 8th day of November, 2019.

  
\_\_\_\_\_  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 8th day of November, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: October 22, 2024.