STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-002249

ROBERT LEE WRIGHT, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower 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).

STATEMENT OF CASE

Petitioner's mother, Betty Scott, was involved in a romantic relationship with Christopher "Chris" Jenkins for several years. App. 748, 11. 20-21; App. 749, 11. 2-9; App. 773, 11. 1-3. When Betty ended the relationship, Chris vacillated between trying to win Betty's affections back through gifts and expressing his anger by berating her publicly or stealing from her. App. 750, 1. 1 - App. 751, 1. 9; App. 757, 11. 8-12; App. 758, 1. 17 - App. 761, 1. 25; App. 764, 11. 14-25; App. 773, 11. 14-16; App. 745, 11. 13-21; App. 747, 11. 4-9.

In April 2010, Petitioner learned that Chris made his mother cry. At the insistence of his grandmother, who was worried about Betty's safety, Petitioner went to talk to Chris. Petitioner found Chris at a nearby basketball court. In April 2010, Petitioner attempted to reason with Chris regarding his behavior toward Betty. App. 775, 11. 2-9; App. 794, 11. 3-14; App. 775, 1. 19 App. 776, 1. 3; App. 794, 11. 17-24; App. 798, 11. 3-9. However, Chris was not receptive to Petitioner's intervention; instead, Chris was belligerent and combative. The two men fought for a few seconds with both men walking away uninjured. App. 776, 11. 3 - 12; App. 793, 11. 13-19; App. 795, 11. 1-15.

On June 10, 2010, Petitioner learned that Chris had been bothering Betty that day. App. 752, 1. 14 - App. 753, 1. 15; App. 763, 11. 9-25; App. 764, 11. 11-18; App. 796, 11. 11-20; App. 797, 11. 3-6; App. 738, 11. 10-19; App. 739, 11. 2-8; App. 739, 1. 25 - App. 740 1. 1; App. 740, 11. 11-17. While driving home from his mother's house, Petitioner saw Chris walking down the street. Petitioner stopped his car, got out, and called out to Chris. App. 779, 11. 9-15; App. 783, 11. 3-5; App. 783, 11. 17-22; App. 799, 11. 4-10. Chris reacted by stepping into the street with his fists up. App. 784, 11. 1-9; App. 799, 11. 10-11; App. 799, 1. 25 - App. 800, 1.-3. The two men then started fighting. This fight, like the previous one, lasted only seconds with both men walking away at the end. App. 785, 11. 2-25; App. 786, 11. 1-6; App. 800, 1. 21 - App. 802, 1. 6.

Chris walked home and went to bed. App. 556, 11. 1-21; App. 572, 11. 4-8; App. 604, 11. 3-5; App. 611, 11. 6-8; App. 628, 11. 2-7. The following day, Chris appeared to be having a seizure, so his family called for help. Chris was transported to a hospital where he later died. App. 557, 11. 8-10; App. 614, 1. 9 - App. 615, 1. 6. The pathologist concluded Chris died from blunt force trauma to the chest. App. 705, 11. 4-16. There were almost no external injuries, but Chris suffered ten fractured ribs on his right side and internal bleeding. App. 697, 1. 9 - App. 699, 1. 1; App. 714, 1. 6 - App. 715, 1. 14. Had Chris received medical attention more quickly, he would have survived. App. 715, 11. 15-25.

On June 12, 2010, a Charleston County, grand jury indicted Petitioner for murder (2010-GS- 10-6153). App. 1282-1283. The state, represented by Benjamin Simpson and Jessica Baldwin, called the case for trial before the Honorable Kristi L. Harrington and a jury on February 24, 2014. Lorelle Proctor and Alicia Penn represented Petitioner. App. 472. The judge instructed the jury concerning murder, voluntary manslaughter, involuntary manslaughter, and self-defense. App. 863, 1.3- App. 869, 1. 24. During its deliberations, the jury requested a definition of malice. App. 872, Tl. 22-24. In response, the judge re-instructed the jury on malice. App. 873, 1. 25 - App. 875, 1. 2. Just over one hour later, the jury reached a verdict. App. 875, 11. 7-8; App. 475, 11. 21-22. The jury found Petitioner guilty of murder. App. 876, 11. 4-10. Judge Harrington sentenced Petitioner to forty years' imprisonment. App. 884, 11. 5-9; App. 1284.

On February 27, 2014, Petitioner filed a motion to reconsider sentence. App. 887-888. On that same date, Petitioner filed a motion for new trial. App. 889. By an order filed March 25, 2014, Judge Harrington denied Petitioner's requests. App. 890. Thereafter, Petitioner filed a notice of appeal. On April 7, 2015, undersigned counsel filed a brief pursuant to Anders v.

California. 386 U.S. 738 (1967). App. 891-907. On March 3, 2016, the Court denied undersigned counsel's motion to be relieved and directed the parties to brief the following issue: Whether the trial court erred in ruling the defenses of accident and self-defense are mutually exclusive and whether this issue is preserved for appellate review. App. 908. Thus, undersigned counsel filed a brief addressing the question presented by the Court. App. 909-928. On January 1 1, 2017, the Court of Appeals affirmed Petitioner's conviction, finding trial counsel abandoned her request for a jury instruction on accident. App. 955-956; State v. Wright 2017-UP-005 (S.C. Ct. App. filed Jan. 11, 2017). Remittitur issued on January 27, 2017. App. 957.

On March 31, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 958-1194. Subsequently, Petitioner, through counsel, filed amendments to his PCR application. App. 1195-1196. The matter proceeded to an evidentiary hearing before the Honorable Thomas Russo on March 1, 2018. App. 1212. Megan Jameson represented the state. App. 1212. James K. Falk represented Petitioner. App. 1212. By an order filed December 6, 2018, Judge Russo denied Petitioner relief. App. 1256-1281.

Petitioner served his notice of appeal on December 18, 2018. This petition for writ of certiorari follows.

RELEVANT FACTS

During the early evening hours of June 10, 2010, Applicant Robert Wright assaulted Christopher Jenkins, the victim, by repeatedly punching and stomping him while he lay on the ground. (R. pp. 80, pp. 81, pp. 110). Victim's two nephews and one of their friends witnessed the beating. (R. p. 77, lines 3-15; R. p. 107, lines 8-18; R. p. 121, lines 19-25). The next day, Victim died as a result of the attack. (R. p. 245, line 16). The pathologist concluded that cause of death was blunt force trauma and noted that the victim had ten broken ribs and numerous external injuries. (R. pp. 226, pp. 227).

On June 10, 2010, Victim's two nephews, thirteen-year-old Robert and fourteen-year-old Jocqui, were playing with a friend, thirteen-year-old Maurice, at their home. (R. p. 72, line 10- R. p. 73, line 1). At that point in time, Victim and his two nephews lived with Mary Jenkins, Victim's mother. (R. p. 70, line 21-R. p. 71, line 25). While the children were playing, Tamika Jenkins, the mother of Robert and Jocqui and sister of Victim, asked the boys to go to the store for her. (R. p. 73, line 3). It was getting dark so Victim decided to walk with the boys. (R. p. 74, line 3). The three boys were walking a few feet in front of Victim down the sidewalk. (R. p. 76, lines 2-3). When Robert turned around to make sure Victim was still following them he saw a car pull up. (R. p. 76, lines 3-10). All three boys witnessed Applicant get out of the vehicle and walk towards Victim. (R. p. 77, lines 3-15; R. p. 107, lines 8-18; R. p. 121, lines 19-25). Before Victim could turn around completely, Applicant picked up Victim and "body slammed" him to the ground. (R. p. 79, lines 3-5). Applicant then began to punch Victim in the face, between five and ten times. (R. p. 80, lines 11-25). He then proceeded to forcefully stomp Victim's body with his feet, between five and ten times. (R. p. 81, lines 1-5). During the assault, Victim did not fight back but "was just laying there on the ground". (R. p. 110, line 5). Victim did not speak to or act violent towards Applicant leading up to or during the assault. (R. p. 83, lines 2-17; R. p. 113, line 25-R. p. 114, line 6). Robert yelled at Applicant to stop attacking his uncle. Applicant responded to Robert, "shut your retarded ass up and come do something about it". (R. p. 124, lines 5-7). Applicant then walked back to his car and drove away. (R. p. 110, lines 11-15).

After Applicant left, Victim stood up and attempted to walk with the boys the remainder of the way to the store. (R. p. 83, line 19-p. 84, line 5). Victim was unable to continue so the boys went on to the store without him. (R. p. 84, lines 6-19). Minutes later, both Victim and the boys returned home. (R. p. 85, lines 1-4). The family watched as a bleeding and bruised Victim walked

upstairs, holding his side in pain, to rest. (R. p. 85, lines 7-21; R. p. 138, lines 21-24). Sounds of moaning could be heard by everyone downstairs. (R. p. 85, line 24; R. p. 140, lines 20-24). Robert explained to Mary that Applicant had just attacked Victim and had yelled at Robert. (R. p. 155, line 15). Mary, being a concerned mother and grandmother, went to Betty's house to talk about Applicant and the incident. (R. p. 166). Betty did not know about the incident and Applicant was not there when Mary arrived. (R. p. 168, line 21).

The next day, June 11, 2010, Victim was still in excruciating pain and spent the day lying in bed. (R. p. 141, lines 2-12). Applicant and Betty came over to Victim's house to speak with Mary, not about the assault but the statement to Robert. (R. p. 141, line 16). Timeka was present and felt that Applicant was not the least bit concerned about victim. (R. p. 142, line 4). Applicant told Timeka, "he was tired of Chris disrespecting his mother and he would have did it again if he had to." (R. p. 144, lines 15-17). Applicant and Betty left soon thereafter.

A couple of hours later, Timeka decided to call EMS after her other brother went upstairs to check on Victim and witnessed Victim having two seizures. (R. p. 143, lines 9-20). At approximately 3:00 p.m., an ambulance arrived at the home and transported Victim to the hospital. (R. p. 162, line 21). Victim died at 5:54 p.m. that same day. (R. p. 245, line 16).

On June 12, 2010, Detective Barry Goldstein of the Charleston Police Department responded to Mary's home to investigate Victim's death. (R. p. 173, line 2). He spoke with Robert and Maurice about the incident and asked if they could identify the man that had attacked their uncle. (R. p. 88, lines 4-22; R. p. 126, lines 10-25). They both positively identified Applicant out of a photo lineup. (R. p. 88, lines 4-22; R. p. 126, lines 10-25). After interviewing Robert and Maurice, the children took Detective Goldstein to the incident location. (R. p. 175, line 5). Detective Goldstein observed blood spatter and drops where Victim had been assaulted. (R. p. 175,

line 20). Officer Randall Unterbrink, with the Charleston Police Department Crime Scene Unit, photographed and collected samples of the blood found on scene. (R. p. 199, lines 3-5; R. p. 201, line 10). He was able to determine that a total of forty-eight blood drops had been left at the incident location. (R. p. 208, line 21). The blood samples were positively identified as belonging to Victim. (R. p. 256, line 1). Later that day, Detective Goldstein obtained an arrest warrant for Applicant. (R. p. 176, line 23). Detective Goldstein observed Applicant did not have any bruising or injuries to his body. (R. p. 177, line 13).

On June 12, 2010, an autopsy was performed on Victim by Dr. Nicholas Batalis. (R. p. 226, line 3). Dr. Batalis observed multiple injuries when conducting an external examination of Victim's body. (R. p. 226, line 12). Victim had a laceration to his left eye, a scrape to the lower lip, two scrapes on the left knee, and a large bruise on the upper left side of his chest. (R. p. 226, lines 12-18). During the internal examination of Victim, Dr. Batalis noted that ten of the twelve ribs on Victim's back right side were fractured in a straight line, which could only have occurred by the use of a significant amount of force. (R. p. 227, lines 8-14; R. p. 229, line 15). The pathologist conceded that forceful stomping could cause fracturing similar to Victim's injuries. (R. p. 230, lines 15-20). This fracturing caused significant bleeding into the chest cavity and bruising to the right side of his back. (R. p. 227, lines 15-18). Dr. Batalis' ultimate finding was that Victim's cause of death was blunt force trauma to the chest. (R. p. 234, line 7).

At trial, Applicant testified to his version of the facts. (R. pp. 300-331). He claimed he followed Victim so they could talk about Betty. (R. p. 327, lines 14-24). Applicant got out of his car and called out to Victim. (R. p. 328, lines 7-10). Applicant testified that Victim turned around and put his hands up to fight. (R. p. 328, lines 10-13). According to Applicant, the two then locked shoulders and Applicant flipped Victim over onto the grounds. (R. p. 313, lines 22-24; R. p. 314,

lines 2-15). Applicant admitted to intentionally punching Victim three to five times. (R. p. 330, lines 22-25). Applicant then walked to his car and left the scene. (R. p. 315, line 2).

ARGUMENT

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

I. The post-conviction relief court properly found trial counsel was not ineffective for abandoning a jury instruction on accident where the evidence did not support giving that charge.

Petitioner alleges trial counsel was ineffective for failing to properly preserve her initial request for a jury instruction on accident, thereby depriving the appellate courts from ruling on the propriety of the trial court's ruling.

During the charge conference, Petitioner requested a charge on the defense of accident. (R. p. 336, line 22). Before hearing from Petitioner, Judge Harrington asked the State to assert its position. The colloquy was as follows:

> **The Court**: Tell me what your position is to accident.
>
> **Mr. Simpson**: Your Honor, we would not be conceding to a charge on accident. The doctrine of accident under the law, I think, applies to the act itself and whether an act is done intentionally or not, and I just don't think there's any conceivable view or any evidence even under that standard that the charge of accident is proper in the case.
>
> The charge of accident is different than – an allegation of accident is different than an allegation that the acts were justified. In self-defense the defendant is simply saying that he is legally justified in doing an intentional act. The law of accident, it would have to be that he accidentally punched the victim, he accidentally took the victim to the ground, and I just don't see any conceivable –
>
> **The Court**: Ms. Penn, tell me from the facts that I have heard make fit this for me, because I'm having a difficult time making them fit under how I understand the theory of both the State's and the defense cases.
>
> **Ms. Penn**: Simply, your honor, that Mr. Wright did not intend to cause Mr. Jenkin's death. From my reading of State v Burress I believe that we must show the killing was unintentional and the defendant was acting lawfully, and, of course, that part about the weapon, which there were no weapons in this case. And I think jury could find that he was acting lawfully in defending himself and that the killing was unintentional.
>
> **Mr. Simpson**: May I respond?

The Court: Ms. Penn, maybe I'm having difficulty understanding your analysis. Tell me the difference between accident and self-defense in this particular case. I think that's where I'm having a hard time distinguishing the two because if he's claiming self-defense he's acting lawfully under the defense, correct?

Ms. Penn: Yes, ma'am.

The Court: I mean, that's your position?

Ms. Penn: It is.

The Court: And he intended to do that act of defending himself. If you want me to charge accident in my mind even if the facts did fit those are two appositive defenses, meaning you can't act in self-defense and it be an accident.

Ms. Penn: Yes ma'am.

The Court: Maybe you could reconcile that for me or have I –

Ms. Penn: I'm probably not that good, Your Honor, but if the court is telling me that it's one or the other in that case we would ask for self-defense.

The Court: I'm saying that's how I see it. I want to charge the accurate statement of law based upon the facts as presented. I don't know in this scenario how it could be both.

Ms. Penn: Yes, ma'am. In that case we would just ask for self-defense.
The Court: Do you need a moment to talk with Ms. Proctor?

Ms. Penn: No, ma'am.

The Court: I will not be charging accident. I will charge self-defense.

(R. p. 336, line 12-R. p. 339, line 15).

On appeal, Petitioner raised a challenge to the trial court's denial of his request for an accident charge. The Court of Appeals determined trial counsel had abandoned the issue below. Petitioner now contends trial counsel was ineffective in waiving this issue because it precluded the appellate court from determining the propriety of the trial court's refusal to charge accident.

Petitioner was not entitled to such a jury instruction. A homicide will be excusable on the ground of accident when (1) the killing was unintentional, (2) the defendant was acting lawfully,

and (3) due care was exercised in the handling of the weapon. State v. Chatman, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999). The record establishes Petitioner's actions do not meet these three requirements.

First, the testimony elicited during trial from multiple witnesses, including Petitioner, showed that Petitioner intended to beat the victim. Testimony from the two minor witnesses showed that the victim was walking them to the store when Petitioner pulled up in a car, body slammed the victim, and proceeded to beat and stomp on his chest. The clear testimony presented to the jury was that Petitioner violently attacked the victim, ultimately resulting in his death. Petitioner has failed to show how the acts that lead to the victim's death were in any way unintentional. Petitioner cites to multiple cases relating to court's charging accident when a gun is accidentally discharged during an altercation. The cases Petitioner cites are not factually similar or relevant to the case at hand, as a gun accidentally going off during an altercation is substantially different from a one-sided fight where a gun is not involved. Petitioner intentionally attacked and beat the victim to the point where his injuries resulted in death, the facts are dissimilar to those in the cited cases supporting a court charging accident to the jury. Therefore, Petitioner has failed to show how the facts would have supported the trial court giving this jury instruction at trial.

Second, the testimony at trial showed that Petitioner was not acting lawfully in when he attacked the victim. The testimony from multiple witnesses was that Petitioner initiated the contact with the victim and was not in imminent danger at the time of the incident. Again, Petitioner attacked the victim as he was walking to the store with two minor children. There was testimony at trial that the victim looked "threatening", however, that fact alone would not be enough to support Petitioner's contention that he was acting lawfully in self-defense in beating

the victim. Petitioner has failed to show how the facts would have supported the second element that he was acting lawfully and not that he was simply attacking the victim. Therefore, Petitioner has failed to show how the facts would have supported the trial court giving this jury instruction at trial.

Third, the evidence and testimony from the trial clearly show that Petitioner did not exercise due care in handling of the weapon, his hands and feet, during his fight with the victim. Dr. Batalis testified a significant amount of force would have had to been used to break the victim's ten ribs. (R. p. 229, line 15; R. p. 230, lines 9-20; R. p. 232, lines 12-14; R. p. 241, lines 19-21; R. p. 242, line 3; R. p. 247, lines 11-18; R. p. 249, lines 1-6). He explained, "The type of injuries to have in this location and this number of fractures is something we more typically see in motor vehicle accident or car accident." (R. p. 230, lines 9-12). Petitioner did not stop beating the victim when he felt any perceived threat had subsided, he continued to attack him with substantial force. The force used by Petitioner through his fists and his feet was enough to ultimately cause the death of the victim. The use of this amount of force in a fight would not be considered the exercise of due care when the result is the death of the victim. Accordingly, Petitioner does not satisfy any of the three elements for an accident defense. "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). Therefore, Petitioner has failed to show how the facts at trial would have supported any element of accident, let alone all of them. Trial counsel was not deficient for failing to preserve the objection to the trial court not giving this jury instruction. The post-conviction relief court properly dismissed this allegation.

II. The post-conviction relief court properly found trial counsel was not ineffective for failing to object to testimony regarding toxicology testing where there were no grounds for an objection.

Petitioner alleges counsel was ineffective for failing to object to testimony regarding toxicology testing and results from the pathologist where the pathologist did not perform the actual toxicology tests and acted as a conduit for the results. However, the expert witness testified he interpreted the results of the toxicology report, incorporated the results into his autopsy report, provided ultimately irrelevant testimony concerning the defense theory, and provided testimony potentially beneficial to Petitioner.

At trial, Dr. Batalis testified to the following concerning the results of the victim's toxicology results:

> Q. And, Doctor, you mentioned sending off bodily fluids for toxicology purposes. You would get the results back from another trusted source of that toxicology report?
> A. Yes. We send these samples to a nationally accredited forensic laboratory. They do the testing. They then provide the results back to us to interpret and incorporate into our report.

(R. p. 225)

> Q. And what were the results of that toxicology screen of Christopher Jenkins?
>
> A. So we tested blood that- we obtained at the autopsy and it was positive for only three substances. One is a drug called atropine, which is commonly used by EMS or physicians in the emergency room to revive the heart or resuscitate somebody. He also had caffeine in his system, and then the drug called Naprosyn, which is an anti-inflammatory drug. If you've ever taken Aleve, that's what Naprosyn is. Similar to ibuprofen.
>
> Q. So present in his system was a drug commonly used by EMS in treating somebody?
>
> A. EMS and physicians, yes.

> Q. Caffeine?
>
> A. Yes.
>
> Q. And something you would get from Aleve?
>
> A. Yes.
>
> Q. Any alcohol in his blood at the time the toxicology report was done?
>
> A. There was no alcohol whatsoever.
>
> Q. Any narcotics such as cocaine, marijuana?
>
> A. No.
>
> Q. The three we discussed were the only results from the toxicology screen?
>
> A. Yes, and just for an idea for the jury, our screen tests for three to 400 different drugs including all the different drugs of abuse such-as cocaine, heroin, alcohol, as well as numerous, numerous medications as well.
>
> Q. And none present other than the things you've already testified to?
>
> A. Correct.

(R. p. 237-38).

"The Sixth Amendment's Confrontation Clause guarantees that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' " State v. McCray, 413 S.C. 76, 90, 773 S.E.2d 914, 921–22 (Ct. App. 2015) (quoting U.S. Const. amend. VI.) "In Crawford v. Washington, the U.S. Supreme Court held the admission of testimonial hearsay against an accused violates the Confrontation Clause if (1) the declarant is unavailable to testify at trial and (2) the accused has had no prior opportunity to cross-examine the declarant." McCray, 413 S.C. 90, 773 S.E.2d at 921-22 (citing Crawford, 541 U.S. 36, 59 (2004)).

"The touchstone for determining whether an expert is giving an independent judgment or merely acting as a transmitter for testimonial hearsay is whether an expert is applying his training and expertise to the sources before him, thereby producing an original product that can be tested through cross-examination." McCray, 413 S.C. 90, 773 S.E.2d at 921-22 (internal quotations omitted). The issue hinges on whether the testifying expert merely served as a conduit for introducing the results of tests that were performed by an expert who did not testify. Id.

First, the expert witness was not acting as a mere conduit when he testified to the results of the toxicology testing done by an external laboratory. Dr. Batali testified at trial concerning the procedures and processes he undertakes when conducting an autopsy on a person to determine the cause of death. Dr. Batali testified: "... also collect different samples of body fluid to send for toxicology testing. Once that's all done we get the report together and typically produce a report that's usually somewhere between four and six pages, after we are finished." R. p. 225). As noted above, further in that same line of questioning Dr. Batali testified that when he gets the results back from the laboratory he then interprets them and incorporates them into his final autopsy report. Petitioner cites to a number of cases concerning police interrogation, emergency circumstances, affidavits used to prove an element of the crime, documents prepared specifically for the production of evidence to be used at trial, and parroting testimonial hearsay. The cases cited by Petitioner are dissimilar to this case and would not preclude Dr. Batali from testifying concerning the results of the toxicology report. The case *sub judice* concerns itself with an expert witness interpreting and incorporating toxicology results necessary for the completion of an autopsy into a report. The fluids were not taken from a DUI suspect for the sole purpose of being used against them in criminal prosecution, they were taken from a deceased victim for the purpose of completing an autopsy to determine the cause of death. The toxicology results, unlike

forensic testing on cocaine to prove an element of a crime, were not used in any way by the State to prove an element of murder. Dr. Batali did not simply parrot testimonial hearsay from out of court declarants, but rather testified to toxicology results used in formulating an expert opinion as to the cause of the victim's death. Petitioner has failed to show how Dr. Batali was a mere conduit for the toxicology testing done by an external laboratory.

Second, as cited by Petitioner, this Court decided in *State v. Brockmever*. 406 S.C. 324, 751 S.E.2d 645 (2013) that a document of this nature is non-testimonial. This Court in *Brockmeyer* analyzed whether or not a witness reading a computerized chain-of-custody log violated the Confrontation Clause and was impermissibly testimonial. Significant to the case *sub judice*, this Case found the logs to be non-testimonial in nature because they were "not created for the sole purpose of providing evidence against the defendant." *Id.* (quoting *Melendez-Diaz*, 557 U.S. at 323). The Court further found that the documents were not testimonial because "their primary purpose is not to constitute evidence in a criminal trial." Id. The toxicology reported in this case was not created for the sole purpose of being used against Petitioner at trial and the results were not relevant to the State proving an element of the crime. Petitioner has failed to show how the toxicology testing was done for the purpose of gaining evidence against Petitioner or for any purpose other than the completion of the autopsy report. The South Carolina rules specifically allow this type of testimony: "the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Rule 703, SCRE. Since Petitioner has failed to show how the Confrontation Clause was violated by trial counsel failing to object, the South Carolina rule should apply.

Third, Petitioner can show no prejudice resulting from any alleged deficiency by trial counsel because the testimony was ultimately irrelevant to Petitioner's case and trial counsel was able to elicit beneficial testimony from Dr. Batali on cross-examination concerning the toxicology results. Trial counsel testified it was irrelevant to the defense theory of self-defense and/or accident and therefore there was no reason to object and highlight it to the jury when it was ultimately neutral for both the State and the defense. She testified she also was able to elicit favorable testimony from Dr. Batalis on cross-examination that any alcohol that might have been in the Victim's body approximately twenty-four hours earlier during the altercation with Petitioner would have fully metabolized out of his body by the time of the autopsy. *See* R. p. 245-46. The issue of whether or not the victim had alcohol or drugs in their system had no bearing on the result of the trial and was not a factor in establishing an element of the crime. The testimony at trial was that Petitioner attacked the victim with no provocation, whether or not the victim had alcohol or drugs in their system is inconsequential to both the defense and to the State. Further, there was testimony at trial that the victim drank excessively and there was a fatty build up on the liver that most likely caused by excessive alcohol consumption. Further, trial counsel was able to elicit from Dr. Batali on cross-examination that even if the victim did have alcohol in their system at the time of the incident it would have metabolized by the time the fluids were taken for testing. Trial counsel was able to present to the jury that the victim had a drinking issue and that the tests done would not have been able to detect whether or not alcohol was in his system at the time of incident. The testimony was ultimately neutral and potentially beneficial to Petitioner due to the ambiguity. Therefore, Petitioner has failed to show how the toxicology results had any impact on the jury's verdict and were prejudicial.

Petitioner has failed to show how the expert witness' testimony was improper, how trial counsel was deficient for failing to object to the testimony, or how he was prejudiced by the admission of the testimony. Therefore, the post-conviction relief court properly dismissed this allegation.

III. The post-conviction relief court properly found Petitioner was not prejudiced when trial counsel failed to object to the State pitting witnesses where the testimony was inconsequential to the result.

Petitioner alleges trial counsel was ineffective for failing to the State's questioning of Petitioner, which pitted his testimony against the testimony of the State's eyewitnesses.

Specifically, Petitioner argues the following portion of the State's cross-examination of him improperly pitted his testimony against the young boys who witnesses the altercation and testified as State's witnesses:

> Q. Okay. Can you think of some reason that three young boys would have to make up untruths about you?
>
> APPLICANT: I can't think of a reason, sir.
>
> Q. Having asked that question let me ask a follow-up question. You admit that a person facing what you are facing here this week might have quite a powerful reason to come up with things that are untrue?
>
> APPLICANT: Yes, sir.

(R. p. 329, lines 13-20). Counsel did not object to this line of questioning.

"No matter how a question is worded, anytime a solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper." Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (citing State v. Bryant, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994); State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-46 (1988)).

"However, improper pitting constitutes reversible error only if the accused is unfairly prejudiced." Id. "To establish his claim of ineffective assistance of counsel, petitioner had to show a reasonable probability that the result of his trial would have been different if counsel had objected to the solicitor's improper questions." Id. (citing Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of a trial. Id.

Petitioner contends he was prejudiced by the improper pitting of the witnesses because credibility was critical to the case, citing to State v. Bryant. 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) (holding Bryant was unfairly prejudiced by the improper cross-examination of a solicitor, which pitting Bryant's testimony against that of a police officer because "[credibility was a critical issue in th[e] case"); State v. Sapps, 295 S.C. 484, 485, 369 S.E.2d 145, 145 (1988) (holding the solicitor's improper questioning of Sapps, which forced him to attack the veracity of another witness, was prejudicial "[b]ecause credibility was the crucial issue in this case"). This case is distinguishable from the case *sub judice* because Bryant was pitted against the only other witness in the case, a police officer, and their testimony was directly contradictory to one another. Here, there were multiple witnesses, including Petitioner, who testified to facts that could support the charge and were not directly contradictory. The uncontroverted testimony at trial was that Petitioner and the victim were involved in a physical altercation, Petitioner flipped the victim causing him to hit the ground, and Petitioner punched the victim three or five times. There was some discrepancy as to how exactly the altercation started, however, testimony from the Petitioner and the minor witnesses both show that Petitioner was the person who started the physical altercation. Petitioner's own testimony was that the victim walked towards him with his fists raised, but that "Now, we right face-to-face. I flip him right like this over my leg." R. p.

314. Petitioner further elaborated that after they were on the ground he was the one who threw punches, with no mention of the victim throwing a punch. R. p. 314. The State impermissibly pitted Petitioner against testimony concerning minor discrepancies as to whether Petitioner snuck up on the victim or whether they walked toward each other from some distance. There was no testimony from Petitioner at trial that the victim initiated the physical altercation or that Petitioner was in imminent fear of danger sufficient to warrant self-defense. Considering all of the other uncontroverted testimony concerning the altercation, the State briefly bringing up rather minor discrepancies between Petitioner's version of events and that of the State's witnesses as "untruths" had no impact on the outcome of the trial. Therefore, Petitioner has failed to show resulting prejudice and the post-conviction relief court properly dismissed the allegation.

IV. **The post-conviction relief court properly found Petitioner was not prejudiced when trial counsel failed to object to portions of jury instructions where the evidence did not support the elements of self-defense.**

Petitioner alleges trial counsel was ineffective for failing to object to inaccurate and misleading portions of the jury instruction. Trial counsel was not deficient for failing to object to the erroneous instruction where the evidence did not support the elements of self-defense and the duty to retreat was not at issue.

The portion of the instruction at issue is as follows:

> The final element of self-defense is that the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular instance. The defendant has a duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase.

The State concedes that the charge as given was an incorrect statement of the law and that Petitioner did not have a duty to retreat if doing so would increase his danger of being killed or suffering serious bodily injury.

First, Petitioner cannot show prejudice from the erroneous jury instruction because it is clear from the record that Petitioner could not have met all four elements of self-defense. ("To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.")

As to the first element, the uncontroverted testimony was that Petitioner was the person to initiate the physical altercation and at worst (if the jury believed Petitioner) the victim was walking towards him with his fists raised. Petitioner was not without fault in bringing on the difficulty when he initiated the physical altercation. As to the second element, there was no testimony at trial from Petitioner that he believed he was in imminent danger of losing his life or sustaining serious bodily injury. If the jury believed the minor witnesses the victim did not and was attacked by Petitioner, if the jury believed Petitioner then there was a belief that a fist fight was about to occur. Importantly, neither of these scenarios amount to Petitioner believing his life

is in danger nor that he was at threat of serious bodily injury. As to the third element the testimony shows at the least Petitioner threw the victim to the ground and punched him multiple times. At the worst, the State's witnesses testified that Petitioner threw the victim on the ground, stomped on his chest, and punched him multiple times. Petitioner's own testimony at trial was that they both fell to the ground, the victim did not throw punches, and that Petitioner got up before the victim because he did not want to be on the bottom during a fight. A person walking toward you with fists raised who is then thrown on the ground would not cause a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself. As to the fourth and final element, Petitioner had every means of avoiding the danger. Petitioner could have avoided the danger even believing Petitioner's testimony concerning how the altercation began. Petitioner testified that he yelled to the victim twice to get his attention, the victim turned around the second time, stepped off the sidewalk towards him with his fists up, then walked some distance toward him before Petitioner took him to the ground. Petitioner had ample opportunity after seeing the victim raise his fists to walk away from the situation instead of initiating a physical altercation. Petitioner could have walked away from the situation or gone to his nearby car to avoid confronting the victim. Instead, Petitioner waited until the victim was in his face to throw him to the ground, stomp on his chest, and punch him in the face. Therefore, Petitioner was not prejudiced because he could not have met one of the elements of self-defense, let alone proving all of them. The post-conviction relief court properly dismissed the allegation on this ground.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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November 26, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
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S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-002249

ROBERT L. WRIGHT, PETITIONER,

v.

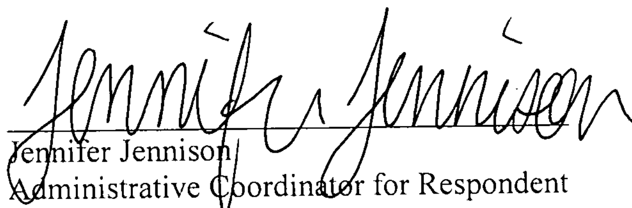
STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29201

This 27th day of November, 2019.



Jennifer Jennison
Administrative Coordinator for Respondent