STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
R. Markley Dennis Jr., Post-Conviction Relief Judge
James C. Williams, Circuit Court Judge

Appellate Case No. 2018-000739

MOSES FRASIER #317940, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR
WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

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?

Respondent's Counterstatement of Issue on Certiorari

Did the post-conviction relief court properly found Petitioner failed to establish counsel was constitutionally ineffective for failing to object pursuant to Rule 701, SCRE, and Rule 702, SCRE, to testimony concerning blood spatter evidence elicited from Sergeant Kevin McGowan where Sergeant Kevin McGowan's testimony concerning the blood spatter evidence was not expert testimony, the evidence was not relevant to any fact at issue, and the testimony did not contradict Petitioner's defense of self-defense?

STATEMENT OF CASE

On June 12, 2006, the Charleston County grand jury indicted Petitioner Moses Frasier for of murder. App. 746-747. Beattie Butler and Jason Mikell of the Charleston County Public Defender's Office represented Petitioner. App. 1. Assistant Solicitors Nathan Williams and Kim Steele of the Ninth Circuit Solicitor's prosecuted the case. App. 1. Petitioner proceeded to a jury trial on October 2, 2006, before the Honorable James C. Williams, circuit court judge. App. 1.

A time Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. Chief Appellate Defender Joseph L. Savitz, III, represented Applicant on appeal. Petitioner's sole issue on appeal was that the trial judge committed reversible error by allowing Frasier's inculpatory statement into evidence, as the investigating officers obtained it in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Following full briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. *State v. Frasier*, 2009-UP-052 (S.C. Ct. App. filed January 15, 2009); App. 605.

On February 7, 2009, Petitioner filed an application for post-conviction relief (PCR). App. 607-613. Applicant alleged he was being held in custody unlawfully for the following reasons: Ineffective assistance of trial and appellate counsel, failure to investigate and present defense, and denial of 5th, 6th, and 14th Amendments to the U.S. Constitution. On July 7, 2009, Respondent filed a return to this application and requested an evidentiary hearing date. App. 614-620. Petitioner then filed an amended application on November 5, 2009, alleging the following:

1. Was appellate counsel ineffective for failing to raise the issue on appeal as to whether the trial court erred in refusing to charge the jury on the issue of involuntary manslaughter?
2. Was counsel ineffective for failing to object to highly prejudicial opinion testimony of a State's witness who had not been qualified as an expert by the trial court?
3. Was counsel ineffective for engaging in improper closing argument to the jury that denied Petitioner a fair trial?

4. Was counsel ineffective for failing to object to the prosecution's improper closing argument that violated the Golden Rule and denied Petitioner his right to a fair trial?

App. 621-653. An evidentiary hearing was convened January 9, 2012, before the Honorable R. Markley Dennis, Jr., circuit court judge App. 654. Jeffrey Yungman, Esquire, represented Petitioner. App. 654. Assistant Attorney General Matthew Friedman of the South Carolina Attorney General's Office represented Respondent. Applicant proceeded on only two issues at the evidentiary hearing. First, was counsel ineffective in failing to object to the highly prejudicial opinion testimony of the State's witness who had not been qualified as an expert by the trial court? Second, was counsel ineffective in failing to object to the prosecution soliciting highly prejudicial opinion testimony from the State's witness who had not been qualified as an expert by the trial court? Petitioner and Beattie Butler (trial counsel) both testified during the hearing. Judge Dennis denied Petitioner relief from the bench and requested a proposed order from Assistant Attorney General Friedman. Judge Dennis issued an Order of Dismissal on February 16, 2012 and filed on February 22, 2012. Judge Dennis made the following findings:

> Applicant was not prejudiced by counsel's failure to object to Sergeant McGowan's testimony regarding blood spatter. Applicant'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 Applicant and the victim were in an altercation and the victim died as a result of the altercation. Thus, counsel was not ineffective for failing to object did not affect the outcome of the trial.

On December 17, 2015, Petitioner filed a *pro se* notice of appeal. App. 694-695.[1] Because Petitioner's pro se notice of appeal was not timely filed, this Court dismissed the appeal by order dated January 6, 2016. App. 700.

[1] 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

On January 25, 2016, Petitioner filed a second application for post-conviction relief seeking a belated appellate review of his initial post-conviction relief action pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 702-712. Respondent filed a return to this application 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, Judge Murphy granted Petitioner a belated appellate review from the denial of his first PCR application pursuant to *Austin* finding Petitioner did not knowingly and intelligently waive his right to appeal. App. 754.[2]

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).

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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.

[2] Respondent is not challenging Jude Murphy's grant of belated appellate review pursuant to *Austin* and does not intend to file a return to the petition for certiorari on that issue; a letter summarizing this positon will be filed simultaneously with this return.

ARGUMENT

The post-conviction relief court properly found Petitioner failed to establish counsel was constitutionally ineffective for failing to object pursuant to Rule 701, SCRE, and Rule 702, SCRE, to testimony concerning blood spatter evidence elicited from Sergeant Kevin McGowan where Sergeant Kevin McGowan's testimony concerning the blood spatter evidence was not expert testimony, the evidence was not relevant to any fact at issue, and the testimony did not contradict Petitioner's defense of self-defense.

Petitioner contends his 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. McGowan was never qualified as an expert, and Petitioner argues McGowan's opinion testimony required special knowledge, skill, experience, and training, and therefore, Petitioner was prejudiced by counsel's deficient performance because the State used McGowan's testimony to dispute Petitioner's defense of self-defense. However, the post-conviction relief court properly concluded trial counsel was not constitutionally ineffective and denied relief, because trial counsel was not deficient where Sergeant McGowan's testimony concerning the blood spatter evidence was not expert testimony and Petitioner was not prejudiced by trial counsel's failure to object to Sergeant McGowan's testimony concerning the blood spatter evidence where the testimony was not relevant to any fact at issue, and the testimony did not contradict Petitioner's defense of self-defense.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove 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 Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland,* 466 U.S. 668.

Trial counsel was not constitutionally deficient for failing to object to Sergeant McGowan's testimony concerning the blood spatter evidence where Sergeant McGowan's testimony did not constitute expert testimony and counsel was able to elicit favorable testimony.

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." 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").

First, trial counsel was not deficient for failing to object to Sergeant McGowan's testimony because counsel had no meritorious grounds upon which to base an objection. Sergeant McGowan's testimony did not amount to expert testimony and thus was not objectionable. McGowan's testimony consisted of his personal observations or perceptions and did not require special knowledge, skill, experience, or training. McGowan testified that he observed a pool of blood on the ground, he saw blood spatter on the pole near the pool of blood, generalities concerning "castoff", and generalities concerning blood spatter analysis. Significantly, McGowan never testified as to any specific interpretations or conclusions he drew from the blood spatter evidence as it relates to the facts of this particular case. McGowan consistently testified in generalities, using expressions or phrases such as "to a point," "in some cases," and "theoretically." At no point in his testimony did McGowan interpret the blood spatter, thus, trial counsel had no grounds to object to the testimony as being improper expert testimony by a lay witness. Second, trial counsel was able to elicit from McGowan that the blood spatter on the pole tested positive for human blood, but that testing was not done to determine to whom the blood belonged. By eliciting this testimony, trial counsel introduced potential doubt as to the State's contention that the blood spatter was the result of "castoff" from Petitioner's fist and provided the possibility for other potential inferences to be drawn by the jury. Therefore, trial counsel was not constitutionally deficient for failing to object to Sergeant McGowan's testimony, as it did not amount to improper expert testimony by a lay witness and trial counsel was able to elicit favorable testimony relating to the blood spatter evidence.

Petitioner was not prejudiced by trial counsel's failure to object to the testimony of Sergeant McGowan concerning the blood spatter evidence. His testimony about the blood spatter was not dispositive to any contested fact, as the arguments made to the jury centered on *why* the

incident happened and whether it was self-defense, and McGowan's testimony did not contradict Petitioner's defense of self-defense.

The issue of whose blood was on the light pole or how it got there was not contested by Petitioner at trial nor was the issue what ultimately happened to the victim that evening. Trial counsel's strategy did not involve disputing that the blood found at the scene was not that of the victim's or that the victim did not die as a result of a physical confrontation with Petitioner. As trial counsel testified at the PCR hearing, the case "wasn't about what had happened but why it happened. There was no dispute that Petitioner killed Kenneth Boston. It was just a matter of whether it was self-defense." App. 673, ll. 14-18.

Sergeant McGowan's testimony was simply that the blood on the ground where the victim lay was likely that of the victim's, the blood on the pole was near the blood on the ground, and the blood spatter on the pole was "theoretically" consistent with castoff. App. 323, l. 25-325, l. 19. Sergeant McGowan did not testify definitively that the blood found on the pole was the victim's; he did not testify that the blood spatter was the result of castoff from excessive force; and he did not testify as to any conclusions that one could draw from the existence of the blood spatter. Petitioner cannot establish prejudice where the testimony of Sergeant McGowan did not provide further insight for the jury's consideration and consisted of mere generalities relating to evidence not in issue.

Petitioner's citation to *Hamrick* in support of his argument that any error by trial counsel in the case *sub justice* was not harmless is imprudent, as Petitioner's case is distinguishable from that of *Hamrick*. In Hamrick, this Court found that the law enforcement officer testifying concerning accident reconstruction was not proper as he was not qualified as an expert and that

the testimony was not harmless error due to its critical nature in proving the State's case. This Court found as follows:

> Officer Harris's opinion testimony was critical to the State's ability to prove an "act forbidden by law" or that Hamrick "neglect[ed] any duty imposed by law in the driving of the motor vehicle," and on that basis prove Hamrick "proximately cause[d] great bodily injury" to Garland. § 56-5-2945(A). While the State also presented evidence Hamrick was driving five miles per hour over the speed limit and failed to keep a proper lookout, the burden of proving proximate cause would have been much more difficult for the State to meet if the point of impact was in the lane of travel. Therefore, we find the error in admitting Officer Harris's opinion testimony regarding the point of impact could not have been harmless.

Hamrick v. State, 426 S.C. 638, 650, 828 S.E.2d 596, 602 (2019). Significantly, this Court found that the admission of the testimony was not harmless due to the critical nature of the testimony in proving an essential element of the State's case. Petitioner's case is distinguishable from *Hamrick* in that Sergeant McGowan's testimony concerning the blood splatter evidence was not critical to any part of the State's case. The blood is just as likely to have gotten on the pole if the jury believed Petitioner's version of events as it was if the jury believed the State's version of events. The officer's testimony in Petitioner's case was clearly not decisive for proving an element of the State's case, as it equally aligns with Petitioner's version of events. Therefore, Petitioner's reliance on *Hamrick* is unsupported.

Second, Sergeant McGowan's testimony in no way contradicted Petitioner's defense of self-defense, and therefore Petitioner has failed to show any resulting prejudice. As noted above, Sergeant McGowan's testimony did not contain any interpretation of the blood spatter or any inferences that could be drawn from its existence. Petitioner contends that he was prejudiced as a result of the solicitor asserting in closing argument that 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, l. 14-496, l. 7; App. 508, l. 23-509, l. 4.[3] The solicitor made no such argument that the blood spatter was evidence of malice, nor that it was indicative of excessive force. The solicitor exclusively used Sergeant McGowan's testimony in closing argument to show that the incident was concentrated in one spot and that there was a struggle. "A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999) (citation omitted). A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Id.* However, if that is the case, Petitioner should have alleged that counsel was ineffective for failing to object to the solicitor misstating the evidence in closing argument rather than the issue as presented before this Court. Notwithstanding, Petitioner has failed to make any colorable argument as to why Sergeant McGowan's testimony harms or contradicts his defense of self-defense. Sergeant McGowan's testimony was that the blood spatter was consistent with blood coming off of a fist that was being drawn backwards, that scenario would be exactly the same whether Petitioner was defending himself or murdering the victim. The testimony of Sergeant McGowan has no impact on Petitioner claiming self-defense, where the testimony is equally applicable to a situation wherein Petitioner was acting in self-defense when he fought the victim and the blood spatter on the pole was the result of Petitioner's fist moving backward after striking the victim. There were a number of different motives or theories the jury could consider in its deliberations: Petitioner was getting revenge for the victim shaking him down and making him urinate on himself, Petitioner initially acted in self-defense as Jaz testified to but that he used excessive force in neutralizing the threat, Petitioner acted properly in self-defense, or

[3] Petitioner appears to argue that that he was prejudiced because the solicitor misstated the evidence in closing argument. This issue was not plead, is not preserved, and is therefore not before this Court. PWC p. 15

Petitioner murdered the victim. Ultimately, the jury did not believe Petitioner's defense of self-defense. Importantly however, they also did not entirely believe the State's version of events either. The jury acquitted Petitioner of murder and convicted him of voluntary manslaughter. In doing so, the jury also solidified the fact that any potential use of Sergeant McGowan's testimony by the solicitor in an effort to show malice was rejected. Malice aforethought is not an element of voluntary manslaughter, thus, the jury rejected any argument or evidence advancing that theory.

Petitioner is asking this Court to find that a non-issue at trial - the blood on the pole - which is logically consistent with a defense of self-defense even if the jury accepted the State's version of how it got there, outweighed the other evidence against Petitioner, and changed the result of Petitioner's trial. Petitioner has failed to meet his burden in proving this to be the case and has failed to show how any prejudice resulted from trial counsel's failure to object to Sergeant's McGowan's testimony concerning the blood spatter evidence. Petitioner has also failed to meet his burden in proving that trial counsel was constitutionally ineffective for failing to object to Sergeant McGowan's testimony, where the testimony was proper lay opinion and not improper expert opinion. Therefore, Petitioner has failed to meet his burden in showing any resulting prejudice from the alleged deficiencies of counsel or any unconstitutional deficiency. The PCR court properly denied Petitioner's request for relief, and this Court should deny certiorari.

CONCLUSION

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

Respectfully submitted,

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