
No. 17-6825

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES COBB HUTTO, III
Petitioner

v.

STATE OF MISSISSIPPI,
Respondent

On Petition for Writ of Certiorari to the
Supreme Court of the State of Mississippi

BRIEF IN OPPOSITION

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**CAPITAL CASE
QUESTION PRESENTED**

- 1. DOES PRECLUDING AN EXPERT FROM TESTIFYING BEYOND THE SCOPE OF HER EXPERT QUALIFICATIONS, CONSISTENT WITH STATE EVIDENTIARY RULES, RAISE A FEDERAL QUESTION?**

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BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Mississippi Supreme Court is reported at *Hutto v. State*, 227 So. 3d 963 (Miss. 2017). Said Opinion is before this Court as Appendix A to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257, but fails to do so.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. He fails to do so.

STATEMENT OF THE CASE

The Petitioner, James Cobb Hutto, III, was convicted on May 25, 2013 for the capital murder of Ethel Simpson in Hinds County, Mississippi. T. 2411. After a separate sentencing hearing was conducted, the jury sentenced Hutto to suffer the penalty of death for capital murder. C.P. 234-235; T. 2646. Hutto perfected an appeal raising fourteen assignments of error. Oral argument was held, and thereafter, the Mississippi Supreme Court issued its opinion affirming Hutto's conviction and sentence. *Hutto v. State*, 227 So. 3d 963 (Miss. 2017). Hutto's motion for rehearing was denied. *Hutto v. State*, 2014-DP-00177-SCT (Miss. Aug. 10, 2017).

STATEMENT OF RELEVANT FACTS

Thirty-nine-year-old James Cobb Hutto, III met and befriended eighty-one-year-old Ethel Simpson at a fitness facility in Clinton, Mississippi. T. 1633, 1640-41. Later that night, Ms. Simpson picked up Hutto from the hotel where he was staying and took him to dinner at a Vicksburg, Mississippi casino restaurant. T. 1796, 1866. Surveillance videos from the casino and hotel where Hutto was staying showed that the pair left the casino at 11:30 p.m. in the victim's car, and that Hutto arrived back to his hotel approximately an hour later, alone, driving the victim's car. T. 1836, 1874, 1884-86. The State proved beyond a reasonable doubt that during that hour, Hutto pulled off the interstate and beat Ms. Simpson to death and left her body to rot on a rural pig farm. The State also proved beyond a reasonable doubt that the murder was committed during the commission of a robbery.

At the bifurcated sentencing phase of trial, the defense offered mitigation testimony from Julie Schroeder, who holds a Ph.D. in social work. Schroeder is a professor and researcher who teaches at Jackson State University. T. 2503. Schroeder was tendered and accepted without objection as an expert in social work, “particularly in the area of human development.” T. 2507. Although the State did not object to Schroeder’s qualifications in the field of social work, it did object to not having received a copy of her report or any opinion she would give, making it impossible to effectively cross-examine her. T. 2507, 2512. The State also objected to Schroeder basing any opinion on Dr. Robert Storer’s report, which was indicated during her voir dire, since Dr. Storer did not reach a conclusion in his report.¹ T. 2507, 2509-2510.

As to the issue of not having previously provided the State with the substance of Schroeder’s opinion, defense counsel stated that Schroeder had not provided a written report. T. 2511. Defense counsel also stated that the defense had only made the decision to call Schroeder as a witness six days prior, which was eight days after trial had commenced. T. 2513-2514. As to the issue of what Schroeder’s opinions would be based on, defense counsel stated that Schroeder relied on the social history provided in Dr. Storer’s report, as well as her interviews with Hutto which were conducted on the first week of trial, and that she would opine as to the “effects of these events in a person’s life.” T. 2507-2513.

The trial court accepted Schroeder as “an expert in the field of social work, human development and behavior.” T. 2524. The court further ruled that because the State had not been properly noticed regarding Schroeder’s proposed testimony, her testimony would first be proffered

¹Hutto refused to cooperate with Dr. Storer, the State Hospital doctor who was ordered to conduct Hutto’s mental evaluation.

outside the presence of the jury so that the State could prepare for cross-examination. T. 2518-19. The trial court also cautioned that while Schroeder was accepted as an expert in social work, she would not be permitted to give testimony beyond her qualifications, specifically as to any type of medical or psychological diagnosis. T. 2519, 2539. The trial court then made the following statement regarding Schroeder's voir dire testimony:

The one thing that bothered me when she was up here trying to excuse me -- strike that -- or explaining, and the Court was trying to follow it very closely, where we started talking about the crossover between social work and psychiatry and psychology and whatever.

There's not going to be any crossover in her testimony. She's strictly being offered and tendered in the field of social work and its impact that it may have on an individual's conduct as the result of social, environmental backgrounds in this individual's life; is that correct?

T. 2520. Defense counsel responded, "That is correct." T. 2520.

During her proffer, Schroeder recounted traumatic events Hutto experienced during childhood and what effects those events typically have on a child. Schroeder testified to Hutto having been beaten by his stepfather, having observed his stepfather beat his mother, and having reported the abuse only to receive no help typically effects "how they view the world and how they engage in relationships," and "decreases a child's ability to trust anyone." T. 2526-2529. She also opined that children who grow up in homes where parents have substance abuse problems "test higher for depression, anxiety and aggression." T. 2531. She further opined that Hutto growing up with a mother with bipolar disorder would have been confusing for him as a child and would have sent "mixed messages." T. 2532. Schroeder further opined that Hutto's lack of a relationship with his biological father also sent "mixed messages." T. 2532-2533. When asked about the effects of sexual abuse on a child, Schroeder offered the following:

There's a great deal of research that exists, and it is longitudinal research where individuals who were victims of sexual violence in childhood in the '70s have been -- have been studied over 30 to 40 years. And the results show marked problems in social adjustment and in social relationships, coping skills, positive social skills **and symptoms that are -- that meet criteria for post-traumatic stress disorder.** And it really impacts how they see the world, and there's a great deal of shame, too.

T. 2529-2530. This was the first mention anywhere in the record of post-traumatic stress disorder. Notably, Schroeder did not testify that Hutto had PTSD. Rather, she testified only that it is not uncommon for children who have been sexually abused to exhibit symptoms "that meet the criteria for post-traumatic stress disorder." Schroeder acknowledged that Hutto had never sought any type of treatment "for these problems he was reporting." T. 2353. Schroeder opined that Hutto needed treatment, and when asked what he needed treatment for, Schroeder stated that she initially believed that he may have "intermittent explosive disorder," but that she had insufficient information to make that determination. T. 2535.

Schroeder then went on to explicitly acknowledge that Hutto did not have an "Axis I medical diagnosis." T. 2536. Post-traumatic stress disorder is a DSM-IV Axis I diagnosis.² This critical fact did not stop Schroeder from then opining, "I believe he does have an anxiety disorder which is where the post-traumatic stress fits in there." T. 2536. The following exchange between defense counsel and Schroeder occurred:

Q. And this -- you mentioned PTSD, post-traumatic stress disorder.

A. Uh-huh (affirmative response) .

Q. That is what you observed?

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See <http://www.ptsd.va.gov/professional/assessment/adult-int/scid-ptsd-module.asp>. See also, Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 Fordham L. Rev. 2955, 2975 (2009).

A. Yes.

Q. Now --

A. Based on my document review and my conversations with him, that fits most closely and he does meet diagnostic criteria for that.

Q. And can this be treated?

A. PTSD can be treated.

Q. As a social worker, you would not -- you're not qualified to prescribe any medications?

A. No.

Q. So that type of treatment would have to be done by a psychiatrist or --

A. What social workers do is recommend to a psychiatrist because we do all of the kind of background -- you know, the big picture and then tell them what we think because psychiatrists don't spend that much time with clients doing that type of work. They rely on collateral sources.

T. 2537. Defense counsel then asked Schroeder what type of treatment plan she would recommend for Hutto, and Schroeder replied that Hutto needed medication for his erratic behavior, mostly likely a low dose antidepressant or a low-dose mood stabilizer. T. 2538. She further opined that to "deal with the PTSD" he would need psychoeducation and therapy. T. 2538.

At the conclusion of the proffer, the State noted that in accepting Schroeder as an expert in social work, the court cautioned the defense that she would not be permitted to offer a "psychological diagnosis." T. 2539. The trial court agreed, stating the following:

I'm sitting here wondering myself how can one prescribe a course of treatment without diagnoses and certain mood-enhancing drugs, certain psychotherapy as part of her recommendations based upon her diagnosis of -- of a medical condition or a psychological condition.

My understanding of her offer was simply this, that she can testify all day long about what she's observed. She can draw opinions in her field of expertise, which is what makes us who we are, and what she's done quite [lengthily]. But then when it comes down to you have a treatment plan -- I believe that's beyond her field of expertise for what she's been offered for.

T. 2540. The State specifically objected to Schroeder offering a PTSD diagnosis. T. 2541. The trial court reminded defense counsel of his representation to the court, at page 2520 of the transcript, that Schroeder was going to limit her testimony to field of social work and not cross over into "psychiatry and psychology." T. 2541. The trial court then asked defense counsel was not PTSD a diagnosis of a psychological problem. T. 2541-42. Defense counsel agreed that it was, but claimed that diagnosing such was within Schroeder's expert qualifications in social work. T. 2542. However at no time during voir dire as to her expert qualifications did Schroeder ever testify that she was qualified to diagnose an individual with post-traumatic stress disorder or any other psychological disorder.³ The trial court then stated that it would rule on specific objections during her testimony before the jury. T. 2543.

Consistent with her proffer, Schroeder testified regarding all traumatic events Hutto reported to have experienced as a child and what effects those events typically have on an individual. T. 2559-2567. Schroeder was prohibited only from offering any medical or psychological diagnosis opinions, and from giving an opinion on a "treatment plan" for Hutto. T. 2565, 2573, 2573-76. As to the exclusion of any opinion about a "treatment plan," the trial court found that one would need "a specific diagnosis in order to establish a treatment plan." T. 2575. Defense counsel agreed with the court's assessment, but again offered that, "we believe that it is within the scope of a professional

³Schroeder did testify that she taught a course in differential diagnosis, which the dissenting opinion seemed to conflate with being qualified to diagnose psychological disorders.

social worker to diagnose a disorder and to make a treatment recommendation.” T. 2576.

REASONS FOR DENYING THE WRIT

“Review on a writ of certiorari is ... a matter ... of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons....” U.S. Sup. Ct. R. 10. Hutto’s petition should be denied because the issue he asks this Court to consider was resolved by exclusive reliance on state law in the Mississippi Supreme Court. As such, there is no federal question to review. For this reason, the State of Mississippi respectfully submits that Petitioner’s claim is not within the jurisdiction of this honorable Court. Therefore, the State of Mississippi respectfully submits that certiorari must be denied.

- 1. THE MISSISSIPPI SUPREME COURT’S DECISION AFFIRMING THE TRIAL COURT’S RULING THAT PETITIONER’S SOCIAL WORK EXPERT COULD NOT TESTIFY BEYOND THE SCOPE OF HER EXPERT QUALIFICATIONS WAS BASED EXCLUSIVELY ON STATE LAW. AS SUCH, THERE IS NO FEDERAL QUESTION TO REVIEW.**

The Mississippi Supreme Court’s resolution of Petitioner’s claim that the trial court erred in limiting Schroeder’s expert testimony to her expert qualifications as a social worker was based solely on Mississippi law, and this Court does not review state court decisions which rest on independent and adequate state law grounds. *Michigan v. Long*, 463 U.S. 1032, 1041,1053, 103 S. Ct. 3469, 3476, 3483, 77 L. Ed. 2d 1201 (1983) (“If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.”). Regarding the necessity of a petitioner seeking certiorari review of a state court decision to show that the state court’s decision involved a federal question, this Court has stated the following:

This Court from the time of its foundation has adhered to the principle that it will not

review judgments of state courts that rest on adequate and independent state grounds. . . . The reason is so obvious that it has rarely upon thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

Herb v. Pitcairn, 324 U.S. 117, 125–26, 65 S. Ct. 459, 463, 89 L. Ed. 789 (1945) (internal citations omitted). The requirement that a petitioner submit a federal question for this Court’s review is jurisdictional, as explained by the Court thusly:

This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54, 115 L. Ed. 2d 640 (1991), holding modified by *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) (internal citations omitted).

In his Petition, Hutto claims that the Mississippi Supreme Court erroneously upheld the exclusion of mitigation testimony by an expert that holds a Ph.D. in social work, thereby creating a new evidentiary rule, a “professor exception.” Hutto argues that because of this exclusion, he was deprived of a fundamentally fair sentencing determination in conflict with controlling Sixth, Eighth and Fourteenth Amendment decisions of this Court. In actuality, however, the Mississippi Supreme Court simply held that the trial court properly found, consistent with Rule 702 of the Mississippi Rules of Evidence, that the defense failed to establish that Schroeder, a social work professor, was qualified to make a PTSD diagnosis or to offer treatment plans. *Hutto v. State*, 227 So. 3d 963, 994-

97 (¶¶112-122)(Miss. 2017).⁴

The admission of expert testimony is within the discretion of the trial court. In Mississippi, the admission of expert testimony is governed by Rule 702 of the Mississippi Rules of Evidence.

That rule provides the following:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Miss. R. Evid. 702. The Mississippi Supreme Court adopted a modified *Daubert*⁵ standard for determining the admissibility of expert testimony, pursuant to Rule 702 of the Mississippi Rules of Evidence, in *Mississippi Transportation Commission v. McLemore*, 863 So. 2d 31 (Miss. 2003).

The framework employed to determine whether expert testimony meets the requirements of Rule 702 requires the trial court to determine whether the expert testimony is both relevant and reliable. *Id.* at 38 (¶16). The relevance requirement is simply a restatement of the M.R.E. 702 requirement that the testimony “assist the trier of fact to understand the evidence or to determine a fact in issue.” The

⁴In touting Schroeder’s qualifications, Petitioner attached Schroeder’s CV to his Petition for Writ of Certiorari as appendix D and references the same on page 8 (footnote 7) of his petition. Schroeder’s CV was never offered at trial and is not part of the appellate record. Accordingly, Schroeder’s CV is not properly before the Court. *See Lawn v. United States*, 355 U.S. 339, 354, 78 S. Ct. 311, 320, 2 L. Ed. 2d 321 (1958) (citing *McClellan v. Carland*, 217 U.S. 268, 30 S. Ct. 501, 54 L. Ed. 762 (1910)).

⁵*Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed.2d 469 (1993).

factors employed to determine whether expert testimony is reliable include the following.

Whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community.

Id. at 37 (¶13).

In addition to the relevance/reliability inquiry, Rule 702 requires that the trial court determine whether the expert is qualified to offer an opinion in a particular area. *Bailey Lumber & Supply Co. v. Robinson*, 98 So. 3d 986, 992-994 (¶¶14-21) (Miss. 2012). Although Mississippi does not require that an expert be “a specialist in a particular branch within a profession” to provide expert testimony pursuant to Rule 702, “*only* if the witness possesses scientific, technical, or specialized knowledge on a *particular* topic will he qualify as an expert on *that topic*.” *Id.* at 992 (¶15)(quoting *Worthy v. McNair*, 37 So. 3d 609, 616 (Miss. 2010)). For instance, a neurosurgeon may be properly precluded, pursuant to Rule 702, from giving an opinion relating to neuro-otolaryngology. *Id.* at (¶16). Likewise, a family physician may be properly precluded, pursuant to Rule 702, from giving an expert opinion in a medical-malpractice action against a dialysis clinic where the proponent of the testimony fails to establish that the witness possesses specialized knowledge, training, or experience in the field of nephrology. *Id.* at (¶17).

In the present case, the Mississippi Supreme Court found that “the defense put on no proof that one who holds a Ph.D. in social work, and who apparently is not a clinician, is qualified to make a PTSD diagnosis.” *Hutto*, 227 So. 3d at 996 (¶119). Schroeder was accepted as an expert in “social work, and particularly in the areas of human development and behavior.” T. 2556-57. After the State argued that psychological disorder diagnosis was beyond her area of expertise, it was

incumbent upon the proponent of the testimony to show otherwise. Yet the defense never did. The defense put on no proof that one who holds a Ph.D. in social work, and who is apparently not a clinician, is qualified to make a PTSD diagnosis. Notably, Schroeder never once suggested that she was qualified to give a PTSD diagnosis, or any other medical or psychological disorder diagnosis. Rather, defense counsel simply kept arguing that she was. As noted above, Schroeder acknowledged that Hutto had never been diagnosed with PTSD, but nevertheless testified that she “believed” he had anxiety disorder, “which is where the post-traumatic stress fits in there.” T. 2536. Schroeder “observed” that Hutto had PTSD, and that opinion was based purely on her “document review” and conversations with Hutto, concluding PTSD “fits most closely and he does meet diagnostic criteria for that.” T. 2537. Reading Schroeder’s testimony as a whole, it is clear that she never claimed that she was qualified to diagnose Hutto with PTSD. Nor did she suggest that a qualified expert had ever diagnosed Hutto with PTSD. In fact, she admitted the opposite.

The defense never tendered or qualified Dr. Schroeder to testify to psychological diagnoses or treatment plans, and, therefore, the exclusion was proper under the Mississippi Rules of Evidence and Mississippi case law construing the same. *See Roberson v. State*, 569 So. 2d 691, 696 (Miss. 1990); *Sample v. State*, 643 So. 2d 524, 530 (Miss. 1994); *Cotton v. State*, 675 So. 2d 308, 312 (Miss. 1996).

Petitioner attempts to elevate a mere evidentiary issue to one of Constitutional proportions by claiming that the exclusion of Schroeder’s unqualified opinion was a Due Process Clause violation. However, this Court has repeatedly rejected attempts to cast mere evidentiary and other state court rule matters as Due Process Clause violations. In *Spencer v. Texas*, the Court stated the following:

Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. . . . But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority.

Spencer v. Texas, 385 U.S. 554, 563-64, 87 S. Ct. 648, 653-54, 17 L. Ed. 2d 606 (1967) (internal citations omitted). *See also Marshall v. Lonberger*, 459 U.S. 422, 438 n.6, 103 S. Ct. 843, 853, 74 L. Ed. 2d 646 (1983) (reaffirming *Spencer*, 385 U.S. 554) (“[T]he Due Process Clause does not permit the federal courts to engage in a finely-tuned review of the wisdom of state evidentiary rules . . .”).

The Mississippi Supreme Court’s decision affirming the trial court’s refusal to permit Petitioner’s expert to testify beyond the scope of her expert qualifications was clearly based exclusively on state law. Accordingly, Petitioner’s claim is not within the jurisdiction of this honorable Court, and certiorari review should be denied.

CONCLUSION

For the reasons above, the Court should deny the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LaDonna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, as well as emailed, a true and correct copy of the above Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi to the following:

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