No.

IN THE

SUPREME COURT OF THE UNITED STATES

CARLTON B. SPRINGER,

Petitioner,

v.

STATE OF OHIO

Respondent.

PETITON FOR WRIT OF CERTIORARI

Carlton B. Springer respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Ohio refusing to hear an appeal of the decision of the Ohio Court of Appeals, Eighth Appellate District refusing to hear his appeal.

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QUESTION PRESENTED

Do Ohio Courts err when they insist that the prejudice prong of an ineffective assistance of counsel claim requires proof that counsel's deficient performance was outcome determinative?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page. None of the parties thereon have a corporate interest in the outcome of this case.

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The decision of the Ohio Court of Appeals, Eighth Appellate District, affirming Mr. Springer's conviction was entered on December 7, 2017. *State v. Springer*, Case No. 104649, 2017-Ohio-8861, 2017 Ohio App. LEXIS 5239 (Dec. 7, 2017) not print published (Pet. App. A-1). The Supreme Court of Ohio refused jurisdiction, Case Announcements, 152 Ohio St.3d 1464, 2018-Ohio-1795, 2018 Ohio LEXIS 1203 (May 9, 2018) (Pet. App. A-8).

JURISDICTION

Petitioner seeks review from the May 9, 2018 decision of the Supreme Court of Ohio refusing without explanation to hear an appeal from the Ohio Court of Appeals, Eighth Appellate District decision affirming Petitioner's conviction for murder. *State v. Springer*, No. 104649, 2017-Ohio-8861, 2017 Ohio App. LEXIS 5239 (Dec. 7, 2017) not print published (Pet. App. A-1), jurisdiction denied, Case Announcements, 152 Ohio St.3d 1464, 2018-Ohio-1795, 2018 Ohio LEXIS 1203 (May 9, 2018) (Pet. App. A-8). On August 2, 2018, Justice Kagan extended the time within which to file a petition for writ of certiorari to and including September 21, 2018.

Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Following a night of drinking and partying, and after an altercation with her one-time boyfriend Carlton Springer, Theresa Adair died of blunt force head trauma with subdural hematoma and brain injuries.

Evidence at trial indicated that sometime during the night, and after Adair and Springer were together, Adair was found by three friends in a hallway by the building's elevator. Although there is significant disagreement about her condition at the time, the friends all agreed that they went with her back to her apartment. In the morning, Adair was on the floor bleeding. EMTs came and took her to the hospital where she died.

In a 6-count indictment, Carlton Springer was charged with her murder. The case was tried to a jury that found Springer guilty of felony murder.

Mr. Springer raised seven assigned errors in Ohio's intermediate appellate court, including, as relevant here, that his trial lawyer's representation was so deficient as to violate his Sixth and Fourteenth Amendment rights to effective assistance of counsel. In a Journal Entry and Opinion of December 7, 2017, the appellate court overruled all but one of the assigned errors and affirmed Mr. Springer's conviction.[1] *State v. Springer*, 8th Dist. Cuyahoga No. 104649, 2017-Ohio-8861, 2017 Ohio App. LEXIS 5239 (Dec. 7, 2017) (Pet. App. A-1).

In a timely appeal from that decision, Mr. Springer asked the Supreme Court of Ohio to review the case. He presented that court with a single proposition of law:

> A criminal defendant is denied effective assistance of counsel when his lawyer (1) fails to object to false, improper, and highly prejudicial testimony; (2) fails to seek a continuance to call his own expert after admitting that the necessity of presenting expert testimony; (3) fails to object to prosecutorial misconduct; and (4) does not timely object to an improper jury instruction.

Without explanation or dissent, the court refused. Case Announcements, 151 Ohio St.3d 1510, 2018-Ohio365, 90 N.E.3d 950 (2018) (Pet. App. A-8).

REASONS FOR GRANTING THE PETITION

Carlton Springer was convicted of murder at a trial where his attorney's performance was objectively deficient. Among other things, Springer complained that his trial counsel should have objected to, and if necessary called an expert to rebut, false and inaccurate testimony about how memory operates – testimony that even if factually correct the detectives who offered it would not have been qualified to give. The issue was important.

[1] The exception, concerning imposed fees and costs, is not relevant here.

Three witnesses testified to finding Theresa Adair in the hallway of the Union Square Apartments as well as to what happened later that night and into the morning. Their accounts vary on many crucial points. They could not agree on whether Springer came back to the apartment where the women were all still gathered after he and Adair argued the elevator. They could not agree whether, when they found Adair, she was fully unconscious or awake and screaming. Only one of them recalled a bizarre comment Springer made about Adair's panties. They could not agree on the extent or location of Adair's physical injuries nor of how long the group remained awake in her apartment afterwards.

Each of the witnesses' versions expanded over time, including new information and greater detail than they were able to provide the morning after the event. Detectives testified that the women gave very brief statements to police the morning after the events but, when detectives interviewed the women a week later, they provided much greater detail. In an effort to explain away these discrepancies, the State questioned the detectives about how memory operates.

One detective testified that "[a] lot of times when you interview [witnesses] at a later time they will remember other things and their statement will be more in-depth." Another detective, asked to explain the effect of a "lapse of time or a period of time passing" on a witness' ability to provide a statement after a traumatic event, said, "I think in most cases it would provide clarity for the victim. They would be able to look back on the situation and recall more detail."

The detectives' opinions about how memory works are factually wrong. Witness memory can be impacted by a variety of factors.[2] Not only can memory fail or be distorted at the time of the event, but it can also become distorted or decay over time. For instance, storage, the second stage in the creation of long-term memory, can be influenced by the stress of being a witness to a crime.[3] Accordingly, though perhaps vivid, emotional memories are no more accurate than other memories.[4] Retrieval, the final stage of memory, involves recalling and reconstructing the event. At this stage, memory can also be influenced by a number of variables.[5]

The detectives' testimony that memory, under various circumstances (*e.g.* intoxication, trauma), will get better over time is false. Memory may *seem* to get fuller over time but that perception is wrong. Expanded memories will be false memories, not newly recalled accurate ones. Moreover, neither detective was remotely qualified to give testimony on the subject. The detectives' statements encouraged the jury to accept as true the witnesses' latest memories and to see any

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[2] S. M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, American Psychologist 56(5): 405–416 (2001).

[3] J. L. McGaugh, *Memory—a Century of Consolidation*, Science 287(5451): 248–251(2000). J. L. McGaugh and B. Roozendaal, *Role of Adrenal Stress Hormones in Forming Lasting Memories in the Brain*, Current Opinion in Neurobiology 12(2): 205–210 (2002).

[4] E. A. Kensinger, "*Remembering the Details: Effects of Emotion*," Emotion Review 1(2):99–113 (2009); T. Sharot, M. R. Delgado, and E. A. Phelps, *How Emotion Enhances the Feeling of Remembering,* Nature Neuroscience 7(12): 1376–1380 (2004); E. Soleti et al., *Does Talking About Emotions Influence Eyewitness Memory? The Role of Emotional vs. Factual Retelling on Memory Accuracy*, Europe's Journal of Psychology 8(4): 632–640 (2012).

inconsistencies as evidence that the witnesses would become more and more accurate as time passed.

Counsel's cross-examination questions demonstrate that he knew the detective was giving the jury misinformation. While defense counsel was aware that there was a problem with the detectives' testimony about memory, counsel neither objected to the testimony nor called an expert to counter the false theories the detectives were putting forth. Those failures were objectively deficient. There was no tactical reason not to object to the detectives' improper "expert" testimony. And, certainly, once the testimony was admitted, there can have been no tactical reason for the counsel not to call a competent expert to debunk the detectives' claims.

This was not an easy case. As noted, accounts of key witnesses varied on important points and changed over time. And counsel did not rebut the State's false explanation for why that was so and how over time memories become more accurate and reliable. In other ways, the State played on the jury's sympathies and complained that Springer did not present evidence proving himself innocent. And still the jury struggled. At one point, it said it was deadlocked, leading the court to issue a *Howard* charge.[6]

But the court of appeals, the only court to address the issue since the Supreme Court of Ohio refused to hear the case, said there was no problem. "We cannot say that

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[5] V. Bruce, *Changing Faces: Visual and Non-Visual Coding Processes in Face Recognition*, British Journal of Psychology 73: 105–116 (1982).
[6] See *State v. Howard*, 42 Ohio St.3d 18, 537 N.E.2d 188 (1989) (replacing the *Allen* charge which the court held lacked balance)

the result of the proceedings would have been different had Springer's counsel objected to the memory-related testimony of the investigating detectives." *State v. Springer*, 2017-Ohio-8861 ¶ 19.

That test, whether "the result of the proceedings would have been different," is exactly wrong.

In *Strickland v. Washington,* 466 U.S. 668 (1984), this Court, established the basic two-prong test for evaluating claims that counsel provided a criminal defendant with representation so poor that it violated the Sixth Amendment right to effective assistance. A finding of ineffective assistance, *Strickland* held, required a showing of first deficient performance and then prejudice.

For the deficient performance prong of the test, the Court explained that "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Given the range of possibility, the Court understandably chose not to be "[m]ore specific." Rather, it recited some "basic duties" of counsel, noting that they "neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance." *Id.* Rather, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *Id.* Finally, and to avoid the temptation for subsequent counsel to "second-guess [prior] counsel's assistance" or for an appellate court to conclude that whatever did not work must have been "unreasonable," the Court made clear that performance review was to "be highly deferential." *Id.* at 689.

The same was not true of the prejudice prong. Setting aside cases of "actual or constructive denial of counsel," cases involving "state interference with counsel's assistance," and cases where counsel was burdened by a conflict of interest, *id.* at 692, the Court examined a range of possible measures of prejudice. The Court first rejected as insufficient a showing that counsel's errors "had some conceivable effect on the outcome, " since [v]irtually every act or omission of counsel would meet that test." Nor did the Court accept Strickland's suggestion of a showing "that the errors 'impaired the presentation of the defense,'" as it "provide[d] no workable principle." *Id.* at 693. At the same time, while recognizing its "several strengths," the Court firmly rejected an "outcome-determinative standard." "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694.

Rejecting those standards, the Court determined that the proper measure was whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." And it added, "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* And while that measure may be ambiguous, the lack of deference to finality is not. As the Court made explicit, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Id.* at 693. The measure of prejudice, then, is not even a preponderance of the evidence.

Yet Ohio appellate courts routinely ignore this Court's determination of the proper measure of prejudice, insisting instead that counsel's representation was not ineffective

unless the deficiency was outcome determinative. As the court of appeals said in this case, "We cannot say that the result of the proceedings would have been different had Springer's counsel objected to the memory-related testimony of the investigating detectives." *State v. Springer* at ¶ 19. See, *e.g.*, *State v. Drummond*, No. 05 MA 197, 2006-Ohio-7078, 2006 Ohio App. LEXIS 6997 (Dec. 20, 2006), ¶ 15 (citing *Strickland* for "defendant must show that counsel's error were so serious that the outcome would have been different"); *State v. Hardley*, Nos. 88456 & 88457, 2007-Ohio-3530, 2007 Ohio App. LEXIS 3251 (July 12, 2007), ¶ 20 (citing *Strickland* for "result of appellant's trial or legal proceeding would have been different); *State v. Dover*, No. 2013-CA-58, 2015-Ohio-4785, 2015 Ohio App. LEXIS 4678 (Nov. 20, 2015) (insisting on "substantial likelihood" of a "different outcome" and not being "persuaded that the evidence was overwhelmingly in favor of an acquittal").[7]

While "States are free to provide greater protections in their criminal justice system than the Federal Constitution requires," *California v. Ramos*, 463 U.S. 992 , 1014 (1993), they may not provide less. See, *e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 29 (2005). When Ohio has tried to provide less, this Court has previously stepped in. See, *e.g.*, *Ohio v. Reiner*, 532 U.S. 17 (2001); *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334 (1995). It should do so in this case.

[7] Among literally dozens of cases making the same mistake, see, *e.g.*, *State v. Lewis*, No. 14CA3467, 2015-Ohio-4303, 2015 Ohio App. LEXIS 4197 (Oct. 14, 2015), ¶ 24; *In re C.W.*, No. 16-09-26, 2010-Ohio-2157, 2010 Ohio App. LEXIS 1792 (May 17, 2010), ¶ 29; *State v. Adams*, No. 2004-T-0053, 2005-Ohio-4332, 2005 Ohio App. LEXIS 3934 (Aug. 19, 2005), ¶ 51; *State v. Davis*, No. 2007-CA-00104, 2008-Ohio-2418, 2008 Ohio App. LEXIS 2070 (May 16, 2008), ¶ 74; *State v. Vore*, Nos. CA2012-06-049 & CA2012-10-106, 2013-Ohio-1490, 2013 Ohio App. LEXIS 1389, ¶ 19.

CONCLUSION

For the foregoing reasons, Petitioner Carlton B. Springer was denied his rights under the Sixth, and Fourteenth Amendments to the Constitution.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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