

No. 18-7576
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

JORDAAN STANLEY CREQUE,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

**BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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CAPITAL CASE

QUESTION PRESENTED

At trial, the lead investigator, Lieutenant Rick Archer, provided detailed testimony about the steps law enforcement took while investigating the case, including his interview of Jordaan Stanley Creque at the hospital. He testified that during the investigation, he received information from the statement made by a codefendant's cousin that refuted Creque's initial claim that he "was riding around" with three black males the night the victims were murdered. Lt. Archer also testified that information from the statement of Creque's girlfriend identified one of Creque's codefendants, as well as provided a description of the clothing Creque wore that night. Lt. Archer explained these statements were used to further his interview with Creque and the investigation of the case.

The question arising from Creque's petition:

1. Did the Alabama Court of Criminal Appeals err when it held that Lieutenant Archer's testimony did not constitute an improper bolstering of witness credibility and invade the province of the jury to make credibility determinations?

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STATEMENT OF THE CASE

Creque killed two people during a robbery, confessed to killing both men, and then testified at trial that he had killed one of the men while a codefendant killed the other. Lieutenant Rick Archer testified that during his investigation of this crime, he received information from statements made by Creque's girlfriend, Brittany Orr, and a codefendant's cousin, Rudy Holmes, that was used to refute initial statements Creque made while receiving treatment at the hospital for self-inflicted wounds. Creque now challenges the admission of Lt. Archer's testimony, arguing that it improperly bolstered trial testimony given by these two witnesses and invaded the province of the jury to determine witness credibility. This claim presents a fact-bound question of no national importance. In fact, it rests on settled law and has little factual significance outside of Creque's case. Moreover, the Alabama Court of Criminal Appeals correctly determined that Lt. Archer's testimony did not invade the jury's province to make credibility determinations. Thus, this Court should deny Creque's petition.

A. The Proceedings Below

Creque was convicted of capital murder when he shot and killed his coworkers, Jeffrey Mark Gaff and Jessie Jose Aguilar. A Morgan County grand jury indicted Creque for capital murder, charging him with one count

of murdering two or more persons by one act in violation of Section 13A-5-40(10) of the Code of Alabama (1975), and two counts of murder committed during a robbery in violation of Section 13A-5-40(2) of the Code of Alabama (1975). The jury found Creque guilty as charged in the indictment and recommended he be sentenced to death by a vote of 11 to 1. After determining the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Creque to death. The Alabama Court of Criminal Appeals affirmed Creque's murder convictions and his death sentence. Creque v. State, CR-13-0780, 2018 WL 798160 (Ala. Crim. App. Feb. 9, 2018). The Alabama Supreme Court denied Creque's petition for writ of certiorari.

B. Statement of the Facts

1. Facts Elicited During Creque's Trial

During a robbery that he planned and committed, Creque shot and killed two people at Krystals. On the morning of the murders, while being treated at the hospital for self-inflicted wounds, Creque told hospital personnel that he had information about the robbery and murders committed at the restaurant. (R. 2307.) Lt. Archer subsequently arrived at the hospital to speak with Creque:

[Creque] initially told the lead investigator, [Lt.] Rick Archer, that he had been riding around with 'Taurus,' 'Quincy,' and

‘Wodie,’ and that he had been showing them the gun he had purchased earlier that day. He said that they had taken his gun, tortured him, and had forced him to take part in their plan to steal money from the restaurant. However, when the police received additional information from officers investigating the crime, including the fact that [Ezekiel] Gholston had been at the restaurant, Archer presented that information to Creque and, Archer said, Creque’s story ‘evolved’ to account for that information. In Creque’s final version of the events, he said that he, Gholston, and [Cassandra] Eldred had planned the robbery and that Eldred drove them to and from the restaurant. He described the crime in detail, and admitted that he intentionally shot Graff and Aguilar.

Creque, 2018 WL 798160, at *1-2 (internal footnote omitted).

Although Creque admitted at trial that he planned and committed the robbery, he testified that he accidentally shot Graff and denied shooting Aguilar. (R. 2270, 2280-81, 2314-15.) According to Creque, he planned to stand watch while Gholston brandished the gun and collected the money. (R. 2281-82.) Creque testified that after Gholston collected money from the registers and safe, Gholston instructed Creque to take Graff and Aguilar to the cooler and handed Creque the gun. (R. 2292.) Creque testified that when he attempted to close the cooler door, Graff leaned against the door and the gun “went off and hit” Graff during the struggle. (R. 2293-94.) Creque stated that Gholston took the gun from him and shot Aguilar several times. (R. 2294.) Creque testified that he was dressed in a “black fitted cap,” a black bandana, a “black collared shirt with . . . an S or white S written on it, camouflage pants”

and, a “pair of black and red and white New Balance” shoes. (R. 2282.) Though he acknowledged that he disposed of his clothing at a dumpster near the apartment he shared with his girlfriend, he denied that any of the clothing recovered by law enforcement officers from a dumpster were his. (R. 2282, 2302.)

2. Lieutenant Rick Archer’s Trial Testimony

Lt. Rick Archer testified three times during the guilt phase of Creque’s trial. (R. 1561, 1962, 2068.) Initially, he was called to establish chain-of-custody for physical evidence that he collected in the case and photographs he took of the crime scene. (R. 1564-75.) He was also called to testify outside the presence of the jury during a midtrial suppression hearing, which related to the voluntariness of Creque’s confession.¹ (R. 1962-2046.) When called the third time to testify, Lt. Archer testified that he was the lead investigator, explained how law enforcement officers worked the case, and presented testimony regarding Creque’s confession.

1. Within his statement of facts, Creque suggests that Lt. Archer fabricated Creque’s confession and challenges the voluntariness of his statement. (Pet. 4.) Neither claim, however, is the basis of the instant petition. Moreover, the Alabama Court of Criminal Appeals correctly affirmed the trial court’s finding that Creque’s statement was voluntary and found that the audiotape of his partial statement was properly admitted. Creque, 2018 WL 798160, at *9, 12-13 (citing (R. 2065)).

As relevant here, Lt. Archer explained how Creque's confession evolved when he was confronted with evidence that refuted Creque's initial statement, including statements made to law enforcement by codefendant Gholston's cousin, Rudy Holmes, and Creque's girlfriend, Brittany Orr. Regarding Holmes, the Court of Criminal Appeals summarized:

Archer testified at length about the cellular-telephone-service provider's records showing calls between numbers matching Holmes' account and Cassandra Eldridge's account, and the prosecutor then asked questions about the provider's records matching the number of Holmes' cell phone:

"Q. [The prosecutor] You heard Mr. Rudy Holmes' testimony in here earlier?

"A. [Archer] Yes.

"Q. During this trial?

"A. I did.

"Q. You heard about Mr. Creque using his phone?

"A. That's correct.

"Q. Are these times and dates consistent with his testimony?

"A. This would be consistent with the time when [codefendant] Gholston should have been in possession of Rudy's phone."

(R. 2097.)

Creque, 2018 WL 798160, at *36. Lt. Archer later testified that he questioned Creque about the inconsistencies between his statement made at the hospital and the evidence collected. He noted that, though Creque initially stated he was “riding around” with three black males around 10:30 that night, (see R. 2136, 2138); Lt. Archer explained that Rudy Holmes’s statement to police and the cellular telephone records refuted Creque’s statement. (R. 2136-37.)

Lt. Archer also explained that, when his interview at the hospital with Creque was interrupted, he contacted Detective Pinion to determine the status of a search warrant he executed at the residence that Creque shared with Brittany and Megan Orr. (R. 2160.) Specifically, the following took place:

[Prosecutor]: All right. And you heard Brittany Orr testify that she saw [codefendant] Exekiel Gholston and [Creque] together on the evening of August 23rd, 2011?

[Lieutenant Archer]: The night, yes, which was just at that point less than 12 hours I guess.

[Prosecutor]: Before the murders?

[Lieutenant Archer]: Earlier, yeah.

[Prosecutor]: Was that information relayed to you by Detective Pinion?

[Lieutenant Archer]: It was. Detective Pinion gave me the information that Brittany had told him That was new information to me. That was the first time - - and they didn’t give me the name of Ezekiel Gholston. They

gave me the nickname, which was EZ, and that's all I had at that point.

[Prosecutor]: All right.

[Lieutenant Archer]: That was the first time that that nickname had come up. He had not mentioned he had been with anybody named EZ.

[Prosecutor]: All right. And then what did you do in regards (sic) to that information in your interview with [Creque]?

(R. 2160-61.)

He further testified about articles of clothing that were recovered from a dumpster.

[Prosecutor]: Then on the audio at some point he said that during the course of the events that he was relating to you he had on his pajamas, that he left the house in his pajamas.

[Lieutenant Archer]: The striped pajamas.

[Prosecutor]: Right.

[Lieutenant Archer]: Yes, sir.

[Prosecutor]: And do you recall Brittany Orr's testimony that when she took him and Mr. Gholston to these apartments that he had on camo pants?

[Lieutenant Archer]: Camouflage pants, yes, sir.

[Prosecutor]: And that he returned in pajamas?

[Lieutenant Archer]: That's correct.

[Prosecutor]: She thought?

[Lieutenant Archer]: That's correct.

[Prosecutor]: Now, you've seen the clothing items that were recovered from the dumpster there at Executive Apartments; right?

[Lieutenant Archer]: I have.

[Prosecutor]: You heard the Defendant testify about what all these folks had on: black T-shirts, black shorts, and whatever he said. You heard that, didn't you?

[Lieutenant Archer]: I did.

[Prosecutor]: Were the clothes that you found in the dumpster along with the bank bags with his fingerprints, were they consistent?

[Lieutenant Archer]: Yes. The clothing consisted of black T-shirts, black shorts, black hat, white T-shirts. The only thing he didn't mention or the only thing we didn't find in the dumpster was something that he attributed to one of the other people wearing which he said was camouflage shorts, which later we found out that's what Brittany said he was wearing. No, we didn't locate those, which of course [is] not to say they weren't discarded elsewhere.

(R. 2139-41.)

Creque did not object to Archer's testimony at trial.

REASONS FOR DENYING THE PETITION

The petition fails to meet this Court's requirement that there be "compelling reasons" for granting certiorari. Sup. Ct. R. 10. The petition presents no arguable split of authority, is heavily fact-bound, and thus fails to establish any of the grounds for granting certiorari review. Creque's claims were rejected by the Alabama Court of Criminal Appeals after a thorough consideration of the facts and circumstances of this case, and Creque has shown no conflict between that decision and a decision of any other court. Creque's fact-bound claim was also waived by his failure to object to the testimony in the trial court.

Moreover, Creque's claim is incredibly weak. Lt. Archer's testimony did not "bolster" or "vouch" for the credibility of testimony presented by either a codefendant's cousin, Rudy Holmes, or by Creque's girlfriend, Brittany Orr. Rather, his testimony was properly admitted to show the steps taken during his investigation. Thus, as it did not invade the province of the jury on the issue of their credibility, this Court should deny the writ.

I. Creque's claim that Lt. Archer's testimony improperly bolstered the testimony of state witnesses is not preserved for review.

Because Creque did not object to Lt. Archer's testimony in state court, Creque's claim that Lt. Archer's trial testimony improperly bolstered the testimony of state witnesses is waived for at least three reasons.

First, because Creque did not object to Lt. Archer's testimony during trial, his objection was waived under this Court's case law. See generally Adams v. Robertson, 520 U.S. 83, 90-91 (1997) ("Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state-law grounds, but also assists [in] deliberations by promoting the creation of an adequate factual and legal record."); Pierce Cty., Wash. v. Guillen, 537 U.S. 129, 140 (2003); Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549-50 (1987) ("It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'") (quotation omitted).

Second, the state appellate courts reviewed Creque's claim for plain error only. See Creque, 2018 WL 798160, at *35. Accordingly, assuming state plain-error review preserved review in this Court, it did not preserve the

issue Creque has presented to this Court – whether Lt. Archer’s testimony improperly bolstered witness testimony. Rather, it preserved review of whether Lt. Archer’s testimony warranted the trial court to overlook the absence of an objection from Creque and order sua sponte to exclude the testimony. See Webb v. Webb, 451 U.S. 493, 498-99 (1981) (“[This] Court has consistently refused to decide federal constitutional issues raised . . . for the first time on review of state court decision.”); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (“It was very early established that the Court will not decide federal constitutional questions raised here for the first time on review of state court decisions.”).

Finally, Creque is raising arguments that he did not even raise in the state appellate courts. Although Creque challenged Lt. Archer’s testimony in the state appellate courts as improperly bolstering state witnesses’ testimony, the claim in his certiorari petition goes beyond that in two ways. First, his petition before this Court challenges Lt. Archer’s testimony regarding Brittany Orr, Rudy Holmes, and Creque’s confession. (Pet. 15-16.) Within his argument, Creque argues for the first time that Lt. Archer provided impermissible overview testimony² and “vouched” for Creque’s confession.

2. Notably, though Creque made the claim that Lt. Archer’s testimony “crossed the line and became a summation of the State’s case” on direct appeal, this statement was made in support of his claim that Lt. Archer’s

(Pet. 15, 18.) As such, Creque did not give the state courts an opportunity to consider these claims. See Webb, 451 U.S. at 498-99; Cardinale, 394 U.S. at 438. Second, Creque’s argument on application for rehearing was limited to Lt. Archer’s testimony about Jessica Stover and Orr. He did not, however, challenge the Alabama Court of Criminal Appeals’s decision regarding Rudy Holmes.

II. Creque’s fact-bound petition merely invites this Court to apply established precedent to the facts of his case.

Even assuming Creque overcomes the waiver of his claim, his petition for writ of certiorari does not present a question of national importance. It is well settled that witness credibility is solely within the province of the jury to determine. See generally United States v. Scheffer, 523 U.S. 303, 313 (1998). Indeed, “[d]etermining the weight and credibility of witness testimony . . . has long been held to be the ‘part of every case [that] belongs to the jury[.]’” Id. (citation omitted). Thus, there is no dispute that the credibility of the testimony offered by these witnesses rested solely with the jury. The resolution of the question Creque presents to this Court turns on settled law and is heavily fact-bound. Indeed, resolution of this issue has little significance outside of his

testimony vouched for other witness testimony. Creque did not argue, as he does here, that Lt. Archer provided overview testimony by testifying to facts without personal knowledge.

case. Because the question presented here is not one of unsettled law, this Court should deny Creque's petition for writ of certiorari.

III. Creque's claim is meritless.

The question presented by Creque – whether Lt. Archer's testimony constituted an improper bolstering of witness credibility and invaded the province of the jury to make credibility determinations – is without merit. Creque attempts to persuade this Court to grant certiorari by arguing that Lt. Archer's testimony "usurped" the jury's role by "vouching" or "bolstering" the testimony of Brittany Orr and Rudy Holmes. But the record belies his arguments.

It is well settled that the jury alone determines the weight and credibility of witness testimony. Scheffer, 523 U.S. at 313 ("A fundamental premise of our criminal trial system is that "the *jury* is the lie detector.") (citation omitted). Indeed, "[w]itness credibility is the sole province of the jury." Snowden v. Singletary, 135 F.3d 732, 739 (11th Cir. 1998). Reviewing his claim to determine whether plain error existed, the Court of Criminal Appeals properly determined that Lt. Archer's testimony did not "invade the province of the jury as to its duty and right to make credibility determinations." Creque, 2018 WL 798160, at *36. In fact, the portions of testimony Creque cites to do

not support his claim that Lt. Archer bolstered or otherwise vouched for Holmes or Orr's credibility.

Creque criticizes two portions of Lt. Archer's testimony. First, regarding Rudy Holmes, Creque argues that Lt. Archer's testimony "helped credit Holmes in the eyes of the jury and minimized the impact" of any bias created by Holmes's familial relationship with Creque's codefendant. (Pet. 17.) Notably, Lt. Archer never testified that Holmes's testimony was believable or opined about Holmes's credibility. Instead, Lt. Archer indicated that he had heard Holmes's earlier testimony that Creque has used Holmes's cellular telephone and testified that the dates and times reference by Holmes were consistent with the telephone records he had obtained through the course of his investigation. (R. 2096.) He further testified that he questioned Creque about the inconsistencies between his statement that he was "riding around" with three black males around 10:30 p.m. and Holmes's statement to police and the cellular telephone records that indicated otherwise. (R. 2136, 2138.)

Second, Creque argues that Lt. Archer's reference to Brittany Orr bolstered Orr's testimony regarding Creque's whereabouts the night he shot and killed his coworkers and attempted to explain away any alleged disparity between Orr's testimony and the physical evidence presented. (Pet. 15.) Like Holmes, at no point did Lt. Archer express any view regarding the credibility

of Orr's trial testimony. Rather, Lt. Archer's testimony explained how Orr's statement to police impacted the course of his interview at the hospital with Creque. During a break in Creque's interview, Lt. Archer learned the identity of one of Creque's codefendants and used that information to confront Creque.

Additionally, when asked by the prosecutor, Lt. Archer confirmed that he recalled Orr's trial testimony that, when she initially saw Creque that night, he was wearing camouflage pants, but he later returned wearing pajamas. (R. 2139-41.) Lt. Archer testified that he recovered clothing inside a bag with Creque's fingerprints and that the clothing was consistent with the clothing Creque told Lt. Archer they were dressed in when they shot and killed his coworkers. (Id.) Lt. Archer noted that law enforcement officers did not recover any camouflage pants, (see R. 2141), which notably was in potential conflict with Orr's testimony.

In this case, Lt. Archer did not invade the province of the jury – directly or indirectly – by testifying that Orr or Holmes were truthful or dishonest on any occasion. Though the prosecutor referenced Holmes and Orr's testimony before questioning, the record reflects that Lt. Archer provided testimony from his independent knowledge about evidence he received because of his role as a lead investigator and explained how that evidence impacted his

interview of Creque and the overall course of his investigation. See United States v. Henderson, 409 F.3d 1293, 1299 (11th Cir. 2005) (finding that the detective's testimony that he found the victim's "story credible was not offered to prove [the witnesses'] truthfulness as witnesses; instead it explained why Collins waited to report Henderson's potential misconduct).

Moreover, contrary to Creque's suggestion otherwise, there is no indication that the jury improperly accorded Lt. Archer's testimony with more credibility simply because he was a law enforcement officer and was seated at counsel table. (See Pet. 17.) This argument fails for two reasons. First, Creque argues that the trial court should have taken "steps to mitigate" this alleged affect by questioning veniremembers during voir dire about assigning undue weight to law enforcement testimony and instructing the petit jury not to inappropriately weigh law enforcement testimony. (Id. at 18.) Yet he acknowledges that defense counsel questioned veniremembers about this very topic. (Id.) The record also reflects that the trial court instructed the jury that it was the sole finder of fact and it would determine the weight and credibility accorded witness testimony. (See R. 3592-94.) Second, Creque does not dispute that Lt. Archer properly remained in the courtroom throughout trial under Rule 615 of the Alabama Rules of Evidence. Ala. R. Crim. P. 615 (explicitly excludes from "the rule" any "officer or employee of a party which

is not a natural person designated as its representative by its attorney”); see also Ex parte Lawhorn, 581 So. 2d 1179, 1181 (Ala. 1991) (“Alabama appellate courts have time and again refused to hold it an abuse of discretion on the part of a trial court to allow a sheriff, police chief, or similarly situated person who will later testify to remain in the courtroom during trial.”). Thus, this Court should deny Creque’s petition for writ of certiorari.

CONCLUSION

For the reasons set forth above, this Court should deny Creque's petition for writ of certiorari.

Respectfully submitted,

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