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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BYRON LABRON RIVERS,

PETITIONER.

APPELLATE CASE NO. 2022-000054

BRIEF OF PETITIONER

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ISSUES PRESENTED

1. Did the Court of Appeals err in finding that the Confrontation Clause objection was not preserved for appellate review when, at trial, counsel objected to allowing a detective to testify to the results of a gun-shot residue test from the co-defendant without calling the witness who conducted the test, stating that the detective was not an expert in the actual testing of GSR kits and then specifically stating that the testimony as to the results of the test violated Petitioner's right to confront witnesses?

2. Did the Court of Appeals err in finding that, if preserved, the trial judge correctly found that defense counsel opened the door to allowing a detective, who did not conduct the gunshot residue test, to testify about the results of the gunshot residue test from the co-defendant in violation of Petitioner's right to confront witnesses?

STATEMENT

In April of 2017, the Charleston County Grand Jury indicted Petitioner, Byron Labron Rivers, for the murder of Kirby Fyall, the attempted murder of Antonio Fyall and Johnell Watson, armed robbery of Sanquan Fyall and possession of a weapon during the commission of a violent crime, indictments #2017-GS-10-2174, 2107, 2106, 1891, 2108.[1] (R. pp. 593-600). In April of 2019, the Charleston County Grand Jury indicted Petitioner for five additional counts of armed robbery and burglary first degree, indictments #2019-GS-10-1893, 1894, 1890, 1899 1889 and 2143.[2] (R. pp. 601-608). On June 10, 2019, Petitioner proceeded to jury trial before the Honorable Jennifer B. McCoy. Benjamin Mack and Teresa Norris represented Petitioner at trial. Christopher Lietzow and David Osborne prosecuted the case. The jury found Petitioner not guilty of three counts of armed robbery but guilty of the other charges. Judge McCoy sentenced Petitioner to life in prison for murder, thirty (30) years concurrent for two counts of attempted murder, thirty (30) years concurrent for three counts of armed robbery, life in prison for burglary first degree, and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was served on July 25, 2019, and the direct appeal perfected. On November 17, 2021, the South Carolina Court of Appeals affirmed the convictions in an unpublished opinion. State v. Rivers, Op. No. 2021-UP-395 (S.C.Ct.App. filed Nov. 10, 2021). (App. pp. 1-2). A petition for rehearing was timely filed and then denied on December 16, 2021. (App. pp. 3-14). The petition for writ of certiorari was filed on January 18, 2022. The return was filed on February 17, 2022.

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[1] It is unclear who testified before the grand jury because the witness listed on the indictment is the North Charleston Police Department.
[2] Again, it is unclear who testified before the grand jury because the witness listed on the indictment is the North Charleston Police Department.

The reply to the return was filed on February 28, 2022. This Court granted the petition for writ of certiorari on September 7, 2022. This brief of petitioner follows.

STANDARD OF REVIEW

"'The admission or exclusion of evidence is a matter addressed to the sound discretion of the [circuit] court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.' State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citation omitted)." State v. McCray, 413 S.C. 76, 90, 773 S.E.2d 914, 921 (Ct. App. 2015).

FACTS

On the evening of July 15, 2016, Sanquan "Mammus" Fyall, his brother, Kirby Fyall, his cousins, Antonio Fyall, Theodore Fyall and Johnell Watson, Johnell's girlfriend, Eleanor Delesline, and their friend, Fredrick "Cam" Smalls were gathered at Sanquan's apartment in the Chicora Cherokee neighborhood in North Charleston also known as "the Makin." In his opening statement to the jury the prosecutor called the neighborhood "one of the most violent neighborhoods in North Charleston." (R. p. 55, lines 4-5). Theodore testified that they were playing video games and Antonio admitted that they were smoking marijuana. (R. p. 124, lines 3-8; p. 287, lines 1-4). Theodore testified that there was a knock on the door and when Antonio answered the door two guys rushed in with guns, ordered everyone face down on the ground and started ransacking the house. (R. p. 124, lines 16-19). Theodore also testified that the men made everyone take their pants off. (R. p. 124, line 20).

Antonio testified that he answered the knock on the door because he thought it was a guy named Percy returning from the store. (R. p. 288, lines 6-17). When the two guys rushed in Antonio knew "something went off" but he did not realize he had been shot. (R. p. 287, lines 9-16). Antonio ran to the kitchen, kicked out the kitchen window and ran around the corner to Antonio Cumming's house to get help. (R. p. 287, line 16 – p. 288, line 1; p. 289, lines 8-15; p. 290, lines 6-17). The others remained in the apartment. Fredrick Smalls testified that Petitioner stood by the door and told the other guy to search through the house. (R. p. 110, lines 2-9). Theodore Fyall, however, testified that, "Stacy [the co-defendant] was the guy that had us at gunpoint and the other individual was ransacking the apartment I guess, or whatever." (R. p. 125, lines 9-11).

Smalls testified at trial, "So the young man over there with the dreads, his hair right there with the white shirt on, told the other guy let's lift the couch up. And when he lift the couch up that's when Kirby jump up from behind the couch and pushed the couch on him and that's when he started shooting and he killed my home boy." (R. p. 109, lines 10-15). Kirby Fyall was fatally shot. According to Smalls both men had guns but the other guy did not fire his gun. (R. p. 110, lines 10-12). Smalls testified that Johnell Watson was also shot. (R. p. 110, lines 22-25). Johnell Watson survived but did not testify at trial. Sanquan Fyall, who lived at the apartment and was present at the time of the incident, also did not testify at trial.

Antonio Cummings testified that Antonio Fyall came to his door bloody stating that they were robbing Sanquan "Mammus" Fyall. (R. p. 89, lines 19-25). Cummings testified that he and Percy went to Sanquan's apartment and Percy knocked on the door. (R. p. 90, lines 9-16). As soon as Percy knocked on the door they heard gunshots. (R. p. 90, lines 16-19). Cummings testified that, "The guy came out the door with his friend on his back and a pillow case in one hand and a gun in the other hand. And Mammus [phonetic] Sanquan Fyall he was behind him and as soon as he seen me he started screaming my name and was like Tony, Tony he killed Kirb; don't let him get away." (R. p. 90, lines 20-25). According to Cummings he prevented the two men from getting into a white Chrysler. (R. p. 91, line 7 – p. 92, lines 1-20). Cummings testified that the Chrysler left upon hearing sirens and Cummings continued to follow the two men on foot. (R. p. 92, lines 19-21). Cummings saw the man who was carrying the other man put the man down on the ground, put the pillow case down, throw the gun and run. (R. p. 92, line 22 – p. 93, lines 1-15). Cummings chased him, hit him with the baseball bat and kept him until the police arrived. (R. p. 93, lines 16-22).

Officer Sara Fortier with the North Charleston Police Department was one of the first officers to arrive. She saw many people in the street and the Petitioner laying on the ground. (R. p. 67, lines 20-25). Officer Fortier also observed Cummings chasing Stacy Green (the co-defendant) and she pursued them on foot. (R. p. 68, line 2 – p. 69, lines 1-3). When she caught up with Cummings and Green they were both in a ditch. (R. p. 72, lines 19-25). Officer Fortier arrested Green and another officer searched him. (R. p. 73, lines 17-20). Green had Theodore Fyall's wallet and a TWIC card belonging to Fredrick Smalls. (R. p. 73, line 21 – p. 74, lines 1-11). Officer Fortier testified that Green was wearing a glove on his right hand. (R. p. 79, lines 2-10).

Officer James Greenawalt with the North Charleston Police Department was also one of the first officers to arrive. He testified that the scene was chaotic and he saw Petitioner on the ground. (R. p. 186, lines 14-24). Officer Greenwalt found a Walther firearm on the ground by a trash can about eight yards from Petitioner. (R. p. 187, lines 12-22). The Walther firearm, State's Exhibit #126, was a 40 caliber Smith and Wesson. (R. p. 428, line 2 – p. 429, lines 1-8). The pillow case that Antonio Cummings claimed to have seen dropped with the gun was not recovered that night. Another North Charleston Police Officer, Kyle Decedue, testified that he saw a black knit glove on Petitioner's right hand. (R. p. 198, lines 2-24). EMS treated Petitioner at the scene, removed his pants and discovered that he had a gunshot wound to the top of both thighs, a fractured femur and an unstable pelvis. (R. p. 313, lines 18-22).

Crime scene technician Anita Moore collected the 40 caliber Smith and Wesson and Petitioner's pants from the scene. (R. p. 229, line 25 – pp. 230 -235). Moore testified that the gun had one round in the chamber and seven rounds in the magazine. (R. p. 230, lines 8-13). Moore testified that she found a work ticket with Petitioner's name, a damaged cell phone and a

projectile in the pockets of the pants. (R. p. 232, line 2 – p. 233, 234, lines 1-23). Moore also testified that there was a bullet hole in the pants. (R. p. 233, lines 1-5). The case agent, Detective Robert Bailey, visited Petitioner the next day in the hospital. (R. p. 343, line 3 – p. 344, lines 1-12). Petitioner was still in the intensive care unit in critical but stable condition varying by the hour. (R. p. 344, lines 9-12). The State questioned Detective Bailey about gunshot residue [GSR] and the detective testified that he did not believe that a GSR kit was done on Petitioner. (R. p. 344, line 17 – p. 345, lines 1-16). The crime scene technician, Anita Moore, testified that she did GSR kits on the deceased, Kirby Fyall, and the co-defendant, Stacy Green. (R. p. 275, line 10 – p. 276, lines 1-23). Moore did not testify about the results of the GSR testing.

Detective Bailey testified that the day after the shooting he received a bag full of items from Rickey Fyall, Anthony Fyall's uncle. (R. p. 346, line 2 – p. 347, 348, lines 1-22). The detective testified that there was a Hi-Point 9 mm silver and black gun, 3 pairs of pants, a TWIC card belonging to Fredrick Smalls and various other items. (R. p. 348, lines 15-22). Rickey Fyall testified at trial that he went to the apartment on the night of the shooting and somebody handed him the bag. (R. p. 373, lines 14-19). When asked who gave him the bag Rickey testified that he did not remember her name. (R. p. 373, lines 20-21). Rickey admitted that he originally told law enforcement that he got the bag from a guy and a girl. (R. p. 373, lines 22-25). He admitted that Nashishi Walker was present when he got the bag and conceded that Nashishi was a crack head. (R. p. 374, lines 1-8). Rickey admitted that he gave somebody keys out of the bag before giving it to the detective. (R. p. 402, lines 1-7). Antonio Fyall admitted that on the night of the shooting he returned to the apartment and hid cocaine before the police arrived. (R. p. 293, line 21 – p. 294, lines 1-22; p. 304, line 2 – p. 315, lines 1-14).

The DNA profile developed from the swabs taken from the trigger and grip of the Hi-Point 9mm that Rickey Fyall provided to the detective the day after the shooting was a mixture of at least three individuals. (R. p. 479, lines 4-6). The partial DNA profile of the major contributor matched the DNA profile of Petitioner. (R. p. 479, lines 7-8). The ballistics expert from SLED testified that all of the shell casings collected from the scene and submitted for testing, including a 380 caliber cartridge, were fired by the Hi-Point 9 mm. (R. p. 439, lines 17-20). The testing of the five bullets submitted, however, was inconclusive as to whether fired by the Hi-Point 9 mm submitted. (R. p. 437, lines 2-6). The witness testified that the bullets submitted for testing were too small to have been fired by the only other gun submitted, State's Exhibit #126, the Walther 40 caliber Smith and Wesson found close to Petitioner. (R. p. 466, lines 1-3).

ARGUMENTS

1. **The Court of Appeals erred in finding that the Confrontation Clause objection was not preserved for appellate review when, at trial, counsel objected to allowing a detective to testify to the results of a gun-shot residue test from the co-defendant without calling the witness who conducted the test, stating that the detective was not an expert in the actual testing of GSR kits and then specifically stating that the testimony as to the results of the test violated Petitioner's right to confront witnesses.**

At trial Petitioner objected to Detective Bailey testifying about the **results** of a gun-shot residue test from the co-defendant as a violation of the Confrontation Clause. The trial judge overruled on the objection based on the Confrontation Clause, attempting to distinguish the present case from Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307, 129 S. Ct. 2527, 2530, 174 L. Ed. 2d 314 (2009). The issue is preserved for appellate review.

The jury found Petitioner guilty of a shooting and robbery of Kirby Fyall and his family and friends at his brother, Sanquan Fyall's apartment. During the direct examination of the case agent, Detective Robert Bailey, the State asked, "Explain to the jury the purpose of GSR, gunshot residue." (R. p. 344, lines 17-18). The detective discussed GSR and then the State asked, "As the case agent were you made aware whether a GSR kit was conducted on Byron Rivers [Petitioner]?" (R. p. 345, lines 13-14). The detective answered, "I was not made aware and I do not believe a GSR kit was conducted on Mr. Rivers." (R. p. 345, lines 15-16). On cross-examination, in response to the questioning about whether a GSR kit was done on Petitioner, trial counsel properly asked if a GSR kit was conducted on the co-defendant Stacy Green. (R. p. 360, line 3 – p. 361, line 1). The detective answered, "Yes, through my understanding of it." (R. p. 360, line 24 – p. 361, line 1).

On redirect examination of Detective Bailey the State asked, "Do you know whether there was gunshot residue particles on Stacy Green?" (R. p. 369, lines 22-23). The detective

answered, “I do not.” (R. p. 369, line 24). The State then asked, “If I showed you a document would that help refresh your memory?” (R. p. 369, line 25 – p. 370, line 1). Counsel for Petitioner first objected stating “This gentleman is not an expert in the actual testing of GSR kits.” (R. p. 370, lines 4-5). The judge said, “I’m not sure that he is being offered as an expert – ” (R. p. 370, lines 6-7). The State argued, “ . . .I’m not. I’m just asking him if he was made aware. I’m trying to refresh his recollection with this document.” (R. p. 370, lines 8-10).

The judge ruled, “I’ll allow it at this point in time.” (R. p. 370, line 11). The trial judge erred. The objection that the detective was not an expert in the actual testing of GSR kits draws the distinction between permissible general questioning about GSR testing and if certain individuals were tested and impermissible questioning about the **result** of any GSR test determined by an expert. If the detective had forgotten whether or not the co-defendant was tested for GSR, the State could have refreshed his memory with the GSR report. The crime scene technician, Anita Moore, had already testified that she did GSR kits on the deceased, Kirby Fyall, and the co-defendant, Stacy Green. (R. p. 275, line 10 – p. 276, lines 1-23). Moore, however, did not testify about the **results** of the GSR testing. The detective should not have been able to testify to the **results** of the GSR test that he did not conduct.

The State then asked the Detective, “I’m showing you what has been marked as identification purposes only as State’s exhibit 189. Does that refresh your recollection on whether Mr. Green had gunshot residue particles on him?” (R. p. 370, lines 12-16). The detective answered, “It does and he did not.” (R. p. 370, line 18). State’s exhibit #189 is listed as the GSR report. (R. p. 390). The objection to allowing the detective, who did not conduct the GSR test, to testify about the **results** of the co-defendant’s GSR test was made shortly before the trial adjourned for the day. (R. pp. 370-382).

The very first thing the judge heard the following morning before the trial resumed before the jury was a renewal of the objection to allowing the detective to testify as to the results of the GSR test on the co-defendant, Green, and a motion for a mistrial. (R. p. 391, line 7 – p. 392, 393, 394, lines 1-16). Counsel said, "Your Honor, just - - just for clarification purposes, we renew our objection to Your Honor's ruling allowing the detective to testify to gunshot residue - - " (R. p. 391, lines 7-9). The judge asked, "The result he received?" (R. p. 391, line 10). Counsel answered, " - - to conclusions. I submit that number one, he is not an expert in that that and it is the very definition of a violation of this young man's right to confront and cross-examine witnesses. It is a little different than Melendez-Diaz v. Massachusetts. But that is the case where the Supreme Court said you can't have a drug certificate from an analyst saying it is drugs and present it through somebody else. We have got a right to question and challenge that." (R. p. 391, lines 11-19).

Counsel specifically argued the questioning violated Petitioner's right to confront witnesses and specifically cited Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307, 129 S. Ct. 2527, 2530, 174 L. Ed. 2d 314 (2009). (R. p. 391, lines 11-19; p. 394, lines 7-8). Counsel for Petitioner argued:

> The problem is, Judge, that I can't cross-examine a man who didn't do the test about what the test is, what it does, what it can show, what it can't show. And I guarantee that if we put a gunshot residue expert on that witness stand I can ask the question – if I stood here right now and fired a weapon is it guaranteed I would have gunshot residue on me – and the answer would be no.
>
> This young man is entitled to question that evidence, rather than just have someone who said he didn't even remember read a report from somebody else doing a test saying yes there is not gunshot residue on this man.

(R. p. 392, line 17 – p. 393, lines 1-2). Counsel for Petitioner continued, "We just object. I think that took away this young man's right to a fair trial, to confront and cross-examine the witnesses.

And if we don't fix it now, in my experience, my opinion, this thing is going to come back at us if he gets convicted." (R. p. 393, lines 4-8).

The State argued that Petitioner opened the door by asking if he was the case agent and by asking about GSR. (R. p. 392, lines 1-15; p. 393, lines 10-15). Counsel for Petitioner replied, "I asked if a kit was done. I didn't ask him what any kit showed. And as far as asking him about being a case agent, I asked him about what was already in evidence, was he aware that drugs were collected at that scene. It was already in. I didn't offer any expert opinion about that." (R. p. 393, lines 16-20). Defense counsel handed a copy of the Melendez-Diaz case to the judge. (R. p. 394, lines 1-14). The Confrontation Clause issue was raised to the trial judge.

The judge ruled on the Confrontation Clause issue stating:

> I have taken an opportunity to review the case law the defense handed me as well as my recollection of the testimony that was presented on direct, cross, redirect. I am standing by my ruling yesterday. I find the door was opened by Ms. Norris as to the GSR results. The solicitor then on redirect then merely used the document to refresh the lead investigator's memory as to whether or not in fact these results were obtained. And then he testified they were and they were negative. So I don't find an issue with how that transpired. I do find that the door was opened by defense counsel on cross-examination, so I stand by my ruling. But your objection is more than covered for the record, Ms. Norris.

(R. p. 394, line 17 – p. 395, lines 1-4). The judge additionally noted, "And I will say for the record I find the difference between the Melendez-Diaz – and there is another case that came actually a couple years after that that discusses the same issue. In both of those cases it was a little bit different because there was – this was all results that were discussed during the direct of the case agent. Again, I think what differentiates our situation is that it was brought up on cross and so the door was opened. So that is my position." (R. p. 395, lines 9-17). The Confrontation Clause issue was raised to the trial judge and she ruled that the testimony was admissible because

the defense opened the door. The error in this ruling is discussed in issue two below. The Confrontation Clause issue was preserved for appellate review.

The Court of Appeals, however, found the issue unpreserved writing:

> Byron Labron Rivers appeals his convictions for murder, first-degree burglary, possession of a weapon during the commission of a violent crime, two counts of attempted murder, and three counts of armed robbery. On appeal, Rivers argues the trial court erred in finding he opened the door to a witness's testimony regarding the results of his codefendant's gunshot residue (GSR) test and this testimony violated the Confrontation Clause. Rivers's issue is not preserved for review because Rivers failed to contemporaneously raise the Confrontation Clause issue to the trial court. Rather, Rivers only argued the witness was "not an expert in the actual testing of GSR kits." Accordingly, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground."); State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) ("Failure to contemporaneously object to the question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial.").

State v. Rivers, Op. No. 2021-UP-395 (S.C.Ct.App. filed Nov. 10, 2021). (App. p. 1).

The record reflects that Petitioner did not **only** argue that the detective was not an expert in the actual testing of GSR kits. Although trial counsel did not initially use the words "Confrontation Clause violation," viewing the context in which the objection was made that the detective was "not an expert in the actual testing of GSR kits" the objection clearly referenced the fact that by allowing the detective to testify about **results** of the GSR test that the detective did not conduct, the judge violated Petitioner's right to confront and cross-examine the person who performed the GSR test. Critically, at the first opportunity after the ruling, Petitioner specifically objected to the testimony as a violation of the Confrontation Clause. (R. p. 391, line 7 – p. 392, 393, 394, lines 1-16). The finding by the Court of Appeals that the Confrontation Clause issue was not preserved for review is not supported by the record.

Petitioner did not bootstrap an unpreserved Confrontation Clause objection by moving for a mistrial as in State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981), cited by the Court of Appeals. In Lynn there was no objection to testimony about Lynn's involvement with the law in Florida. The issue was only raised at the close of the State's case by a motion for mistrial. In contrast, in the present case counsel objected when the State attempted to refresh the detective's memory about whether the co-defendant tested positive for gunshot residue by showing him the GSR report the detective did not conduct. (R. p. 370, lines 4-5). The detective, over objection, testified about the results of the GSR from the co-defendant. The objection was made shortly before the trial adjourned for the day and the mistrial motion was made first thing the next morning, not at the close of the State's case as in Lynn. The trial judge had a fair opportunity to rule on the issue at the time of the objection and again at the time of the mistrial motion. The issue is preserved for appellate review.

"Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Their purpose is not to sabotage attorneys' efforts to bring issues before the appellate courts, particularly where, as here, it was clear to all concerned that Jones's counsel continued to object to the denial of his motion to suppress." State v. Jones, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021).

The issue in the present case was not raised for the first time on appeal. The trial court in the present case ruled on the issue finding that defense counsel opened the door to the admission of the testimony. After Petitioner specifically cited Melendez-Diaz, the trial judge said, "I do find that the door was opened by defense counsel on cross-examination, so I stand by my ruling. But your objection is more than covered for the record, Ms. Norris." (R. p. 395, lines

1-4). The judge specifically attempted to distinguish Melendez-Diaz. (R. p. 395, lins 9-17). It was clear to all concerned that Petitioner objected to the admission of the results of the co-defendant's GSR test through the testimony of the investigator as a violation of the Confrontation Clause. The issue is preserved for appellate review.

2. The Court of Appeals erred in finding that, if preserved, the trial judge correctly found that defense counsel opened the door to allowing a detective, who did not conduct the gunshot residue test, to testify about the results of the gunshot residue test from the co-defendant in violation of Petitioner's right to confront witnesses.

Counsel did not open the door or waive the Confrontation Clause objection to the admission of the **results** of the co-defendant's GSR test. The trial judge erred in finding defense counsel opened the door to allow the detective to testify about the **results** of the GSR test rather than requiring the State to call as a witness the person who conducted the GSR test. The State, not Petitioner, initiated questioning about the **results** of GSR testing during redirect examination.

The State first questioned Detective Bailey about GSR generally. The State asked, "Explain to the jury the purpose of GSR, gunshot residue." (R. p. 344, lines 17-18). The detective discussed GSR and then the State asked, "As the case agent were you made aware whether a GSR kit was conducted on Byron Rivers [Petitioner]?" (R. p. 345, lines 13-14). The detective answered, "I was not made aware and I do not believe a GSR kit was conducted on Mr. Rivers." (R. p. 345, lines 15-16).

On cross-examination, in response to the questioning about whether a GSR kit was done on Petitioner, trial counsel properly asked if a GSR kit was done on the co-defendant Green. (R. p. 360, line 3 – p. 361, line 1). The detective answered, "Yes, through my understanding of it."

(R. p. 360, line 24 – p. 361, line 1). The detective admitted that neither Green's nor Petitioner's clothes were tested for GSR. (R. p. 361, line 2 – p. 362, lines 1-2). Counsel for Petitioner properly questioned the detective about whether Green, the co-defendant, was tested for GSR in order to demonstrate that law enforcement could have tested Petitioner but failed to do so. (R. p. 360, line 3 – p. 361, line 1). The cross-examination about who was tested for GSR was not in depth and was proper follow up to the questions asked by the State on direct.

On the redirect examination of Detective Bailey the State asked about the **results** of the GSR test done on the co-defendant, Green, asking, "Do you know whether there was gunshot residue particles on Stacy Green?" (R. p. 369, lines 22-23). The detective answered, "I do not." (R. p. 369, line 24). The State then asked, "If I showed you a document would that help refresh your memory?" (R. p. 369, line 25 – p. 370, line 1). Counsel for Petitioner objected and stated, "This gentleman is not an expert in the actual testing of GSR kits." (R. p. 370, lines 4-5). The judge said, "I'm not sure that he is being offered as an expert –" (R. p. 370, lines 6-7). The State argued, " . . .I'm not. I'm just asking him if he was made aware. I'm trying to refresh his recollection with this document." (R. p. 370, lines 8-10). The judge ruled, "I'll allow it at this point in time." (R. p. 370, line 11). The trial judge erred. If the detective had forgotten whether or not the co-defendant was tested for GSR, the State could have refreshed his memory with the GSR report. The detective, however, should not have been able to testify to the **results** of the GSR test that he did not conduct.

The State then asked the Detective, "I'm showing you what has been marked as identification purposes only as State's exhibit 189. Does that refresh your recollection on whether Mr. Green had gunshot residue particles on him?" (R. p. 370, lines 12-16). The detective answered, "It does and he did not." (R. p. 370, line 18). State's exhibit #189 is listed

as the GSR report. (R. p. 390). As discussed in issue one above, the objection made that the detective was not an expert in the actual testing of GSR kits was an objection to allowing the detective to testify about **results** of the GSR report rather than calling as a witness the person who conducted the GSR test. The objection was made shortly before the trial adjourned for the day. (R. pp. 370-382).

The first motion made when the trial resumed the following morning was a renewal of the objection to allowing the detective to testify as to the results of the GSR test on the co-defendant, Green, and a motion for a mistrial. (R. p. 391, line 7 – p. 392, 393, 394, lines 1-16). Counsel argued the questioning violated Petitioner's right to confront witnesses and specifically cited Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307, 129 S. Ct. 2527, 2530, 174 L. Ed. 2d 314 (2009). (R. p. 391, lines 11-19; p. 394, lines 7-8). As noted by counsel for Petitioner, "The problem is, Judge, that I can't cross-examine a man who didn't do the test about what the test is, what it does, what it can show, what it can't show." (R. p. 392, lines 17-19).

The State argued that Petitioner opened the door by asking if he was the case agent and by asking about GSR. (R. p. 392, lines 1-15; p. 393, lines 10-15). Counsel for Petitioner replied, "I asked if a kit was done. I didn't ask him what any kit showed. And as far as asking him about being a case agent, I asked him about what was already in evidence, was he aware that drugs were collected at that scene. It was already in. I didn't offer any expert opinion about that." (R. p. 393, lines 16-20). Petitioner did not open the door to the admission of the otherwise inadmissible hearsay testimony about the result of the GSR test on the co-defendant. Defense counsel then handed a copy of the Melendez-Diaz case to the judge. (R. p. 394, lines 1-14).

The judge ruled on the Confrontation Clause issue stating:

> I have taken an opportunity to review the case law the defense handed me as well as my recollection of the testimony that was presented on direct, cross, redirect. I

> am standing by my ruling yesterday. I find the door was opened by Ms. Norris as to the GSR results. The solicitor then on redirect merely used the document to refresh the lead investigator's memory as to whether or not in fact these results were obtained. And then he testified they were and they were negative. So I don't find an issue with how that transpired. I do find that the door was opened by defense counsel on cross-examination, so I stand by my ruling. But your objection is more than covered for the record, Ms. Norris.

(R. p. 394, line 17 – p. 395, lines 1-4). The trial judge erred. Petitioner did not open the door to the admission of the GSR results from the co-defendant.

The judge additionally noted, "And I will say for the record I find the difference between the Melendez-Diaz – and there is another case that came actually a couple years after that that discusses the same issue. In both of those cases it was a little bit different because there was – this was all results that were discussed during the direct of the case agent. Again, I think what differentiates our situation is that it was brought up on cross and so the door was opened. So that is my position." (R. p. 395, lines 9-17). The results of the GSR test were brought up on re-direct not cross. Allowing the detective to testify about the results of the GSR test, without calling the witness who conducted the test, deprives Petitioner of the right to confront witnesses pursuant to Melendez-Diaz and the Sixth Amendment.

The cross-examination about whether a GSR kit was done on the co-defendant was proper, in response to the direct examination about whether a GSR kit was done on Petitioner and did not open the door to allow the State to question the detective about the **results** of the GSR test on the co-defendant. The State's re-direct examination about the results went too far. There is a difference between asking if a test was done and asking about the results of the test. Defense counsel's cross-examination did not open the door to admit the results of the co-defendant's GSR test when the State, on direct, was the first to ask if a GSR kit was done on Petitioner.

The Court of Appeals, however, in a footnote, found the door was opened writing:

> Even if the issue were preserved, the trial court did not err in finding Rivers opened the door to the testimony because he asked the witness whether his codefendant was tested for GSR. See State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008) ("Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial [court]."); State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006) ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) ("[A defendant] cannot complain about the admission of evidence where he opened the door to the evidence."); State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." (alteration in original) (quoting State v. Albert, 277 S.E.2d 439, 441 (N.C. 1981))).

State v. Rivers, Op. No. 2021-UP-395 (S.C.Ct.App. filed Nov. 10, 2021). (App. p. 1). The Court of Appeals erred. Defense counsel asked the detective, on cross, whether the co-defendant was tested in response to the State asking, on direct, whether Petitioner was tested. The cross-examination did not open the door to the testimony about the results.

The Door was not opened.

In State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008), the trial judge found that defense counsel's cross-examination of the detective opened the door to remove redactions made pursuant to Bruton v. United States, 391 U.S. 123 (1968). The South Carolina Court of Appeals disagreed writing, "While we recognize the discretionary authority of the trial judge in this area, we believe he erred in finding that Page's counsel's zealous representation of his client required the admission of this inadmissible evidence in order to rehabilitate Detective's investigative techniques." State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). As in Page, the trial judge in the present case abused her discretion in finding defense counsel's cross-

examination opened the door to the admission of the GSR **results**. Unlike the Court of Appeals found in Page, the error in the present case is not harmless, as discussed above.

The present case is distinguished from State v. Beam, 336 S.C. 45, 518 S.E.2d 297, (Ct. App. 1999). In Beam, the Court of Appeals correctly noted that, on cross-examination, counsel for Beam "asked the proverbial 'one question too many.'" 336 S.C. at 51, 518 S.E.2d at 300. Beam was accused of selling or renting pirated video tapes and charged with transfer of recorded sounds. In Beam defense counsel cross-examined a State expert about a particular test that could determine if a film was genuine or counterfeit. Defense counsel questioned the witness about whether he performed the test on any of the tapes in question and the expert admitted not performing the test on any of the tapes. Defense counsel then went too far and asked, "Okay. Well, this jury's got a tough decision to make today. Don't you think that it would require you to do that test if that's available to shut the door on whether or not you've got a counterfeit tape or not when you've got that—" 336 S.C. at 49, 518 S.E.2d at 299. This question backfired as the expert volunteered to perform the test and the judge allowed it, over objection. The expert tested two tapes and determined both contained counterfeit films. On appeal Beam argued, among other things, unfair surprise by the midtrial testing. The Court of Appeals disagreed writing:

> Beam cannot complain about the admission of evidence where he opened the door to the evidence. See State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991) (where Petitioner opened door to evidence, he cannot complain of prejudice from its admission); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) (Petitioner cannot complain of prejudice from admission of evidence if he opened the door to its admission). Further, when a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984). A party may not complain of error caused by his own conduct. Id.
>
> Once Beam's counsel questioned Bowley about the existence of the switch point test, its superiority over visual inspection in the detection of counterfeit videos, and whether the State should have been required to perform the test on the seized

> videotapes, the State was free on redirect to ask whether the test could be performed. Beam's counsel's questions directly attacked the expert's testimony that the seized videos were counterfeit. The State asked Bowley to perform the test, in part, to rehabilitate him. The scope of redirect is a matter of the trial court's discretion. Stroman, 281 S.C. at 513, 316 S.E.2d at 399. Because Beam opened the door to this evidence, the trial judge did not abuse his discretion in allowing Bowley to perform the test.

Beam, 336 S.C. at 52–53, 518 S.E.2d at 301.

In contrast, in the present case the State first asked the detective if Petitioner had been tested for GSR. (R. p. 345, lines 13-14). Defense counsel then cross-examined the detective about whether the co-defendant, Green, had been tested for GSR. Defense counsel did not ask about the results of the GSR test but rather whether a test had been done. The State then improperly on re-direct asked the detective about the results of the GSR test that he did conduct. Defense counsel did not ask the "proverbial one question too many." Instead, defense counsel, in response to the State's questioning on direct, asked if the co-defendant was tested for GSR. Defense counsel did not ask about the results of the GSR test. Petitioner's right to confront the witness who conducted the GSR test was violated by allowing the detective to testify about the results of the GSR test.

The present case is also distinguished from State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984). In Stroman defense counsel cross-examined a co-defendant, McDowell, about breaking into other homes for money. On re-direct, the State questioned McDowell about the prior housebreakings and specifically about the fact that Stroman also participated in two of the prior housebreakings. Defense counsel objected. The trial judge ruled that the "door had been opened." This Court agreed writing:

> "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." State v. Albert, 277 S.E.2d 439, 441 (N.C.1981); State v.

> Miller, 61 N.C.App. 1, 300 S.E.2d 431 (1983). See also U.S. v. Allain, 671 F.2d 248 (7th Cir.1982); U.S. v. Barrentine, 591 F.2d 1069 (5th Cir.), cert. den., 444 U.S. 990, 100 S.Ct. 521, 62 L.Ed.2d 419 (1979). Additionally, a party "cannot complain of an error which his own conduct has induced." State v. Worthy, 239 S.C. 449, 465, 123 S.E.2d 835 (1962).
>
> Once Petitioner's counsel initiated the questioning concerning McDowell's prior acts of theft, the State was free to question him as to the details of any prior crime involving the stealing of money. The scope of redirect rests in the discretion of the trial court. State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). We hold the trial court properly admitted McDowell's testimony.

State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984).

In the present case the State first introduced testimony about the fact that Petitioner was not tested for GSR. Defense counsel was then entitled to introduce testimony that the co-defendant was tested for GSR. Defense counsel's cross-examination did not create the error. The State created the error by questioning the detective about GSR test results without calling as a witness the person who conducted the GSR test. Defense counsel did not open the door. The admission of the detective's testimony that a GSR test for the co-defendant was negative violates Petitioner's Sixth Amendment right to confront witnesses.

Confrontation Clause Violation

In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the case cited by Petitioner at trial, the United States Supreme Court found that the admission of certificates of state laboratory analysts stating that material seized by police and connected to Petitioner was cocaine of a certain quantity violated Petitioner's Sixth Amendment right to confront witnesses. The Court wrote:

> The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against

> him." In Crawford[3], after reviewing the Clause's historical underpinnings, we held that it guarantees a defendant's right to confront those "who 'bear testimony' " against him. 541 U.S., at 51, 124 S.Ct. 1354. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. Id., at 54, 124 S.Ct. 1354.

557 U.S. at 309, 129 S. Ct. at 2531. In footnote 3 of the opinion the Court wrote, "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections. See *infra,* at 2554." Petitioner in the present case did not waive the right to confront the person who analyzed the GSR test done on the co-defendant. Petitioner objected to the testimony as a violation of the right of confrontation and did not open the door to the admission of the hearsay testimony.

The testimony about the results of the GSR test of the co-defendant was testimonial in nature triggering the Confrontation Clause analysis. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); Bullcoming v. New Mexico, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011). The State was required to call the person who conducted the GSR test in order for the results to be admitted. The State failed to call that person as a witness and that person was not subject to cross-examination. Allowing the investigator to testify about the GSR results violated Petitioner's right to confront witnesses.

In State v. McCray, 413 S.C. 76, 773 S.E.2d 914 (Ct. App. 2015), the South Carolina Court of Appeals determined that allowing a DNA analysis expert who simply peer reviewed another DNA expert's report to testify about the DNA results violated the Sixth Amendment's Confrontation Clause guarantee. The testimony "merely served as a conduit for introducing the

[3] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

results of DNA tests that were performed by an expert who did not testify." 413 S.C. at 90, 773 S.E.2d at 922. In McCray the Court of Appeals wrote:

> 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." 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. 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (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." United States v. Palacios, 677 F.3d 234, 243 (4th Cir.2012) (quoting United States v. Johnson, 587 F.3d 625, 635 (4th Cir.2009)) (internal quotation marks omitted).

413 S.C. at 90, 773 S.E.2d at 921–22.

In the present case, admission of the detective's testimony that a GSR test for the co-defendant was negative violates the Petitioner's Sixth Amendment right to confront witnesses in the same way that the admission of the certificates in Melendez-Diaz and the admission of the testimony from the DNA expert who did not conduct the DNA test in McCray violates the Sixth Amendment right to confront witnesses. The detective was merely acting as a transmitter for testimonial hearsay. Unlike the testimony in McCray, however, the admission of the detective's testimonial hearsay that the co-defendant was negative for GSR was not harmless.

In State v. Gracely, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012), the South Carolina Supreme Court wrote:

> A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Whether such an error is harmless in a particular case depends upon a host of factors.... The factors include the *importance of the witness's testimony* in the prosecution's case, whether the testimony was *cumulative,* the presence or absence of evidence *corroborating* or contradicting the testimony of the witness on material points, the *extent of cross examination* otherwise permitted, and, of course, the *overall strength* of the

> prosecution's case. *Id.* at 684, 106 S.Ct. 1431 (emphasis added). *See* State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) ("The list of factors as set out in Van Arsdall is not exhaustive.").

The detective's testimony that the co-defendant was negative for GSR was very important in the prosecution's case. The defense theory was that the co-defendant was the shooter. Counsel for Petitioner told the jury in opening statement, "Byron Rivers was at [address of Sanquan Fyall's apartment] for a deal. In his possession was a 40 caliber handgun, a Walther PPS that never fired a shot." (R. p. 60, lines 13-15). The night of the shooting a Walther firearm was found on the ground by a trash can about eight yards from Petitioner. (R. p. 187, lines 12-22). The Walther firearm, State's Exhibit #126, was a 40 caliber Smith and Wesson. (R. p. 428, line 2 – p. 429, lines 1-8). The Walther gun had one round in the chamber and seven rounds in the magazine. (R. p. 230, lines 8-13). Counsel for Petitioner also stated in opening that, "In this particular case as we hear so often the hand of one is not the hand of all. In this particular case the hand of one is the hand of one and that hand belongs to Stacy Green." (R. p. 60, lines 18-21). The State argued in closing, "And Stacy Green's DNA was not on the murder weapon. He didn't have GSR particles." (R. p. 529, lines 8-9). The Hi-Point 9 mm linked to shell casings found at the apartment was not recovered by police on the night of the shooting. Instead, that gun was provided to police the next day by a member of the Fyall family. The bullets submitted for testing were too small to have been fired by the Walther 40 caliber Smith and Wesson found close to Petitioner. (R. p. 466, lines 1-3). The negative result of the GSR test from the co-defendant was an important part of the State's case. The error in allowing the testimonial hearsay in violation of the right to confrontation was not harmless.

CONCLUSION

Based on the above arguments, this Court should reverse the convictions and remand for a new trial.

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This 7th day of October, 2022.