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**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
The Honorable Jennifer B. McCoy, Circuit Court Judge

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THE STATE,.....RESPONDENT

v.

BYRON LABRON RIVERS,.....PETITIONER

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**BRIEF OF RESPONDENT**  
**Appellate Case No. 2022-000054**  
**Opinion No. 2021-UP-395**

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## **PETITIONER'S 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?

### **RESPONDENT'S COUNTER ISSUE PRESENTED**

1. Did the Court of Appeals err in deciding that the issue regarding the Confrontation Clause was not properly preserved since what was initially argued was that the Detective was not an expert in this field and did not conduct the test so he should not be allowed to relay test results to the jury, and the Confrontation Clause argument was not made until the next day?
2. Did the Court of Appeals err in determining that even if preserved since the Petitioner opened to door the results of the GSR, it being relayed to the jury was not in violation of the Confrontation Clause?
3. Were the GSR results a minor component of the State's case and other more substantial evidence was revealed, would the outcome have not changed if the GSR results was not given to the jury; so, if the court committed any error should it be considered harmless?

## STATEMENT OF THE CASE

On July 15, 2016, victims Sanquan, Kirby, Antonio, and Theodore Fyall along with Johnell Watson and his girlfriend Eleanor Pelesline, and Frederick “Cam” Smalls were at Sanquan and Antonio’s apartment in North Charleston, South Carolina.<sup>1</sup> While at the apartment they were smoking marijuana and playing video games. (R. p. 55 l. 4-5).

There was a knock on the door, Antonio immediately answered because he thought it was a guy named Percy who was supposed to be returning from the store. (R. p. 288 l. 6-17). Instead, at the door was the Petitioner along with his co-defendant Stacy Green. When Antonio answered the door, he was immediately shot by the Petitioner. (R. p. 287 l. 9-16). Once Antonio was shot the defendants rushed into the apartment. (R. p. 124 l. 16-19). Antonio bleeding from his gunshot wound was still able to kick out a kitchen window and escape.

After they entered the apartment Petitioner along with his co-defendant ordered everyone to remove their pants. (R. p. 124 l. 20). Petitioner stood by the door pointing the gun at everyone while the co-defendant searched the apartment. While searching, Petitioner told the co-defendant to lift the couch. Hiding behind the couch was Kirby who proceeded to push the couch on them. Petitioner shot Kirby, then shot Johnell. (R. p. 109 l. 10-15; R. p. 110 l. 22-25).

While the robbery was occurring, Antonio ran to his friend Antonio Cummings (Cummings) apartment, inside the apartment was Cummings and Percy. (R. p. 287 l. 16 – p. 288 l. 1; p. 289 l. 8-15; p. 209 l. 6-17). Antonio informed them that he was robbed and shot at his apartment. Cummings grabbed a baseball bat and he and Percy went to Antonio’s apartment. As they approached and knocked on the door, they heard gunshots. After the gunshots they saw the co-defendant carrying the Petitioner on his back out of the apartment. Petitioner was carrying a

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<sup>1</sup> In order to avoid confusion, I will refer to each victim by their first names.

pillowcase. Cummings and Percy attempted to stop Petitioner and co-defendant from escaping by blocking their access to the getaway vehicle. (R. p. 91 line 7 – p. 92 l. 20). Their getaway vehicle sped off, so defendants started down the street, Cummings and Percy followed. (R. p. 92 l. 19-21). The co-defendant placed the Petitioner and pillowcase on the ground threw his gun away and ran. He was chased by Cummings with the baseball bat, Cummings hit the co-defendant in the back knocking him into a ditch. (R. p. 92 l. 22 – p. 93 l. 22).

Officer Sara Fortier of the North Charleston Police Department arrived at the scene. She saw Cummings and the co-defendant in the ditch. Office Fortier placed the co-defendant under arrest. Officer James Greenawalt also arrived at the scene where he found a Walther .40 caliber Smith & Wesson handgun on the ground about eight yards from the Petitioner. (R. p. 187 l. 12-22). Petitioner was treated at the scene by emergency medical services for gunshot wounds to both legs, a fractured femur, and an unstable pelvis. (R. p. 313 l. 18-22). Kirby was later pronounced dead, the other victims wounds were not fatal.

The day after the incident Detective Robert Bailey received a bag from Ricky Fyall, Antonio's uncle. (R. p. 346 l. 1 – p. 348 l. 22). In the bag Detective Bailey found a hi-point 9mm silver and black handgun, three pairs of pants, and a TWIC card belonging to Fredrick. (R. p. 348 lines 15-22). Ricky went Antonio's apartment after the shooting and was given this bag from Nashishi Walker. (R. p. 374 l. 1-8).

On June 10, 2019, Petitioner's case was called for trial before the Honorable Jennifer B. McCoy, Circuit Court Judge. Present before the trial court was the Petitioner represented by his attorneys Benjamin Andrew Mack and Teresa Norris. Representing the State of South Carolina was Assistant Solicitors Christopher Lietzow and David Osborne of the Ninth Circuit Solicitor's Office.

During trial ballistics expert Agent Chad Smith from the South Carolina Law Enforcement Division (SLED), testified. Agent Smith stated that all the shell casings found at the scene were fired from a 9mm handgun. The bullets were for a .380 caliber weapon; however, those bullets could be shot from a 9mm. (R. p. 433 l. 19-21). Each witness testified that only one of the defendant's fired a weapon.

Agent Sara Goodman, a forensic scientist at SLED also testified. Agent Goodman tested the trigger grip of the 9mm for DNA. The results revealed that the DNA found was a mixture of individuals, however, the Petitioner was the major contributor. Agent Goodman testified that the DNA match with the Petitioner was approximately 1 in 32 billion. (R. p. 479 l. 11). There was not a DNA match from the co-defendant.

After four days of testimony, a jury of his peers found the Petitioner guilty of murder, four counts of armed robbery, burglary 1<sup>st</sup>, two counts of attempted murder, and possession of a weapon during the commission of a violent crime. (R. p. 587 l. 5 – p. 588 l. 20). After the verdicts were announced, Petitioner appeared before the trial court for sentencing. The trial court sentenced the Petitioner to a term of imprisonment for the remainder of his natural life for the offense of murder, and burglary 1<sup>st</sup>; thirty years for each count of armed robbery; thirty years for each count of attempted murder; and, five years for possession of a weapon during the commission of a violent crime. The trial court ordered that each of these sentences were to be served concurrently. (R. p. 590 l. 24 – p. 591 l. 24). While serving his sentence the Petitioner made a timely filing of a notice of appeal before the Court of Appeals.

The Court of Appeals decided this case without oral arguments. On November 19, 2021, the Court of Appeals issued an unpublished opinion. *State v. Rivers*, WL 5232315 (2021). The

Court of Appeals decided unanimously that due to Petitioner failing to argue a violation of the confrontation clause in a timely fashion this issue was not preserved for appeal. In a footnote the Court of Appeals also stated, “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.” *Id.*, n.1.

The Petitioner filed a petition for rehearing on November 29, 2021, it was denied on December 16, 2021. Upon the denial of a rehearing the Petitioner filed a petition for writ of certiorari before this court on January 18, 2022, the return was filed by the Respondent on February 17, 2022. This Court granted certiorari on September 7, 2022. Brief of Respondent supporting their arguments follows.

### **ARGUMENTS**

- 1. The Court of Appeals did not err in their determination that the Petitioner did not preserve the Confrontation Clause argument so it was not preserved for appeal and could not be addressed by the Court of Appeals.**

### **Relevant Facts**

The State called to the stand lead investigator Detective Robert Bailey. During his testimony he spoke about statements given by the victims, he was also asked about any gunshot residue test (GSR) done on any individual involved in this case. Detective Bailey explained why GSR’s are done, and that there is a six-hour window to complete these tests. If the GSR test is not done within this window of time the test is useless. (R. p. 344 l. 17 – p. 345 l. 6). Detective Bailey also testified that he was unaware if any test was performed on the Petitioner. (R. p. 345 l. 13-16). During his testimony there was never an objection raised by the Petitioner regarding his lack of expertise in revealing when or how these tests are conducted, nor was there an objection raised

regarding him not being introduced as an expert in this field. The Petitioner allowed this testimony to continue and even asked questions regarding GSR during cross examination.

During cross-examination the Petitioner inquired about any GSR test being conducted on the co-defendant. (R. p. 360 l. 24 – p. 361 l. 1). Petitioner also inquired about GSR found on clothing, and if any test done on the clothing of the co-defendant. (R. p. 361 l. 9-11).

During re-direct examination the State inquired into the results of the GSR performed on the co-defendant. The State used the GSR report to refresh the memory of Detective Bailey regarding the test results. Petitioner objected due to the fact Detective Bailey was never introduced as an expert on gunshot residue tests. (R. p. 369 l. 22 – p. 370 l. 11). The trial court allowed the testimony mainly due to the Petitioner’s questioning of Detective Bailey on GSR testing during cross-examination. The trial court specifically ruled that the door was opened by the Petitioner and the State merely used the test document to refresh the memory of Detective Bailey on whether or not the results were obtained. (R. p. 11 l. 20-24).

The next day the Petitioner re-opened their objection and moved for a mistrial but now due to a violation of the Confrontation Clause. The trial court denied their motion for mistrial. The trial court stuck with their original ruling that the Petitioner opened the door to Detective Bailey’s testimony regarding the GSR test results of the co-defendant.

### **Standard of Review**

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). 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 manifest abuse of discretion accompanied by probable prejudice. *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847 (2006). The failure to make an objection at the time evidence

is offered constitutes a waiver of that right. *Cogdill v. Watson*, 289 S.C. 531, 537 347 S.E.2d 126 (Ct. App. 1986). We have routinely held that a party must object at the first opportunity to preserve an issue for review. *State v. Aldret*, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999). 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. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003).

### **Discussion**

The Petitioner argues that the Court of Appeals erred in deciding that his argument was not preserved for appeal. Initially the Petitioner made an objection due to the fact that Detective Bailey was not an expert in the field of GSR testing. The trial court ruled that the Petitioner opened the door to the State's questioning and overruled the Petitioner's objection. The next day the Petitioner brought in a new argument for a motion for mistrial. The Petitioner argued that since Detective Bailey was not the individual who conducted the actual test his testimony violates the confrontation clause. The Respondent argues that it was too late to raise this argument. The opportunity had already passed, the Court of Appeals was correct that it was not preserved for review.

The present case before this Court is very similar to this Court's decision in *State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 645 (2013). In *Brockmeyer* the Appellant argued that the trial court erred in allowing items into evidence in violation of the confrontation clause.

William Mark Brockmeyer was convicted of shooting and killing Nicholas Rae. During trial the State introduced as evidence, the Appellant's t-shirt, a shell casing, magazine and pistol recovered near the murder scene, and a fired projectile recovered from Mr. Rae's neck during the autopsy. At the time the State moved to introduce these items into evidence the Appellant objected.

The objection was based solely on an insufficient foundation. *Brockmeyer*, 406 S.C. at 344, 751 S.E.2d at 655. Later during the trial, the State attempted to introduce the fired projectile. The Appellant once again objected based on, “insufficient foundation of the chain of custody.” *Id.*, 406 S.C. At 345, 751 S.E.2d at 656. Later during the testimony of the SLED agent regarding receiving these items of evidence the Appellant objected finally alleging a violation of the confrontation clause.

Within the *Brockmeyer* opinion this Court decided:

We first find Brockmeyer’s claim is not preserved for appellate review. Although Brockmeyer objected to the admission of the t-shirt, the shell casing, the magazine, the .380 pistol, and the fired projectile, none of Brockmeyer’s initial objections alleged a Confrontation Clause violation; rather, Brockmeyer challenged only the sufficiency of the foundation for admitting each item. The issue of whether evidence is admissible under “state-law requirements regarding proof of foundational facts” is distinct from the issue of whether a defendant’s Sixth Amendment confrontation right was violated.

Thus, on appeal, Brockmeyer may not bootstrap a Confrontation Clause objection onto his objection to the State’s proof of foundational facts. Although Brockmeyer eventually raised Confrontation Clause objections, those objections were untimely as to the admission of the items themselves and do not preserve for appellate review the issue of whether that evidence was properly admitted.

*Id.*, 406 S.C. at 354, 751 S.E.2d at 659.

Within the present case the Petitioner initially objected to the results coming in through Detective Bailey due to the fact he was never introduced as an expert in GSR. There was never any mentioning of the Confrontation Clause during this initial objection. This was not raised until the next day when Petitioner made an attempt to raise this argument during a motion for mistrial. (R. p. 391 l. 21-23). Failure to contemporaneously object to a question not advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial. *State v. Lynn*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981).

Within their brief the Petitioner alleges that during their objection they raised the United States Supreme Court case of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)(certificates of state lab analysis being introduced without testimony of the lab operator violated the confrontation clause.) The Petitioner argues that the mentioning of this decision reveals they were arguing the confrontation clause during their initial objection. However, *Melendez-Diaz* was not raised until the next day. The Petitioner had ample opportunity to raise a violation of the confrontation clause at the time the GSR testing results were mentioned, and after Detective Bailey finished his testimony, but it was not done. Therefore, the Court of Appeals was correct in deciding this argument was not preserved for appeal. To preserve an issue for appellate review, an Appellant must object at his first opportunity. *State v. Sullivan*, 310 S.C. 311, 426 S.E.2d 766, 768 (1993). A defendant must object at his first opportunity to preserve an issue for appellate review. *State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991).

The grounds being raised for an objection must be immediately made known to the trial court. If this is not done, then it is permanently waived. The reason for this is the trial court must have an opportunity to make an immediate and reasoned decision regarding an objection. The rationale behind the requirement of a contemporaneous objection is to enable trial judges to make reasoned decisions by appropriately developing issues by way of argument both for, or against, any particular legal position. *State v. Torrence*, 305 S.C. 45, 67, 406 S.E.2d 315, 327 (1991).

It is clear by the record that the Petitioner failed to raise a violation of the confrontation clause in a timely fashion. During Detective Bailey's testimony Petitioner raised an objection regarding Detective Bailey not being an expert in the field of GSR testing, not the confrontation clause. These two matters are totally different. There is no way the trial court should have assumed that the argument of the Petitioner would be anything, but the fact Detective Bailey was not

introduced as an expert in that field. Being an expert in a particular field relates to actual knowledge of a particular aspect being raised during testimony. The confrontation clause is related to the Sixth Amendment right that guarantees that “in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him. *Brockmeyer*, 406 S.C. at 340, 751 S.E.2d at 653, quoting, *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Unless it is brought to the attention of the trial court, there is no way the trial court is going to know the issue of the confrontation clause is being raised. The Petitioner waiting until the next day to make this argument is too late for it to be preserved for appeal. That objection should have been made at the time the question was asked and answered by Detective Bailey. The Court of Appeals was correct, this issue was not preserved, so it could not be considered by the Court of Appeals. The decision of the Court of Appeals was correct and should not be reversed by this Court.

- 2. The Court of Appeals did not err in finding that even if the argument regarding the Confrontation Clause was preserved, Petitioner’s counsel opened the door to the State’s questioning regarding the results of the gunpowder residue test done on the co-defendant.**

#### **Relevant Facts**

During trial Detective Bailey testified as to the purpose of GSR kits and the fact there exists a six-hour window to perform these tests. (R. p. 344 l. 19 – p. 345 l. 2). He also testified that a GSR test was not done on the Petitioner. (R. p. 345 l. 15-16). During cross-examination the Petitioner inquired if any GSR test was done on Sanquan or Theodore. (R. p. 360 l. 8-11). Petitioner also asked Detective Bailey if the co-defendant was seen within this six-hour window, and if any GSR test was done on the co-defendant. (R. p. 360 l. 25 – p. 361 l. 1). On cross the defense also asked Detective Bailey if it was possible to retrieve GSR off clothing, and if the clothing of the co-defendant was collected and tested for GSR. (R. p. 361 l. 12-15).

On re-direct examination, the State asked Detective Bailey that since he was the case agent, he had access to all information collected in this case. (R. p. 362 l. 22-25). The State then inferred to Detective Bailey about having access to all of the information collected including results of the GSR tests. (R. p. 369 l. 15-18). The State then decided to inquire about the results of the GSR test done on the co-defendant. At the time Detective Bailey did not remember the results. The State offered to show Detective Bailey the test results only to refresh his memory. The Petitioner objected stating that Detective Bailey “is not an expert in the actual testing of GSR kits.” (R. p. 369 l. 22 – p. 370 l. 11). The State told the court they were not asking him as an expert only to refresh his memory on the results of the test.

The trial court allowed the testimony because he used his report just to refresh his recollection to information, he was already privy to. The trial court also ruled that Petitioner opened the door to this line of questioning when they asked Detective Bailey about the co-defendant testing for GSR. (R. p. 370 l. 11).

### **Standard of Review**

A litigant cannot complain of prejudice by reasons of an issue he has placed before the court. *Frazier v. Badger*, 361 S.C. 94, 104, 603 S.E.2d 587, 592 (2004). “Once a defendant opens the door, the solicitor’s invited response is appropriate so long as it... does not unfairly prejudice the defendant.” *State v. Simmons*, 430 S.C. 1, 14, 841 S.E.2d 845, 852 (2020), *quoting, Ellenberg v. State*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006). 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 judge. *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (2008). Otherwise, inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence. *Bowman v. State*, 422 S.C. 19, 40, 809 S.E.2d 232, 243 (2018).

## Discussion

Within a footnote in the *Rivers* opinion the Court of Appeals made this determination,

“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 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))”

*Rivers*, 2021 WL 52323315, n.1

It was clear by the questioning by the Petitioner he opened the door as to any results of the GSR test. Petitioner questioned Detective Bailey regarding the GSR test done on the co-defendant and victims as well as the clothing of the Petitioner and co-defendant (R. p. 360 l. 25 – p. 361 l. 15). So, it was only fair for the trial court to allow the State to question Detective Bailey as to the results since the Petitioner questioned him in such depth regarding the GSR tests. Not allowing the results into evidence would have left the jury wondering about these results. Where defense counsel purposefully and explicitly opens the door on a particular line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on the same topic. *U.S. v. Lopez-Medina*, 596 F.3d 716, 731 (10<sup>th</sup> Cir. 2010). The sole reason the trial court allowed the results into evidence was because the Petitioner open the door to this line of questioning.

The introduction of GSR being done on the victim and co-defendant was never objected to by the Petitioner. On cross-examination the Petitioner even inquired about certain aspects of the collection of GSR, including that fact it can be recovered from clothing and whether or not the clothing of the co-defendant was tested. The questioning regarding the GSR test being done on the co-defendant properly led the State to ask Detective Bailey about the co-defendant's GSR test results. If the Petitioner had not raised that line of questioning the State would not be able to inquire about these results. Since the Petitioner went at length about the test performed on the co-defendant the door was opened. The ruling of the Court of Appeals was lawful and should not be subject to reversal.

- 3. Even if the Court of Appeals erred in their decision the gun powder residue test was not the reason for the Petitioner's conviction, this ruling did not influence the final outcome so any error that might have been committed by the Court of Appeals, or the trial court should be considered harmless.**

#### **Relevant Facts**

There was ample evidence provided by the State proving the Petitioner guilty of these offenses beyond a reasonable doubt. There were numerous eyewitnesses who testified that the Petitioner and his co-defendant came to Antonio's apartment armed with weapons and while one looked for money the other held them at gunpoint. Law enforcement testified that Petitioner was found shot laying near a bag containing items from the robbery and a gun. The gun that matched ballistics as the murder weapon had the Petitioner's DNA on the trigger. Due to all of the facts presented proving the Petitioner's guilt, if the decision made by the Court of Appeals was in error it must be considered harmless.

#### **Standard of Review**

Error is harmless where it could not reasonably have affected the trial's outcome. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Most errors that occur during trial,

including those that violate a defendant's constitutional right, are trial error that are subject to harmless error analysis. *State v. Jenkins*, 412 S.C. 643, 651, 773 S.E.2d 906, 909 (2015).

### **Discussion**

The "harmless error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than the virtually inevitable presence of immaterial error'" *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013), *quoting*, *Delaware v. VanArsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

Petitioner argues that his right to confrontation was denied due to the trial court allowing the results of the GSR testing into evidence through a witness not recognized as an expert in this field. Petitioner also argues that the negative result of the GSR from the co-defendant was an important part of the state's case. The State introduced more definitive evidence proving that the Petitioner committed these crimes beyond a reasonable doubt. So, if any error occurred it must be considered harmless.

The United States and South Carolina Supreme Courts have determined the criteria that the court must use to consider if an actual error can be considered harmless. In the case of *State v.*

*Gracely*, this Court decided:

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.

*State v. Gracely*, 399 S.C. 363, 375 S.E.2d 880, 886 (2012)(emphasis in original), *quoting*, *VanArsdall*, 475 U.S. at 673.

It is clear that sufficient evidence was presented by the State to the jury that would cause the jury to determine that Petitioner committed this crime beyond a reasonable doubt. This determination would have been made without the inclusion of GSR evidence. Within his brief the Petitioner argues that “The negative result of the GSR test from the co-defendant was an important part of the State’s case.” The Respondent disagrees.

During trial the Petitioner’s major defense was that this incident occurred during a drug deal that went wrong. It was their position that the Petitioner was the person armed with the .40 caliber weapon and was just present when the co-defendant shot three individuals killing Kirby Fyall and severely wounding the other two. All of the evidence presented greatly revealed that this was an armed robbery not some drug deal gone bad. As a result of this armed robbery one person was killed three others were wounded, including the Petitioner.

During trial Antonio testified that when he answered the door he was immediately shot. (R. p. 288 l. 22 – p. 289 l. 6). This fact was never in dispute. Victims testified that they were held at gunpoint by one person, while the other searched the house. (R. p. 109 l. 7-8; R. p. 124 l. 17-19). They were then forced to remove their pants which were taken by the defendants. (R. p. 109 l. 4-5; R. p. 124 l. 20-22). The actions by the defendants amounted to an armed robbery, not some drug deal.

During trial the Petitioner argued that the loaded .40 caliber weapon that was not fired in this robbery was found close to him when the police arrived. Ample evidence revealed that this was the gun of the co-defendant and not the one used by the Appellant. The evidence presented revealed that the gun used by the Petitioner was the 9mm, which was determined as the caliber of weapon fired during the commission of this crime, which was the only weapon fired while this crime was being committed.

Antonio testified that after being shot, he escaped through a kitchen window and ran to the house of his friend Cummings. Cummings testified that he grabbed a baseball bat and ran to the incident location. At that time, he saw the co-defendant with a pillowcase in one hand and a gun in the other. (R. p. 93 l. 5-6). He also testified that he saw the co-defendant throw the gun down and run. (R. p. 93 l. 14). Anita Marie the I.D. Technician who responded to the scene testified that the gun found behind the trashcan was a fully loaded Walther .40 caliber handgun. (R. p. 230 l. 6-13). Chad Smith a SLED forensic lab technician testified that all the shell casings found at the scene were .9mm or .380 that could have been fired from a 9mm. (R. p. 433 l. 19-21). Detective Bailey testified that he received from Anthony Fyall a bag containing an unloaded handgun. (R. p. 347 l. 25 – p. 348 l. 7). Sara Goodman, SLED forensic scientist who did DNA testing testified that she made comparisons to samples that were provided to her. (R. p. 478 l. 23-24). DNA samples were taken from Sanquan, Theodore, Antonio, Eleanor Delesline, and Nashisi Walker. (R. p. 342 l. 7 – p. 344 l. 1). Detective Bailey testified that he received a search warrant to go to the Charleston County Detention Center to obtain DNA samples from both defendants. (R. p. 352 l. 9-20). During trial Agent Goodman testified that she found a DNA mixture on the trigger grip of the murder weapon, the major contributor however, was the Petitioner. She testified that the Petitioner's match was approximately 1 in 32 billion. (R. p. 479 l. 11).

Petitioner believes that the inclusion of GSR evidence was a major part of the State's case, it was not. Without GSR evidence the evidence would have still revealed that the weapon that matched all the shell casings found at the scene had DNA on the trigger grip matching the Petitioner and not the co-defendant. Eyewitnesses testified that they saw the defendants leave the house, as the co-defendant carried the Petitioner because he was shot in both legs. Each eyewitness testified that both defendants were active participants in this armed robbery. A witness also

testified that the gun that was found at the scene near a trashcan was thrown by the co-defendant not the Petitioner. This was the fully loaded .40 caliber that was not fired during the course of this robbery. All of the evidence reveals that GSR evidence was not necessary to prove the Petitioner committed these crimes.

There was also ample evidence presented revealing that the Petitioner was a major contributor in the commission of an armed robbery. Even if the Petitioner was not the shooter, he is still guilty of murder. One who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. *State v. Langley*, 334 S.C. 643, 648, 334 S.E.2d 98, 101 (1999). There was testimony that both individuals appeared with weapons. One was at the door pointing his gun at the victims while the other searched the house. There was some conflicting testimony as to who was holding the gun and who was searching, however, there was no conflict as to what was occurring. The defendants even made everyone take off their pants. These pants and the victim's other belongings were later found in the pillowcase which was being carried by the Petitioner as he was being carried by the co-defendant as they were fleeing the incident location. This reveals an armed robbery, which makes this a situation in which both individuals were guilty of the murder of Kirby. Any evidence regarding any error that could have occurred with the inclusion of the GSR results must be considered harmless.

Detective Bailey's testimony was important because he was the lead investigator. He obtained the DNA evidence from the witnesses and the defendants and took statements from the victims. On cross-examination the Petitioner asked questions regarding the clothes that were found belonging to both defendants that were never tested. But the ultimate test regarding whether or not an error of the court is harmless, is the overall strength of the prosecution's case and whether or

not the exclusion of the evidence could have possibly exonerated the Petitioner. Without GSR results there is more than enough evidence through testimony and forensics that gave the jury the ability to find the Petitioner guilty beyond a reasonable doubt.

In *State v. McCray*, 413 S.C. 76, 773 S.E.2d 914 (Ct. App. 2015), the Court of Appeals determined that the statement of the DNA expert was of minimal importance to the State's case, so they determined this to be harmless error.<sup>2</sup> The same holds true for the present case. The GSR results are minimal considering the other evidence provided by the state. The murder weapon with the Petitioner's DNA on the trigger, all witnesses testifying that two individuals committed the armed robbery and murder, the police finding the Petitioner at the scene, and both defendants wearing gloves proving that they conspired to commit this criminal act. Even without the GSR evidence there was sufficient evidence revealing the obvious conclusion that the Petitioner along with his co-defendant committed this crime.

The State will not surrender their argument that the trial court nor the Court of Appeals committed these errors. However, if this Court determines that there was an error, due to the amount of evidence provided, the Respondent request this Court find such error harmless. Error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained. *State v. Watts*, 321 S.C. 158, 467 S.E.2d 272, 277 (Ct. App. 1996).

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<sup>2</sup> "A violation of a defendant's Sixth Amendment right to confront a witness is not *per se* reversible error if the error was harmless beyond a reasonable doubt." *McCray*, 413 S.C. at 91, 773 S.E.2d at 922, quoting, *State v. Pradubsri*, 403 S.C. 270, 280, 743 S.E.2d 98, 104 (Ct. App. 2013).

**CONCLUSION**

The trial court made the proper decisions regarding this matter so the decision made by the Court of Appeals were lawful and should not be subject to reversal.

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