STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Chesterfield County
Honorable D. Craig Brown, Circuit Court Judge

Opinion No. 2023-UP-398 (S.C. Ct. App. Filed Dec. 13, 2023)

Lower Court Case No. 2016-GS-13-00545

THE STATE,

RESPONDENT,

V.

RASHAWN MONTEZ LITTLE,

PETITIONER.

APPELLATE CASE NO. 2021-001385

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 9, 2024.

QUESTION PRESENTED

Did the Court of Appeals err in finding that the trial judge properly allowed a witness, qualified as an expert in firearm analysis, to testify that a particular bullet matched a particular firearm to the exclusion of all other firearms rather than limiting her testimony to the fact that a bullet was consistent with being fired from a particular firearm when the State failed to prove that the science behind the match testimony was reliable?

STATEMENT OF THE CASE

In September of 2016, the Chesterfield County Grand Jury indicted Petitioner, Rashawn Montez Little, for six counts of attempted murder, two counts of murder, three counts of possession of a weapon during the commission of a violent crime, and one count of unlawful possession of a firearm by a person convicted of a violent offense, indictments #2016-GS-13-545-556. (R. pp. 537-578). On November 15, 2021, Petitioner proceeded to jury trial before the Honorable Craig Brown. S. Boyd Young, Emily Kuchar and William Frick represented Petitioner at trial. Kernard Redmond, Mary Thomas Johnson Lee, and Elizabeth Munnerlyn prosecuted the case. After all of the indictments were read to the jury during jury selection, after opening statements, and after the State presented two witnesses the State moved to withdraw the indictment for unlawful possession of a firearm by a person convicted of a violent offense, conceding that Petitioner did not have a conviction for a violent offense pursuant to the statute. (R. p. 87, lines 5-23). The judge granted the State's motion to withdraw indictment #2016-GS-13-556 for unlawful possession of a firearm by a person convicted of a violent. (R. p. 113, lines 6-9). The jury found Petitioner guilty of the other charges. Judge Brown sentenced Petitioner to life on the two murder indictments, thirty (30) years concurrent for each of the six attempted murder charges, and five (5) years concurrent for the weapon charge not associated with the murder charges for which Petitioner received a life sentence. A timely notice of intent to appeal was served on November 19, 2021, and the direct appeal perfected.

On December 12, 2023, the South Carolina Court of Appeals filed an unpublished *per curiam* opinion affirming the convictions. State v. Rashawn Montez Little, No. 2023-UP-398 (S.C. Ct. App. December 13, 2023). A timely petition for rehearing was filed and then denied on January 9, 2024. This petition for writ of certiorari follows.

STANDARD OF REVIEW

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "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) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the Petitioner must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

REASON WHY CERTIOARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari to clarify the reliability requirement provided in Rule 702, SCRE.

FACTS

On October 25, 2015, between 7:00 and 8:00 PM, officers with the Chesterfield County Sheriff's responded to a call about shots fired and a subject being hit at a trailer park on the outskirts of Pageland. (R. p. 47, line 12 – p. 48, lines 1-3; p. 49, lines 11-16). When they arrived the officers saw that Luther Chambers had been shot in the arm. (R. p. 48, lines 2-15). Chambers was described as "very uncooperative." (R. p. 49, lines 1-2). Chambers did not testify at trial.

Officers then heard additional shots fired from inside the trailer park. (R. p. 50, lines 2-25). As the officers headed in the direction of the gunshots they saw Tyvon Threatt laying in the arms of a female, later identified as Megan McManus, on the front porch of a trailer. (R. p. 51, lines 1-14). Threatt had been shot and later died. (R. p. 51. lines 11-14). As the officers were clearing other trailers for safety, gunshots rang out from inside a trailer. (R. pp. 53-57). Captain Wayne Jordan testified that as the officers took cover a black male opened the front door of the trailer and began shooting. (R. p. 56, lines 10-12). Captain Jordan identified the shooter as Petitioner. (R. p. 56, lines 19-25). Officers returned fire. (R. p. 56, lines 12-13).

Captain Jordan then testified that they saw Petitioner coming from around the corner of the trailer with his hands up, unarmed. (R. p. 58, lines 14-25). Although Petitioner did not comply with orders, Captain Jordan ordered the other officers not to shoot as Petitioner was not armed. (R. p. 59, lines 4-12). Captain Jordan testified that Petitioner got into a parked Cadillac and sped away. (R. p. 59, lines 13-22). Officers shot at the Cadillac. (R. p. 59, line 23 – p. 60, line 1). Captain Jordan also testified that they did not chase after Petitioner because they needed to check the trailer for another shooter. (R. p. 60, lines 18-25).

When the officers entered the trailer they found a deceased female, later identified as Petitioner's wife, Shannon Little, and her three children. (R. p.61, lines 1-11). The three children were interviewed and the videos and transcripts of those interviews were admitted in evidence without objection. (R. p. 358, lines 10-21). Although not present when the officers entered the trailer, they later learned that Marques Tyson had been in the trailer at the time of the shooting. (R. p. 62, lines 1-10). Tyson was interviewed and charged with two counts of attempted murder and possession of a weapon during the commission of a violent crime. (R. p. 299, line 18 – p. 300, lines 1-13).

A short time later the Cadillac was found abandoned on the side of the road with the engine running, lights on, the driver's side door open, and the right front tire blown. (R. p. 194, lines 8-16; p. 195, lines 6-7). SLED blood hounds and helicopter were called to assist in finding the suspect. (R. p. 200, line18 – p. 201, lines 1-4). At approximately 5:30 AM agents located Petitioner and, after an encounter with Egor the K9 officer and an agent's taser, Petitioner was arrested.

At the trailer officers found a MMP Body Guard 380 semiautomatic handgun under the left side of the neck of the deceased, Shannon Little. (R. p. 256, lines 7-14). The gun was admitted in evidence at trial, without objection, as State's exhibit #41. (R. p. 256, lines 16-22). After interviewing Marques Tyson, Agent Todd Schenk returned to the crime scene and discovered more evidence. (R. p. 318, lines 17-24). Agent Schenk testified that after receiving additional information he returned to the crime scene and found a Ruger Security Six 357 revolver in the yard behind the trailer, labeled Marker A . (R. p. 257, lines 13-16; p. 275, lines 2-12; p. 277, lines 14-20). This gun was also admitted in evidence at trial, without objection. (R. p. 257, lines 17-21).

ARGUMENT

The Court of Appeals erred in finding that the trial judge properly allowed a witness, qualified as an expert in firearm analysis, to testify that a particular bullet matched a particular firearm to the exclusion of all other firearms rather than limiting her testimony to the fact that a bullet was consistent with being fired from a particular firearm when the State failed to establish that the science behind the match testimony was reliable.

Petitioner objected to the testimony of the firearms examiner from SLED, Suzanne Cromer, that a particular bullet was fired by a particular firearm on the ground that the testimony lacked scientific reliability. (R. p. 408, line 25 – p. 409, lines 1-9). The State proffered the testimony of Agent Cromer. (R. pp. 409-425). The judge overruled the objection. (R. p. 422, line 14 – p. 423, 424, 425, lines 1-22).

Before the jury Agent Cromer testified that seven firearms were submitted: 1.) a 40 caliber Glock belonging to Officer Robinson; 2.) a 40 caliber Glock belonging to Officer Cruz; 3.) a 45 caliber H and K submachine gun belonging to Officer Burns; 4.) a Phoenix Arms 25 auto caliber firearm found on the bed in the trailer; 5.) a Highpoint brand 45 auto caliber found in the Caravan vehicle at the scene; 6.) a Ruger Revolver 357 Magnum caliber labeled Marker A, State's exhibit #40; and 7.) a Smith and Wesson 380 semiautomatic M and P Body Guard pistol found under the deceased, State's exhibit #41. (R. p. 438, line 1 – p. 439, lines 1-10).

Agent Cromer testified that multiple cartridge cases or shell casings were collected at the scene and submitted for examination. (R. p. 439, lines 20-21). The agent then testified that certain casings matched certain firearms. She testified that eleven of the 40 S and W caliber cartridge cases were fired by Officer Robinson's firearm. (R. p. 439, lines 21-23). She testified that four of the 40 caliber cartridge cases were fired by Officer Cruz's firearm. (R. p. 440, lines 3-7). She testified that three of the items were fired by Officer Burns' firearm. (R. p. 440, lines 11-15). The agent testified that three items submitted were unsuitable for identification. (R. p.

441, lines 12-22). She testified that four of the cartridge cases were fired by the same gun but not any of the guns submitted. (R. p. 442, lines 1-23). The agent testified that four of the cartridge cases were fired by the 380 semiautomatic pistol, State's exhibit #41. (R. p. 444, lines 15-17; p. 445, lines 6-10). The agent additionally testified that the bullet jacket recovered at the autopsy of Shannon Little was fired by the 380 semiautomatic pistol, State's exhibit #41. (R. p. 446, line 19 – p. 447, lines 1-10). Petitioner renewed his objection to the testimony. (R. p. 446, line 25 – p. 447, line 1). The judge should have limited the agent's testimony to consistencies she observed rather than matches.

While firearm identification testimony has generally been found admissible, the reliability of this kind of expert testimony has come under scrutiny. See David H. Kaye, Firearm-Mark Evidence: Looking Back and Looking Ahead, 68 Case W. Res. L. Rev. 723, 724 (2018). As the United States District Court for the District of Massachusetts wrote:

> Courts have understandably been gun shy about questioning the reliability of firearm identification evidence. See Santiago, 199 F.Supp.2d at 111–12 ("The Court ... can only imagine the number of convictions that have been based, in part, on expert testimony regarding the match of a particular bullet to a gun seized from a defendant or his apartment."). Accord United States v. Foster, 300 F.Supp.2d 375, 377 n. 1 (D.Md.2004) (noting that "[b]allistics evidence has been accepted in criminal cases for many years"); United States v. O'Driscoll, 2003 WL 1402040 at *1, 2003 U.S. Dist. LEXIS 3370 at *4 (M.D.Pa. Feb. 10, 2003). Storm clouds, however, are gathering. See Sexton v. State, 93 S.W.3d 96 (Tex.Cr.App.2002) (rejecting matching of cartridge cases based on magazine marks alone without recovery of underlying magazine); Ramirez v. State, 810 So.2d 836 (Fla.2001) (rejecting toolmark analysis matching knife to fatal stab wounds).

United States v. Monteiro, 407 F. Supp. 2d 351, 364 (D. Mass. 2006)(n. 1 citing United States v. Green, 405 F. Supp. 2d 104 (D. Mass. 2005) omitted).

In limiting the firearm identification testimony in United States v. Green, 405 F. Supp. 2d 104, 124 (D. Mass. 2005), the United States District Court for the District of Massachusetts wrote:

> Putting together this precedent with the evidence I have heard, suggests admission but with limitations, limitations identical to those I adopted in *Hines*. O'Shea is a seasoned observer of firearms and toolmarks; he may be able to identify marks that a lay observer would not. But while I will allow O'Shea to testify as to his observations, I will not allow him to conclude that the match he found by dint of the specific methodology he used permits "the exclusion of all other guns" as the source of the shell casings. Defense will be permitted full and fair cross-examination.

Agent Cromer's qualification as an expert was not challenged. (R. p. 412, lines 14-15). The agent could testify about her observations. As in Green, however, Agent Cromer should not have been allowed to testify about matches between casings and firearms.

In limiting the firearm identification testimony in Monteiro the Massachusetts District Court explained that, "[b]ecause an examiner's bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty[,]" and "[a]llowing the firearms examiner to testify to a reasonable degree of ballistic certainty permits the expert to offer her findings, but does not allow her to say more than is currently justified by the prevailing methodology." 407 F. Supp. 2d at 372. The agent's testimony in the present case should have been limited to a reasonable degree of ballistic certainty.

The Massachusetts courts are not alone in limiting firearm identification testimony. In United States v. Ashburn, 88 F. Supp. 3d 239, 248 (E.D.N.Y. 2015), the United States District Court for Eastern District of New York wrote:

> Based on the court's review of the field of toolmark and firearms identification, including the NAS Report upon which Laurent relies, and on this court's review of Daubert proceedings performed in other cases, an instruction limiting LaCova's testimony is appropriate. See, e.g., Willock, 696 F.Supp.2d at 549 (precluding expert from stating opinions and conclusions with any degree of certainty and precluding expert from stating that it was a "practical impossibility" that any other firearm fired the cartridges in question); Taylor, 663 F.Supp.2d at 1179 (limiting expert to an opinion that his conclusion was "to a reasonable degree of ballistic certainty"); Glynn, 578 F.Supp.2d at 574 (limiting expert ballistics opinion to statement that match was "more likely than not"); Diaz, 2007 WL 485967, at *14 (precluding experts from testifying that their conclusions were "to the exclusion of all other firearms in the world" and limiting description of certainty to a "reasonable degree of certainty in the ballistics field"); Monteiro, 407 F.Supp.2d at 372 (limiting testimony to a "reasonable degree of ballistic certainty"); Green, 405 F.Supp.2d at 124 (precluding expert from testifying that his methodology permitted "the exclusion of all other guns").

The court in Ashburn cited Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under both Daubert and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), Agent Cromer's testimony should have been limited to consistencies she observed. The error was not harmless.

In United States v. Brown, 973 F.3d 667, 703 (7th Cir. 2020), the defendants challenged the reliability of toolmark analysis as a discipline for expert testimony. The United States Court of Appeals for Seventh Circuit admitted the expert testimony but noted reliability concerns with toolmark analysis writing:

> Although it is hard to show abuse of discretion, the defendants urge that it occurred in this instance when the district court found that the toolmark analysis is sufficiently reliable. They assert that the "premise underlying the field of firearms analysis—that no two firearms will produce the same microscopic features on bullets and cartridge cases—[i]s, at best, an unproven hypothesis." They also complain that there are no objective, quantitative standards for determining whether two ammunition components "match."
>
> The defendants' argument has respectable grounding. It is based largely on a report issued by the President's Council of Advisors on Science and Technology (PCAST). The report states that the "foundational validity can *only* be established through multiple independent black box studies," and it identifies only one such

> study, the Ames Study. According to PCAST, the other available studies could not estimate the reliability of firearms analysis because they employed "artificial designs that differ[ed] in important ways from the problems faced in casework," which "seriously underestimate[d] the false positive [match] rate." Ultimately, the PCAST report found that firearms analysis "[fell] short of the criteria for foundational validity." The defendants also emphasize that even the Ames Study had not been published or subject to peer-review at the time of trial. Moreover, they contend, the government's experts misled the jury by testifying about the Ames Study's error rate, because that rate is not representative of the "entire discipline of firearms analysis."

973 F.3d at 703. The present case is distinguished from Brown because the challenge in the present case was not to the reliability of toolmark analysis generally but to the reliability of the methodology used by the agent to the extent that she could testify that there was a match.

In affirming the conviction the Court of Appeals wrote:

> The firearms analyst testified the methodology she used has been widely accepted since the early 1900s and extensively peer reviewed. She also testified her conclusion in this case was subjected to quality control and confirmed by another examiner. Therefore, we find her opinion testimony as to a "match" between the bullet and the firearm was sufficiently reliable for a qualified firearms analyst. See State v. Hackett, 215 S.C. 434, 445, 55 S.E.2d 696, 701 (1949) (finding that courts "allow the introduction of expert testimony to show that the bullet which killed the deceased was fired from a particular pistol or rifle ... [if] the witness ... is, by experience and training, qualified to give an expert opinion in the field of [firearms analysis]").

State v. Little, No. 2021-001385, 2023 WL 8621086, at *1 (S.C. Ct. App. Dec. 13, 2023). While firearm identification generally has been widely accepted since the 1900s and extensively peer reviewed, the State failed to show that the methodology used by the agent was reliable to the extent that she could testify that there was a match.

In State v. Wallace, 440 S.C. 537, 543–44, 892 S.E.2d 310, 313 (2023), the South Carolina Supreme Court wrote:

> Rule 702 of the South Carolina Rules of Evidence provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." To admit expert testimony under Rule 702, the proponent—in this case the State—must demonstrate, and the trial court must find, the existence of three elements: "the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Council, 335 S.C. at 20, 515 S.E.2d at 518.

The only element in question in the present case is the third element – whether the underlying science is reliable. The State submits that Agent Cromer's testimony falls in the non-scientific, or experienced-based category. (Final Brief of Respondent p. 17). Regardless of the type of expert testimony, the State must still prove reliability. The State failed to prove that the "match" testimony was reliable.

In State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688–89 (2009), the South Carolina Supreme Court addressed non-scientific dog tracking evidence and wrote:

> The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony. We have set forth above foundational requirements for Rule 702 expert testimony concerning dog tracking evidence.
>
> We do not pretend to know the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence. Consequently, we offer no formulaic approach that will apply in the generality of cases. Yet the trial court in the discharge of its gatekeeping role in determining admissibility must initially answer the always present threshold questions of qualification and reliability.

The trial judge in the present case abused his discretion by allowing Agent Cromer to testify that a particular firearm fired a bullet rather than limiting the testimony to consistencies. In State v. Jones, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018), the South Carolina Supreme Court wrote,

"A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion where the ruling is unsupported by the evidence or controlled by an error of law. Maybank v. BB&T Corp., 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016)." The State failed to show that the "match" testimony, as opposed to limited testimony that a bullet was consistent with being fired from a particular firearm, met the reliability requirement for admission. The trial court's ruling that the "match" testimony was reliable is unsupported by the record.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of January, 2024.

STATE OF SOUTH CAROLINA

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Certiorari to the Court of Appeals
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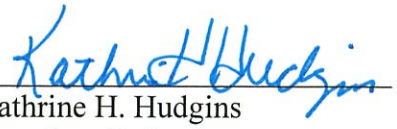
APPELLATE CASE NO. 2021-001385

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the petition for writ of certiorari to the Court of Appeals and appendix in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and the South Carolina Court of Appeals; and on Rashawn Montez Little, #320601, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 25th day of January, 2024.



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