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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2024-000115

THE STATE, ...RESPONDENT

v.

RASHAWN M. LITTLE, ... PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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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?

RESPONDENT'S COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals properly affirm the trial court's ruling admitting firearms identification testimony where the expert's methodology is widely accepted, has been subjected to peer review and publication, and includes quality controls to ensure reliability.

STATEMENT OF THE CASE

In September 2016, the Chesterfield County Grand Jury returned indictments charging Petitioner, Rashawn Montez Little, with two counts of murder, six counts of attempted murder, and three counts of possession of a weapon during the commission of a violent crime.[1] (Indictments, R. 537-78). The State alleged that Petitioner murdered Shannon Little (his wife) and Tyvon Threatt (a neighbor) during a shooting spree at a trailer park. (Indictments, R. 562 and 566). Additionally, the State alleged that Petitioner attempted to murder Luther Chambers (an acquaintance) and five police officers who responded to the scene. (Indictments, R. 538, 542, 546, 550, 554 and 558).

The case went to trial in November 2021. (R. 1). Boyd Young, Esq., and William Frick, Esq., represented Petitioner. (R. 1). The jury found Petitioner guilty as charged. (R. 1; 518, l.23 - 520, l. 5). The Honorable Craig Brown sentenced Petitioner to life in prison for each murder charge, thirty years for each attempted murder charge, and five years for one count of possession of a firearm during the commission of a violent crime.[2] (R. 534, l. 16 - 535, l. 19). Judge Brown ordered the sentences to run concurrently. (R. 535, l. 21). Petitioner timely appealed.

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[1] The grand jury also returned an indictment for unlawful possession of a firearm by a person convicted of a violent offense. (R. 10, l. 23-25). After jury selection, the parties realized that Petitioner's prior convictions for distribution of crack cocaine did not qualify as a crime of violence under S.C. Code Ann. § 16-1-60. (R. 87, l. 14-23; see also R. 523, l. 18-23). The State withdrew that indictment. The trial court issued a curative instruction as requested by the defense at the close of the State's case. (R. 87, l. 25 – p. 88, l. 9; p. 450, l. 9-21). Though defense counsel challenged the curative instruction at trial, (see R. 450, l. 24; 452, l. 3 – 453, l. 3), the sufficiency of the curative instruction was not an issue in the appeal.

[2] Under S.C. Code Ann. § 16-23-490(A), the five year sentence for possession of a firearm during the commission of a violent crime "does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime." The trial court cited this provision in declining to impose a sentence for two counts of possession of a firearm during the commission of a violent crime because the underlying violent offense for those two charges was murder. (R. 534, l. 2-15).

By Final Brief of Appellant filed February 22, 2023, Petitioner presented two issues in his brief to the South Carolina Court of Appeals:

> 1. Did the trial judge err in allowing a witness, qualified as an expert in firearm analysis, to testify that a particular bullet was fired by 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?
>
> 2. Did the trial judge err in allowing an agent to testify as to the statement made by a non-testifying witness about who shot him when the statement did not meet a hearsay exception pursuant to Rule 803, SCRE?

(FBOA at 1).

The State filed its brief in response on February 28, 2023. Petitioner did not file a reply brief. By unpublished decision issued on December 13, 2023, the Court of Appeals affirmed. *State v. Little*, Unpublished Opinion No. 2023-UP-398 (S.C.Ct.App. filed Dec. 13, 2023). (App. at 1-4). Petitioner filed a petition for rehearing on December 27, 2023, that was denied on January 9, 2024. (App. at 5-15).

Petitioner filed his petition with this Court on January 26, 2024. This return follows.

STATEMENT OF FACTS

A. Petitioner's Arrest

On the evening of October 25, 2015, Lieutenant Wayne Jordan and other officers were conducting an inventory of stolen property in Chesterfield County. (R. 47, l. 15; 90, l. 3-4; 122, l. 13-15). Over the police radio, they heard a call of shots fired at a nearby trailer park on Evans Mill Road. (R. 47, l. 12-25). According to dispatch, one person had already been hit. (R. 47, l. 25 - 48, l. 1). The officers quickly responded to Evans Mill Road and found Luther Chambers bleeding from a gunshot wound to the arm. (R. 48, l. 17-18). They tried to gather information from Chambers, but he was evasive and uncooperative. (R. 48, l. 22-23). Within a few minutes,

the officers heard more gunshots coming from the trailer park less than five hundred yards away. (R. 49, l. 7-10; 50, l. 3). One officer stayed behind with Chambers, while the rest headed towards the sound of gunfire. (R. 50, l. 17.)

The officers were moving into a dangerous situation. (R. 124, l. 13-24). People were screaming and running indiscriminately for shelter. (R. 91, l. 24-25; 145, l. 8-16). Amid the chaos, the officers had to identify the active shooter, prevent additional violence, and help the victims. (R. 52, l. 15-23; 92, l. 2; 124, l. 13-24; 145, l. 8-16). They initially found Tyvon Threatt on the front porch of a trailer, lying in the arms of his girlfriend. (R. 51, l. 3-14; 341, l. 21). He was "bleeding profusely" from a gunshot wound to the lower abdomen. (R. 107, l. 20; 173, l. 6). The officers moved Tyvon inside the trailer so that he and EMS would have cover from additional gunfire. (R. 146, l. 21-23; 173, l. 3-23). When asked what happened, Tyvon repeatedly told EMS that "Shawn Little shot me."[3] (R. 351, l. 24; 352, l. 9). Tyvon said that he just went to check on Petitioner after hearing gunshots and had no idea why Petitioner shot him. (R. 343, l. 13-14). Tyvon Threatt would die at the hospital from hypovolemic shock, or loss of blood from the gunshot wound. (R. 37, l. 20-25).

While EMS personnel treated Tyvon, Lieutenant Jordan and his team approached Petitioner's trailer. He could hear a female inside say either "I can't come out" or "I ain't coming out." (R. 53, l. 18-20). The officers also heard children "just hysterically crying." (R. 54, l. 10). As Lieutenant Jordan knocked on the front door, a back light came on. (R. 97, l. 2-6). Then, out of nowhere, someone inside began firing at the officers through the walls. (R. 54, l. 11-14). Two officers saw sparks flying "right at [Lieutenant Jordan's] head." (R. 97, l. 8-11; 109, l. 23; 150, l. 9-13). The responding officers, including Lieutenant Jordan, thought he had

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3 Three witnesses testified to Tyvon Threat's dying declaration that Petitioner shot him: his father (R. 356, l. 9-13), his girlfriend, and an emergency medical technician (R. 351, l. 19-24).

been hit. (R. 54, l. 18; 151, l. 10-13). When the shooting stopped, Lieutenant Jordan dove across the hood of a parked car. (R. 55, l. 10-13). He and the other officers would not have much time to figure out their next move.

As Lieutenant Jordan called to another officer, the trailer's front door flew open. (R. 56, l. 10-12). Petitioner appeared in the doorway, guns blazing in both hands.[4] (R. 56, l. 9-25). Some of the officers fired back. (R. 57, l. 13; 73, l. 9; 99, l. 19). One officer explained that he returned "cover" or "suppression fire," which means he was trying "to stop the defendant from shooting us." (R. 99, l. 19-23). According to the officer, "it was like something you would see in the movies." (R. 99 l. 11-12).

When the shooting stopped, the front door of the trailer swung shut. (R. 155, l. 25; 156, l. 1). The officers checked on their teammates, reloaded their weapons, and moved to better positions. (R. 128, l. 5-6; 156, l. 3-4). As Lieutenant Jordan considered whether to storm the trailer, Petitioner walked around the corner with his hands up. (R. 57, l. 18-25; 58, l. 18-22). His shirt was covered in blood. (R. 102, l. 12). One of the officers yelled, "what do we do, Lieutenant?" (R. 59, l. 6). Lieutenant Jordan responded, "do not shoot him, I don't see a gun. He does not have a weapon, don't shoot." (R. 59, l. 6-8). Rather than firing their weapons, the officers ordered Petitioner to the ground. (R. 59, l. 8-9). Ignoring those commands, Petitioner walked over to a Cadillac, got inside, and threw it in drive. (R. 157, l. 11-12; 162, l. 8-9). As Petitioner sped away, one of the officers fired at the tires and engine block. (R. 180, l. 16-17). Lieutenant Jordan told his team not to pursue Petitioner as he drove away in the Cadillac. (R. 60, l. 18-25).

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[4] The five responding officers testified during the State's case-in-chief. Three identified Petitioner as the man firing at them from the front doorway of the trailer. (R. 56, l. 25; 100, l. 12; 177, l. 7-15). The other two officers could see an individual firing from the doorway, but could not identify Petitioner as that individual. (R. 135, l. 15-20; 152, l. 3-4; 166, l. 13-14).

Instead, they cleared the trailer for additional shooters and victims. (R. 60, l. 20-25). By that point, they could hear "this god-awful screaming" from the children inside. (R. 104, l. 25). As they entered, they saw Shannon Little's body in the living room, face-up in a pool of blood. (R. 61, l. 4-5; 105, l. 21). She was "obviously deceased." (R. 61, l. 10-11). Underneath her neck was a Smith & Wesson .380 caliber pistol. (R. 233, l. 1-2; 256, l. 10-14). Shannon's three children were also hovering on top of their mother. (R. 105, l. 23-24; 163, l. 5). One officer testified that "you could feel it in the pit of your stomach. It was awful." (R. 105, l. 1-2). After clearing the home, officers tried to bring the children outside. But one of the children simply would not let her mother go. (R. 61, l. 16). When Lieutenant Jordan picked her up, she was holding so tightly that she dragged Shannon's dead body across the floor. (R. 61, l. 18).

As the dust settled at the trailer park, other law enforcement officers passed by a Cadillac driving with its tire out. (R. 193, l. 19-22; 194, l. 1-3). They later found Petitioner's car on an access road leading to a swamp. (R. 194, l. 12). The headlights were on, the engine was still running, and the driver's door was wide-open. (R. 194, l. 13-16). With Petitioner nowhere in sight, the officers waited for assistance from a fugitive apprehension team. (R. 196, l. 8-16). SLED agents would arrive with bloodhounds and a helicopter equipped with infrared night vision. (R. 201, l. 14-19).

After searching through the night, a SLED agent spotted Petitioner at 5:00 am the next morning. (R. 201, l. 19-24). The agent quickly drew his weapon and ordered Petitioner to the ground. (R. 203, l. 6-9). Rather than following the command, Petitioner said, "I ain't got no strap[5] on me no more" and started heading for some woods. (R. 203, l. 13-25). Seeing that Petitioner was unarmed, the agent called for non-lethal munitions. (R. 204, l. 2-3). A canine

5 The agent clarified that "strap" is a "street term[] for a handgun or some sort of weapon." (R. 228, l. 15-16).

officer released his apprehension dog, Egor, to subdue Petitioner. (R. 205, l. 1-7). As Egor jumped to catch his target, Petitioner punched the dog in the face. (R. 205, l. 10-11). The dog fell to the ground, and Petitioner kicked it. (R. 205, l. 11). Undeterred, Egor tried again. (R. 205, l. 12). But once more, Petitioner punched and kicked the dog away. (R. 205, l. 12-13).

When Petitioner kicked Egor the second time, he slipped and fell. (R. 205, l. 14). The agent drew his taser and ordered Petitioner to remain on the ground. (R. 205, l. 16-20). Once again, Petitioner refused to comply, so the agent tazed him. (R. 205 l. 23). Petitioner temporarily froze from the electrical shock, allowing other officers to "swarm on top of him." (R. 206, l. 2-3). Nevertheless, Petitioner continued to resist once the electrical shock from the taser wore off. (R. 206, l. 5-7). It would take three rounds of taser blasts before Petitioner would allow agents to put him in handcuffs. (R. 206, l. 4-11).

Following Petitioner's arrest, authorities conducted an autopsy of Shannon Little.[6] The official cause of death was a gunshot wound to the upper neck. (R. 32, l. 11; 534 l. 22). The bullet penetrated her C1 vertebrae, pierced the brainstem, and stopped in the vertebral bone. (R. 35, l. 1-3). She died instantly. (R. 44, l. 6-8). Given the amount of soot surrounding the entrance wound, the forensic pathologist assessed that the gun was only a few inches away from her neck when it was fired. (R. 36, l. 3-12). Although the pathologist noted that it was theoretically possible for someone to shoot themselves in that part of the neck, he had never seen a suicide committed like that during his career. (R. 41, l. 9-16).

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6 The authorities also conducted an autopsy of Tyvon Threatt. As noted above, he died from hypovolemic shock, or loss of blood from the gunshot wound. (R. 37, l. 20-25).

B. Petitioner's Trial

1. Expert Firearms Identification Testimony

The State also presented testimony from Suzanne Cromer, a firearms identification expert from SLED. Among other things, Cromer assessed whether the pistol found underneath Shannon Little's neck fired the bullet removed from her brainstem and four cartridge cases recovered at the scene. (R. 442-47). The defense conceded that Cromer was qualified to give expert testimony but challenged the "reliability of the science" she used in formulating her opinion.[7] (R. 412, l. 14-15). Specifically, the defense objected to "the language that this bullet was fired by this particular firearm to the exclusion of all other firearms in the world." (R. 409, l. 7-9). Following the objection, the trial court heard the State's proffer on reliability. (R. 409-22).

a. The State's Proffer

Cromer first defined the technical discipline: firearms identification. (R. 413, l. 4). The process analyzes ammunition components, primarily bullets and cartridge cases, to determine whether they were fired by a specific weapon. (R. 413, l. 5-7). If there is no firearm for comparison, the examiner identifies potential models or manufacturers that could have fired a bullet or cartridge case. (R. 413, l. 7-13). A firearm will mark a cartridge case at five specific points: the breach face, the firing pin impression, the ejector, the extractor, and the chamber. (R. 413, l. 15-20). The examiner looks at each of these specific areas when analyzing a cartridge case. (R. 413, l. 19-20).

Analyzing a fired bullet "is a little different because it's marked by a different part of the firearm." (R. 413, l. 20-22). The examiner first weighs the bullet to determine its caliber. (R.

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[7] Cromer did provide the trial court a brief summary of her qualifications. (R. 410-11). Of note, at the time of trial she had been qualified as an expert in firearms analysis approximately 120 times. (R. 437, l. 3). See e.g., State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) (considering the admissibility of Cromer's ballistics report).

414, l. 7-11). Next, the bullet is placed under a microscope to identify the type of rifling from the gun barrel. (R. 414, l. 15-23). From there, the examiner counts the number of "lands and grooves," *i.e.,* raised and depressed areas on the bullet. (R. 414, l. 23-25; 415, l. 1). The number varies by firearm manufacturer. (R. 414, l. 23-25). After that, the examiner will determine which direction the barrel makes the bullet spin. (R. 415, l. 6-9).

If all of these characteristics on a bullet match a known standard, the examiner will compare microscopic markings on each. (R. 415, l. 14-18). These tiny markings arise from imperfections on a firearm that are left during the manufacturing process. (R. 435, l. 17-21). According to Cromer, this final step is "the only subjective part of our job." (R. 420, l. 2). For quality assurance, a second examiner must also conduct an independent microscopic comparison. (R. 420, l. 4-8). The second examiner does not know the result of the first analysis. (420, l. 13-14). The rationale is that the examiner must be "completely blind" to prevent "cognitive bias." (R. 420, l. 18; 421, l. 2). Both examiners must independently arrive at the same conclusion before an official finding is reached. (R. 420, l. 9-10).

Cromer explained that this methodology has been around since the early twentieth century and is generally accepted in the field. (R. 416, l.1, l. 25; 417, l. 1). It has also been subjected to peer review in various journals about firearms identification. (R. 417, l. 2-3). The firearms identification unit at SLED is also accredited according to international standards by the American Society of Crime Lab Directors. (R. 417, l. 22-25). In other words, she and other analysts at SLED conduct firearms identification "the same way as all of these other international organizations and crime labs." (R. 418, l. 2-3). Finally, Cromer must pass an annual proficiency test conducted by an independent agency. (R. 417, l. 7-19).

b. The Trial Court's Ruling

After hearing the proffer, the trial court ruled that the State had established reliability. (R. 422-25). The court noted that firearms identification has been around since the early twentieth century and is generally accepted as reliable. (R. 425, l. 1-6). In fact, the methodology is used not only in the United States but also throughout the world. (R. 425, l. 6-7). Moreover, it has been subjected to peer review and publication. (R. 423, l. 19-20). Finally, the court identified the quality control mechanisms employed by SLED. (R. 424, l.8-24). Most importantly, a second examiner must conduct an independent evaluation on the case. (R. 423, l. 23-25). Only if both examiners reach the same conclusion will a report the issued. (R. 424, l. 1-3). In light of these factors, the court ruled Agent Cromer's testimony was reliable under State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) and State v. Jeffrey L. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). (R. 422, l. 14-23). Defense counsel then stated, "Our specific request is that she be allowed to testify but not be able to renew [sic] the ultimate opinion that this bullet was fired from this particular firearm." (R. 425, l. 12-15). The trial court found that Rule 704, SCRE allowed opinion testimony even when "it embraces an ultimate issue" in the case, then overruled the objection. (R. 425, l. 16-20).

c. The Expert's Testimony to the Jury

Cromer testified that "in my opinion," the pistol found under Shannon's body fired four cartridge cases recovered at the crime scene.[8] (R. 445, l. 17-18; 446, l. 3-17). Two of those cartridge cases were found outside the trailer, and two inside. (R. 445, l. 21-24; 446, l. 2-17). Additionally, the bullet removed from Shannon Little's brainstem had the same caliber, type of

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[8] Cromer's language varied slightly when describing her conclusions on one of the four cartridge cases. Instead of "in my opinion," Cromer testified that "again, I did that microscopic comparison, and it was my conclusion that it was fired from" the .380 caliber pistol. (R. 446, l. 16-18).

rifling, number of lands and grooves, and direction of twist as the .380 pistol. (R. 447, l. 4-6). Therefore, Cromer conducted a microscopic comparison. (R. 447, l. 6-7). According to Cromer, the result of microscopic comparison was that "in my opinion there was enough of those individual identifying markers that matched up for me to say that I believe that this was fired by the ... 380 Smith and Wesson Bodyguard pistol." (R. 447, l. 7-10).

On cross-examination, Cromer conceded that the microscopic comparison involved a subjective analysis. (R. 448, l. 5-22). There are no "set number of points to match or anything like that." (R. 448, l. 18-20). Rather, Cromer analogized the process to evaluating a signature. (R. 449, l. 4-5). Although her signature can differ based on her focus and if she is in a hurry, "you can pretty much make out my S and my C ... I know it's mine." (R. 449, l. 9-10). Stated differently, each bullet may have differences, but "we're looking for similarities and the individual matching identifying criteria." (R. 449, l. 17-18).

2. Additional Evidence

a. Excited Utterances

Luther Chambers' girlfriend testified for the State at trial. She explained that on the evening of murders, Chambers drove to Petitioner's house to borrow some money. (R. 330, l. 2-3). She subsequently received a call from Chambers. (R. 331, l. 9). She could tell that he was "in distress" and "in shock" when he called. (R. 331, l. 19). He explained, "Bay, I've been shot." (R. 332, l. 2). After receiving the phone call, the girlfriend drove to Petitioner's house to figure out what happened. (R. 332, l. 5). She asked Petitioner if Chambers was there because he had just called and told her about the shooting. (R. 332, l. 12-15). Petitioner replied he was not. (R. 332, l. 14). The girlfriend then saw the police arrive on scene and ran towards them. (R. 332, l. 20-21). She would later hear gunshots, followed by someone "hollering that ... Tyvon had [been] shot." (R. 333, l. 7-8).

Chambers' father subsequently arrived at the trailer park looking for his son. (R. 334, l. 5). He and the girlfriend drove to the hospital where Chambers was initially taken, CMC-Union in Monroe, North Carolina. (R. 334, l. 8-12). There, the girlfriend saw that Chambers "was still in shock from the gun wound." (R. 334, l. 17). Chambers told her "that Shawn shot him." (R. 334, l. 23). The girlfriend explained to the jury that she knew Chambers "was referring to the defendant." (R. 335, l. 12).

Following his treatment at CMC-Union, Chambers would receive more treatment at CMC-Main Hospital in Charlotte. (R. 334, l. 12). At approximately 6:59 am,[9] a SLED agent approached Chambers while he "was in the hospital awaiting treatment for a gunshot wound." (R. 292, l. 4-5). According to the agent, Chambers seemed "very frustrated and aggravated that he had been shot." (R. 292, l. 4-6). Stated differently, the agent believed Chambers "was still under the stress of the situation ... specifically having been shot." (R. 292, l. 10-12; 293, l. 22-23). In fact, Chambers could not even initial a police form because he "was unable to write." (R. 292, l. 18). Recall that Chambers had been shot in the arm. (R. 48, l. 17-18). After finding Chambers at the hospital, the agent asked Chambers if he knew why law enforcement was there to talk. (R. 295, l. 16-18). Over Petitioner's objection, the agent testified that Chambers immediately responded, "Shawn shot me." (R. 295, l. 17-18). At the time, the agent did not know Rashawn Little because he had just begun to investigate the case. (R. 295, l. 6-7).

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[9] On direct exam, the agent could not recall when he interviewed Luther Chambers on the morning of October 26, 2015. (R. 291, l. 20-22). On cross-examination, he testified that the time reflected on the police form was 6:59 am. (R. 312, l. 25).

b. Recorded Interviews of Shannon Little's Children

The State also introduced recorded interviews of Shannon Little's three children.[10] (St. Ex. 99). One of Shannon's daughters, Zara, told the interviewer that Petitioner said "I wanna kill Bam because he's a snitch." (St. Ex. 110, p. 10). The jury had previously learned that "Bam" was a nickname for Luther Chambers. (R. 291, l. 5-6; 322, l. 9; 330, l. 14). Petitioner also said, "today's the day," which Zara understood to mean "[e]veryone dies." (R. 622). Zara further explained that:

> I was looking in the living room my dad was holding my mama and she couldn't move and she was saying 'I don't want to die I don't want to die' he said 'open up the door' and she said 'if you love me you'll let me go back there with my children' and he wouldn't let her and that's when he was holding in the chair and then someone shot her and she fell on the ground.

(R.617-18).

Shannon's other daughter, Carmella, corroborated much of that account. Prior to the murders, Petitioner said "today is the day." (R. 600, 602). Carmella explained that a man came over to their home and said "hey Shawn." (R. 600, 602). Petitioner replied, "hey snitch" and shot the man. (R. 600, 602). Carmella later saw Petitioner holding her mom around the waist. (R. 603). According to Carmella, Shannon was trying to get to her kids, but Petitioner would not let her go. (R. 603). Carmella did not know who shot her mom because she was in her bedroom. (R. 600). By the time she came out and found her mom on the floor, Petitioner had left the house. (R. 600).

c. Petitioner's Statement to Law Enforcement

After Petitioner's arrest, he requested to speak with the SLED agents investigating the case. (R. 303, l. 21-22). Petitioner told the agents that there had been another shooting at the

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[10] The Defense consented to the introduction of the recorded interviews in lieu of live testimony. (R. 358, l. 1-8). Additionally, the State introduced transcripts of the interviews. (R. 359, l. 22-25; 360, l. 1-3; R. 587-627).

trailer park a few days before the murders. (R. 304, l. 21-22). A family member, whose name Petitioner did not provide, advised that "somebody was out to get him." (R. 304, l. 23-24). On the day of the murders, Petitioner smoked marijuana for most of the day with his cousin, Marques Tyson. (R. 305, l. 1-4). Petitioner explained that "weird things were happening" that day, but would not elaborate further. (R. 306, l. 13-17). At some point, Luther Chambers was shot. (R. 305, l. 7-8). Petitioner believed Chambers was either "the police" or "worked for the police." (R. 308, l. 15-17). Although Petitioner admitted being present when Chambers was shot, he claimed he did not pull the trigger. (R. 305, l. 7-8). Petitioner later hid in the woods. (R. 305, l. 10). He apparently had no idea what happened to his wife, Shannon Little. (R. 305, l. 12). Upon hearing Petitioner's story, a SLED agent asked bluntly, "who shot [your] wife." (R. 305, l. 14-15). Petitioner responded that "he didn't want to talk anymore and that he would contact [the agents] back if he wanted to talk." (R. 305, l. 15-17). Nevertheless, Petitioner said "he wanted to talk to the feds" as the agents were getting ready to leave. (R. 305, l. 18). The agents ended the interview and walked out the door. (R. 305, l. 19).

STANDARD OF REVIEW

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242 (b), SCACR. General reasons for granting a petition include to review a Court of Appeals decision that: (1) reflects a novel question of law; (2) included a dissent; (3) conflicts with this Court's precedent; (4) addressed a substantial constitutional right; or (5) decided a matter of federal law in a way that conflicts with federal precedent. *Id.* The foregoing list is not exclusive, and this Court may exercise its discretion in the absence of these facts. *Id.*

Admission of Expert Testimony

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). The trial court abuses its discretion when "the ruling is unsupported by the evidence or controlled by an error of law." State v. Jones, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018).

Admission of Evidence

The standard of review for the admission or exclusion of evidence is an abuse of discretion. State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014). "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. Anderson, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009)(quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

ARGUMENT

The Court of Appeals Properly Affirmed the Trial Court's Admission of the Firearms Identification Testimony Because the Expert's Methodology Is Widely Accepted, Has Been Subjected to Peer Review and Publication, and Includes Quality Controls to Ensure Reliability.

The Court of Appeals considered Petitioner's argument that the State's "expert should have been allowed to testify only that the bullet recovered was consistent with the firearm, rather than her conclusion that they matched because it is unsupported by a reliable method of firearms analysis." (App. at 1). However, the Court of Appeals resolved:

> 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]").

(App. at 2-3).

In his petition to this Court, Petitioner submits this Court's review is warranted to "clarify the reliability requirement ... in Rule 702, SCRE." (Pet. at 5). Respondent submits that is unnecessary. This Court has clearly reviewed the reliability requirement and set out guidance for the lower courts. At base, Petitioner's argument is not with the rule but the Court of Appeals' disposition. The opinion, however, is well-supported by the case law and the facts of record. Again, Petitioner has failed to show certiorari review is warranted.

The Testimony Supports the Reliability Finding

Prior to admitting expert testimony under Rule 702, the trial court must determine whether the substance of the testimony is reliable. State v. Roy Lee Jones, 423 S.C. 631, 637, 817 S.E.2d 268, 270 (2018). In cases involving "scientific" evidence, it considers the four *Council* factors: (1) whether the expert's methodology has been published and subjected to peer review, (2) has previously been applied in similar situations, (3) includes quality control procedures, and (4) is consistent with recognized scientific laws and procedures. State v. Council, 335S.C. 1, 20, 515 S.E.2d 508, 517 (2001). In contrast, the same "formulaic approach" does not apply when a party offers nonscientific, or experience-based expert testimony. Roy Lee Jones, 423 S.C. at 638-39, 817 S.E.2d at 272.

Regardless of the type of expert testimony, the trial court must act as a "gatekeeper" to ensure reliability of the evidence. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). But the "gatekeeping" role does not mean the trial court decides if the expert is "correct." Roy Lee Jones, 423 S.C. at 640-41, 817 S.E.2d at 272. In fact, the trial court must be careful to avoid

doing so. Id. Only the jury gets to accept or reject the expert's opinion. Id. Instead, "[t]rial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it be may offered into evidence." Id. Stated differently, "the trial judge must remain at the gatepost and not tread on the advocate's or the jury's turf." State v. Warner, 430 S.C. 76, 87, 842 S.E.2d 361, 366 (Ct. App. 2020) *overturned on other grounds*, 436 S.C. 395, 872 S.E.2d 638 (2022). Once a party demonstrates that "the expert's testimony consists of a reliable method faithfully and reliably applied, the gate of admissibility should be opened." Id. On appeal, the ruling is reviewed for abuse of discretion. White, 382 S.C. at 269, 676 S.E.2d at 686.

Again, this Court has already significantly reviewed the requirements of Rule 702 in existing case law. The reason Petitioner offers to support the grant of certiorari review – to further address these requirements – lacks merit. Further, the trial court satisfied its gatekeeping role in this case.

Although Agent Cromer's opinion falls in the nonscientific, or experience-based category, the court addressed all of the *Council* factors. (R. 422-25). First, the methodology has been published and subjected to peer review. (R. 417, l. 1-4). Agent Cromer explained those include trade publications and the Journal of the American Medical Association. (R. 417, l. 2-4). Second, law enforcement agencies routinely use the methodology to determine whether a specific weapon fired a bullet or cartridge case. (R. 415-18). According to Agent Cromer, law enforcement has employed the methodology since the early twentieth century. (R. 446, l.1). Third, Agent Cromer discussed the quality control procedures adopted at SLED. For example, a second agent conducts an independent, blind comparison on every case. (R. 420, l. 2-8). Only if both agents reach the same conclusion will SLED issue a report. (R. 420, l. 7-8). Additionally,

the SLED lab is accredited by American Society of Crime Lab Directors. (R. 417, l. 22-25). Finally, Agent Cromer and SLED use the same methodology as law enforcement agencies across the globe. She testified that they do it "the same way as all of these other international organizations and crime labs." (R. 418, l. 2-3). In other words, SLED's methodology is consistent with recognized scientific law and procedures. See Council, 335 S.C. at 19, 515 S.E.2d at 517.

Furthermore, the trial court's ruling aligns with other jurisdictions that have considered the issue. See e.g., United States v. Brown, 973 F.3d 667, 704 (7th Cir. 2020) (noting that firearms identification has been "almost uniformly accepted by federal courts"); United States v. Hicks, 389 F.3d 514, 526 (5th Cir. 2004) ("[T]he matching of spent shell casings to the weapon that fired them has been a recognized method of ballistics testing in this circuit for decades."); Amaro v. State, 272 So. 3d 853, 855 (Fla. Dist. Ct. App. 2019) ("Forensic firearm and tool-mark identification evidence is not a new or novel methodology, and its admissibility in criminal cases is well-documented in Florida's jurisprudence."); Al Amin v. State, 597 S.E.2d 332, 344 (Ga. 2004) (noting that firearms identification evidence "is not novel, and has been widely accepted in Georgia courts.") *overruled on other grounds by* State v. Lane, 838 S.E.2d 808, 819 (Ga. 2020); State v. Britt, 718 S.E.2d 725, 729 (N.C. Ct. App. 2011) ("Courts in North Carolina have upheld the admission of expert testimony on firearm toolmark identification for decades.").

For example, in Brown the United States Court of Appeals for the Seventh Circuit considered the reliability of an expert's opinion on "whether a bullet or casing was fired from a particular firearm." Brown, 973 F.3d at 702. The court noted that firearms identification has been tested and subjected to peer review, has a low rate of error, and "is widely accepted beyond the

judicial system." Id. As such, the methodology satisfied the *Daubert*[11] standard for reliability. Id. The Seventh Circuit's analysis mirrors that of the trial court here. See Warner, 430 S.C. at 86, 842 S.E.2d at 366 (noting South Carolina's standard for reliability is "extraordinarily similar" to the *Daubert* test).

Petitioner even conceded in his brief in the Court of Appeals that "firearm identification testimony has generally been found admissible." (FBOA at 7). He does so again here. (Pet. at 9). He simply objects to the *scope* of that testimony. (FBOA at 7; Pet. 9-10). According to Petitioner, if an expert testifies that a firearm "is a 'match' to an absolute certainty," the opinion exceeds what "is currently justified by the prevailing methodology." (FBOA at 8; Pet. at 10) (quoting United States v. Monteiro, 407 F. Supp. 2d 351, 372 (D. Mass. 2006)). In support of the argument, Petitioner cited in his Court of Appeals briefing to several cases from federal district courts in Massachusetts and New York. (FBOA at 7-9).[12] He again relies on these few lower court federal cases. (Pet. at 9-11). Yet, these cases cannot help him here, especially considering the testimony at issue.

Simply, Petitioner's argument on the merits fails because – regardless of other arguments concerning the phrasing as forwarded in the Monteiro case or others – Agent Cromer never rendered an opinion "to the exclusion of all other firearms," the basis of his complaint. Nor did she express "absolute certainty" in her conclusion, a rephrasing of his basic complaint. (See FBOA at 8; Pet. at 10) (quoting Monteiro). Quite the opposite. Agent Cromer "determined that

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11 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

12 Even while acknowledging some courts have imposed limitations, it has been suggested that phrasing limitations such as those reflected in the cited cases results in an improper judicial "rewrite [of] an expert witness's opinion" since there is no provision in case law or court rule that empowers a court to do so. *See* Colonel (Ret.) Jim Agar, The Admissibility of Firearms and Toolmarks Expert Testimony in the Shadow of Pcast, 74 Baylor L. Rev. 93, 188-89 (2022).

in my opinion those four fired cartridge cases were fired by that firearm." (R. 445, l. 8-10) (emphasis added). As for the bullet removed from Shannon Little's brainstem, Agent Cromer testified that "*in my opinion* there was enough of those individual identifying markers that matched up for me to say that *I believe* that this was fired by the ... 380 Smith and Wesson Bodyguard pistol." (R. 447, l. 7-10) (emphasis added). By repeatedly using terms such as "in my opinion" and "I believe," Agent Cromer is acknowledging the existence of other possibilities, not ruling them out. Using a reasonable juror analysis, the jury here could simply hold no illusion Agent Cromer employed an objective, mathematical process that could and did rule out all other possibilities. She even compared the process to analyzing signatures. (R. 449, l. 4-13).

In other words, Agent Cromer's testimony avoided the concerns identified in the case law Petitioner cites. See e.g, Monteiro, 407 F. Supp. 2d at 372; United States v. Green, 405 F. Supp. 2d 104, 124 (D. Mass. 2005). Her testimony never went beyond what "is currently justified by the prevailing methodology." Monteiro, 407 F. Supp. 2d at 372. Instead, her testimony mirrors what the Seventh Circuit approved in Brown. In that case, the court noted that firearms identification "is used to determine *whether a bullet or casing was fired from a particular firearm*". Brown, 973 F.3d at 702 (emphasis added). The language in Brown is nearly identical to the Agent Cromer's testimony. Petitioner attempts to distinguish Brown by arguing the issue in Brown was not the science generally the reliability of "the methodology used by the agent ... *to the extent that she could testify that there was a match.*" (Pet. at 12). The strain of Petitioner's argument argues well for denial of the petition. Because the "testimony consists of a reliable method faithfully and reliably applied," the trial court acted within its discretion in admitting it. Warner, 430 S.C. at 87, 842 S.E.2d at 366.

Further, as the trial court additionally found, our rules of evidence specifically allow for admissibility of an opinion even where "it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. Nothing in the rule requires specific phrasing along the lines of those Petitioner suggests. *Accord* Sprague v. Avalon Care CR., 2019 UT App 107, ¶ 25, 446 P.3d 132, 140 (state precedent "does not require that an expert expressly state the phrase, 'to a reasonable degree of medical probability' for their testimony to be admissible or entitled to weight"); *see also* United States v. Cyphers, 553 F.2d 1064, 1072 (7th Cir. 1977) (finding "no requirement" in law that "an expert's opinion testimony must be expressed in terms of a reasonable scientific certainty in order to be admissible").

Further still, Petitioner's arguments against finding harmless error[13] do not warrant certiorari review primarily because the Court of Appeals did not find error, thus, did not conduct a harmless error review. (See App. 2-3). There is no ruling for this Court to review. Even so, as the State previously argued in its response brief in the Court of Appeals, to the extent the trial court should have limited Agent Cromer's conclusion "to a reasonable degree of ballistic certainty," the error is harmless. (FBOA at 8; Pet. at 10).

Some errors "are so insignificant and inconsequential they do not require reversal of a conviction." State v. Reyes, 432 S.C. 394, 405-06, 853 S.E.2d 334, 340 (2020). If a reviewing court is satisfied beyond a reasonable doubt that the error did not contribute to the guilty verdict, then the conviction should be affirmed under a harmless error analysis. State v. Tapp, 398 S.C.

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[13] In apparent support of his argument that an error occurred that was not harmless, Petitioner has cited to State v. Wallace, 440 S.C. 537, 892 S.E.2d 310 (2023), for the general point of a showing there is a reliability requirement. (Pet. at 11-13; see also App. 10-12). In Wallace, this Court noted with favor "the trial court's 'robust' examination of" the expert in keeping with the trial court's responsibility as gatekeeper." Id., at 549, 892 S.E.2d at 316. This further supports the ample basis to affirm in this case. As illustrated, the trial court carefully considered the evidence during the State's proffer.

376, 389-90, 728 S.E.2d 468, 475 (2012). Given the context of Agent Cromer's testimony, such a limitation "doesn't make any difference." See Reyes, 432 S.C at 406, 853 S.E.2d at 340. Agent Cromer informed the jury of the nature and limitations of firearms identification. (R. 431-36). Rather than expressing her findings in terms of "absolute certainty" or "to the exclusion of all other firearms," Agent Cromer repeatedly framed her conclusion as "in my opinion." (R. 445, l. 8-9; 447, l. 7; 448, l. 16-17). On cross-exam, counsel ensured the jury understood that her conclusion was not based on a mathematical formula. (R. 448, l. 5-20). Agent Cromer also explained that if there were "not enough markings" on the evidence, her official finding would be "unsuitable" for comparison. (R. 436, l. 1-3). Additionally, if there was no agreement on the markings, the finding would be "inconclusive." (R. 436, l. 3-7). Agent Cromer's testimony implies that she reached her conclusion based on a reasonable degree of ballistic certainty.

Petitioner alternatively argues that "Agent Cromer's testimony should have been limited to consistencies she observed." (FBOR at 9; Pet. at 11). But it practically was. (R. 447, l. 6-10; 449, l. 17-18). In discussing the rationale for concluding that the .380 pistol was the murder weapon, Agent Cromer explained that "in my opinion there was enough of those individual identifying markers that matched up for me to say that I believe that this was fired by the ... 380 Smith and Wesson Bodyguard pistol." (R. 447, l. 7-10). Moreover, the last words Agent Cromer said to the jury were, "[w]e're looking for similarities and the individual matching criteria." (R. 449, l. 17-18). Considering the context in which Agent Cromer placed her opinion, the alleged error in framing that opinion "doesn't make any difference." See Reyes, 432 S.C. at 406, 853 S.E.2d at 340. Therefore, any error at trial is harmless.

For all these reasons, the record and relevant precedent and rule well demonstrate that the trial court did not abuse its discretion in admitting the testimony. Consequently, there is no error

in the Court of Appeals affirming the trial court. Certiorari review is not warranted for this ordinary application of the established rule.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

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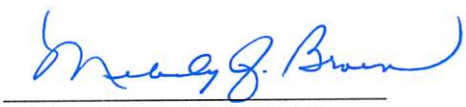
BY: 
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[17] Counsel acknowledges the prior work in this matter by Michael D. Ross, a former Assistant Attorney General who participated in briefing in the Court of Appeals. Mr. Ross is no longer with the Attorney General's Office, thus, is not listed as counsel of record. However, substantial portions of his work have been included in this return.