THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
General Sessions Court
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2024-UP-182 (S.C. Ct. App. filed May 22, 2024)

Appellate Case No. 2024-_____

The State,

Respondent,

v.

Charles Barham,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court's admission of testimony of Floyd Owen concening Petitioner's alleged participation in a prior burglary?

2. Did the trial court err in admitting the testimony of Laurin Barnes that Charles Kusko said Petitioner stole his tools?

3. Was the cumulative effect of the trial court's errors so prejudicial as to deny Petitioner a fair trial?

STATEMENT OF THE CASE

Petitioner, Charles Brandon Barham, was indicted by the Richland County grand jury on charges of murder, first-degree burglary, common-law conspiracy, and possession of a weapon during the commission of a violent crime. R. pp. 1-8. He was tried before a jury on August 26-30, 2019, in the Richland County General Sessions Court, with Judge DeAndrea G. Benjamin presiding. R. p. 13. The jury returned a verdict of guilty with respect to all four charges. R. pp. 1002-03. At a sentencing hearing held November 18, 2019, Judge Benjamin sentenced Petitioner to concurrent terms of 40 years for the murder and burglary convictions and five years for the conspiracy and weapon convictions. R. pp. 9-12, 1169.

Following the trial, the defense moved for a new trial based on alleged error committed by the court in the admission of the rebuttal testimony of Floyd Owen offered by the state during the trial. R. pp. 1128-30. The state filed a written response to this motion. R. pp. 1131-34. The court heard and denied this motion on October 14, 2019. R. pp. 1135-46. The defense also moved for reconsideration of the court's sentence. R. pp. 1171-72. The court denied this motion by order dated May 26, 2020. R. p. 1173.

Petitioner appealed, raising two claims of error in the admission of testimony and a third claim of cumulative prejudice. The charges arose from a house break-in and the shooting of Charles Kusko[1] in September 2015. One of the state's key witnesses was Floyd Owen, who was charged with the same offenses and admitted his guilt. One of Petitioner's issues on appeal (Issue 2) challenged the trial court's decision to allow the state to recall Owen to testify concerning Petitioner's alleged participation in an unrelated burglary that occurred in 2007. Another (Issue 1) challenged the trial court's admission of the testimony of Charles's daughter, Laurin Barnes, that months prior to the shooting Charles told her Petitioner had stolen his tools. The facts surrounding these issues are set out in greater detail in the argument section of this petition.

In an unpublished opinion filed May 22, 2024, a panel of the Court of Appeals affirmed. The Court affirmed as to Owen's rebuttal testimony upon a finding the defense opened the door to such testimony with its questioning of another witness and upon a finding that aspects of Petitioner's argument were not preserved. The Court affirmed as to the daughter's testimony upon a finding the objection was not preserved. The Court did not address the cumulative prejudice claim because it found no error with respect to the other claims. Petitioner filed a petition for rehearing, which the Court of Appeals denied by order filed August 12, 2024.

CONSIDERATIONS GOVERNING CERTIORARI REVIEW

Rule 242(b), SCACR, provides for certiorari review "where there are special and important reasons" and lists specific examples of the character of reasons which will be considered in determining whether to grant a writ of certiorari. Three of those reasons are present in this case: the issue of the admissibility of Owen's recall testimony involves both a novel question of law and

[1] Charles Kusko and other members of his family are referred to herein by their first names rather than their last names, for clarity.

substantial constitutional issues, and the decision of the Court of Appeals is in conflict with decisions of the Supreme Court. *See* Rule 242(b) (1), (3), (4), SCACR.

ARGUMENT AND AUTHORITIES

Floyd Owen shot Charles Kusko in Charles's home on the night of September 5-6, 2015. Owen and Charles were former lovers who had briefly lived together and who had remained friends after breaking up. R. pp. 512-14. They partied and did drugs together. R. pp. 512, 514, 516. In the early hours of September 6, the Sunday of Labor Day weekend, Owen broke into Charles's residence on Budon Court in Columbia, South Carolina. R. pp. 545-46. Owen entered Charles's bedroom and shot him twice in the head while he was sleeping. R. pp. 144-45, 548-49, 569. Owen admitted he committed the offenses. R. pp. 545-56, 548-49, 569. The murder was discovered on Tuesday, September 8, after James Jones went to Charles's home to check on him. R. pp. 50-51, 74. Jones observed a broken window, smelled an odor, and called 911. R. pp. 51-52, 64. Police arrived, entered, and found Charles's body. R. p. 74.

Owen admitted he had a motive. Charles was threatening to report Owen to the Department of Social Services, thereby jeopardizing Owen's contact with his children. R. pp. 223-24, 584-85. Owen was interviewed by Columbia police investigators the day after the body was found, September 9, and he lied and denied he had committed the crimes. R. pp. 563, 579-80, 589-90. He was questioned by the police again in 2017 after he was arrested for an unrelated armed robbery and gun charge, and he continued to lie and denied committing the crimes. R. pp. 564, 581-82, 588-89. He finally admitted the break-in and murder in his third statement to the police, but even then he gave an account that was not consistent with his trial testimony. R. pp. 590-94, 596-97.

Owen claimed Petitioner provided the gun he used and drove Owen to Charles's home for the purpose of killing Charles, waited nearby as lookout while Owen went in, and drove Owen

away after the shooting was over. R. pp. 534-51, 557. Petitioner denied any involvement in the events at Budon Court that night. R. pp. 865-66.

A week before Petitioner's trial, Owen pleaded guilty to murder, burglary, conspiracy, and possession of a firearm in connection with the break-in of the residence and the murder of Charles, but he had not yet been sentenced. He was facing varying amounts of prison time for the offenses, including a potential life sentence. R. pp. 570-75. He was also facing additional time for the unrelated armed robbery and firearm charges. R. pp. 576-77. He had not been sentenced following his plea, pending his testifying at Petitioner's trial, and he was hoping for more favorable treatment based on his cooperation and testimony against Petitioner. R. pp. 577-79.

The defense suggested Owen implicated Petitioner to protect his girlfriend, Jessica James. That contention was supported by evidence that the police had begun questioning James in 2017 and had threatened her with incarceration. R. p. 639. When Owen ultimately gave a statement to police in 2017 confessing to the murder and implicating Petitioner as well, he repeatedly asked law enforcement to keep James out of it. R. pp. 587-89.

The defense also suggested Charles's brother, Andrew Kusko, fabricated information against Petitioner to divert attention from himself. Charles and Andrew were brothers of Petitioner's mother, Karin Jean Barham. R. pp. 244, 834. Karin was disabled and required caregivers, having been in an accident some years earlier that left her with traumatic brain injury. R. pp. 246-47, 835. Over the years, various family members served as her caregiver and handled her affairs through successive powers of attorney. R. pp. 55, 246-47, 835-38. At the time of these events, Charles was the person handling Karin's finances. R. pp. 55, 247, 252, 837. Karin's brother Andrew believed Charles was misusing or stealing Karin's personal property and funds. R. pp. 171-72, 252, 325, 343-45. He believed Charles had misused or stolen from Karin property

and funds worth $38,000 to $39,000. R. pp. 252, 325. In the months ahead of Charles's murder, Owen told Andrew Charles was selling and throwing away Karin's things, which led to an ongoing dispute between Owen and Charles in July and August 2015, prior to Owen's murder of Charles on September 6, 2015. R. pp. 517-19.

Charles and Andrew had a history of angry disputes and an "up and down relationship." R. pp. 170-73, 245, 248, 280, 310-11. Andrew admitted having made statements others would characterize as threats against Charles, including that he would choke him. R. p. 311. On the Friday of Labor Day weekend, September 4, an incident occurred between Charles and Andrew at Charles's residence. R. pp. 57-59, 170-71. Andrew went there because of what Owen told him Charles was doing with their sister's belongings. R. pp. 248-49. Charles told Jones what occurred that Friday, including that he and Andrew had been fighting. R. p. 59. Charles was agitated, upset, and physically afraid of Andrew. R. pp. 59, 83, 170-71. Charles called the police, and the police arrived and placed Andrew under a no-trespass notice. R. pp. 59, 249-50, 326. When Charles's body was found the next Tuesday, September 8, Jones told law enforcement Charles had said he was afraid for his life because he and Andrew were in a dispute over property. R. pp. 60, 83.

On Tuesday, September 8, Andrew picked up his sister and took her to the Columbia Police Department to make a report about what Charles had been doing with Karin's property. R. pp. 227, 251-52, 343-45. While the lead investigator was at the Budon Court address following the discovery of Charles's body, he received a call and learned Andrew was at the police department making a report against his brother Charles. R. p. 227.

The defense contended it was Andrew, not Petitioner, who put Owen up to murdering Charles and supplied the gun. Owen's girlfriend told police Owen told her "Midget" supplied the gun. R. pp. 641-42. Midget was Andrew's nickname. R. pp. 314-15, 704-06.

The exact time of Charles's death was not pinpointed with certainty, but the pathologist who conducted the autopsy acknowledged it could have occurred within a 12-hour window the night of September 5-6 through the morning of September 6. R. pp. 149, 154-55. He believed the level of decomposition was consistent with death in the early morning hours of September 6, or possibly within a period of hours before or after the early morning hours. R. pp. 148-49, 154-56.

In its efforts to link Petitioner to Owen's crimes that night, the state offered into evidence a video from the security camera system of a business near the Budon Court neighborhood. That video showed a truck similar to Petitioner's white Chevy pickup truck in the area at approximately 5:04 and 5:10 a.m. on September 6. R. pp. 216-18, 233; State's Exhibits 132, 133. The state suggested this truck may have been Petitioner's, in keeping with Owen's claim Petitioner drove him to the Budon Court residence for the purpose of having Owen enter and kill Charles. R. pp. 216-18. However, the occupant or occupants of the vehicle in the video were not discernible, and the presence of this truck in the video, if it was Petitioner's truck, was consistent with Owen's having taken the truck while Petitioner was asleep and having driven himself to Charles's residence to commit these crimes. R. pp. 234-35, 852. Another vehicle appearing in the video at approximately 4:53 a.m. was similar in appearance to a Chevy Blazer, the make of vehicle then driven by Andrew. R. pp. 232, 235-36, 267; Defendant's Exhibit 1. Despite the similarity of that vehicle to Andrew's, the known conflicts between Andrew and Charles, the altercation between the brothers to which police were called just two days prior to the murder, and information the gun came from "Midget," who was Andrew, the investigating officers never considered that the vehicle seen on the video might be Andrew's. R. pp. 235-37, 326, 704-11.

The state introduced evidence attempting to show the whereabouts of various individuals near the time of the murder, through analysis of their cell phone records during the time period of

the murder and the particular cell towers that handled their cell phone communications. The information obtained from Petitioner's cell phone usage did not place him in the vicinity of Budon Court during the window of time in which the murder could have been committed. R. pp. 177-78, 182, 185, 402. The information purporting to pertain to Andrew was useless, because Andrew had given the police his wife's cell phone number, not his own, and law enforcement officials had not obtained cell phone records for Andrew's actual number. R. pp. 183-84, 186-87, 713-17, 770-71.

Charles was a friend of Columbia lawyer Neal Lourie. R. pp. 158-59. Lourie owned the residence where Charles lived and employed Charles as a handyman. R. pp. 56, 159, 164-65. Petitioner at times worked with Charles on projects he did for Lourie. R. pp. 160, 841-43. Lourie testified Petitioner came to him a week or two before Labor Day and said Charles had not paid him for work he had done for Lourie. R. pp. 161-62. On the Friday before Labor Day, Lourie asked Charles about it, and Charles said Petitioner had been paid. R. pp. 161-62. Lourie testified Petitioner called him again the day after Labor Day, and Lourie told him what Charles had said. R. pp. 161-62. Petitioner testified Charles owed him $1,900 for work he had performed. R. pp. 841-43. Lourie recalled the amount was about $2,000, consistent with that testimony. R. p. 168. As Petitioner noted, he expected to be paid for the work and would not have killed Charles over the delayed payment, since his doing so would have resulted in his never being paid. R. p. 843.

Andrew and Owen imputed to Petitioner a much greater monetary motive, an amount of $5,000 they claimed Petitioner said Charles owed him. R. pp. 264, 327, 336, 586. However, that amount was contradicted by Lourie's testimony, which corroborated the amount Petitioner said he was owed, $1,900. R. pp. 168, 841-42. Owen also claimed Petitioner was upset about Charles's treatment of his mother and her missing money. R. pp. 532, 585. To the contrary, the evidence established it was Andrew, not Petitioner, who was upset and angry with Charles. R. pp. 251-52,

838-39. Andrew believed Charles had stolen or misused as much as $38,000 to $39,000 of Karin's assets, going so far as to initiate police action against Charles. R. pp. 227, 251-52, 325.

The state contended Charles's non-payment for Petitioner's work was Petitioner's motive for his alleged involvement in the crimes. Lourie testified about Petitioner's demeanor when discussing being paid for his work. Petitioner was not belligerent or upset and was not causing a scene. R. pp. 167, 169. There were no threats between Charles and Petitioner and no allegations of any physical violence between them. R. p. 169. Charles never expressed to Lourie he was afraid of Petitioner. R. p. 170. On the other hand, Lourie was aware of the disputes between Charles and Andrew and knew Charles was agitated, upset, and afraid of Andrew. R. pp. 170-71. Jones, who was also an employee of Lourie, knew of Charles's dispute with Andrew, that they had been fighting and Charles was upset, and that Charles feared for his life. R. pp. 59-60, 83.

Some time after his initial statement to the police on Tuesday, September 8, Andrew gave the police information about a gun he claimed to have seen in Petitioner's possession prior to Labor Day weekend. R. pp. 256, 322-23. The bullets that killed Charles were .45 caliber bullets, which could have been fired from multiple kinds of firearms, including but not limited to revolvers, some lever action rifles, carbines, and short barrel rifles. R. pp. 121-23. Andrew claimed he had seen a gun Petitioner had in his truck the Sunday before, and he thought it was a .40 caliber. R. pp. 260-61, 316, 357. The bullet he examined that came from that gun was cut off at the tip and had a hole in the top. R. pp. 262, 316. However, the bullets that killed Charles and were found in his bed linens were semi-wadcutter, not hollow point. R. pp. 123-24. Andrew claimed he later asked Petitioner about the gun, and Petitioner said he no longer had it and had thrown it in a lake. R. pp. 276-77, 336. Contrary to Andrew's implication that Petitioner supplied the gun for this murder and then disposed of it, the confessed murderer, Owen, testified he personally threw the gun he

used to kill Charles into a field or woods after leaving the scene but before returning home. R. pp. 552-54, 597.

Jessica James, Owen's girlfriend who was being questioned by the police in her own right and had been threatened with incarceration before she gave any information, testified Owen had confessed the killing to her and implicated Petitioner as providing the gun and serving as lookout. R. pp. 631, 633-34, 639. Her trial testimony was contrary to her earlier statement to the police, in which she stated Owen said Petitioner was merely with him. R. p. 641. James also was inconsistent as to where Owen said he got the gun, initially insisting to the police it came from "Midget," who was Andrew. R. pp. 314-15, 641-42, 704-06. She acknowledged the state had subpoenaed her father for the purpose of having him influence her to testify. R. p. 638.

Another witness was Jenny Baker, who was serving a 20-year federal sentence for serious drug charges, was an admitted meth addict and drug trafficker, and was by Owen's account a liar. R. pp. 448, 476-77, 484-85, 497, 583. Baker claimed Petitioner told her his uncle was a bad guy and deserved to be killed. R. pp. 472-73. She did not tell the police about this alleged conversation until after she was jailed over eight months later, in 2016, or over a year later, in 2017. R. pp. 476, 478-79. She gave the statement to keep herself out of trouble and to help herself with her own charges. R. pp. 477, 496. She acknowledged she was hoping for a downward departure on her federal sentence as a result of her testimony. R. pp. 487-89.

Petitioner testified in his defense. He denied any involvement in the crimes at the Budon Court address. R. pp. 865-66. He denied he was present or participated in any way. R. pp. 854-57, 865-66. He did not own a firearm at the time of these crimes. R. p. 861. He and Owen had been at Jenny Baker's the night before Owen killed Charles, and they had been drinking. R. pp. 850-51. Petitioner did not think he had used cocaine but acknowledged he may have told the police

he had. R. pp. 872-73. He and Owen both denied they used meth, contradicting the testimony of Baker that they had. R. pp. 460-61, 497, 524, 872. He and Owen had left Baker's house in the early hours of September 6 and returned to Owen's house, where Petitioner went to sleep. R. p. 850. When Petitioner woke the next morning, Owen was already up and outside. R. p. 853. Petitioner's truck had been there when Petitioner went to sleep, and he had set his keys down on the counter or floor with the other items from his pocket. R. pp. 851-52. Owen could have taken Petitioner's truck to Charles's residence and committed the crimes while Petitioner was sleeping. Owen had on multiple occasions in the past taken Petitioner's truck without his permission. R. p. 858. On two of those occasions, Petitioner had filed police reports with respect to Owen's having taken his truck, a fact corroborated by the case investigator. R. pp. 726, 858.

No DNA evidence or other forensic evidence placed Petitioner at the scene or implicated him in any way in the break-in and murder. R pp. 137, 240-41.

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S ADMISSION OF OWEN'S TESTIMONY CONCERNING PETITIONER'S ALLEGED PARTICIPATION IN A PRIOR BURGLARY.

Owen testified for the state. Later, during cross-examination of the investigating officer, the defense asked if Owen had previously tried to bring Petitioner's name into a charge he faced, but the answer did not elicit that information. R. p. 724. Thereafter, the state sought to recall Owen to have him testify about Petitioner's alleged participation with Owen in an unrelated burglary years earlier, claiming the defense opened the door to introduction of the details of those allegations through its cross-examination of the investigating officer. The defense argued it did not open the door to such testimony and it was inadmissible under Rules 404(b) and 403, SCRE. The court found the defense opened the door and admitted the evidence. R. pp. 734-45, 785-829. Petitioner challenged this ruling as Issue 2 in his briefs in the Court of Appeals.

The defense again raised this issue in its new trial motion, reiterating its earlier arguments that the defense did not open the door to this evidence and it was inadmissible under Rules 403 and 404, SCRE. R. pp. 1129, 1137-40, 1143-44. The defense further contended the admission of this evidence was prejudicial because it forced the Petitioner to give up his right not to testify, in order to address the allegation of his participation in the extraneous, unrelated offense for which Petitioner had not been tried or convicted. R. pp. 1128, 1130, 1139-40, 1143-44. The court denied the new trial motion. R. pp. 1144-45. This argument was again asserted on appeal in Issue 2.

Rule 404(b) generally precludes admission of prior crimes, wrongs, or other acts to prove the character of a person or to show action in conformity therewith. *See* Rule 404(b), SCRE; *State v. Perry*, 430 S.C. 24, 29-33, 842 S.E.2d 654, 657-58 (2020); *State v. Robinson*, 438 S.C. 421, 435, 882 S.E.2d 883, 891 (Ct.App. 2023); *see also State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Such evidence is admissible only to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE. Even if evidence falls within one of these exceptions, however, if the defendant was not convicted of the crime, the evidence may not be admitted unless it rises to the level of clear and convincing evidence. *See State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008); *State v. Bell*, 430 S.C. 449, 466, 845 S.E.2d 514, 523 (Ct.App. 2020); *State v. Thompson*, 420 S.C. 386, 397, 803 S.E.2d 44, 50 (Ct.App. 2017), *cert. dismissed as improvidently granted*, 426 S.C. 325, 826 S.E.2d 871 (2019). Moreover, it must be excluded if the prejudicial effect of the evidence outweighs its probative value. Rule 403, SCRE.

The information about Petitioner's alleged involvement in the 2007 burglary was within the preclusive scope of Rule 404(b) and not admissible in the state's case against Petitioner. It was also inadmissible under Rule 403, because it had no probative value with respect to the crimes

for which Petitioner was on trial but was extremely prejudicial in suggesting he had a propensity to engage in criminal behavior and inviting a conviction on the basis of such propensity.

Our courts recognize that inadmissible evidence may become admissible when a party opens the door to its admission: "A party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction." *See State v. Heyward*, 426 S.C. 630, 636, 828 S.E.2d 592, 595 (2019). But under this "invited response" doctrine, our courts also recognize that the response must be proportional. *See State v. Simmons*, 430 S.C. 1, 14-15, 841 S.E.2d 845, 852 (2020); *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595. The rebuttal evidence is appropriate only so long as it does not unfairly prejudice the defendant. *See Simmons*, 430 S.C. at 14, 841 S.E.2d at 852. This Court has repeatedly admonished, "we will not condone 'a thinly-veiled attempt to show propensity by way of the open-door doctrine.'" *See Simmons*, 430 S.C. at 15, 841 S.E.2d at 85, *quoting Heyward*, 426 S.C. at 637, 828 S.E.2d at 595; *see also State v. Williams*, 430 S.C. 136, 151, 844 S.E.2d 57, 65 (2020) (acknowledging the application of the same principle in the context of impeachment evidence). In this case, the defense did not open the door to admission of this inadmissible evidence, but if it did, the rebuttal evidence introduced by the state was wholly disproportional and unduly prejudicial to Petitioner.

The defense questions of the investigating officer did not elicit the evidence the defense was seeking, and therefore did not open the door to the otherwise inadmissible testimony about the prior burglary. The defense sought to establish that Owen had previously implicated Petitioner in a crime with which Owen was charged, but the witness did not provide that testimony. The relevant questions and answers in the officer's cross-examination are these:

> Q . . . And this isn't the first time that Floyd Owen has tried to bring Brandon's name into something, is it?

A I don't know about his past. I know about what he may have said to me, Floyd Owen, during his interview.

Q In fact, back in 2007, Floyd got charged with a burglary charge. You're familiar with that, right?

A I don't know the entire case or the particulars of it, but I do recall information like that, yes.

Q And at that point, he tried to bring Brandon's name into it, and there was no credibility in that case either?

A I don't know whether there was credibility or not. It wasn't my case.

R. p. 724, lines 3-18. In answer to the defense question about Owen trying to bring Petitioner into a prior charge, the witness did not testify that had in fact occurred. These questions and the answers they elicited did not open the door to Owen's being recalled to testify to the details of his prior burglary offense and the details of what he claimed was Petitioner's involvement.

The Court of Appeals found the ***questions*** asked by counsel, not the answers elicited by the questions, opened the door to Owen's rebuttal testimony. Its decision was premised on language contained in *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984), *overruled on other grounds, State v. Davis-Kocsis*, 443 S.C. 127, 903 S.E.2d 491 (2024), language the Court of Appeals applied without considering the context in which that language appeared in the Supreme Court's opinion in *Stroman*. The Court of Appeals found *Stroman* allowed admission of Owen's recall testimony, finding counsel's ***questioning*** opened the door, rather than requiring that the questioning had to result in the ***introduction of evidence*** before the door is deemed to have been opened for testimony rebutting that ***evidence***.

The Court of Appeals erred in applying *Stroman* in this case. Although *Stroman* stated counsel's having "initiated the questioning" had opened the door to further evidence on the subject of that questioning, the quoted language appeared in the context of the Court's earlier recital of

the facts – that counsel asked the witness if he had ever broken into other homes for money ***and the witness answered that he had***. *See Stroman*, 281 S.C. at 512-13, 316 S.E.2d at 398-99. The quoted language also appeared in the context of the Court's prior statement of the controlling principle of law with respect to opening the door: "'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.'" *See Stroman*, 281 S.C. at 513, 316 S.E.2d at 399 (citations omitted) (emphasis added). Based on *Stroman*'s statements of its facts and of the applicable law, the *Stroman* Court's reference to counsel's having "initiated the questioning" must be read in the context of having ***initiated the questioning that resulted in introduction of evidence*** on the subject. In the present case, questions were asked, but they did not elicit the expected response. Because the defense did not by its question ***introduce evidence*** that Owen previously implicated Petitioner in another crime, it did not open the door to recalling Owen to give the details of Petitioner's alleged involvement in the earlier crime. Simply put, where no ***evidence*** to that effect was elicited, there was no ***evidence*** to rebut through Owen's recall testimony.

However, if *Stroman* could be argued to have once stood for the proposition that a question by counsel, standing alone and without eliciting the evidence sought, can open the door to rebuttal evidence, application of *Stroman* to the facts of this case conflicts with more recent decisions of the Supreme Court that negate the validity of such a proposition.

The Supreme Court has repeatedly recognized that statements by counsel are not evidence. *See Landry v. Landry*, 430 S.C. 153, 163, 843 S.E.2d 491, 496 (2020); *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). The Court has also recognized that argument of counsel is not evidence. *See In re Gonzalez*, 409 S.C. 621, 636 n. 3, 763 S.E.2d 210, 218 n.3 (2014); *Morris*,

367 S.C. at 64, 624 S.E.2d at 653. And, most importantly in the context of the instant case, the Court has recognized that counsel's ***questions*** are not evidence; rather, ***only the answers elicited*** by counsel's questions are evidence. *See State v. Washington*, 431 S.C. 394, 408, 848 S.E.2d 779, 786 (2020).

In *Washington*, this Court recognized the distinction between questions asked by counsel and the answers the questions elicit in its determination whether there was evidence in the record to support a particular jury charge. There, the defense attempted repeatedly, without success, to elicit testimony that an individual other than the defendant was the person who shot the victim. *See Washington*, 431 S.C. at 408, 848 S.E.2d at 786. That individual, Kinloch, repeatedly denied the assertions to that effect contained in counsel's questions. *Id.* The state sought and the trial court granted a jury instruction on accomplice liability, based on the defense's questions that suggested someone other than the defendant was the shooter. The Court found the accomplice liability charge was not properly given, because the record contained no evidence that someone else may have been the shooter. *Id.*, 431 S.C. at 407-10, 848 S.E.2d at 786-87.

Significantly, the Supreme Court rejected the contention that the ***questions*** directed to Kinloch in his cross-examination by defense counsel provided an evidentiary foundation for the accomplice liability charge. The Court stated:

> While Petitioner very aggressively cross-examined Kinloch, the fact remains that counsel's questions and accusations were not evidence. Kinloch's refusal to admit to the statements and conduct attributed to him does not constitute evidence upon which the jury could rely to determine Kinloch was armed or that he was the shooter.

Id., 431 S.C. at 408, 848 S.E.2d at 786. Similarly, in the instant case, defense counsel asked the investigating officer if Owen previously named Petitioner in connection with a charge he faced, but that question did not elicit an answer confirming that he had. The questions by counsel were

not evidence, and those questions did not elicit the evidence they sought. Because no actual evidence was introduced to the effect that Owen previously implicated Petitioner in a crime with which Owen was charged, the door was not opened to allow otherwise inadmissible testimony to be admitted in response. The Court of Appeals erred in applying *Stroman*, in contravention of the clear cases of this Court that recognize a distinction between statements and questions by counsel and actual evidence. Rebuttal testimony is only appropriate to rebut ***evidence introduced*** by the other party. *See Stroman*, 281 S.C. at 513, 316 S.E.2d at 399 ("[w]here one party ***introduces evidence*** . . . , the other party is entitled to introduce evidence in explanation or rebuttal thereof . . ."). This Court should grant a writ of certiorari, find defense counsel's questions did not open the door to rebuttal testimony, and grant Petitioner a new trial.

If, however, notwithstanding *Washington* and the other authorities cited above, counsel's questions could be deemed to have opened the door to some response by the state, that response was required to be proportional and not unduly prejudicial to the defendant. *See Simmons*, 430 S.C. at 14-15, 841 S.E.2d at 852; *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595. Here, the rebuttal testimony offered by the state and allowed by the trial court was grossly disproportional and extremely prejudicial to Petitioner. As the defense argued, its questions did not go into the facts or allegations of the offense, asking the officer only if Owen brought Petitioner into it, and the defense contended allowing the state to introduce the specifics of the alleged offense was improper. R. p. 741, lines 8-14. The court asked if what the state was trying to put in was that "[Petitioner] did get charged, and it got dismissed. And the other guy [Owen] got convicted of it." The state responded, "Yes, ma'am." R. p. 742, lines 5-15. The defense offered to so stipulate if that was what the state wanted to introduce. R. p. 742, lines 20-22. The state, however, wanted to put Owen on the stand and go into the facts of the offense, which is what the court ultimately allowed.

The court erred in not limiting the state's response to a proportional response that did not include the details of the alleged crime and that was not unduly prejudicial.

The Court of Appeals declined to address Petitioner's argument that the response was not proportional and was extremely prejudicial, on preservation grounds. The Court found that the trial court indicated a "willingness to conduct an on-the-record balancing test" but that "the record does not indicate a balancing test was done." This statement misconstrues the trial court's reference to "do[ing] a balancing test." R. p. 797, line 4. In arguing the issue, the defense made multiple distinct arguments, including that (1) allowing testimony as to the factual details of the 2007 burglary far exceeded what the questions to the officer addressed – that Owen had previously implicated Petitioner in another crime for which Owen but not Petitioner was convicted – in keeping with the proportional response component of the opening-the-door doctrine, and (2) the probative value of this testimony was substantially outweighed by unfair prejudice, under Rule 403, SCRE. The trial court's reference to doing a balancing test was made expressly in the context of the Rule 403 analysis. R. p. 797, lines 4-6. That reference did not pertain to the analysis of whether the response the state sought to introduce was proportional to the suggestion made by counsel's question that Owen had previously implicated Petitioner in another crime.

Moreover, the trial court did not state that an "on-the-record" balancing test would be done. Rather, the court merely stated it would hear a proffer then "do a balancing test on it to see if the prejudical effect outweighs the probative value." R. p. 797, lines 3-6. The court heard the proffer and admitted the testimony.

The key requirement for an argument to be preserved for appellate review is that it be raised to and ruled upon by the trial judge. *See State v. Johnson*, 439 S.C. 331, 338, 887 S.E.2d 127, 130 (2023); *State v. King*, 424 S.C. 188, 198, 818 S.E.2d 204, 209 (2018). In addition to this

requirement, the argument must have been made by the appellant, with specificity, and in a timely manner. *See State v. Simmons*, 423 S.C. 552, 561, 816 S.E.2d 566, 571 (2018). These requirements were all met. Importantly, the appellant is not required to use the exact name of the legal doctrine to preserve the argument. *Johnson*, 439 S.C. at 338, 887 S.E.2d at 130; *King*, 424 S.C. at 199, 818 at 209. Rather, what is required is merely that the grounds of the argument be clear. *Johnson*, 439 S.C. at 338, 887 S.E.2d at 130; *King*, 424 S.C. at 199, 818 at 209.

Both the proportionality aspect of the argument and the Rule 403 prejudice aspect of the argument were clearly articulated by trial counsel. On the issue of proportionality, defense counsel stated that its questions allowed only testimony that Owen had previously implicated Petitioner in an offense for which Petitioner was not convicted but Owen was, but not the specific details of the alleged prior burglary, and the defense even offered to stipulate to the more limited information. R. p. 741, lines 8-14; p. 742, lines 5-15, 20-22; p. 788, line 24 - p. 789, line 2. While the defense may not have used the term "proportional response," it is clear that the proportional response aspect of the door-opening doctrine was what it was arguing. The trial court clearly understood the nature of this aspect of the argument and the distinction the defense was drawing between Owen's testifying about having previously implicated Petitioner versus Owen's testifying about the details of the 2007 burglary, because the court specifically focused on that distinction in its questions to the prosecution. R. p. 743, lines 8-20. On the issue of weighing the probative value and the prejudicial effect, defense counsel repeatedly invoked Rule 403 and argued testimony as to the facts of the burglary would be "incredibly prejudicial and not at all probative." R. p. 736, lines 20-21; p. 737, lines 8-11; p. 738, lines 13-24; p. 790, lines 1-4; p. 790, line 25 - p. 791, line 6. The trial court clearly understood the defense was arguing Rule 403, stating it would hear a proffer and then "do a balancing test to see if the prejudicial effect outweighs the probative value." R. p. 797,

lines 1-6. In admitting the testimony, the court ruled against both these aspects of the defense's argument. The defense clearly raised these arguments to the court, in a timely manner, and with specificity, and they were ruled upon by the court. They are preserved for appellate review.[2]

Error preservation rules are designed to give the trial court a fair opportunity to rule on the issues and to enable the trial court to rule properly after it has considered all relevant facts, law, and arguments. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). The Court approaches preservation rules "'with a practical eye and not in a rigid, hyper-technical manner.'" *Johnson*, 439 S.C. at 341, 887 S.E.2d at 132, *quoting Herron*, 395 S.C. at 470, 719 S.E.2d at 644. It is not the purpose of preservation rules to "sabotage attorneys' efforts to bring issues before the appellate courts" or to "foster a game of 'gotcha,' where form is elevated over substance." *State v. Jones*, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021). Rather, the purpose is to ensure that issues are not being raised for the first time on appeal. *Id.* Here, the arguments as to a proportional response and a Rule 403 analysis were clearly raised in the court below and were clearly understood and considered by the trial court. They were rejected by the court in its determination to admit the evidence. They are properly preserved. This Court should grant a writ of certiorari and address the proportionality and prejudice arguments on the merits.

The testimony given by Owen in rebuttal was very detailed and implicated Petitioner in a break-in at an apartment that had previously been Petitioner's residence. Owen testified he and Petitioner went to the apartment to retrieve items of property Petitioner had left. When they found

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[2] To the extent the Court of Appeals' decision can be read to impose a requirement for an "on-the-record" balancing test on a Rule 403 objection, such a holding expands the preservation requirements beyond their current and logical bounds. Indeed, Rule 403 objections are often made in criminal trials, with nothing more than a statement by the trial judge that the objection is overruled, and such objections receive appellate review. This Court does not require, for preservation purposes, that counsel seek and obtain an on-the-record balancing of the probative value and the prejudicial effect.

the locks had been changed, they broke into the apartment, but nothing was there. They then broke into the office of the apartments which contained a storage room, but they did not find what they were looking for. As they were getting ready to leave, Owen claimed, Petitioner stole a computer from the office. R. pp. 814-18. Only at the very end of his testimony did Owen offer the precise rebuttal of the matter suggested by the defense's questions – denying that he lied about Petitioner in that burglary. R. p. 821. His testimony far exceeded what would have been sufficient to rebut the suggestion made by the defense's question posed to the investigating officer. It was not a proportional response, as required under this Court's precedents. Rather, it was the very kind of "'thinly-veiled attempt to show propensity by way of the open-door doctrine'" that this Court does not condone. *See Simmons*, 430 S.C. at 15, 841 S.E.2d at 852, *quoting Heyward*, 426 S.C. at 637, 828 S.E.2d at 595.

This testimony was also extremely prejudicial and inadmissible under a Rule 403 analysis. It enticed the jury to convict Petitioner on an improper basis. The 2007 burglary was remote and unrelated to the events of September 2015. It had no probative value with respect to the charges for which Petitioner was on trial. On the other hand, it was highly prejudicial, inviting conviction on the basis of a perception that Petitioner had a propensity to commit crimes. The prejudicial effect clearly outweighed the probative value.

The Court of Appeals also failed to address Petitioner's argument concerning the constitutional ramifications of the admission of this testimony. R. pp. 1139-40, 1144. The trial court's admission of this evidence compelled Petitioner to give up his constitutional right to remain silent, resulted in improper burden-shifting, and denied him his due process right to a fair trial. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 12. After Owen testified with respect to the specifics of Petitioner's alleged involvement in the remote and unrelated burglary, it became

imperative that Petitioner take the stand in order to refute those allegations. Had Owen's recall testimony not been admitted, Petitioner would have invoked his right to remain silent and not taken the stand, due to the inadequacy of the state's evidence to link Petitioner to the charged crimes. There was no forensic evidence that he committed the offenses. The state's attempt to establish his whereabouts through the location of his cell phone did not confirm that he was present at or in the vicinity of the Budon Court residence. The witnesses that implicated him – Owen, Baker, James, and Andrew – all had motives to fabricate his involvement for their own purposes, and they all were demonstrated to have lied in their previous statements. Admission of Owen's testimony about the 2007 burglary forced Petitioner to give up his right to remain silent and take the stand to refute Owen's recall testimony, increasing the prejudicial effect of the erroneously admitted recall testimony. The Court should address this additional aspect of Petitioner's claim.

The Court should grant a writ of certiorari, reverse the trial court's admission of this prejudicial evidence and remand for a new trial.

II. THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF LAURIN BARNES THAT CHARLES SAID PETITIONER STOLE HIS TOOLS.

The state called Laurin Barnes, Charles's daughter, to testify about a conversation she had with her father a few months before his death, in which he told her Petitioner stole his tools. The defense objected to the testimony, but the court allowed it, finding it was within the state of mind exception for hearsay of Rule 803(3), SCRE; that it was admissible as evidence of motive under Rule 404(b), SCRE; and that its prejudicial effect did not outweigh its probative value under Rule 403, SCRE. R. pp. 617-28. Barnes testified that several months before his death, her father told her Petitioner stole his tools and that he was mad at Petitioner. R. pp. 778-79. This testimony was inadmissible and prejudicial.

This claim was raised as Issue 1 in Petitioner's briefs in the Court of Appeals, but the Court declined to address it, finding it was not preserved. The Court noted the objection was raised and ruled upon *in limine* following a proffer; intervening witnesses then testified; and the defense failed to renew the objection when Barnes testified. If this Court grants certiorari with respect to the first question presented in this petition, it should also address the merits of Petitioner's claim the court erred in admitting Barnes's testimony, because that issue is likely to arise again upon retrial.

Hearsay is defined as a statement, other than one made by the declarant while testifying, offered to prove the truth of the matter asserted. *See* Rule 801(c), SCRE. Hearsay is inadmissible, unless it is within one of the exceptions recognized by the evidence rules. *See* Rule 802, SCRE. Rule 803(3), commonly called the state-of-mind exception, allows admission of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . , but not including a statement of memory or belief to prove the fact remembered or believed . . . ." *See* Rule 803(3), SCRE.

The appellate decisions construing this rule are clear with respect to its limits. A statement of the declarant's state of mind or emotion is admissible, but the reason for that state of mind or emotion is not. *State v. Tennant*, 394 S.C. 5, 15-16, 714 S.E.2d 297, 302-03 (2011), *State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999); *State v. Daise*, 421 S.C. 442, 460, 807 S.E.2d 710, 719 (Ct.App. 2017); *State v. Hughes*, 419 S.C. 149, 155-56, 796 S.E.2d 174, 177-78 (Ct.App. 2017); *Vail v. State*, 402 S.C. 77, 87, 738 S.E.2d 503, 508-09 (Ct.App. 2013). The *Garcia* Court explained the purpose of the restriction in Rule 803(3) with respect to a statement of memory or belief to prove the fact remembered or believed, as follows:

> The purpose of this exclusion is "to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as a basis for an inference of the happening of the event which produced the state of mind." Consequently, while the present state of the

> declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not.

See Garcia, 334 S.C. at 76, 512 S.E.2d at 509 (footnote and citations omitted). *Garcia* noted an example from the case it cited: "If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition – 'I'm scared' – and not belief – 'I'm scared because [someone] threatened me'." *See id.* (citation omitted). Under Rule 803(3), the *Garcia* decision, and *Garcia*'s progeny, Charles's statement to his daughter of his state of mind or emotion – that he was mad at Petitioner – was admissible. His further statement of the reason for that state of mind or emotion – his belief that Petitioner stole his tools – was not. The trial court erred in finding the statement was admissible under the state-of-mind exception.

Charles's statement that Petitioner stole his tools was also inadmissible under Rule 404(b), SCRE. Contrary to the argument of the state and the trial court's ruling, this evidence was not admissible as evidence of motive. Had the evidence been that ***Charles stole Petitioner's tools***, it may have established a motive for the killing of Charles. But Charles's belief that ***Petitioner stole Charles's tools***, without more, does not establish an alleged motive for Petitioner to have participated in Owen's crimes against Charles.

Even if this statement could be deemed to provide evidence of motive, it is still inadmissible under the requirement of clear and convincing evidence, where the defendant has not been convicted of the crime. The Court of Appeals' decision in *State v. Bell,* 430 S.C. 449, 845 S.E.2d 514 (Ct.App. 2020), addressed an almost identical statement – that a murder defendant had stolen property from the decedent. The Court found there was "no evidence, let alone clear and convincing evidence, demonstrating that [the defendant] had previously stolen [the decedent]'s property." *Id.*, 430 S.C. at 468, 845 S.E.2d at 524. The witnesses to the decedent's statements as

to her belief also testified the family had no proof of the alleged thefts, had not called the police, and had not confronted the defendant about the alleged thefts. *Id.* The Court further noted there was "no evidence, beyond her statements of belief, that [the decedent]'s property had in fact been stolen." *Id.* The Court found reversible error in the admission of the statements under Rule 404(b). *Id.* This reasoning is correct and dictates a finding that the trial court erred in admitting Laurin's testimony that Charles said Petitioner stole his tools. *See id.*, 430 S.C. at 468-73, 845 S.E.2d at 524-27.

The court also erred in finding the prejudicial effect of this testimony did not outweigh its probative value. Even where evidence is deemed admissible under Rule 404(b), the court is required to conduct an analysis under Rule 403. *See Perry*, 430 S.C. at 31, 44, 842 S.E.2d at 657-58, 665; *Fletcher*, 379 S.C. at 23-24, 664 S.E.2d at 483; *Thompson*, 420 S.C. at 398, 803 S.E.2d at 50. The inadmissible prior statement of Charles, imputing to Petitioner a past crime of stealing, was not probative of the crimes for which Petitioner was charged but was extremely prejudicial, inviting conviction on the basis of a perception he had a criminal propensity. If this Court grants certiorari on the first question presented, it should also grant certiorari on this additional question, reverse the trial court's admission of this evidence, and grant Petitioner a new trial.

III. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS WAS SO PREJUDICIAL THAT PETITIONER WAS DENIED A FAIR TRIAL.

Petitioner also raised an issue of cumulative prejudice, which the Court of Appeals did not address because it found no error on Petitioner's other issues. If this Court grants a writ of certiorari and finds error in the admission of the testimony challenged in the first and second questions presented but further finds neither error sufficiently prejudicial, standing alone, to warrant reversal, it should review the cumulative effect of the two errors and find it was so prejudicial as to deny Petitioner the fairness required by due process. *See* U.S. Const. amends. V,

XIV; S.C. Const. art. I, § 3; *State v. Blurton*, 342 S.C. 500, 512-13, 537 S.E.2d 291, 297-98 (Ct.App. 2000) (finding cumulative effect of improper comments in closing argument and erroneous exclusion of evidence warranted reversal), *rev'd on other grounds*, 352 S.C. 203, 573 S.E.2d 802 (2002) (finding additional error with respect to a jury charge); *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct.App. 1995) (reversing conviction based on combined effect of court's limitation of cross-examination and court's improper comments interjected during the trial). Owen's rebuttal testimony and Barnes's testimony both placed before the jury prejudicial propensity evidence of alleged prior criminal conduct and together invited the jury to convict based on the alleged extraneous crimes, not on a finding beyond a reasonable doubt that Petitioner was guilty of the charged offenses. The Court should grant certiorari and reverse.

CONCLUSION

For all the reasons set out above, this Court should grant a writ of certiorari, reverse Petitioner's convictions, and remand for a new trial.

Respectfully submitted,

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