

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County

Frank R. Addy, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DAVID LEE WALKER,

APPELLANT

APPELLATE CASE NO. 2015-000519

FINAL BRIEF OF APPELLANT

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

The evidence adduced at Appellant's trial did not support the court's jury instruction concerning the accomplice liability principle of "hand of one is the hand of all" as an alternative theory of Appellant's criminal liability.

II.

The trial court committed an error of law by denying Appellant's motion for a continuance so as to allow Appellant, who was indigent, the chance to secure an expert in gunshot residue analysis where the trial court had only approved funding for such an expert one week before trial, thus denying Appellant's right to equal protection and due process right to present a complete defense.

STATEMENT OF THE CASE

On February 21, 2014, the Laurens County Grand Jury indicted Appellant David Lee Walker for murder. R. 482. On February 23-27, 2015, Appellant proceeded to trial before the Honorable Frank R. Addy, Jr., and a jury.

Elizabeth P. Wiygul represented Appellant, and Assistant Solicitor O. Warren Mowry represented the State. The jury found Appellant guilty as charged. R. 468, l. 7 - 469, l. 23. The trial court sentenced Appellant to life imprisonment. R. 473, l. 7 - 474, l. 13.

ARGUMENT

I.

The evidence adduced at Appellant's trial did not support the court's jury instruction concerning the accomplice liability principle of "hand of one is the hand of all" as an alternative theory of Appellant's criminal liability.

Relevant Facts

Laurens County Sheriff's deputies responded to a 911 call regarding a shooting at a single-wide trailer located outside of Enoree, South Carolina. R. 141, l. 3 - 147, l. 18. Arriving at the trailer, law enforcement encountered Appellant sitting in a chair on the front porch with a gunshot wound at the base of his neck. *Id.* Deputy Marty Crain, the officer first to arrive, heard frenzied screaming coming from inside the trailer. *Id.*

Crain knocked on the door. After a few minutes, a hysterical Kelly Ball opened it. Ball attempted to explain to Cain what happened, but was so frantic that she was unintelligible. Upon entering the trailer, Crain immediately saw that the trailer's owner and Ball's boyfriend, Johnny Cheeks, had also been shot. R. 121, l. 1 - 122, l. 22.

Crain and the other deputies administered first aid to Cheeks until EMS arrived. Both Cheeks and Appellant were taken to Greenville Hospital. Cheeks died the next day. R. 367, ll. 3-16. Laurens County Sheriff's Lieutenant Bryant Cheek was the lead investigator. He arrived shortly after the 911 call. R. 354, l. 7 - 355, l. 24.

He spoke briefly to Johnny Cheeks before Cheeks was taken to the hospital. Lt. Cheek would claim at trial that, "I heard Mr. Cheeks state that they came to rob him. [That Appellant] shot him. He shot [Appellant]. And then [Appellant] shot him again. *Id.* Police recovered a Lorcin .38 caliber semi-automatic pistol from Cheeks' yard. R. 279, l. 6 - 284, l. 4. At the hospital, Lt. Cheek performed a gunshot residue test on Appellant. R. 360, l. 18 - 361, l. 17.

Appellant's Trial

Appellant proceeded to trial alone. His two alleged co-defendants, Christopher Wells and Johnny Lee Saxon, did not stand trial with him. Appellant moved pre-trial to relieve his appointed defense attorney, explaining to the court that he did not believe she had adequately prepared his defense. R. 7, l. 2 - 13, l. 14. The trial court, noting that Appellant had successfully relieved several other attorneys that were appointed to represent him, denied the motion. Appellant then refused to participate in or attend his trial. *Id.*

State's Opening Argument

The State's theory of the case was that Appellant, Johnny Lee Saxon, and Christopher Wells attempted to rob Cheeks. R. 66, l. 14 - 70, l. 10. Assistant Solicitor Mowry promised jurors, "[w]e submit to you that David Lee Walker was the shooter, and we will present to you scientific evidence that will support that conclusion. Mr. Walker was also found at the scene. He also had been shot. We submit to you that he was shot by Johnny Lee Cheeks." *Id.* The State also explained the "hand of one is the hand of all" principle of accomplice liability. *Id.*

Trial Testimony of Toris Moore

The State's first witness was Appellant's niece, Toris Moore. R. 75, l. 23 - 76, l. 4. Moore claimed that on the night of the shooting, Appellant stopped by her house and asked to borrow her mother's gun. R. 76, l. 21 - 78, l. 24. Christopher Wells and Johnny Lee Saxon were with him.

Moore alleged that Appellant told her he needed a gun because the three were "going to Enoree to rob an older man at his house." R. 78, ll. 7-20. Moore lied to Appellant and claimed that her mother had sold the pistol. *Id.* Moore further testified that Wells already had a gun on him and that she lied to Appellant because she did not want to be involved. R. 79, l. 2 - 80, l. 12.

Trial Testimony of Kelly Ball

At trial, Ball testified that she and Cheeks had just arrived at Cheeks trailer after picking up food at a nearby Waffle House when there was a knock at the front door. R. 90, l. 9 - 91, l. 22. Cheeks went to answer the door while Ball remained in the living room. From her vantage point Ball could not see the front door. *Id.* Ball reluctantly admitted that Cheeks was a drug dealer and sold both drugs and moonshine out of his residence. *Id.* After Cheeks opened the front door and stepped on to the front porch, Ball heard an argument ensue between Cheeks and at least one other person. R. 92, l. 3 - 95, l. 24.

Shortly after the argument began, Ball claimed that she heard a loud thud and then multiple gunshots. *Id.* Ball stated that she then ran towards the still open front door to check on Cheeks. *Id.* Once she reached Cheeks, she saw Appellant also lying shot in the yard. *Id.* Ball further claimed that she saw a third individual she later identified as Christopher Wells, standing in the yard. Wells fled after seeing Ball. R. 96, ll. 4-21

Ball alleged that after she pulled Cheeks into the trailer and closed the door, Appellant knocked on the door pleading to be let in. Ball recalled that Cheeks told her “[d]o not open that door. That is who shot me.” R. 101, ll. 1-16. A few minutes after Ball pulled Cheeks inside the trailer, law enforcement and EMS arrived. R. 102, ll. 2-13.

Ballistic and Gunshot Residue Evidence

Law enforcement was unable to develop any latent prints from the Lorcin pistol recovered from Cheeks’ yard. R. 305, ll. 10-11. SLED technician Jennifer Stoner completed gunshot residue tests on the samples taken by Lt. Cheek. R. 318, ll. 9-17. She testified that particles found on Appellant’s hands were consistent and associated with gunshot residue. R. 321, ll. 2-23. Bullets removed from Cheeks were a ballistic match for the Lorcin pistol. R. 344, l. 11 - 346, l. 24.

Jury Instructions

Defense counsel objected to the State's request that the court instruct the jury on the accomplice liability principle of "hand of one is the hand of all." R. 404, l. 24 - 409, l. 14. Defense counsel argued that, based on the evidence the State presented at trial, the only way for the jury to find Appellant guilty was by concluding that he shot Cheeks. *Id.* Counsel also argued that the State had made a deliberate decision not to try Appellant with this alleged co-conspirators and had not charged Appellant with attempted robbery or criminal conspiracy. *Id.*

The State countered "except for Toris Mooer, Your Honor," implying that Moore's testimony regarding Appellant looking for a gun provided the State with a basis to allege "hand of one is the hand of all". R. 405, l. 5. The trial court summarily dismissed Appellant's objections and charged the jury

Ladies and gentlemen, I instruct you that if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the act done in carrying out the common plan and purpose.

R. 453, ll. 11-17; *see also* R. 409, ll. 10-14. During prolonged deliberations, jurors requested and re-heard the testimony of Toris Moore and Kelly Ball. R. 467, ll. 16-17.

After two days of deliberations, the jury found Appellant guilty of murder, but **not guilty of possession of a weapon during the commission of a violent crime.** R. 469, ll. 12-20.

Discussion

There was no evidence produced at Appellant's trial to support charging the jury with the "hand of one is the hand of all" theory of accomplice liability. From the beginning of the trial, the State's theory was that Appellant was the shooter. R. 67, l. 14 - 68, l. 15. Nevertheless, the State successfully sought to have the jury instructed on the principle of "hand of one is the hand of all" accomplice liability. Accordingly, the trial court committed a reversible error in instructing the jury on the "hand of one is the hand of all" theory as the instruction was not warranted by the evidence. R. 453, ll. 11-22.

The trial court is required to charge only the current and correct law of South Carolina. *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Mattison*, 388 S.C. 469, 478-79, 697 S.E.2d 578, 583 (2010).

Under the 'hand of one is the hand of all' theory, a person who joins with another to accomplish an illegal purpose is liable criminally for everything done by any co-conspirator incidental to the execution of their common objective. *State v. Mattison*, 388 S.C. 469, 478-79, 697 S.E.2d 578, 583 (2010).

In *Barber v. State*, our Supreme Court analogized jury instructions on alternate theories of liability as the prosecutorial equivalent of jury instructions on lesser included offenses:

In *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976), and other cases, this Court has held that a lesser-included offense **may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence. . . .**

Like a lesser-included offense, an alternate theory of liability may only be charged **when the evidence is equivocal on some integral fact** and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.

Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011) (*emphasis added*). In *Barber*, the State alleged that the defendant and three others conspired to rob a drug dealer. During the course of the robbery the drug dealer was shot with a semi-automatic handgun. *Id.* The defendant's co-conspirators testified at trial and identified him as the shooter. *Id.* at 235, 712 S.E. 2d at 438.

However, defense counsel elicited testimony on cross-examination that one of the co-conspirators also had a semi-automatic handgun with him **during the robbery**. *Id.* On appeal, Barber alleged that the jury instruction on "hand of one is the hand of all" was improper. *Id.* at 236, 712 S.E. 2d at 438. The Supreme Court disagreed holding that the testimony elicited by defense counsel that a co-conspirator was armed **at the time of the robbery with the same kind of weapon as was used to kill the drug dealer permitted the charge**. "[T]he sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter." *Id.* at 236, 712 S.E. 2d at 439

Conversely, in *Wilds v. State*, this Court recently held that appellate counsel was ineffective for failing to challenge on appeal the trial court's decision to instruct the jury on the principle of the "hand of one is the hand of all" in response to a jury question. *Wilds v. State*, 407 S.C. 432, 440, 756 S.E. 2d. 387, 391 (Ct. App. 2014). Wilds was charged with the robbery and murder of Anthony Rumph. At trial, the State alleged that Wilds and two co-defendants passed Rumph on the street and that Wilds, believing Rumph was carrying money, led the group in robbing Rumph. *Id.* at 436-437, 756 S.E. 2d. at 389.

The co-defendants testified that Wilds shot Rumph in the chest after Rumph refused to surrender his wallet. *Id.* No weapon was ever recovered. During deliberations, the jury sent a note

asking the trial court “‘if we say [Wilds is] guilty of murder, are we saying he of the three [alone] actually pulled the trigger?’” *Id.* at 437, 756 S.E.2d at 389. In response, the trial court instructed the jury on “hand of one is the hand of all” accomplice liability. Defense counsel objected, but appellate counsel did not raise the issue on appeal. *Id.*

In affirming the PCR court’s granting of a new trial, this Court contrasted *Wilds* with *Barber* and concluded that “no evidence in the instant case indicated anyone other than Wilds was the shooter.” *Id.* at 439-440, 756 S.E.2d at 390-391. Specifically, this Court determined that while the jury may have found the co-conspirators’ testimony not credible, “an alternate theory of liability, such as accomplice liability, ‘may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.’” *Id.*

Therefore, to support an accomplice liability “hand of one is the hand of all” charge, the State must present evidence that a co-conspirator was the shooter and that Appellant was acting in concert with this co-conspirator when the robbery took place. *See State v. Dickman*, 341 S.C. 293, 295–96, 534 S.E.2d 268, 269 (2000). Like a defense counsel’s request for instructions on a lesser included offense, in order to secure a charge on the accomplice liability theory of “hand of one is the hand of all,” the State must present evidence “from which the jury could infer the defendant” was an accomplice rather than the shooter. *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439

In Appellant’s case, the State presented no evidence indicating that anyone other than Appellant was the shooter under its theory of the case. As the assistant solicitor stressed in his opening argument, “[w]e submit to you that [Appellant] was the shooter, and we will present to you scientific evidence that will support that conclusion.” R. 67, ll. 6-15. Two pistols were recovered from the incident scene. One belonged to Cheeks. The other was the murder weapon. According to Kelly Ball, Cheeks identified Appellant as the shooter. R. 101, ll. 4-9.

By contrast, in *Barber* there was evidence that two of the robbers were armed with .38 caliber pistol **at the time of the robbery**. 393 S.C. at 236-237, 712 S.E.2d at 439. The decedent was killed by a .38 caliber bullet. *Id.* While the defendant in *Barber* was identified by co-conspirators as the shooter, the jury could still conclude that the other co-conspirator with the second pistol shot the decedent and that the defendant was merely participating in the robbery. *Id.*

Here, the State's only argument in support of the "hand of one is the hand of all charge" was that Appellant's niece, Toris Moore, claimed that, **several hours before the incident**, Appellant tried unsuccessfully to borrow her mother's handgun and that Christopher Wells had a handgun with him at that time. R. 77, l. 17 - 79, l. 16. This is insufficient to justify a charge on an alternate theory of liability as it does not present a coherent alternative narrative "from which the jury could infer the defendant" was only an accomplice rather than the shooter.

The assistant solicitor was unequivocal in his belief that Appellant was the shooter. R. 67, ll. 6-15. The defense countered that Appellant was merely present at Cheeks' trailer when the shooting occurred. R. 73, l. 16 - 74, l. 24. Clearly the jury was influenced by the "hand of one is the hand of all" instruction as they returned a guilty verdict as to murder, but a not guilty verdict as to possession of a weapon during the commission of a violent crime. R. 469, ll. 12-20. However, given the facts presented by the State at trial, there was simply no evidence to support charging the jury with the "hand of one is the hand of all" theory of accomplice liability.

Accordingly, the trial court erred and Appellant is entitled to a new trial.

II.

The trial court committed an error of law by denying Appellant's motion for a continuance so as to allow Appellant, who was indigent, the chance to secure an expert in gunshot residue analysis where the trial court had only approved funding for such an expert one week before trial, thus denying Appellant's right to equal protection and due process right to present a complete defense.

Relevant Facts

Prior to trial, defense counsel moved for a continuance so that she would have the opportunity to retain a gunshot residue (hereinafter "GSR") expert. R. 28, l. 2 - 31, l. 8. Counsel explained that she had been appointed to Appellant's case only three months before Appellant's trial. R. 30, l. 7 - 31, l. 8. Counsel reminded the trial court that it had approved funding for an expert witness only a week before the trial. R. 26, ll. 20-25; *see also* R. 475 - 476.

Defense counsel further explained that, given the voluminous discovery, her need to prepare for trial, and the eve-of-trial provision of funding for an expert witness, she had hastily retained a former law enforcement officer whom she believed to be qualified as an expert on gunshot residue evidence. R. 26, l. 20 - 29, l. 6. On the day of Appellant's trial, the State's gunshot residue expert, SLED technician Jennifer Stoner, informed defense counsel that the individual she had retained was not qualified to provide expert testimony on gunshot residue. *Id.*

Accordingly, defense counsel requested a continuance so that she could retain and thoroughly vet a new GSR expert. *Id.* Counsel argued that without a defense expert, Appellant would be unable to present a complete defense. *Id.* Specifically, counsel highlighted discrepancies between the SLED GSR report and the actual results of the GSR test kit. *Id.*

Stoner's report concluded that "several [r]ound particles associated with gunshot residue were found" on the back of Appellant's left hand. The report also stated that one round particle associated with GSR was found on Appellant's left palm and the back of Appellant's right hand. *Id.*

The GSR test kit recorded that the “several round particles” were actually only two particles. Only four particles out of a total of six-hundred fifteen tested from four samples, registered as consisted with GSR. *Id.*

Defense Counsel posited, “[o]ur concern is that hearing from only one expert [the jury] is going to hear only what the State wants them to hear and we’re not going to have the opportunity to explain how many particles you would actually expect to find on a person that has fired a gun.” R. 26, l. 20 - 29, l. 6. In addition, counsel noted that the defense was entitled to have access to expert witnesses and that the State had only provided the GSR kit and SLED case file the week before trial. R. 26, l. 20 - 27, l. 12; R. 29, ll. 19-22.

The State countered that their expert “would be the perfect person” to fully and fairly explain GSR tests and its implications to the jury. R. 29, ll. 7-18. The State assured the court that SLED technician Stoner would testify on the environmental factors that could lead to a false positive GSR test result. R. 30, ll. 11-15. Without taking further argument, the trial court denied the continuance while imploring defense counsel to try and locate an expert in GSR analysis before the close of the State’s case. *Id.* at ll. 16-17; R. 59, l. 24 - 61, l. 6.

Trial Testimony of SLED Technician Jennifer Stoner

Stoner testified that the GSR tests had been properly administered on Appellant and that GSR consists of three elements: barium, antimony, and lead. R. 318, l. 9 - 321, l. 5. Test results revealed that there were no GSR particles on Appellant’s right palm. *Id.* There was “one round particle” consistent with GSR on the back of Appellant’s right hand. *Id.* Appellant’s left palm also had one round particle consistent with GSR on it. *Id.* The back of Appellant’s left hand had “several round particles associated with gunshot residue.” *Id.* As noted above, in actuality there were only two “round particles” on the back of Appellant’s left hand.

Confirming defense counsel earlier concerns, despite only **four of the six hundred fifteen particles** being consistent with GSR, Stoner concluded, **“I found particles that were consistent and associated, which I feel are from gunshot residue, but I cannot call them gunshot residue because it was not the three component particles.”** R. 321, ll. 2-5 (*emphasis added*). On cross-examination, Stoner conceded that no GSR particles were found, but reiterated that she found particles consistent with GSR. R. 326, l. 1 - 327, l. 4.

Nevertheless, she assured jurors that, “we see them so much with gunshot residue. When we see them, it fits morphology and this composition, we feel that it is from gunshot residue. But due to the definition, we cannot call it gunshot residue. But in my opinion it is what I see when I have gunshot residue.” *Id.* Likewise, Stoner dismissed the risk of environmental contamination or false positives resulting from Appellant’s job as a car mechanic. Again, **Stoner expressed this level of certainty based on .65% of the six hundred and fifteen tested particles being partially consistent with GSR.**

During a brief re-direct, Stoner stressed that she had conducted GSR tests in over 2,000 cases during her sixteen year career. R. 327, ll. 19-22. Defense counsel was unable to secure a GSR expert before the end of trial. R. 402, l. 11 - 403, l. 24.

Discussion

“The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.” *State v. Yarborough*, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

However, even if there was no evidentiary support, “[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.” *State v. Preslar*, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct.App.2005); *see also State v. Wyatt*, 317 S.C. 370, 372–73, 453 S.E.2d 890, 891 (1995) (stating that error without prejudice does not warrant reversal).

In holding that the trial judge did not abuse his discretion in refusing to grant a continuance, the South Carolina Supreme Court in *State v. Squires*, 248 S.C. 239, 149 S.E.2d 601 (1966) stated in pertinent part that “[t]here is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points in their behalf could have been raised had more time been granted for the purpose of preparing the case for trial.” *State v. Tanner*, 299 S.C. 459, 385 S.E.2d 832 (1989) (citing *Squires*, 248 S.C. at 244, 149 S.E.2d at 603).

In addition, if a defendant is not granted sufficient opportunity to present a complete defense, including the right to present favorable witnesses, the denial of a continuance can constitute an error of law. *State v. Cooper*, 747 S.E. 2d. 398, 404 (N.C. Ct. App. 2013) (holding that the denial of a defendant's right to present a witness through denial of a continuance, and the denial of a defendant's right to present a witness through a misapplication of a rule of evidence are constitutionally indistinguishable).

Given the pro-prosecution interpretation offered by SLED technician Stoner, it is abundantly clear that Appellant needed his own expert witness to challenge Stoner’s conclusions. Concomitant with the need to retain an expert is the necessity for sufficient time to retain and consult with that expert. Accordingly, the trial court erred in not granting a continuance so as to allow Appellant the chance to secure a qualified expert.

An Accused's Right to Present a Complete Defense

The state and federal constitutions guarantee equal protection of the laws. U.S. Const. Amend. XIV; S.C. Const. art. I, § 3 and § 19. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038 (1973); *see also California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, (1984) (finding the Due Process Clause of the Fourteenth Amendment affords criminal defendants a meaningful opportunity to present a complete defense); *State v. Hutton*, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct.App.2004) (recognizing fundamental fairness requires criminal defendants be granted a meaningful opportunity to present a complete defense).

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 294, 93 S.Ct. 1038. In South Carolina, our State's Constitution specifically enumerates that, "[a]ny person charged with an offense shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense." S. C. Const. art. I, § 14; *see also* S.C. Code Ann. § 17-23-60 (every person accused of a crime has the right to "produce witnesses and proofs in his favor").

The right to present a complete defense encompasses the right to call expert witnesses to rebut evidence and testimony put forward by the State. *Cooper*, 747 S.E.2d at 412 (holding that trial court violated defendant's constitutional right to present a complete defense by excluding defense expert's testimony); *Chambers*, 410 U.S. at 302, 93 S.Ct. at 1049 (the right to call witnesses in one's own behalf are essential to due process).

Indigent Defendants Right to Funds for Expert Witnesses

Indigent defendants are entitled to the assistance of expert witnesses. S.C. Code Ann. 17-3-50(B); *see also* *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) *citing* *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985) (holding that a “defendant must have ‘a fair opportunity to present his defense,’ thereby requiring the State to provide the ‘basic tools’ for an adequate defense to an indigent defendant.”).

An indigent defendant’s right to the assistance of an expert witness is rooted in equal protection, as our Supreme Court observed in *Ex Parte Lexington County*:

Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection.

314 S.C. 220, 228, 442 S.E.2d 589, 594 (1994) (holding that *ex parte* hearings on expert funding for indigent capital defendants should be closed to the public) (internal citations omitted)(*emphasis added*); *see also* *Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465 (1985) (holding that a state violates equal protection by creating arbitrary classifications among similarly-situated persons); U.S. Const. Amend. XIV; S.C. Const. art. I, § 3; S.C. Const. art. I, § 19.

Trial courts should approve “such reasonable expenses as are plainly necessary for the defendant to have his day in court and to permit counsel to fairly and adequately present the case.” *Bailey v. State*, 309 S.C. at 459, 424 S.E.2d at 506. Implicit in this responsibility is the obligation to approve funding in a timely manner that allows the defense to benefit from the expert’s assistance when preparing for trial.

The trial court's denial of Appellant's request for a continuance deprived Appellant of the opportunity to fairly and adequately present his case.

In Appellant's case, the trial court abused its discretion in denying Appellant a continuance because it denied Appellant the opportunity to hire an expert in GSR analysis. R. 59, l. 10 - 61, l. 6. Crucially, the trial court had only approved the *ex parte* funding order the week before trial. R. 26, l. 20 - 27, l. 23; R. 475 - 476; *Bailey v. State*, 309 S.C. at 459, 424 S.E.2d at 506. Moreover, the State only provided defense counsel with SLED's GSR report the week before trial. *Id.* In an effort to be ready for trial, defense counsel had secured the services of someone she believed was qualified to testify as an expert in GSR evidence. *Id.*

She was informed on the day of trial by the State's expert witness, Jennifer Stoner, that this individual, a former SLED investigator, was not qualified to render expert opinions on GSR. *Id.* Clearly under these circumstances, counsel's motion for a continuance was not intended to delay Appellant's trial, but to allow time for counsel to secure an expert witness whose testimony was necessary to present a complete defense.

In denying the motion for a continuance, the trial court (with the wholehearted agreement of the assistant solicitor) opined that the defense could safely rely on the State's expert testimony to present unbiased scientific evidence. R. 60, l. 8 - 61, l. 8. Forcing an indigent defendant to rely on the State's expert witness because his attorney was unable to secure a defense expert in the week between the approval of funding for an expert witness and the start of Appellant's trial, violated Appellant's right to equal protection. *Ake*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093 (meaningful access to justice and fundamental fairness entitles indigent defendant to access to funds for expert witnesses). A non-indigent defendant would not have had to delay hiring an expert witness on the court's approval. *Ex Parte Lexington County*, 314 S.C. at 228, 442 S.E.2d at 594.

A review of SLED technician Jennifer Stoner's testimony demonstrates how reliance on an opponent's expert to testify in a neutral manner is totally improper in our adversarial justice system. *Ake*, 470 U.S. at 83, 105 S.Ct. at 1096 (holding that due process gives defendants the right to experts who will "assist in evaluation, preparation, and presentation of the defense"). The "pro-prosecution bias" of State crime laboratory experts has been widely criticized. See Andre A. Moenssens, *Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. Crim. L. & Criminology 1, 6 (1993) (noting that crime labs "may be so imbued with a pro-police bias that they are willing to circumvent true scientific investigation methods for the sake of 'making their point'").

In its opening argument, the State alluded to "scientific evidence" that will help jurors conclude Appellant was guilty. R. 67, ll. 6-15. This objective permeated Stoner's testimony. She repeatedly stressed that the particles found in the GSR kit were "consistent and associated" with GSR. R. 321, ll. 2 - 23.

Further, she misleadingly phrased her finding two particles consistent with GSR on the back of Appellant's left hand as "several" particles. R. 319, l. 5 - 321, l. 23. Finding two particles consistent with GSR (the particles are missing one of three GSR elements) falls well below the FBI's minimum threshold of three particles of actual GSR per sample (all three elements present) required before they will report a positive GSR test result. Michael A. Trimpe, *The Current Status of GSR Examinations*, FBI Law Enforcement Bulletin, May 2011, available at <https://leb.fbi.gov/2011/may/the-current-status-of-gsr-examinations>. An expert retained to assist the defense would not have reported these results as Stoner did.

Likewise, Stoner dismissed the multitude of environmental factors that could also lead to these elements being found on Appellant's hands, unrelated to firing a gun. R. 314, ll. 13-22. Appellant repaired cars for a living, auto mechanics frequently test positive for GSR as a result of

materials and substances they come in contact with. R. 28, l. 18 - 29, l. 6; *see* Diana M. Wright and Michael A. Trimpe, "Summary of FBI Laboratory's Gunshot Residue Symposium, May 31 - June 3, 2005," *Forensic Science Communications*, July 2006, *available at* https://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/july2006/research/2006_07_research01.htm.

The risk of contamination was particularly high in this case as Appellant was himself shot and then transported with Cheek, who had also been shot. In addition, Lt. Cheek collected GSR samples from Appellant several hours after the incident. R. 361, l. 1 - 362, l. 18. This gap, between the incident and the collection of evidence, presents a substantial risk of sample contamination. R. 357, l. 14 - 358 l. 18; *see* Wright and Trimpe, *supra*.

Stoner also minimized the inconvenient fact the particles could be present as a result of Appellant having been shot and not as a result of Appellant being the shooter. R. 322, ll. 1-17. Despite the weakness and ambiguity of the GSR evidence, Stoner claimed, with near absolute certainty, that the particles found on Appellant's hands were the result of the firing a weapon. R. 327, l. 19 - 328, l. 4; *see* *Watson v. Ford Motor Co.*, 389 S.C. 434, 449, 699 S.E. 2d 169, 177 (2010) (observing that conferring the "expert" label upon a witness may cause juries to give excessive or undue weight to the "expert" testimony).

Like many other formerly unassailable fields of forensic science, GSR evidence has come under scrutiny as more rigorous scientific evaluation is conducted. Jessica D. Gabel & Margaret D. Wilkinson, "Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics, 59 Hastings L.J. 1001, 1020 (2008); *see also* Dennis L. McGuire, "The Controversy Concerning Gunshot Residue Examinations", *Forensic Magazine*, Aug.-Sept. 2008. **Notably, the FBI stopped conducting GSR tests in 2006.** Julie Bykowicz, *FBI Lab Scraps Gunfire Residue: Agency Won't do Analysis, Putting Evidence in Doubt*, Baltimore Sun, May 26,

2006, available at http://articles.baltimoresun.com/2006-05-26/news/0605260327_1_gunshot-residue-forensic-evidence-analysis.

Since Appellant was not afforded a reasonable opportunity to retain an independent defense expert, the jury was never informed of the weakness of the State's scientific evidence. *Ake*, 470 U.S. at 83, 105 S.Ct. at 1096; *see also U.S. v. Stafford*, 721 F.3d. 380, 393-395 (6th Cir. 2013) (conducting a lengthy review of GSR evidence and holding that the scientific dispute regarding the reliability of GSR evidence went to the weight not the admissibility of the evidence); *State v. Council*, 335 S.C. 1, 515 S.E. 2d. 508 (1999) (holding that once evidence is admissible under Rule 702, SCACR, and determined to be probative, it is admissible and the jury may "give it such weight as it deems appropriate.").

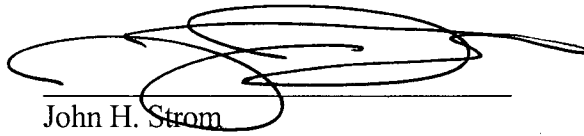
A non-indigent defendant would not have faced this court imposed funding hurdle. *Ex Parte Lexington County*, 314 S.C. at 228, 442 S.E.2d at 594. The defense expert's role is to aid the defendant and function as a "basic tool" for the defense. *Id.* at 77, 105 S.Ct. at 1093. To fulfill this function, an expert must be made reasonably available to "assist in evaluation, preparation, and presentation of the defense." *Id.* at 83, 105 S.Ct. at 1096. Such availability and assistance requires more than *pro forma* assurances of neutrality on the part of the State's expert and the opportunity for cross-examination. R. 59, l. 10 - 61, l. 6.

The trial court committed an error of law in denying Appellant a continuance to allow Appellant, who was indigent, the additional time necessary to retain an expert in gunshot residue analysis when the trial court had only approved funding for such an expert the week before trial and, thus, denied Appellant his right to equal protection and his due process right to present a complete defense. Accordingly, Appellant should be granted a new trial.

CONCLUSION

For the foregoing reasons, Appellant David Lee Walker respectfully requests that this Court reverse his convictions and remand this case to the Laurens County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of November, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 3, 2016



John Harrison Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

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