STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PAULA REED ROSE,

APPELLANT

APPELLATE CASE NO 2015-002445

SUPPLEMENTAL RECORD ON APPEAL

JOHN H. STROM
Appellate Defender

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

ATTORNEY FOR APPELLANT

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

WILLIAM W. WILKINS, III.
Solicitor, Thirteenth Judicial Circuit

ATTORNEYS FOR RESPONDENT

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THE COURT: Alright, would you bring the jury in please, sir.

THE BAILIFF: Yes, sir.

THE COURT: For the record, uh, I have denied defense motion for a directed verdict as to all indictments in this matter, uh, uh, orally announced that to counsel in my chambers but I do need to place that on the record, okay.

(The following takes place in the presence of the jury.)

THE COURT: Okay, ladies and gentlemen of the jury, uh, I know after I've been pushin' and pushin', pushin' you're probly wondering why I've sat you back in the back room for hour and a half plus I made ya come at 8:30, let me explain to you where we are on the case. At this point, uh, we're going to a next phase in the case. I told you there five phases: first phase is the opening statements, second phase is the, uh, presentation the evidence. At this point the parties have advised me that that's all the evidence they intend to present this matter it's been presented so that takes us to the closin' arguments of counsel, my charge on the law by me and then deliberations. Uh, we have by agreement switched the order from the traditional role, I am going to charge you on the law now, uh, and then the attorneys will be able to give their closing statements, Mr. Riordan will go first and since the State has the burden of proof they'll go last, okay, so you'll know where we are. After their arguments or after my

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

NIKKI R. HALEY
Governor

MARK A. KEEL
Chief

Ben Cannon
Greenville County Sheriff's Office
Law Enforcement Center, 4 McGee Street
Greenville, SC 29601

TRACE EVIDENCE
August 13, 2012
SLED LAB: L12-09076
Your Case No: 01-2012-109451
Incident Date: 7/27/2012
[V] Homer Rose

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Mark A. Keel, Chief
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE:

Item: 1 One quart can containing charred wood and yard debris

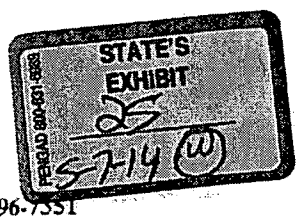
RESULTS:

A mixture containing a heavy petroleum distillate and a heavy aromatic product was found. This can be from a blended product or from a physical mixture. Some examples of heavy petroleum distillates are kerosene, diesel fuel, some jet fuels, and some charcoal starters. Some examples of heavy aromatic products are some insecticide vehicles and industrial cleaning solvents.

Item: 2 One quart can containing charred wood and yard debris

RESULTS:

A mixture containing a heavy petroleum distillate and a heavy aromatic product was found. This can be from a blended product or from a physical mixture. Some examples of heavy petroleum distillates are kerosene, diesel fuel, some jet fuels, and some charcoal starters. Some examples of heavy aromatic products are some insecticide vehicles and industrial cleaning solvents.



Item: 3 One gallon can containing charred wood

RESULTS:

Gasoline found. This includes all brands of gasoline and gasohol.

Item: 4 One gallon can containing charred wood

RESULTS:

Gasoline found. This includes all brands of gasoline and gasohol.

Item: 5 Unknown dark red metallic paint chip, submitted as "paint chip from head of hatchet"

RESULTS:

A two layer, dark red metallic paint chip was found. The unknown dark red metallic paint chip and the top two layers of the standard paint from the safe (Item 6) are the same in physical and chemical characteristics. The standard from the safe can be considered as a possible source of the unknown paint.

Item: 6 Dark red metallic paint chips, submitted as "paint chip from safe (standard)"

RESULTS:

Three layer, dark red metallic paint standard.

Item: 7 One gallon can containing one tan slipper with fur inside and rubber sole

RESULTS:

A mixture containing toluene and a medium petroleum distillate was found. This can be from a blended product or from a physical mixture. Some examples medium petroleum distillates are some charcoal starters, some paint thinners, and some dry cleaning solvents.

Item: 8 One gallon can containing blue jean material

RESULTS:

A mixture containing gasoline and a medium petroleum distillate was found. This can be from a blended product or from a physical mixture. Some examples medium petroleum distillates are some charcoal starters, some paint thinners, and some dry cleaning solvents.

Item: 9 One gallon can containing black cloth material

RESULTS:

A mixture containing gasoline and a medium petroleum distillate was found. This can be from a blended product or from a physical mixture. Some examples medium petroleum distillates are some charcoal starters, some paint thinners, and some dry cleaning solvents.

Item: 10 One gallon can containing one tan slipper with fur inside and rubber sole

RESULTS:

A mixture containing gasoline and a medium petroleum distillate was found. This can be from a blended product or from a physical mixture. Some examples medium petroleum distillates are some charcoal starters, some paint thinners, and some dry cleaning solvents.

Megan M. Fletcher

Megan M. Fletcher
Forensic Scientist

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)))	COURT OF GENERAL SESSIONS 2013-GS-23-678, 679, 680,681
STATE OF SOUTH CAROLINA v. PAULA REED ROSE	)))))))	**DEFENDANT'S MEMORANDUM IN SUPPORT OF POST-TRIAL MOTIONS**

In support of her previously filed Post-Trial Motions, Defendant Paula Reed Rose ("Defendant") prays for the grant of one or more of her motions for: Directed Verdict of Acquittal; Suppression of Evidence (as raised Pre-Trial) and/or her motion for a New Trial.

DIRECTED VERDICT OF ACQUITTAL

Defendant acknowledges that, "[i]f there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly and logically deduced, the case should submitted to the jury." State v. Johnson, 334 S.C. 78, 512 S.E. 2d 795 (1999). However, "[t]he trial court should grant a directed verdict motion where a jury would be speculating as to the accused's guilt or where the evidence is sufficient only to raise a mere suspicion of guilt." State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001); State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996); State v. Schrock 283 S.C. 129, 322 S.E.2d 450 (1984); see also State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)("The trial judge should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty."). Defendant submits that ***no direct evidence*** was presented and ***the circumstantial evidence was NOT substantial*** as required to overcome directed verdict. Her mere presence is insufficient. Moreover, the alleged "evidence" was shown by testimony from the State's own

expert to merely raise or arouse suspicion rather than reasonably tend to prove guilt. Given the incomplete investigation conducted, the circumstances of the crimes alleged against defendant were not proved beyond a reasonable doubt. See State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) and State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2012). Accordingly, Defendant prays that the Trial Court grant a Directed Verdict of Acquittal

Pre-trial, the State acknowledged that the clothing and shoes encompassed the majority of their evidence, such that if those items were suppressed it would be detrimental to the State's case-in-chief, making it largely possible the case probably would not go forward. (Tr.A, p.23, l. 21 – p.24, l.17).[1] Defendant objected to the admission of those items given a lack of proper evidence regarding free, knowing and voluntary consent to search and/or seize as well as the lack of reliability or probative nature of the arson dog's "expertise." However, given the information eventually presented, both pre-trial and at trial, it is illuminating how speculative the evidence truly is and how lacking in probative value the items and testimony were, even upon admission.

CLOTHING

Given the presence of the red gas can and per subsequent testing of removed wood and/or debris, it was agreed gasoline was the ignitable liquid used on the front porch. The State submitted that testing detected the presence of ignitable liquid residue of gasoline and other petroleum distillates (such as paint thinner) on Defendant's jeans and shirt. While the State attempted to suggest such could only result from actual liquid gasoline dripping directly onto such clothing, the expert testimony from Agent Fletcher logically acknowledged such could result indirectly via various transfer methods and that the ultimate "findings" were merely the

[1] Three separate portions of transcripts were created. Copies will be provided and labeled with a single Exhibit: Transcript A (Tr.A) consists of pre-trial testimony of Investigators Cannon, Gonzalez and Morgan and trial testimony of DNA Analyst Brian Browning and SLED Agent/Forensic Examiner Megan Fletcher. Transcript B (Tr.B) consists of the pre-trial testimony of Homer and Paula Rose and subsequent pre-trial argument and rulings. Transcript C (Tr.C) contains trial testimony from the three investigators.

presence of ignitable liquid residue (Tr.A, p.179, ll.14-16). In discussing the samples of wood taken from the front porch, Agent Fletcher pointedly acknowledged that even the touching of such wood could create the potential for the transfer of "ignitable liquids" to subsequently touched items (Tr. A, p. 181, l.9 – p.183, l.9). In fact, near the close of Agent Fletcher's questioning on redirect, the suggestion that ignitable liquid poured on wood that had "burned off' would leave no presence was rejected (Tr.A p. 212, ll.7-24).

Initial responders testified that the front porch fire was still burning upon arrival and they wanted to get Defendant off the porch. (Tr.C p.344, ll.15-16; p.375, ll.11-24). At least one firefighter acknowledged that Paula was "in" and about the fire and its debris on the front porch. (Tr.C p.377, ll.4-9). Investigators noted that, even upon their later arrival, they "could smell gas layin' on the front porch" and the smell of gasoline was "still very strong." (Tr.C p.184, ll.13-21; p.193, l.25 – p.194, l.2; p.376, ll.7-11). Photos continued to show wetness on the porch (See Photos). It was also well documented that Defendant was in contact with those pets that were on that front porch, eventually carrying and holding some throughout that morning. (See Photos). At trial, when the items were removed from the can, dog hair (or other fiber) was observable on the clothing. Discussions were had, and common sense dictates, that hair of any sort, including dog hair, is excellent at absorbing oils, including petroleum products. http://moderndogmagazine.com/articles/dog-hair-soaks-gulf-oil-spill/10803 Finally, it is without dispute that the shirt and jeans were "balled up" in the top of Paula's overnight bag when they were recovered from Ellie Hansen's apartment (Tr.C p.88, ll. 2-8; p.226, ll. 5-15), where Paula was staying as an overnight guest. In conjunction with testimony regarding extreme concern regarding any cross-contamination, the fact that any residue of ignitable liquids was found to have vaporized onto the carbon strip placed in the can with either item of clothing prior to the

cans and items being heated in an oven to over 140° for 16 hours (Tr.A, p. 187, ll. 16-22) is of little to no probative evidentiary value. Agent Fletcher admitted that the offered explanation of transfer from the porch, which had nothing to do with someone setting a fire, was "as plausible as any" given that she "can't ever determine the source of an ignitable liquid" (Tr. A, p.190, l.20 – p. 191, l.5), or "whether or not that was transfer from second or thirdhand versus direct exposure." (Tr.A p.214, ll.11-16). Accordingly, the prejudicial effect of the testimony and submitted "evidence" by the State greatly outweighed any probative value and merely raises a suspicion of guilt – nothing more.

SHOES

Likewise, cross-contamination concerns were voiced repeatedly by the State's own experts and investigators, acknowledging that it is something they strive to avoid (Tr.C p.78, ll. 2-19; p.194, ll.12-20). Here, concerns such could have occurred are seemingly beyond dispute when the crime scene was released at 12:20 p.m. and remediation contractors with ServPro were clearly and admittedly on the scene and at least actively taking photos, if not beginning their cleanup, before the shoes were seized (Tr.A p.137, l.18 – p.138, l.3; Tr.C p.78, ll.3-17; p.80, ll.6-8; p.382, ll.6-8). Whether the cleanup was begun or not, it was clear that any persons entering the home beforehand by two of the three entrances would have been walking through the debris and residue from the fires (Tr.C p.209, ll.15-21). As referenced, Agent Fletcher acknowledged that samples taken from the front porch still contained the ignitable liquid and/or its residue. Her testimony also made clear that even touching those samples and any other item would create a potential cross-contamination. Obviously, such concerns existed here given that ServPro and/or others were clearly walking in and around the home and the shoes in question seemingly changed position from earlier in the day. (Tr.A p.41, l.12 – p.42, l.12; See photos discussed as

7128, 7248, 7247 prior to marking as Exhibits; Tr.A p.196, ll.7-17 – would not wish to speculate whether moccasins or tennis shoe moved when dealing with something this important).

The arson dog which allegedly "hit" upon at least one of the shoes was clearly in the residue earlier in the day, when photographs were taken of it lying down, signaling its "hit" on the front porch (Defendant's Exhibit 3; Tr.C p.195, ll.5-22; p.196, ll.3-15). Moreover it was acknowledged that the dog was not cleaned in the interim, was not wearing any type of protective "shoe" (Tr.A. p.115, ll.21-23; Tr.C p.138, ll.16-17; see photos of dog), and was allowed to "search" off leash (Tr.C p.141, ll.4-8; p.153, ll.20-23). Finally, the dog was trained to "hit" on paint and lacquer thinner, common household items when renovating or painting. (Tr.A p.200, ll.10-13; p.205 ll.12-14). Investigator Gonzalez acknowledged "I think there may have been some painting upstairs if I remember right." He further acknowledged the dog would not distinguish between potential accelerants. (Tr.C p.178, l.9 – p.179, l.6).

Agent Fletcher acknowledged that even the minutest sample, as little as a drop of gasoline, was enough to confirm a positive presence from her testing. (Tr.A p.201, ll.16-20). At least some testimony suggested a dog's sense of smell could be similarly sensitive regarding its trained for accelerants, including several found in common household goods. (Tr.C p.143, ll.16-20). Accordingly, the probative value of the initial seizure, as well as the ultimate test result, is vastly outweighed by the potential prejudice. The overall speculative nature and unreliability of such findings are placed into question by the cross-contamination concerns, compounded by the lack of any investigation of such issues through questioning of the initial responders on the scene. How could this ever constitute a reliable arson investigation when the initial firefighters, who observed and interacted with Defendant in the midst of the fire, were never even questioned?

Ultimately, given the contamination concerns, the significance of any results under the admitted testing procedures were inconsequential. Agent Fletcher acknowledged that toluene existed in paint thinners, was potentially a leather tanning solvent and was likely involved in adhesives. (Tr.A p.205 ll.12-19). She further acknowledged private investigator John Lentini was authoritative in the fields of fire debris, fire and analysis (Tr.A p.205 l.24 – p.206 l.10) and his peer review article "The Petroleum Laced Background" in a prominent publication was similarly authoritative, agreeing with regard to testing "[w]e wanna make sure that they are indeed ignitable liquids and not from products at the scene." (Tr.A p.206 l.15 – p.207, l.20; p.209 ll.1-2). She eventually acknowledged that this authoritative article specifically stated that "no substrate tested presented more potential problems than shoes . . . a pair of shoes for comparison would seem to be absolutely essential prior to making any decisions about the significance of petroleum products identified on shoes." (Tr.A p.208 ll.2-25). Therefore any testing with regard to a petroleum based outcome is suspect, especially, when controlled testing is not done, as was the case herein. Observation of the exhibits themselves, especially the left shoe, alleged to have the presence of gasoline, may further illuminate the speculative nature of any such testing, such that a directed verdict of acquittal is warranted.

REASONABLE DOUBT

The lack of direct evidence and/or substantial circumstantial evidence is further supported by the overwhelming existence of reasonable doubt. How could reasonable doubt NOT exist when so little was done to actually investigate Defendant's reported complaint? Here are some of the more obvious deficiencies:

1) Investigators exerted little effort to locate or gain further information regarding the reported red pickup with an empty trailer seen just across the street at Bucky's Barber Shop, the closest "home" in the area, just prior to the crime (Tr.C p.53, l.15 – p.55, l.8; p.193, ll.19-22).

2) Investigators did nothing to speak with any of the neighbors in the neighborhood located immediately behind Defendant's property. (Tr.C p.55, l.14 - p.56, l.21)

3) If these investigators truly did check for similar burglaries in either the area or the Upstate of South Carolina, no notation of such efforts was documented and they failed to locate those similarly reported instances discussed *in limine* and noted in a Pre-Trial Exhibit of News Stories submitted by Defendant. (Tr.C p.189, l.15 – p.190, l.8; p.339, ll.3-20)

4) Investigators did nothing to check with Defendant's phone provider regarding the cut phone line to determine when it was cut, or if similar instances had occurred in the neighborhood or elsewhere (Tr.C p.117, ll.1-24; p.377, ll.12-24; Tr.B p.61, l.12 – p.64, l.9; Defendant's Exhibit of News Stories).

5) There was no notation that anyone even sought to determine who had access to the combination of the safe. (Tr.C p.216 ll.7-10) Such certainly was not asked during questioning of Homer's ex-wife. Moreover, no investigator even opened the safe to determine what was inside that may have been desired by the burglars (Tr.C p.220, ll.5-19; p.350, l.25 – p.351, l.4).

6) Investigators did not determine when or how the fire was started (Tr.C p.378, ll.3-17).

7) Investigators could not state that anything was done to inspect, analyze or investigate the cell phone which was found on the street outside of her home or a Lowe's bag taken into evidence. (Tr.C p.118, ll.6-23).

8) Investigators did nothing to review the fingerprints and the photographs of the prints found and reported to them by State Farm. (Tr.C p.95, l.21 – p.96, l.19; p.234, l.13 – p.235, l.3; See testimony of Phil Brooks).

9) Investigators failed to recognize the report from their own forensics unit that one of the two prints found on the safe were eliminated as being produced by Defendant or her husband (initial testimony related the incorrect belief that the only two sets of prints which were found by the forensics team both belonged to Defendant (Tr.C p.89, l.13 – p.90, l.13; p.91, l.22 – p.94, l.18; Transcript of Dustin Kretschmar's testimony not created, but it is asserted he confirmed).

10) Investigators failed to speak with Defendant's yard man. (Tr.C p.116, ll.15-25)

11) In this arson case, no investigator ever spoke with the responding firefighters (Tr.C p.226, l.16 – p.227, l.17; p.344, l.24 – p.345, l.11)

12) With regard to any investigation relating to the yellow diesel container, no attempt was made to locate fingerprints on the separated cap (Tr.C p.50, l.25 – p.51, l.19; p.379, ll.8-25). Investigator Morgan arbitrarily asked only the most local stores about their sales of such cans and limited his focus on the sale of such yellow cans to the past ten days. When given potential information with regard to those sales, investigator Morgan neglected to obtain a copy of the two photographs that were provided of persons purchasing those cans. Moreover, when given identifying information regarding persons who had purchased those cans, nothing was done to contact either them or work associates to determine whether such yellow cans were still in their possession or whether they had been given to other individuals. (Tr.C p.97, l.4 – p.102, l.21)

13) Most importantly, arrest warrants were sought even before any results were obtained regarding the DNA analysis of the three latex gloves found on the crime scene. (Tr.C p.353, ll.15-18) It is telling that, even upon receipt of such results, they were not produced in discovery

for another 14 months. Most tellingly, the resulting DNA established contribution by three or more persons (though there was no indication there were more than three), with the only definitive sex typing being MALE DNA. (Tr.A p.157, ll.15-25; Tr.C p.253, l.5 – p.254, l.6). DNA Analyst Browning's response when questioned about the possibility of female DNA existing within the samples is appropriate with regard to the entirety of the State's allegations: "It could be possible theoretically, I can't really say for this case specifically 'cause there's just, there's just too much information to make a conclusion." (Tr.A p.155, ll.4-6). The suggestion that ANY female, much less Defendant, had produced or contributed to the DNA was admittedly pure speculation. (Tr.A p.158, ll.1-8). Defendant submits that the DNA results alone establish sufficient reasonable doubt given this factual scenario. Accordingly, it is urged that reasonable doubt be deemed to exist as a matter of law, such that a directed verdict of acquittal is appropriate.

No affirmative testimony regarding motive, where such is a requirement of certain elements of the charged offenses, was definitively offered, such that acquittal would be appropriate. (Tr.C p.68, ll.3-8; p.343, ll.8-16).

PRE-TRIAL MOTIONS

As an alternative basis for relief, Defendant respectfully prays that the Trial Court reconsider and/or reevaluate Defendant's Motions raised *in limine*, specifically those contesting the searches and seizures occurring at 136 Riley Smith Road and 150 Oak Ridge Apartments, seeking exclusion of the items of clothing and footwear improperly seized as violative of Defendant's Fourth and Fourteenth Amendment rights guaranteed under the U.S. Constitution and Article I, §10 of the State Constitution. "It is well settled that searches conducted without a warrant are *per se* unreasonable unless an exception to the warrant requirement is presented, and

the burden is upon the state to justify a warrantless search." State v. Peters, 271 S.C. 498, 501, 248 S.E. 2d 475, 476 (1978).

As discussed *in limine*, both consent searches were allegedly provided by non-parties. Defendant continues to maintain that the consent forms themselves constituted hearsay without an exception, and the same was true for the testimony from the investigators seeking to assert that the alleged consent by non-parties was knowingly, freely, and voluntarily provided, without duress or coercion. At no time did the State provide any admissible testimony from Ellie Hansen, who moved to Pennsylvania soon after this incident and was not subpoenaed for or present at trial. Likewise, though Defendant's husband, C. Homer Rose, III ("Homer"), was questioned *in limine* he was NOT called as a witness during the State's case in chief. The State's attempt to prove consent was wholly based upon hearsay, without any properly noted exception.

ADMISSION OF EXPERT TESTIONY FROM DOG

It is submitted that Defendant's concerns regarding the "expertise" of the arson dog Misty (and perhaps more importantly the probative value of any testimony or evidence related thereto) was well founded. No dog was necessary to determine that an intentional fire was set and that ignitable liquids or accelerants were used. Once the crime scene was released, the high potential for cross-contamination, which was apparent from the admitted testimony of the SLED forensic expert and/or corroborated or agreed with by the investigators, was patent. The lack of crime scene preservation rendered any evidentiary value with regard to the shoes unreliable and therefore the seizure and admission of evidence with regard to Defendant's shoes should have been suppressed and excluded.

The dog's "expertise" was primarily utilized in providing a basis for the seizure of Defendant's shoes. As previously discussed, the arson dog was trained to identify numerous

"accelerants," many of which are normal household items, including paint thinners, which would be utilized by any number of homeowners, including Defendant. Investigator Gonzalez acknowledged his recollection that he likely did see a room being painted. (See previous cites.) Moreover, Lentini's article specifically mentioned the retention of toluene within the adhesives for the soles. Toluene was one of the arson dog's accelerants. Accordingly, there is no true evidentiary/probative value to any "testimony" the dog could provide; admission as an expert should have been declined.

SEARCH OF APARTMENT

Defendant contested that the search of Ellie Hansen's apartment (150 Oak Ridge Apartments) on numerous grounds. Even assuming Ellie could provide sufficient consent to a search or seizure involving items of Defendant, such showing required non-hearsay testimony. The State failed to secure Ellie's appearance at trial. To the extent the recollections by the investigators and/or the Consent Form itself were deemed admissible, non-hearsay evidence, (which Defendant continues to protest) it is urged that Ellie's dutifully notarized affidavit, proffered during the *in limine* hearings, be utilized in re-evaluating the totality of the circumstances with regard to the search and seizure. Given admissions regarding Ellie being upset and crying (Tr.A p.90, l.25 – p.91, l.18) and being unsure what to do, the totality of the evidence suggests Ellie did not freely, knowingly and voluntarily give consent to the search and seizure of Defendant's clothing within the apartment.

More importantly however, the Court rightfully found Defendant was an overnight guest (Tr.B p.56, ll.2-3) which was adequately supported by evidence: 1) she packed a bag so that she could shower and stay at the apartment; 2) she had assisted Ellie in obtaining the apartment, for which she held her own key (Tr.A p.19, ll.3-17; Tr.C p.85, ll.2-3); 3) even Investigators referred

to the container which held her clothes as an "overnight bag" (Tr.A p.92, ll.2-7); 4) not only did Paula and Homer Rose stay there the night of the fire and this search, but for the majority of the next months while their home was being repaired (Tr.B p.39, l.13 – p.40, l.15; p.52, ll.14-24).

It was acknowledged that Defendant never gave consent to this search (Tr.A p.89 ll.15-16; p.98, ll.20-22; p.143, ll.15-17). As an overnight guest, Defendant retained her own expectation of privacy as to her items. See State v. Missouri, 361 S.C. 107, 113, 603 S.E.2d 594, 597 (2004)(citing Minnesota v. Olson, 495 U.S. 91, 99 (1990)("From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside...The houseguest is there with the permission of his host, who is willing to share his house and *his privacy* with his guest."). Even if she could allow persons inside, such consent does not extend to Defendant's personal items.

The State relied upon the authority of State v. Flowers, 360 S.C. 1, 598 S.E.2d 725 (Ct. App. 2004) for the proposition that a host's consent to search a residence overrides the objection of an overnight guest. However, Flowers can be distinguished from the present case in that the guest's objection to search had been "previously" given and was not made when the homeowner "subsequently" consented to the search. See Flowers, 360 S.C. at 6.[2] Thus, the overnight guest in Flowers was not a "present objector" as Defendant was in this case. In any event, to the extent Flowers stands for the proposition that the host can trump the guest's objection—which is denied, *Flowers* runs afoul of the United States Supreme Court's decision in Georgia v. Randolph, 547 U.S. 103 (2006) and, as such, Defendant believes Flowers would have to be

[2] In *Flowers*, our Court of Appeals summarizes the decision of the Court of Appeals of Washington in State v. Vaster, 24 Wash.App. 405, 601 P.2d 1292 (1979), suggesting that it stands for the proposition that a homeowner's consent overrides a guest's objection; however, the Court of Appeals in *Flowers* fails to note that the guest's objection in *Vaster* was made during the search and after the homeowner's consent had already been given.

overruled by South Carolina's appellate courts. In Randolph, the Supreme Court—resolving a jurisdictional split of authority—held that "***a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him***." Randolph, 547 U.S. at 106. Accordingly, the search and seizure at 150 Oak Ridge was unlawful and invalid under the clear authority of Randolph.[3] "This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." Id. at 122-123. Both the search and the seizure, over Defendant's specific objection, constituted violations of Defendant's legitimate expectation of privacy and 4th Amendment rights against unreasonable searches or seizures of her "houses" or "effects."

Moreover and even assuming *arguendo* that investigators were lawfully present in the Oak Ridge apartment—a proposition that Defendant expressly and vehemently denies—and the clothing was in plain view, the seizure of clothing violated Defendant's constitutional protection from unlawful search and seizure in that any incriminating character of the clothing seized was not immediately apparent to the officers without conducting some further search. The "immediately apparent" requirement mandates there be "a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior." Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 307 (1967). As the United States Supreme Court has clearly stated, "**plain view *alone* is never enough to justify the warrantless seizure of evidence**." Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971). Because the clothing was not a fruit, instrumentality or contraband, but rather constituted what is referred to

[3] In anticipation of the State's distinction between a co-tenant and an overnight guest, it is of import to note the admittedly narrow request by the investigators (argued as amounting to coercion) that the premises would not be subject to a general search, but merely the limited seizure SOLELY of Defendant's property. There should be little validity to any suggestion that a homeowner may claim any authority or right over the property of a houseguest by its mere presence in the home.

as "mere evidence," in order that the incriminating character of the clothing is "immediately apparent," the officers must first establish a nexus between the clothing and the criminal behavior prior to the seizure.

Additionally, the United States Supreme Court has held that where additional effort is required to "discover" the incriminating character of the evidence seized, it is less likely that the "immediately apparent" requirement will be met. See Arizona v. Hicks, 480 U.S. 321 (1987). In Hicks, stolen stereo equipment was in plain view of the officers lawfully present in the defendant's residence; however, the officers only discovered the incriminating character of the stereo after moving it to view the serial numbers. The Court in Hicks held that moving the equipment constituted a second, unauthorized search, and therefore the plain view doctrine was inapplicable. The application of this rule is even more applicable in this case, where the allegedly incriminating character of Defendant's clothing was not apparent until subjected to chemical analysis. By way of comparison and example, in Harris v. United States, 390 U.S. 234 (1968), the seizure of "mere evidence" (a vehicle registration belonging to a robbery victim) under the plain view doctrine was upheld because it was obtained while the officer was lawfully present in the suspect's vehicle and the victim's name was printed and plainly visible on the front of the document. Thus, its "incriminating character" was "immediately apparent." The same cannot be said for Defendant's clothing at the time of the seizure. Moreover, the testimony from Agent Fletcher, was less than compelling with regard to the actual significance of any findings. Accordingly, it is asked that the pretrial motion with regard to the same be granted.

SEARCH OF DEFENDANT'S HOME

Likewise, this was a warrantless search for which consent must be freely, knowingly and voluntarily given. It is acknowledged that no such consent was ever sought or obtained from

Defendant in this matter. The State did attempt to obtain such consent through the consent form signed by Defendant's husband. However, in pre-trial testimony, Homer maintained that the form he signed was submitted to him after items had already been seized in their garage and he signed the same more as a receipt (Tr.B p.8, ll.7-10). He maintained, in retrospect that the request was pretext to distract his attention while the dog entered his home. (Tr.B p.9, ll.13-19) He maintained his consent was restricted to the garage, especially since the crime scene had been released (Tr.B p.9, l.24 – p.10, l.3) Moreover, it was admitted by one or more investigators that they never informed Homer that they considered his wife a suspect, despite acknowledgment that such would be important to determining whether someone's consent was free and voluntary. (Tr.A p.71, ll.2-24)

It is interesting that, when attempting to gain the consent from Ellie, who was admittedly crying and stating she did not know what to do, the investigators informed her that their "search" would be restricted to the obtainment of Defendant's clothes. Despite this testimony, the form Ellie eventually signed was NOT amended in any fashion to clarify the agreed restriction. Similarly, though Homer's consent form was NOT restricted, he considered his execution to be the limited acknowledgment of the items already seized - not an unrestricted consent for the search of his home. Perhaps most importantly, though Homer did testify *in limine*, he was never called, as required, in the State's case in chief. Numerous assurances were made that Defendant's pre-trial and trial objections were preserved.(Tr.B p.58, ll.13-20; Tr.A p.34, l.8 – p.35, l.12) Moreover, when defense counsel questioned Investigator Ben Cannon regarding a written statement provided by Mr. Rose to Investigator Morgan, the State objected that such constituted hearsay, which was rightfully sustained.(Tr.C p.339, l.22 – p.340, l.8) Such position is telling in that it corroborates the defense's own position with regard to any and all statements by Mr. Rose

offered out of court to prove the truth of the matter asserted, not only with regard to the actual investigation, but also with regard to the consent to search. The State should be held to their own objection; the consent to search and any testimony allegedly assigned to Mr. Rose with regard to the consent constituted hearsay and were thereby inadmissible with regard to the State's proof of free, knowing and voluntary consent.

The State's failure to call Homer Rose as a witness to establish his free, knowing, willing and voluntary consent should be fatal – the motion to suppress such evidence should be granted.

NEW TRIAL

Out of an abundance of caution Defendant does renew and raise as a backup argument and plea, that a new trial be granted. For all of the reasons provided heretofore, the grant of a new trial as thirteenth juror would be warranted. Subsequent to trial, numerous additional documents were produced, the existence of which became apparent through trial testimony. Though the handling of this conflict matter by the Attorney General rather than the local solicitor cannot be discounted as a reason for the less than prompt production of discoverable items, neither can the adverse effect upon the defense due to such delays be discounted. The cumulative documentation is provided as Tab D to the Exhibit to the post-trial motions in support of any and all motions, including the grant of a new trial.

CONCLUSION

For all of the foregoing, Defendant prays for a directed verdict of acquittal. Alternatively, Defendant requests that her pre-trial motions be reconsidered and/or granted and a new trial ordered as to all charges.

Respectfully submitted,

By: _____

John P. "Jack" Riordan (Bar No. 65284)
SMITH MOORE LEATHERWOOD, LLP
2 West Washington Street, Suite 1100
P.O. Box 87, Greenville, SC 29602
Telephone: (864) 751-7600
Facsimile: (864) 751-7800
jack.riordan@smithmoorelaw.com
Attorneys for Defendant

Dated: _____

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	CA No. 2013-GS-23-678, 679, 680, 681
		2012A2330202127
		2012A2330202126
		2012A2330202128
STATE OF SOUTH CAROLINA,	)	2012A2330202125
Plaintiff,	)	
v.	)	**ORDER**
PAULA REED ROSE,	)	
Defendant.	)	

FILED-CLERK OF COURT
PAUL B. WICKENSIMER
GREENVILLE CO. SC
2015 NOV 13 PM 2:12

This matter was before the Court for a hearing on Defendant's Post-Trial Motions for: Directed Verdict of Acquittal; Suppression of Evidence (as raised Pre-Trial) and New Trial on September 2, 2015.

DIRECTED VERDICT OF ACQUITTAL

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Moore, 374 S.C. 468, 474-75, 649 S.E.2d 84, 87 (Ct. App. 2007) (citing State v. McKnight, 352 S.C. 635, 642, 576 S.E.2d 168, 171 (2003); State v. Rothschild, 351 S.C. 238, 243, 569 S.E.2d 346, 348 (2002)). However, "[a] case should be submitted to the jury if there is any direct evidence or any substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced." Moore, 364 S.C. at 474-75, 649 S.E. 2d at 87 (citing State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002); State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001)). In this case, the Court finds that the State produced evidence reasonably tending to prove the guilt of the accused; therefore, the Court denies Defendant's motion for directed verdict.

SUPPRESSION OF EVIDENCE

As to Defendant's motion for Suppression of Evidence, the Court finds that the denial of Defendant's pre-trial motion *in limine* was proper. In State v. Flowers, the South Carolina Supreme Court held that "[t]hird party consent may be given by one who has common authority over or some other sufficient relationship to the premises or effects being searched." 360 S.C. 1, 5, 598 S.E.2d 725, 728 (2004) (citing State v. Moultrie, 271 S.C. 526, 528, 248 S.E.2d 486, 487 (1978)). Furthermore, "a homeowner may grant consent to search the premises on which a criminal defendant resides if the homeowner possesses common authority over a sufficient relationship to the premises or effects to be inspected." Flowers, 360 S.C. at 5-6, 598 S.E.2d at 728 (citing State v. Pressley, 288 S.C. 128, 130 341 S.E.2d 626, 627 (1986)). Although the Defendant may not have given consent to the search of the premises, Ellie Hansen, as the homeowner and host, possessed common authority over the premises and provided sufficient consent to the search which resulted in the seizure of the evidence. Therefore, Defendant's motion for Suppression of Evidence is denied.

NEW TRIAL

"Where there is no evidence to support a conviction, an order granting a new trial should be upheld." State v. Taylor, 348 S.C. 152, 159, 558 S.E.2d 917, 920 (Ct. App. 2001) aff'd, 355 S.C. 392, 585 S.E.2d 303 (2003) (citing State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993)). "However, where there is competent evidence to sustain the jury's verdict, the judge may not substitute his judgment for that of the jury." Taylor, 348 S.C. at 159, 558 S.E.2d at 920 (citing State v. Prince, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993)). The Court finds that there is competent evidence to sustain the jury's verdict against the Defendant; therefore, the court denies Defendant's motion for a New Trial.

CONCLUSION

The Court denies all of Defendant's Post-Trial Motions including: Directed Verdict of Acquittal; Suppression of Evidence; and New Trial.

IT IS SO ORDERED This 8th Day of NOV OCTOBER A.D., 2015.

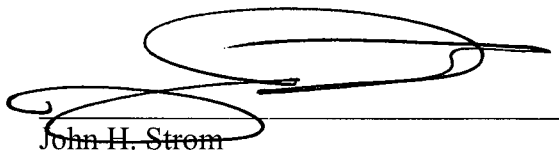
R. Lawton McIntosh, Judge
Tenth (10th) Judicial Circuit.

Greenville, South Carolina.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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."

Respectfully Submitted,



John H. Strom
Appellate Defender

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

ATTORNEY FOR APPELLANT

This 16th day of December, 2016.