THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions, First Judicial Circuit
The Honorable Maite Murphy

Circuit Court Case No. 2014-GS-38-0088-0093
South Carolina Court of Appeals Case No. 2015-000516

THE STATE,

RESPONDENT,

V.

ARCHIE MORE HARDIN,

APPELLANT

APPELLATE CASE NO. 2015-000516

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF THE ISSUES PRESENTED ON APPEAL 4

STATEMENT OF THE CASE 5

STANDARD OF REVIEW 5

STATEMENT OF THE FACTS 6

ARGUMENT 9

CONCLUSION 20

TABLE OF AUTHORITIES

CASES **Page(s)**

State v. Tanner, 299 S.C. 459, 385 S.E.2d 832 (S.C., 1989)............................9, 12, 13
State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012)......................................6
State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006)....................................5
State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989)....................................13
State v. Browder, 277 S.C. 206, 284 S.E.2d 775 (1981)...............................
Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)............13
State v. *Saltz,* 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)........................6
State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966)...........................12, 13
State v. Asbury, 328 S.C. 187, 493 S.E.2d 349 (S.C. 1995)..........................
State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)................................10
State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996)..........................9, 10, 13
State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991)..............................12
State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001)......................................5
State v. Austin, 306 S.C. 9 (Ct.App.1991)..17
State v. Forrester, 343 S.C. 637 (2001)...17
State v. French, 279 N.W.2d 116 (1979)...18
State v. Mattison, 352 S.C. 577, 587 (Ct. App. 2003)....................................17
State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 449.....................13, 15, 16
State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (2000)................................13
State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct.App.1999)......................14
Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997)...................................13
State v. William C. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002)..............12
State v. Roper, 274 S.C. 14 (1979)...
State v. Langford, 223 S.C. 20, 73 S.E2d 854, (1953)...................................10
State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011)..................................6
United States v. Dichiarinte, 445 F.2d 126 (7th Cir.1971)..............................18
United States v. Miner, 484 F.2d 1075, 1076 (9th Cir.1973)...........................18
United States v. Bily, 406 F.Supp. 726, 728 (E.D.Pa.1975).............................18
United States v. Ibarra, 731 F.Supp. 1037 (D.Wyo.1990)...............................18
U.S. v. Reilly (9th Cir. 2000) 224 F.3d 986, 995...20
Florida v. Jimeno, 500 U.S. 248, 251 (1991)...17
Cooper v. State, 480 So.2d 8 (Ala.Crim.App.1985).......................................18
Illinois v. Gates, 462 U.S. 213 (1983)...
Mapp v. Ohio, 367 U.S. 643 (1961)...17
Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).........13
Maryland v. Garrison, 480 U.S. 79 (1987)...
Miranda v. Arizona, 384 U.S. 436 (1966)..19
Atwater v. City of Lago Vista, 532 U.S. 318 (2001).......................................
State v. George, 323 S.C. 496 (1996)..
State v. Stewart, 275 S.C. at 450, 272 S.E.2d at 629................................13, 14

TABLE OF AUTHORITIES

CASES **Page(s)**

Eaves v. Broad River Elec. Co-op., Inc., 277 S.C. 475 (1982)........................
Parrott v. Plowden Motor Co., 246 S.C. 318 (1965)...................................
Deaton v. Leath, 279 S.C. 82 (1983)...
Jones v. City of Columbia, 301 S.C. 62 (1990)...
Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)...13
Terry v. Ohio, 392 U.S. 1 (1968)...
Curtis v. Commonwealth, 11 Va.App. 28, 396 S.E.2d 386 (1990)....................14
Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)........14, 15, 16
State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct.App.1993).......................14

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1) Archie Harding was deprived of the opportunity to have DNA evidence analyzed by an independent expert because the State, despite its representations and assurances to the Defendant that said DNA evidence would be sent to SLED for analysis, failed to have any DNA evidence analyzed by SLED prior to trial, and further, the State controlled the docket. **The trial court erred in refusing to grant Archie Harding's motion for a continuance so that he could have any DNA evidence analyzed by an expert, evidence which was possibly exculpatory**.

2) The alleged victims were shown only a single photograph of a solitary person on a law enforcement officer's, small, cell phone screen, and this highly suggestive photograph depicted Archie standing alone with a uniformed law enforcement officer in the background. **The cell phone photograph identification of Archie Harding was inherently flawed**.

3) The investigating officer obtained one, signed Consent to Search form from Archie Harding to search his residence, and despite the lack of exigent circumstances, a warrant-less search was carried out that yielded no evidence for collection. Following the discovery of evidence far away from Archie's residence, the investigating officer then amended the original Consent to Search form with additional, hand-written items to be seized, and Archie withdrew his consent and refused to re-sign the form, but law enforcement officers nevertheless conducted a second, warrant-less search of his residence. **The evidence collected in the second warrant-less search of his home was not properly admitted because Archie Harding effectively withdrew consent, thereby requiring a search warrant to search his residence for the second time**.

STATEMENT OF THE CASE

This is a criminal matter arising out of the armed robbery by two, disguised men of a T-Mobile store in Orangeburg County, South Carolina, on May 16, 2014. This matter, Circuit Court Case Number 2014-GS-38-0088-0093, was heard in the Orangeburg Court of General Sessions, First Judicial Circuit, before the Honorable Maite Murphy, on February 23, 25, 26 and 27, 2015. Archie More Harding of Columbia, South Carolina, was quickly indicted in this matter.

Following one day of pretrial motions and a three-day trial, the jury returned a verdict of guilty on each and every charge, namely two counts of kidnapping, and one count each consisting of armed robbery, possession of a weapon during the commission of a violent crime, assault and battery of a high and aggravated nature, and assault and battery second degree, within 87 minutes on a Friday afternoon. (R. 707, lines 12-14). This appeal arises out of this wrongful criminal conviction of Archie Harding pursuant to his indictment in this matter. This appeal to the South Carolina Court of Appeals for post conviction relief (PCR) was timely filed by counsel on behalf of the Petitioner on June [illegible], 2016.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010) (quoting *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001)). Thus, an appellate court "is bound by the [circuit] court's factual findings unless they are clearly erroneous." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent

an abuse of discretion." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Black*, 400 S.C. at 16, 732 S.E.2d at 884 (quoting *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011)). "To warrant reversal, an error must result in prejudice to the appealing party." *Black*, at 16–17, 732 S.E.2d at 884.

STATEMENT OF FACTS

On May 16, 2014, two, disguised, African-American men armed with revolvers entered the T-Mobile store in Orangeburg, South Carolina, and robbed it after binding the store's three employees in a back room with duct tape. Among the property stolen from this store was a personal iPad belonging to one of the store employees, Thomas Sims, Jr. (R. 372, lines 3-4). By using the "Find My iPad" application, law enforcement officers eventually and expertly "tracked the defendant" (R. 682, lines 24-26; R. 334, lines 1-4) through its transmissions to cell phone towers, to the Bentley Apartments, a large complex of multiple apartment buildings located in Columbia, South Carolina. (R. 250, lines 14-24). Upon arriving at the Bentley Apartment complex, Corporal Cain testified that a vehicle generally matching the description of the suspected getaway car, possibly either a "gray" or "dark" Toyota (R. 69, line10; R. 233, lines18-24), was seen with a door open in front of one of the complex buildings, and Archie More Harding, was seen to be walking down the apartment building's front stairs without a limp. (R. 601, lines 7-23). In fact, this car had been legally rented by Archie, and he had lent this vehicle to his friend nick-named "Black" earlier in the day. (R. 24, lines1-27; R. 628, lines1-7).

Archie resided at the apartment complex and he was immediately stopped by the law enforcement officers, subjected to a "*Terry*" frisk, was found to be unarmed, was informed that law enforcement was only looking for "an iPad" and a man who "walks with a limp," and his apartment key was then taken from him. (R. 562, lines1-15; R. 235, lines15-22). Archie was then requested to sign a Consent to Search Form, which he signed on the hood of the police car in front of his on-looking neighbors and he was hand-cuffed. (R. 231, lines1-21; R. 284, lines1-12; R. 635, lines13-18).

Corporal Cain further testified that law enforcement then conducted a warrant-less search of Archie's dwelling, as Investigator Wade activated the "play music" function on the iPad so that the iPad would emanate sound and could thereby be located. (R. 604, lines 24-25). No sound was heard from the iPad in Archie's apartment, and Archie, who had accompanied the officers on the first search of his apartment, was taken back downstairs to the parking lot and then detained in the back of a police car. (R. 241, lines 8-14; R. 637, lines 7-24). During a subsequent perimeter sweep, the iPad was then found emanating sound from a bag near an apartment dumpster located "about a hundred yards" from Archie's apartment building. (R. 605, lines 1-5; R. 353, lines 5-8; R. 549, lines 12-25).

Following this discovery of the iPad by one of the apartment complex's dumpsters, law enforcement then demanded that a now-detained Archie re-sign the original Consent to Search Form which had been modified by Officer Wade in different-colored ink to include additional items such as firearms. (R. 79, lines 16-23; R. 236, lines 23-25; R. 237, lines 1-5). In addition, at this time, uniformed officers may have reported to Investigator Wade that, in fact, during the protective sweep conducted at the onset of the first search of

Archie's domicile, a box of cell phones in "plain view" had actually been somehow overlooked. (R. 266, lines 24-25; R. 287, lines 6-8; R. 260, lines 16-24).

Archie unequivocally refused to consent to this second search, and although Officer Wade's modification to the Consent to Search form was not initialed by Archie, the officers nevertheless returned upstairs to search his apartment. (R. 287, lines 14-25; R. 639, lines 6-24; R. 736). A second, warrant-less search of Archie's domicile was then conducted while Archie was detained in the back of the police cruiser. (R. 639, lines 12-13; R. 282, lines 13-14). This second search of Archie's home was much more fruitful, and now produced all the evidence, namely a box of cell phones and firearms. (R. 61, lines 6-16; R. 518, lines 16-17).

Archie informed officers that these items belonged to his friend nicknamed "Black," and he offered to help officers find this friend, and provided law enforcement officers with a bill which was addressed to one of Black's girlfriends. (R. 300, lines 9-11; R. 267, lines 1-23). As of Archie's trial, his friend "Black" was currently still under active investigation. (R. 128, lines 7-11).

Corporal Cain further testified that, while other officers were searching for the iPad, he took a cell phone photograph of the Defendant with his cell phone and texted this picture (State's Exhibit 2) to Officer Schumpert, who was on-scene with some of the robbery victims. (R. 63, lines 1-10; R. 64, lines 9-15). This single photograph was then shown to the highly traumatized victims of the robbery who were still on-scene at the T-Mobile store, on a small cell phone screen which was held by a uniformed law enforcement officer, more than three hours after the robbery. (R. 329, lines 18-24). This single photograph (State's Exhibit 2) consisted of a solitary picture of Archie, with a fully-uniformed, law enforcement

officer featured very prominently in the background. (R. 322, lines 7-22; R. 329, lines 18-21; R. 194, lines 3-4).

This use of a single picture for identification purposes (State's Exhibit 2), rather than a traditional "six-pack" lineup, was an "exercise of officer's discretion." (R. 130, lines 12-21). Despite the fact that the victims' eye-witness descriptions of the suspects varied substantively (R. 668, lines 18-20; R. 669, lines 2-4), seeing only this single photograph on a very small cell phone screen in broad daylight (State's Exhibit 2), the victims positively identified Archie as one of the disguised suspects, and Archie was taken into custody. (R. 63, lines 7-12).

Archie was subsequently transported to Orangeburg County and placed in an interview room at the Criminal Investigation Division on Chestnut Street. (R. 99, lines 4-25). Although Archie was in the interview room for some time, he refused to give a written statement, and this interview was not taped also due to another exercise of "officer's discretion." (R. 101, lines 18-24). Thereafter, Archie was subsequently indicted, and then swiftly convicted of all charged offenses.

ARGUMENT

1. The trial court erred in refusing to grant Archie Harding's motion for continuance so that he could have any DNA evidence analyzed by an expert, evidence which was possibly exculpatory.

It is well-settled in South Carolina that a trial court's denial of a motion for continuance "will not be disturbed absent a clear abuse of discretion." *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) (citing *State v. Tanner*, 299 S.C. 459, 385 S.E.2d 832 (1989)). Reversals of a continuance are typically as "`rare as the proverbial

hens' teeth.'" *Williams*, 321 S.C. at 459, 469 S.E.2d at 51 (quoting *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957)).

In pre-trial motions the Defense vehemently requested a continuance based in part upon "our understanding was that DNA especially was also being sent to SLED for analysis, and the fingerprints were being compared," and that such evidence, once provided to the Defense by the State, would be very "material" and even "critical" to Archie's defense. (R. 14, lines 1-1; R. 27, lines 20-24). This understanding between the State and the Defense was held until February 17, 2015, six days before the start of Archie's trial. (R. 15, lines 17-24).

Pursuant to *State v. Langford*, 223 S.C. 20, 73 S.E2d 854, (1953), the Defense moved for a continuance, citing the State's inherent power to control the docket in this matter, and the fact that Defense had sought a scheduling order to sort these serious evidentiary matters out. (R. 25, lines 21-25). The Defense rightfully pointed out that, without this data, they were prevented from arguing a third party defense. (R. 23, lines 3-4). The State, in turn, argued the position that *Langford* was currently in abeyance, and the State controlled the docket for this case since it was less than a year old. (R. 28, lines 20-25). The Court ultimately denied the request for this continuance, holding that the "evidence that's sought by the Defense is potentially not exculpatory and I don't think it is exculpatory in nature." (R. 25, lines 8-10).

And whether exculpatory or inculpatory, a determination impossible to ascertain since none of it was actually analyzed, abundant physical evidence was indeed collected in this case. To wit, "Touch DNA" was collected from the two firearms and Archie's rental car, and the State repeatedly emphasized that this DNA was not analyzed because

it "is SLED's policy" not to analyze the evidence if one suspect is in custody while another suspect remains at large (R. 519, lines 1-11; R. 526, lines 10-23; R. 679, lines 20-22). Fingerprints were also collected from a "Nexus" box and an iPhone at the T-Mobile store and even Archie's rental car, and these prints did not match Archie's fingerprints under a direct comparison to his fingerprints, only. (R. 14, lines 3-6; R. 525, lines 1-12). None of the collected fingerprints were run through the Automated Fingerprint Index System, or AFIS. (R. 525, line 18).

Moreover, none of the duct tape used to bind the T-Mobile employees , which was collected from the T-Mobile store (State's Exhibits 73, 74, 75, 76, 77, and 78) was analyzed, much less even opened, prior to its appearance on the stand at Archie's trial in the rubber-gloved hands of the State's forensic witness, Officer Ketcherside. (R. 509, lines 18-24; R. 510, lines 20-21; R. 529, lines 19-21). In addition, some of the reports produced by investigating Officer Wade were actually lost (R. 262, lines 13-16), while Officer Stokes did not sign some of his reports. (R. 499, lines 15-24). Finally, the now decommissioned cell phones which were used to photograph Archie (State's Exhibit 2) and then text this picture, phones which had been saved in a box at the Orangeburg County Sherriff's Office, could not be produced by the police, even when subpoenaed. (R. 24, lines 10-24).

Witnesses for the State did note that there was an ongoing investigation (R. 29, lines 14-17; R. 523, lines 8-11), and that hopefully, maybe, some of the evidence might be tested in a later case. (R. 518, lines 10-12; R. 528, lines 101-11). Echoing the Court's holding on the Defense's motion of a continuance, the State's ultimate position at closing is that while the un-analyzed DNA, fingerprint, and duct tape evidence might very well

have proved that Archie was innocent and fingered his friend "Black" (R. 680, lines 1-2; R. 680, lines 10-15), it might just as well have pointed to Archie.

The South Carolina Supreme Court "has repeatedly upheld denials of motions for continuances where there is no showing that any other evidence on behalf of the defendant could have been introduced, or that any other points could have been raised, if more time had been granted to prepare for trial. *State v. Williams*, 305 S.C. 116, 406 S.E.2d 357 (1991), (citing *State v. Squires*, 248 S.C. 239, 149 S.E.2d 601 (1966))," *State v. William C. McKennedy*, 348 S.C. 270, 280, 559 S.E.2d 850, 857 (2002). As the record *supra* clearly indicates, there is <u>more</u> than a "showing that any other evidence on behalf of the defendant could have been introduced." *Id.*

Furthermore, in *State v. Tanner,* 299 S.C. 459, 385 S.E.2d 832 (S.C., 1989) the South Carolina Supreme Court ruled on an almost this exact fact pattern, holding that:

> "In this instant case, blood, skin, and hair samples were taken from the Taylor-owned car after the accident and held in police custody. It appears from the record that Tanner's attorney may have become aware of the existence of these samples some time before trial. However, it is uncontroverted that in response to at least six inquiries and a Rule 8 discovery motion, Tanner's counsel was informed by the Solicitor's office that the samples were lost or misplaced. The samples were brought to the court by SLED and ten minutes before the pretrial hearing, the defendant's counsel was told of their availability.
>
> The samples had not been tested and Tanner informed the trial court that he wished to conduct an independent examination of them, or at least to wait for a SLED analysis. Tanner therefore requested a continuance. The trial court ruled that the State could not use the samples in its case against Tanner and, on that basis, refused to grant Tanner's request for a continuance. The case proceeded to trial that day. We hold that the trial court erred in failing to consider the potential exculpatory value of the samples. We further hold that the defendant has satisfied the *Squires* criteria of demonstrating other evidence that could have been produced, and other points in his behalf that could have been raised." *Tanner*, 461-446.

"The trial court's refusal of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion resulting in prejudice to the appellant. *State v. Williams,* 321 S.C. 455, 469 S.E.2d 49 (1996); *State v. Babb*, 299 S.C. 451, 385 S.E.2d 827 (1989). *See, Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997)(denial of motion for continuance rests within trial court's sound discretion and will not be disturbed on appeal absent abuse of discretion resulting in prejudice to appellant)." *State v. Mansfield*, 343 S.C. 66, 73, 538 S.E.2d 257, 264 (2000).

Under the *Squires* standard, following the precedent of *Tanner*, and based upon the abundance of unanalyzed evidence reviewed herein which clearly prejudiced the Appellant, evidence which might well have been exculpatory for the Defendant, the Court's decision to deny the Defense's pre-trial motion for a continuance must be overturned, in both the interests of justice and the Defendant's Constitutional due process rights.

2. The cell phone photograph identification of Archie Harding was inherently flawed.

As noted in *State v. Moore*, 343 S.C. 282, 286, 540 S.E.2d 445, 449 (2000), a "criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). Further, "an in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)); *State v. Stewart*, 275 S.C. 447, 272 S.E.2d 628 (1980)." *Moore,* at 449.

During pre-trial motions, the trial Court heard a *Biggers* motion utilizing the two-prong inquiry to determine the admissibility of an out-of-court identification based upon State's Exhibit 2. (R. 321-327). First, "[a] court must first determine whether the identification process was unduly suggestive .... [It] next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." *Curtis v. Commonwealth*, 11 Va. App. 28, 396 S.E.2d 386, 388(1990) (citing *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

Single person show-ups are particularly disfavored in the law. *State v. Johnson*, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law). The Court in the current matter explicitly found that the cell phone identification picture of Archie (State's Exhibit 2) was "unduly suggestive." (R. 341, lines 2-5).

Only after a determination as to the reliability of a witness' identification has been made by the trial court may the witness testify before the jury. *State v. Patterson*, 337 S.C. 215, 522 S.E.2d 845 (Ct.App.1999). The trial Court in this matter then went onto examine the five, "totality of the circumstances," factors as to whether an identification is admissible as outlined in *Biggers*, namely "[T]he opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*, 409 U.S. at 199, 93 S.Ct. at 382; *State v. Stewart*, 275 S.C. at 450, 272 S.E.2d at 629.

The trial Court ultimately found all of the *Biggers'* factors weighed in favor of admitting the cell phone picture (State's Exhibit 2) of a solitary Archie with a uniformed law enforcement officer in the background. (R. 342, lines 3-5). There was no weighing of the individual "totality of circumstances" factors against one another by the trial court. (R. 341, lines 2-24; R. 342, lines 3-5). In *Moore*, upon a close examination of the record, the South Carolina Supreme Court re-considered the lower court's application of the *Biggers'* factors, and came to a much different conclusion, after finding only one of the five "totality of circumstances" factors was met, namely the shortness of time factor, and moreover this timing factor was "clearly outweighed by the other factors." *Moore*, at 289.

In this case, one robber had a nylon stalking over his face, while the other robber had on sunglasses and a ball cap. (R. 383, lines 6-17). The three witnesses, who were all bound with duct tape and placed on the floor of a back room at the T-Mobile store, face - down, all give very differing descriptions of the robbers, yet all can now identify the disguised robbers with "100% certainty." (R. 341, lines 9-11). The victims were all bound in a back room while the robbers ransacked the front of the store, a robbery which only took ten to fifteen minutes. (R. 367, lines 16-22; R. 370, line 3). There is no video of the robbery. (R. 441, lines 14-16).

Although Archie was in full custody of the police, the use of a single picture for identification purposes (State's Exhibit 2), rather than a traditional "six-pack" lineup, was another "exercise of officer's discretion." (R. 130, lines 12-21). This single photograph was shown to the highly traumatized victims of the robbery who were still on-scene at the T-

Mobile store, on a small cell phone screen, which was held by a uniformed law enforcement officer, more than three hours after the robbery. (R. 329, lines 18-24).

Further, while State's Exhibit 2 clearly exists in paper form, all of the phones which took these digital images have been broken and none could be produced for the Defense, even under subpoena. (R. 21, lines 16-25). Finally, the State acknowledges that, in fact, two photographs were shown to the victims at the crime scene and that "two subjects were identified" and there is also an "independent witness," but they can elaborate no further due to an "ongoing investigation." (R. 21, lines 1-7; R. 17, lines 7-13).

The South Carolina Supreme Court in *Moore* conclusively stated that "an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law. *Caver v. Alabama*, 537 F.2d 1333, 1335 (5th Cir.1976), cert. denied, 430 U.S. 910, 97 S.Ct. 1183, 51 L.Ed.2d 587 (1977), citing *Foster v. California*, 394 U.S. 440, 442-43, n. 2, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969)." *Moore*, at 451.

The identification of Archie in this matter was, by the Court's own admission "unduly suggestive," and the five "totality of circumstances" factors as outlined in *Biggers* were not weighed against one another by the Court (R. 341, lines 2-5; R. 341, lines 2-24). Based upon the facts of this case, and following the precedent of *Moore*, Archie's identification based upon State's Exhibit 2 is clearly inadmissible and should therefore have been excluded by the trial Court.

3. <u>The evidence collected in the second warrantless search of his home was not properly admitted because Archie Harding effectively withdrew consent, thereby requiring a search warrant to search his residence for the second time.</u>

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. The South Carolina Constitution provides similar protection against unlawful searches and seizures. *See,* S.C. Const. Art. I, § 10. Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. *See, Mapp v. Ohio,* 367 U.S. 643 (1961); *State v. Austin,* 306 S.C. 9 (Ct.App.1991).

Under our state constitution, suspects are very free to limit the scope of the searches to which they consent. *State v. Forrester,* 343 S.C. 637 (2001). "When relying on the consent of a suspect, a police officer's search must not exceed the scope of the consent granted or the search becomes unreasonable." *Id.* at 648. Even in a situation where police have received a general and unqualified consent, " 'the police do not have *carte blanche* to do whatever they please.' " *Id.* at 648-49. The scope of the consent is measured by a test of " 'objective' reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno,* 500 U.S. 248, 251 (1991).

Conduct falling short of "an unequivocal act or statement of withdrawal" is not sufficiently indicative of an intent to withdraw consent. *State v. Mattison*, 352 S.C. 577, 587 (Ct. App. 2003). Effective withdrawal of a consent to search requires unequivocal conduct, in the form of either an act, statement or some combination of the two, that is inconsistent with consent previously given. *Id.*

Most withdrawal of consent cases focus on this unequivocal act or statement of withdrawal. *See, United States v. Dichiarinte,* 445 F.2d 126, 128-29 (7th Cir.1971) (stating defendant exclaimed, "The search is over. I am calling off the search."); *United States v. Miner,* 484 F.2d 1075, 1076 (9th Cir.1973) (finding a withdrawal of implied consent to airport search where prospective airline passenger balked at search of luggage, saying, "No, it's personal."); *United States v. Bily,* 406 F.Supp. 726, 728 (E.D.Pa.1975) (holding that defendant's statement, "That's enough. I want you to stop," was a withdrawal of consent); *United States v. Ibarra,* 731 F.Supp. 1037 (D.Wyo.1990) (noting motorist's act of closing and locking trunk of his car after a police officer's consensual warrantless search of trunk constituted withdrawal of that consent and barred further search); *Cooper v. State,* 480 So.2d 8(Ala.Crim.App.1985) (ruling that although first search of airplane was pursuant to voluntarily and freely given consent of defendant, his act of locking plane after he taxied plane to hanger area and before being driven by police to nearby motel, effectively revoked defendant's consent to any future searches); *State v. French,* 203 Neb. 435, 279 N.W.2d 116, 119-20 (1979) ("[D]efendant's unequivocal 'no' could only be reasonably interpreted as revoking whatever consent might have previously been given, if any.").

The Consent to Search Form (State's Exhibit 1) which was initially signed by Archie Harding clearly stated: "By signature below I understand I can withdraw my consent," and Archie could read. (R. 541, lines 16-18; R. 540, lines 17-18). In this case, Archie Harding refused to re-sign the modified Consent to Search Form (R. 568, lines 1-4), and clearly could not accompany the officers on their warrant-less, yet highly productive, second search of his home. (R, 639, lines 12-13). Archie later initialed portions

of a waiver of his *Miranda* rights, but again he refused to ultimately sign this waiver during his unrecorded interview in the interrogation room (State's Exhibit 3), clearly indicating that he knew refusing to consent was an option. (R. 491, lines 1-20; R. 97, line 4).

When the issue of consent to the second search was raised at trial, the State, having it both ways, stated that while "there was more than enough probable cause to get a search warrant" (R. 314, lines 6-7), it proactively countered that <u>even if</u> there was a problem with Archie's consent to the second warrant-less search, they would have found the evidence under the "inevitable discovery" rule due to the cellular transmissions of the "Find my iPad application." (R. 313, lines 9-15; R. 315, lines 2-7).

Requiring no expert analysis at all according to the State, the "Find my iPad application" is both "a very common app" (R. 313, line 15) that only generally "shows you a map and it shows you a blue dot on where it is" (R. 372, lines 17-18), but in this specific case, the locational informational is somehow very precise, even though the data from this application was only being verbally relayed to officer Caine, <u>*not*</u> visually or directly. (R. 448, lines 202-25). The Bentley Apartment complex is, in fact, composed of numerous apartment buildings, and when located, the stolen iPpad was in the woods next to a dumpster a far distance away from Archie's residence, a location at best tenuously connected with Archie's second-floor apartment. (R. 586, line 19).

The "Find My iPad" application cannot be both general, and expertly precise, for the purposes of the State. While it is possible that the discovery of the iPad might be argued to have been inevitable, assuming of course it never rained and its batteries never ran out, it is <u>not</u> inevitable that the iPad would inextricably lead to Archie, anymore than it would have lead to anyone else who might have used that dumpster in the large Bentley

Apartment complex. The inevitable discovery doctrine does not apply to these facts, and there is no evidence of Archie's consent to a second search, much less exigent circumstances for a warrant-less search.

Absent a renewed Consent to Search Form, the evidence collected only during the second search of Archie's home required a search warrant, as the officers themselves noted they could easily obtain (R. 314, lines 9-12), yet no such search warrant was acquired. And, "to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the [F]ourth [A]mendment" *U.S. v. Reilly* (9th Cir. 2000) 224 F.3d 986, 995. The evidence collected during the second search is therefore inadmissible, and must be suppressed.

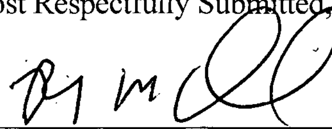
CONCLUSION

Following four days of pretrial motions and trial in February of 2015, Archie More Harding was convicted in Orangeburg Court of General Sessions of each and every charge upon which he was accused, following 87 minutes of jury deliberation on a Friday afternoon. The Appellant seeks review of his conviction of three primary points.

First, the trial court erred in refusing to grant the Defense's motion for a continuance so that it could have any DNA evidence analyzed by an expert, evidence which was possibly exculpatory. Second, the cell phone photograph identification of Archie Harding was inherently flawed. And finally, the evidence collected in the second warrant-less search of his home was not properly admitted because Archie effectively withdrew consent, thereby requiring a search warrant to search his residence for the second time.

Based upon the facts stated above, and the precedent reviewed *infra*, the Appellant request that this honorable court overturn his conviction in this matter in the interests of justice.

Most Respectfully Submitted,



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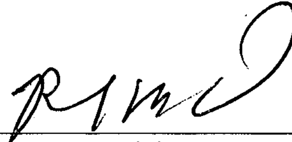
ATTORNEYS FOR THE APPELLANT

This 7th day of April, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

April 7th, 2017



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions, First Judicial Circuit
The Honorable Maite Murphy

Circuit Court Case No. 2014-GS-38-0088-0093
South Carolina Court of Appeals Case No. 2015-000516

THE STATE,

RESPONDENT,

V.

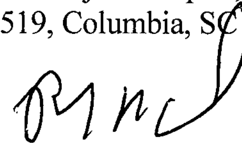
ARCHIE MORE HARDIN,

APPELLANT.

APPELLATE CASE NO. 2015-000516

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of April, 2017.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of April, 2017.

Rhonda Denise Farwarth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021