STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 2017-UP-169 (S.C. Ct. App. Filed April 19, 2017)

2014-GS-30-0228

THE STATE,

RESPONDENT,

V.

DAVID LEE WALKER,

PETITIONER

APPELLATE CASE NO 2015-000519

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 2, 2017.

QUESTIONS PRESENTED

I.

The Court of Appeals erred in affirming Petitioner's convictions where the evidence adduced at Petitioner's trial did not support the trial court's jury instruction concerning the accomplice liability principle of "hand of one is the hand of all" as an alternative theory of Petitioner's criminal liability.

II.

The Court of Appeals erred in affirming Petitioner's convictions where the trial court committed an error of law by denying Petitioner's motion for a continuance so as to allow Petitioner, who was indigent, the chance to secure an expert in gunshot residue analysis when the trial court only approved funding for an expert one week before trial, thus denying Petitioner'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 Petitioner David Lee Walker for murder. R. 482. On February 23-27, 2015, Petitioner proceeded to trial before the Honorable Frank R. Addy, Jr., and a jury.

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

Petitioner filed a timely notice of appeal. Appellate Public Defender John H. Strom represented Petitioner on appeal. Senior Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Sherrie Butterbaugh represented the State.

On April 19, 2017, the Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. *State v. Walker*, 2017-UP-0169 (Ct. App. Filed April 19, 2017). On May 2, 2017, Petitioner filed a petition for rehearing. On May 2, 2017, the Court of Appeals denied Petitioner's Petition for Rehearing.

This petition follows.

ARGUMENTS

I.

The Court of Appeals erred in affirming Petitioner's convictions where the evidence adduced at Petitioner's trial did not support the trial court's jury instruction concerning the accomplice liability principle of "hand of one is the hand of all" as an alternative theory of Petitioner'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 Petitioner 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 unintelligible in her hysteria. 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 Petitioner 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 Petitioner] shot him. He shot [Petitioner]. And then [Petitioner] 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 Petitioner. R. 360, l. 18 - 361, l. 17.

Petitioner's Trial

Petitioner proceeded to trial alone. His two alleged co-defendants, Christopher Wells and Johnny Lee Saxon, did not stand trial with him. Petitioner 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 Petitioner had successfully relieved several other attorneys that were appointed to represent him, denied the motion. Petitioner then refused to participate in or attend his trial. *Id.*

State's Opening Argument

The State's theory of the case was that Petitioner, 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 Petitioner's niece, Toris Moore. R. 75, l. 23 - 76, l. 4. Moore claimed that on the night of the shooting, Petitioner 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 Petitioner told her they needed her mother's pistol because the three were "going to Enoree to rob an older man at his house." R. 78, ll. 7-20. Moore lied to Petitioner and claimed that her mother sold the pistol. *Id.* Moore further testified that Wells already had a gun on him and that she lied to Petitioner because she did not want to be involved. R. 79, l. 2 - 80, l. 12.

Trial Testimony of Kelly Ball

Ball testified that there was a knock at the front door of Cheeks' trailer shortly after she and Cheeks returned home after picking up food at a nearby Waffle House. R. 90, l. 9 - 91, l. 22. Cheeks went to answer the door while Ball remained in the living room. Ball could not see the front door from her vantage point. *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 Cheeks and at least one other person arguing. 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 Petitioner lying shot in the yard. *Id.* Ball further claimed that she saw a third individual, whom she later identified as Christopher Wells, standing in the yard. Wells fled in waiting car after seeing Ball. R. 96, ll. 4-21. Ball did not say Wells was armed.

Ball alleged that after she pulled Cheeks into the trailer and closed the door, Petitioner 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 Petitioner'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 Petitioner guilty was by concluding that he shot Cheeks. *Id.* Counsel also argued that the State had made a deliberate decision not to try Petitioner with this alleged co-conspirators and had not charged Petitioner with attempted robbery or criminal conspiracy. *Id.*

The State countered "except for Toris Moore, Your Honor," implying that Moore's testimony regarding Petitioner 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 Petitioner'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 probably 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 to rehear the testimony of Toris Moore and Kelly Ball. R. 467, ll. 16-17. After two days of deliberations, the jury found Petitioner guilty of murder, but **not guilty of possession of a weapon during the commission of a violent crime**. R. 469, ll. 12-20.

Court of Appeals

The Court of Appeals (Lockemy C,J., Geathers, and McDonald, JJ.) affirmed Petitioner's conviction in an unpublished, summary opinion. *State v. Walker*, 2017-UP-0169 (Ct. App. Filed April 19, 2017). In affirming the conviction, the Court relied on *Barber* for the contention that

"hand of one, is the hand of all" instruction was proper. *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011).

Petition for Rehearing

On May 2, 2017, Petitioner filed a petition for rehearing. Petitioner aruged that the Court of Appeals erred by failing to properly distinguish *Barber* from Petitioner's case. Specifically, in *Barber* there was evidence that two of the robbers were armed at the time of the robbery. By contrast in Petitioner's case, there was no evidence adduced at trial that tended to prove that anyone other than Petitioner shot Cheeks.

Discussion

There was no evidence produced at Petitioner'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 Petitioner 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. The Court of Appeals erred in affirming Petitioner's convictions where the trial court reversibly error by instructing the jury on the "hand of one is the hand of all" theory of criminal liability because 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. 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 him. *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 Petitioner 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 produce 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 Petitioner's case, the State presented no evidence indicating that anyone other than Petitioner was the shooter under its theory of the case. As the assistant solicitor stressed in his opening argument, "[w]e submit to you that [Petitioner] 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 Petitioner 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 Petitioner's niece, Toris Moore, claimed that Petitioner tried unsuccessfully to borrow her mother's handgun **several hours before the shooting** 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 Petitioner was the shooter. R. 67, ll. 6-15. 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. 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.

The Court of Appeals erred in affirming Petitioner's convictions where the trial court erroneously instructed jurors on the accomplice liability principle of the "hand of one is the hand of all" as an alternative theory of Petitioner's criminal liability when there was no evidence supporting such a jury instruction. Accordingly, Petitioner is entitled to a new trial.

II.

The Court of Appeals erred in affirming Petitioner's convictions where the trial court committed an error of law by denying Petitioner's motion for a continuance so as to allow Petitioner, who was indigent, the chance to secure an expert in gunshot residue analysis when the trial court only approved funding for an expert one week before trial, thus denying Petitioner'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 could retain a gunshot residue (hereinafter "GSR") expert. R. 28, l. 2 - 31, l. 8. Counsel explained that she had been appointed to Petitioner's case three months before Petitioner'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 Petitioner's trial, the State's gunshot residue expert, SLED technician Jennifer Stoner, informed defense counsel that the individual she 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, Petitioner 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 Petitioner's left hand. The report also stated that one round particle associated with GSR was found on Petitioner's left palm and the back of Petitioner'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 consistent 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. Counsel noted that the defense was constitutionally entitled to an independent expert witness 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 Petitioner 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 Petitioner's right palm. *Id.* There was "one round particle" consistent with GSR on the back of Petitioner's right hand. *Id.* Petitioner's left palm also had one round particle consistent with GSR on it. *Id.* The back of Petitioner's left hand had "several round particles associated with gunshot residue." *Id.* In actuality there were only two "round particles" on the back of Petitioner'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 Petitioner'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.

Court of Appeals

In affirming, the Court, relying on *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996), held that Petitioner failed to show what additional evidence could have been produced had the continuance been granted. The Court of Appeals also held that Petitioner failed to prove any prejudice from the trial court's denial of a continuance.

Petition for Rehearing

In the petition for rehearing, Petitioner argued that the Court of Appeals erred in affirming Petitioner's conviction because it failed to consider that the SLED GSR report was only turned over to the defense and the trial court did not approve funding for an expert witness until the week before trial. Moreover, on appeal, Petitioner had presented substantial evidence that the State's expert GSR witness had a severe "pro-prosecution bias" evident in her testimony. The Court of Appeals denied the Petition for Rehearing on June 23, 2017.

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). Even if there is no evidentiary support for the denial of a continuance, "[i]n order for an error to warrant reversal, the error must result in prejudice to the Petitioner." *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 Petitioner 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).

However, where 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 SLED technician Stoner's pro-prosecution bias, it is abundantly clear that Petitioner, an indigent defendant on trial for murder, needed an independent defense expert witness to challenge Stoner's dubious 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 Petitioner 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. South Carolina's Constitution specifically provides 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.").

Recently, in *McWilliams v. Dunn*, the United States Supreme Court reversed the denial of a *habeas corpus* petition on the grounds that Alabama's failure to provide McWilliams with an expert to assist in the "evaluation, preparation, and presentation of the defense" constituted a violation of clearly established law. 137 S.Ct. 1790, 1794 (2017). In *McWilliams*, the Alabama trial court refused to grant the defense a continuance so that defense counsel secure an expert witness to review recently disclosed medical records concerning McWilliams' mental illness. *Id.* at 1795-1796.

In reversing the denial of *habeas*, the Supreme Court specifically rejected Alabama's contention that a "neutral expert" satisfied an indigent defendant's right to the assistance of an expert witness. *Id.* at 1798. Instead the Court held McWilliams had a clearly established right to an expert that was "sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'" *Id.* at 1799.

Unlike Alabama, South Carolina has long recognized that indigent defendant's right to the assistance of an independent expert witness, rooted in equal protection, is essential in our adversarial system. 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.

Accordingly, South Carolina Circuit 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; *Cf. Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1992) (holding that PCR court did not abuse discretion in denying petitioner's motion for a third competency evaluation as petitioner had already been evaluated twice, including once by an independent defense expert).

Implicit in this responsibility is the obligation to approve funding in a timely manner that allows the defense to benefit from the independent expert's assistance when preparing for trial. *McWilliams*, 137 S.Ct. at 1799; *Reeves v. State*, 415 S.C. 366, 378, 782 S.E.2d 747, 753 (finding counsel ineffective for failing to seek funding for expert witness who would have directly refuted State's theory of the case).

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

In Petitioner's case, the trial court abused its discretion in denying Petitioner a continuance so that Petitioner could retain an independent expert in GSR analysis. R. 59, l. 10 - 61, l. 6. 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. Critically, the State only provided defense counsel with SLED's GSR report the week before trial. *Id.*

Prior to the production of the GSR report, defense counsel would have had little to no reason to move for funding to secure an independent expert witness. In a good-faith effort to be ready for trial, defense counsel retained 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 Petitioner's trial, but to allow for time to secure an expert witness whose testimony was necessary to present a complete defense and to rebut the last minute GSR evidence produced by the State.

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 Petitioner's trial, violated Petitioner'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 law enforcement 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 Petitioner 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. Stoner's testimony is gross overstatement of the probative value of the GSR evidence and reveals her role as an advocate for the prosecution rather than a neutral and detached expert envisioned by the trial court. R. 59, l. 24 - 61, l. 6.

Tellingly, she misleadingly phrased her finding two particles consistent with GSR on the back of Petitioner's left hand as "several" particles. R. 319, l. 5 - 321, l. 23. Finding two particles consistent with GSR (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 in each sample) 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. Obviously, an independent expert retained to assist the defense would not have characterized the GSR results as Stoner did.

When cross-examined, Stoner dismissed the multitude of environmental factors that could lead to these two elements being found on Petitioner's hands, unrelated to Petitioner firing a gun. R. 314, ll. 13-22. Petitioner repaired cars for a living. Car 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 as Petitioner was shot and then transported by ambulance in the immediate aftermath of the shooting with Cheek, who was also shot. In addition, Lt. Cheek collected GSR samples from Petitioner 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 minimized the inconvenient fact the particles could be present as a result of Petitioner having been shot and not as a result of Petitioner 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 Petitioner's hands were the result of 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 Petitioner 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" GSR 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 the funding delay caused by Petitioner's indigency. *Ex Parte Lexington County*, 314 S.C. at 228, 442 S.E.2d at 594. A defense expert's role is to aid the defendant and function as a "basic tool" for the defense. *Ake*, 470 U.S. 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.

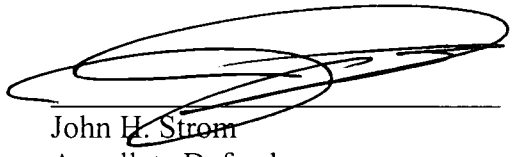
Court of Appeals erred in affirming Petitioner's conviction where the trial court committed an error of law in denying Petitioner a continuance. Petitioner, an indigent defendant, was entitled to the additional time necessary to retain an expert in gunshot residue analysis where the State only disclosed the existence of the GSR results and the trial court only approved funding for such an independent defense oriented expert the week before trial.

Thus, denied Petitioner his right to equal protection and his due process right to present a complete defense. Accordingly, Petitioner should be granted a new trial.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari, allow further briefing, and ultimately reverse Petitioner's conviction.

Respectfully Submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of August, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Laurens County
Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 2017-UP-169 (S.C. Ct. App. filed 6/23/2017)
2014-GS-30-0228

THE STATE,

RESPONDENT,

V.

DAVID LEE WALKER,

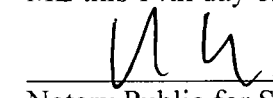
PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Sherrie Butterbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and David Lee Walker, #274195, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 14th day of August, 2017.

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 14th day of August, 2017.



_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025