RECEIVED
SEP 13 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM LAURENS COUNTY
Frank R. Addy, Circuit Court Judge

Op. No. 2017-UP-169 (S.C. Ct. App. filed Apr. 19, 2017)

THE STATE, ...RESPONDENT,

v.

DAVID LEE WALKER, ... PETITIONER.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Appellate Case No. 2017-001582

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit
P.O. Box 516
Greenwood, SC 29648
(864) 942-8800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

PETITIONER'S QUESTIONS PRESENTED 1

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

WHY CERTIORARI SHOULD BE DENIED 2

STATEMENT OF THE FACTS 3

ARGUMENT

I.

The Court of Appeals properly found the trial court did not abuse its discretion in charging the jury on accomplice liability where the evidence presented at trial supported the charge, was equivocal as to who shot the victim, and the charge was correct, as a whole. Moreover, any error was harmless beyond a reasonable doubt. 6

II.

The Court of Appeals properly affirmed the trial court's denial of petitioner's motion for a continuance where the record shows defense counsel had adequate time to prepare for trial, petitioner cannot demonstrate what evidence or other point a second defense witness could have raised on his behalf, and petitioner engaged in previous delay tactics. Moreover, any error was harmless beyond a reasonable doubt. 13

CONCLUSION 24

PETITIONER'S 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.

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

I.

The Court of Appeals properly affirmed the trial court's ruling to instruct the jury on accomplice liability where the evidence at trial supported the charge and the theory petitioner and two co-defendants planned the robbery that led to the murder, and the record demonstrates the court carefully considered the evidence presented that was equivocal as to who shot the victim. Moreover, any error was harmless beyond a reasonable doubt as petitioner could be found guilty under other theories of liability.

II.

The Court of Appeals properly affirmed the trial court's decision to deny a motion for a continuance where petitioner cannot show what evidence or other point a second defense witness could have raised on his behalf, the record demonstrates defense counsel had adequate time to prepare for trial, and petitioner engaged in previous delay tactics. Moreover, any error was harmless and had no impact on petitioner's case.

STATEMENT OF THE CASE

A Laurens County grand jury indicted petitioner, David Lee Walker, for murder and possession of a weapon during the commission of a violent crime. (R.pp.482-84). Petitioner proceeded to a jury trial on February 23, 2015 and was represented by Elizabeth P. Wiygul.[1] (R.p.1). O. Warren Mowry, Jr., and Ruston W. Neely of the Eighth Circuit Solicitor's Office represented the State. (R.p.1).

On February 27, 2015, the jury found petitioner guilty of murder, but not guilty of the weapons charge. (R.p.469, lines 12-20). The Honorable Frank R. Addy, Jr., sentenced petitioner to life imprisonment. (R.p.474, lines 2-4).

Petitioner filed a notice of appeal and after briefing by both parties, the Court of Appeals issued an unpublished opinion affirming petitioner's conviction and sentence. (App.pp.1-2); *State v. Walker*, Op. No. 2017-UP-169 (S.C. Ct. App. filed Apr. 19, 2017). On May 2, 2017, petitioner filed a petition for rehearing which the Court of Appeals denied by order filed June 23, 2017. (App.pp.3-12).

On August 14, 2017, petitioner filed a petition for writ of certiorari seeking review from this Court. This return follows.

WHY CERTIORARI SHOULD BE DENIED

Respondent maintains certiorari should be denied because the Court of Appeals properly affirmed the trial court's decisions to instruct the jury on accomplice liability and in denying a motion for a continuance. First, petitioner argues the Court of Appeals failed to distinguish prior case law related to accomplice liability from the facts of petitioner's case. Petitioner contends the

[1] Petitioner refused to appear in court during the majority of the trial and chose to remain at the detention center. (R.p.7, lines 2-12; p.7, line 18-p.8, line 12; p.19, line 23-p.24, line 5; p.54, lines 8-18; p.239, line 17-p.240, line 2; p.406, lines 4-13). However, petitioner was in court for the verdict and sentencing. (R.p.468, lines 7-11).

trial court erred where the evidence did not support the "hand of one is the hand of all" jury instruction. Contrary to petitioner's assertions, the evidence was equivocal as to who fired the shot that killed the victim. Notably, the gun, which did not belong to petitioner, was found on the ground near an area where a witness saw petitioner and another man standing. Moreover, the evidence presented at trial supported the inference that petitioner and his accomplices conspired to rob the victim, leading to his murder.

Second, petitioner argues this Court should grant certiorari because the Court of Appeals erred in affirming the trial court's denial of a continuance to obtain a gunshot residue expert. Respondent submits the Court of Appeals properly deferred to the lower court's decision where the record demonstrates defense counsel had adequate time to prepare for trial, thoroughly understood the issue, received funding prior to trial to hire a qualified expert yet failed to do so, and petitioner has not demonstrated what evidence a second person could have uncovered on his behalf. Importantly, the trial court denied the motion for a continuance following numerous delay tactics by petitioner himself. The trial court did not abuse its discretion in making either of its rulings.

Pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this case. Indeed, the decision was a straightforward exercise of reviewing and affirming the trial court's application of established precedent, logic, and practical considerations of the particular facts and circumstances of petitioner's case. Therefore, respondent respectfully requests the petition for a writ of certiorari be denied and dismissed.

STATEMENT OF FACTS

Deputies were not sure what they would find when they drove up to a mobile home in

Laurens County on Halloween night—October 31, 2013. What they heard was a panicked and screaming woman inside, trying to help her friend who had been shot twice. What they saw was a second man, collapsed on the porch. What deputies would later learn was about the plan between three men to rob the victim, Johnny Cheeks, which led to his violent death. (R.p.77, line 16-p.78, line 13; p.140, line 25-p.145, line 21; p.356, lines 1-16; p.356, line 24-p.357, line 3; p.374, lines 21-23).

At trial, Toris Moore (Moore), petitioner's niece, testified petitioner stopped by to see her on the night of the shooting. (R.p.75, line 25-p.76, line 4; p.76, line 17-p.77, line 15). Petitioner was with two men—Christopher Wells (Wells) and a second co-defendant—and petitioner asked Moore if she had a gun he could borrow. (R.p.77, line 16-p.78, line 8). Moore testified petitioner told her the three men were "going to Enoree to rob an older man at his house" and said they only had one gun, which belonged to Wells, and wanted another. (R.p.78, lines 9-11; p.79, lines 10-18). Petitioner further told Moore the man sold drugs and liquor out of his home. (R.p.78, lines 12-17). Moore lied and told petitioner her mother pawned the gun. (R.p.78, line 18-p.79, line 5). Petitioner, Wells, and the third man left. (R.p.79, lines 6-9).

Kelly Ball (Ball) corroborated Moore's testimony about the number of men involved in the robbery. Ball and the victim had just returned to the victim's mobile home when someone knocked on the door. (R.p.86, lines 9-24; p.91, lines 3-12). Ball testified the victim walked out, carrying keys and money in his pockets, and a gun. (R.p.92, lines 2-17; p.103, lines 10-13). Ball heard arguing, and testified she heard three voices, but only recognized that of the victim. (R.p.92, line 18-p.93, line 1). Ball stated she also heard "scuffling," a loud thud, and seconds later she heard a gunshot. (R.p.93, lines 2-6). Ball ran toward the front door and subsequently heard four more gunshots. (R.p.93, lines 9-20; p.127, lines 12-21).

Ball testified when she looked outside, she saw a man lying on the ground, later identified as petitioner, and a second man standing near him. (R.p.94, lines 6-10; p.124, lines 2-20). The second man was standing under a street light and Ball stated she got a good look at his face before he took off running. (R.p.95, line 20-p.96, line 8). Ball later identified the man under the light as Wells. (R.p.96, lines 9-19; p.120, lines 4-14). Ball testified Wells ran to a waiting vehicle, got in the back seat, and the driver sped away. (R.p.97, lines 4-25).

Ball dragged the victim inside the house, called 911, and testified petitioner was still on the ground. (R.p.98, lines 1-11). A few minutes later, someone banged on the door and Ball asked who was there, and the person replied, "David." (R.p.100, line 5-p.101, line 3). Ball testified the victim told her, "Do not open that door. That is who shot me." (R.p.101, lines 4-10). As Ball and the victim waited for emergency crews to arrive, the victim told Ball the men took everything he had on him, including his money, keys, and jewelry. (R.p.129, lines 12-14; p.137, lines 13-24).

The first deputy on the scene saw petitioner collapsed on the porch and he heard a woman screaming inside. (R.p.140, lines 19-21; p.140, line 25-p.141, line 4; p.141, lines 22-23; p.142, lines 5-13; p.143, lines 1-3). Another deputy found a gun in the yard, which was later determined to be a .380 Lorcin handgun. (R.p.167, lines 2-5; p.170, lines 4-13; p.279, lines 6-13). The lead investigator testified the victim was alive and talking when he arrived at the scene. (R.p.352, lines 8-21; p.360, lines 7-17). The victim said "they" came to his home to rob him, and that petitioner shot him, the victim fired back, and petitioner shot him again. (R.p.355, lines 1-5). Both petitioner and the victim were taken to the hospital.

While at the hospital, petitioner consented to a gunshot residue (GSR) test of his hands. (R.p.361, line 1-p.362, line 7). The results of the tests revealed the presence of particles

associated and consistent with GSR, and a bullet that fell out of the victim's clothes at the scene was later matched to the Lorcin gun found in the yard. (R.p.148, lines 6-10; p.343, lines 11-20; p.368, line 11-p.369, line 1). Based on that evidence and information from Toris Moore, Kelly Ball, and the victim's statements before he died, investigators arrested petitioner and his two co-defendants for the murder of Johnny Cheeks.

ARGUMENTS

I.

> The Court of Appeals properly affirmed the trial court's ruling to instruct the jury on accomplice liability where the evidence at trial supported the charge and the theory petitioner and two co-defendants planned the robbery that led to the murder, and the record demonstrates the court carefully considered the evidence presented that was equivocal as to who shot the victim. Moreover, any error was harmless beyond a reasonable doubt as petitioner could be found guilty under other theories of liability.

Petitioner argues the Court of Appeals erred in affirming the trial court's determination to instruct the jury on accomplice liability, maintaining the Court of Appeals failed to properly distinguish prior case law from the facts of petitioner's case. Specifically, petitioner asserts the trial court abused its discretion where there was no evidence presented that tended to prove anyone other than petitioner shot the victim. (Pet.pp.7-8).

Respondent disagrees and submits the Court of Appeals properly found the trial court did not abuse its discretion in charging the jury with the "hand of one is the hand of all" theory where the record demonstrates petitioner and two men planned a robbery, petitioner was at the scene and participated fully, and the victim died as a result. (R.pp.75-79; pp.92-97; p.120; p.124; p.355). Moreover, it was not clear who fired the deadly shot, as the gun used to commit the robbery did not belong to petitioner and was found on the ground near the area where petitioner and a co-defendant were seen standing. (R.pp.77-79; pp.94-96; p.124; p.170; pp.279-80; p.285).

Therefore, the trial court did not abuse its discretion in ruling the evidence supported the accomplice liability charge, the Court of Appeals properly affirmed the lower court's ruling, and the petition for writ of certiorari should be denied.

Analysis

Standard of Review

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). In reviewing jury charges for error, appellate courts must consider the trial court's charge in light of the evidence and issues presented at trial. *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (citation omitted). "A jury charge is correct if, when read as a whole, the charge adequately covers the law." *Id.* at 90-91, 747 S.E.2d at 448. A charge that is substantially correct does not require reversal. *Id.*

When an Accomplice Liability Charge is Appropriate

Under the "hand of one is the hand of all" theory, a person who joins with another to accomplish an illegal purpose is criminally liable for everything done by his accomplice incidental to the execution of the common plan. *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). This Court has further held "[l]ike 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 a fact." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In *Barber*, four men committed an armed robbery and, during the robbery, one of the men shot two victims. *Id.* at 234-35, 712 S.E.2d at 437-38. Three of the robbers pled guilty and all testified at Barber's trial that Barber shot the victims. *Id.* at 235, 712 S.E.2d at 438. On appeal, Barber argued the evidence at trial did not support a jury charge on accomplice liability. *Id.* at 236, 712

S.E.2d at 438. The Court noted to support an accomplice liability charge, the question was whether there was any evidence another co-conspirator was the shooter and Barber was acting with him when the robbery took place. *Id.* at 237, 712 S.E.2d at 439. Under this test, the Court found the trial court did not err in instructing the jury on accomplice liability because the sum of the evidence presented at trial was equivocal as to who was the shooter. *Id.* at 236, 712 S.E.2d at 439.

Evidence at Trial Supported Accomplice Liability Charge

During his opening statement, the solicitor told the jury the State would present evidence that petitioner and two men went to the victim's mobile home to rob him. (R.p.66, lines 4-8). While the State believed petitioner was the shooter, the solicitor also informed the jury it could find petitioner guilty under the theory of accomplice liability because he and his co-defendants planned the robbery and the victim was murdered during the commission of that crime. (R.p.66, lines 14-20; p.69, line 2-p.71, line 2).

Prior to the jury charge, defense counsel objected to the proposed instructions on accomplice liability and the felony murder inference, and argued the State had not presented sufficient evidence to support either of the theories. (R.p.404, line 20-p.405, line 12). However, counsel acknowledged she would request a "mere presence" charge, if the court instructed the jury on accomplice liability. (R.p.405, lines 19-21).

The trial court ruled it would charge the jury on both theories because there was evidence "from which one could conclude, that the hand of one instruction is appropriate as well as the felony murder inference." (R.p.409, lines 10-14).

The trial court subsequently instructed the jury at length on the law of the case, including accomplice liability, mere presence, and the felony murder inference. (R.p.444, line 16-p.460,

line 13). Following the instructions, the jury deliberated for about four and a half hours before retiring for the evening, then continued deliberating the following morning, and returned with a guilty verdict for murder. (R.p.461, lines 12-13; p.462, lines 4-5; p.466, lines 4-22; p.468, lines 2-10; p.469).

The evidence presented at trial supported the inference petitioner and his accomplices conspired to rob the victim, leading to his murder. *See State v. Fleming*, 243 S.C. 265, 274, 133 S.E.2d 800, 805 (1963) (holding the State need not show a formal expressed agreement to prove parties acted as accomplices, but may prove the agreement by circumstantial evidence and the conduct of the parties). Petitioner's niece testified petitioner, Wells, and a third man were together on the night of the murder when petitioner asked her if she had a gun he could borrow because they planned to rob a man in Enoree. (R.pp.75-79). The victim's friend corroborated that testimony when she stated she saw two men outside the victim's home that she did not recognize and saw a third man in the getaway vehicle. (R.pp.94-97; p.120; p.124). She later identified two of those men as petitioner and Wells. The victim's friend also testified to hearing several voices, including at least one she did not recognize. (R.pp.92-93). Moreover, an investigator testified the victim told him "they" came to his house to rob him. (R.p.355). Such testimony supported the theory that petitioner and his co-defendants planned the robbery together and the victim died as a consequence. Accordingly, the evidence was sufficient to support an accomplice liability charge. *See Langley*, 334 S.C. at 648, 515 S.E.2d at 101 (explaining that under the "hand of one is the hand of all" theory, a person who joined another to accomplish an illegal purpose is liable for everything done by his accomplice in the commission of the common plan); *see also State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding the trial court should grant a requested instruction if there is any evidence presented at trial to support the

charge).

Moreover, similar to the facts in *Barber*, the evidence presented in petitioner's case was equivocal as to who fired the shot that ultimately killed the victim. *See Barber*, 393 S.C. at 236, 712 S.E.2d at 439 (holding an alternate theory of liability may be charged when the evidence is equivocal on some integral fact and the jury was presented with evidence supporting the existence or nonexistence of a fact). Importantly, the jury heard evidence that the gun used in the murder did not belong to petitioner. (R.p.79). The victim's niece testified petitioner told her he and his accomplices wanted another gun to use during the robbery because they only had one, which belonged to Wells. (R.pp.77-79). Further, a deputy testified a gun and two bullet casings were found in the yard, near the area where the victim's friend saw both petitioner and one of his co-defendants, and it was not clear who actually fired the gun before it was dropped to the ground. (R.pp.94-96; p.124; p.170; pp.279-80; p.285, lines 1-8). The co-defendant standing near petitioner was later identified as Wells—the owner of the only gun used during the robbery. Accordingly, the evidence presented at trial was equivocal as to who was the shooter, and the trial court was correct in charging the jury on the theory of accomplice liability. *See Barber*, 393 S.C. at 237, 712 S.E.2d at 439 (noting to support an accomplice liability charge, the relevant question is whether there is any evidence that another co-conspirator was the shooter and petitioner was acting with him when the robbery took place).

Finally, the trial court did not abuse its discretion in its instructions where the record shows the jury charge, as a whole, was correct. *See Logan*, 405 S.C. at 90, 747 S.E.2d at 448 (holding appellate courts must consider the jury charge as a whole and in light of the evidence presented at trial when reviewing the instructions for error). The court instructed the jury at length on the law of the case. (R.pp.444-60). During the accomplice liability charge, the court

also cautioned the jury that a defendant's mere presence at the scene was insufficient to prove he was guilty, reminding the jury that they must find the State demonstrated, beyond a reasonable doubt, that petitioner actively participated in the crime. (R.pp.454-55). The record shows the jurors thoroughly and thoughtfully considered the entire charge, as they deliberated for close to six hours over the course of two days. (R.pp.461-62; p.466, p.468). *See Logan*, 405 S.C. at 90-91, 747 S.E.2d at 448 (holding a jury charge is correct if, when read as a whole, it adequately covers the law, and such a charge does not require reversal).

Therefore, the evidence presented at trial supported the accomplice liability charge, and the decision of the Court of Appeals is supported by a fair reading of the record and certiorari is not warranted.

Any Error Was Harmless Beyond a Reasonable Doubt

Regardless, any error in the jury instructions was harmless beyond a reasonable doubt. *See State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis."). When considering whether an error with respect to a jury instruction was harmless, an appellate court must determine that the error complained of did not contribute to the verdict. *Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993).

Here, there were other theories under which the jury could find petitioner guilty, even if it did not hear the accomplice liability charge. The trial court properly charged the felony murder inference. The court explained the jury could find an inference of malice sufficient to support a guilty verdict for murder, if the State proved beyond a reasonable doubt that the victim was killed during the commission of a felony. (R.pp.456-57). The felony murder inference instruction given in this case was similar to that which was characterized as a "proper charge on

implied malice" by this Court. *See State v. Norris*, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985) (*overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)) (stating South Carolina makes no distinction between murder and felony-murder and suggesting a proper implied malice charge); *cf. Lowry v. State*, 376 S.C. 499, 506, 657 S.E.2d 760, 764 (2008) (noting courts may charge juries using permissive language indicating an inference of malice may arise from an act occurring during the commission of a felony and the inference may be accepted or rejected by the jury as it deems appropriate); *see also Lyles v. Reynolds*, No. 6:15-cv-04229-RMG, 2016 WL 4940319, at *6 (D.S.C. Sept. 14, 2016) (contrasting the language used in *Lowry* with the permissive language used by the court in the felony murder inference charge at issue to find federal habeas relief was not warranted).

The testimony presented at trial demonstrated petitioner and his co-defendants planned to rob a man in Enoree, and the victim died during the commission of that crime. The victim told investigators before he died the men had been there to rob him and he told his friend the robbers took his money, keys, and jewelry. Further, at least one bullet that hit the victim was fired from the gun found in the yard where petitioner and a co-defendant were seen, the gun did not belong to the victim, and the victim's gold chain and pendant were yanked off his neck and found outside. The jury could find the victim's murder was a logical consequence of the robbery in which petitioner actively participated.

Second, there was sufficient evidence presented petitioner was the shooter. The victim's friend testified the victim told her petitioner shot him, a lieutenant testified the victim said petitioner shot him, and the lead investigator testified the victim stated petitioner shot him first and he fired back. Particles consistent and associated with GSR were found on petitioner's hands and, as noted, the gun that fired a shot that hit the victim was found in the yard near where

petitioner was lying.[2]

Accordingly, while respondent submits the trial court's instruction was not error and the subsequent decision by the Court of Appeals is supported by the record, any alleged error was harmless as the jury could find petitioner guilty of murder under other properly charged theories of liability.

II.

The Court of Appeals properly affirmed the trial court's decision to deny a motion for a continuance where petitioner cannot show what evidence or other point a second defense witness could have raised on his behalf, the record demonstrates defense counsel had adequate time to prepare for trial, and petitioner engaged in previous delay tactics. Moreover, any error was harmless and had no impact on petitioner's case.

Petitioner asserts the Court of Appeals erred in affirming the trial court's denial of his motion for a continuance because the lower court failed to consider the defense only received the South Carolina Law Enforcement Division (SLED) gunshot residue (GSR) report and funding for an expert witness a week prior to trial, and on appeal petitioner presented "substantial evidence" the State's expert witness had a pro-prosecution bias. (Pet.p.16).

Respondent disagrees and submits the Court of Appeals properly deferred to the trial court's decision not to grant petitioner's motion for a continuance. The record demonstrates defense counsel had adequate time to prepare for trial, received funding to hire an expert yet learned the morning of trial the person she hired was not qualified, understood the issue to thoroughly cross-examine the State's expert, and petitioner has not demonstrated what additional

[2] Petitioner argues the jury was clearly influenced by the accomplice liability charge as the jurors returned a guilty verdict for murder, but acquitted him of the weapons charge. (Pet.p.11). Respondent submits this argument references the inconsistent verdict rule, which was abolished in our state. *See State v. Alexander*, 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991) (abolishing the rule against inconsistent verdicts, in part, because it was "severely criticized and rejected by most courts"). Accordingly, petitioner's assertion should not be used as a reason to grant relief.

evidence could have been uncovered on his behalf. (R.pp.26-33; pp.60-61; pp.318-21; pp.324-25). Notably, the record contradicts petitioner's argument where defense counsel acknowledged to the trial court she had the SLED GSR report "from the outset" but only requested and received the full SLED case file the week prior to trial. (R.pp.26-27; p.29). Moreover, the trial court denied the motion following numerous delay tactics by petitioner himself. (R.pp.7-13; pp.16-25). Therefore, the trial court did not abuse its discretion in denying the motion for a continuance, the Court of Appeals properly affirmed the lower court's ruling, and the petition for writ of certiorari should be denied.

Analysis

Standard of Review

A trial court's denial of a motion for a continuance will not be disturbed absent a clear abuse of discretion resulting in prejudice. *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). In fact, reversals of the refusal to grant a continuance are as "'rare as the proverbial hens' teeth.'" *McMillian*, 349 S.C. at 21, 561 S.E.2d at 604 (quoting *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957)).

Trial Court's Decision Entitled to Deference

Appellate courts have shown great deference to trial judges on this issue. This Court has repeatedly upheld denials of continuances "[w]here there is no showing that *any other evidence* on behalf of the appellant could have been produced, or that any other points could have been raised had more time been granted *for the purpose of preparing the case for trial*." *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996) (emphasis added). When a motion for a continuance is based on the contention that defense counsel has not had adequate time to prepare, the motion's denial has rarely been disturbed on appeal. *State v. Babb*, 299 S.C. 451, 454-55, 385 S.E.2d 827, 829 (1989).

In *Babb*, the defendant committed check forgery and, on the morning of trial, defense counsel moved for a continuance to obtain a handwriting expert. *Babb*, 299 S.C. at 452-53, 385 S.E.2d at 828-29. Counsel argued that to properly defend Babb, due process necessitated that he obtain his own expert. *Id.* at 452-53, 385 S.E.2d at 829. The trial judge denied the motion, finding counsel had adequate time to prepare where the public defender's office was appointed a week and a half prior to trial. *Id.* at 454, 385 S.E.2d at 829. On appeal, the Court detailed the tactics used by Babb to delay his trial and noted, "a party cannot complain of an error which his own conduct has induced." *Id.* at 452-55, 385 S.E.2d at 828-29. The Court held the trial judge did not err where the record established any shortage of time to prepare a defense was not the fault of the trial judge or the State, "but rather the fault of Babb in failing to act." *Babb*, 299 S.C. at 455, 385 S.E.2d at 829.

Record Supports Trial Court's Denial of Continuance

On the morning of trial, defense counsel moved for a continuance to obtain a different expert in GSR testing. (R.p.26, line 20-p.27, line 12). Counsel acknowledged the trial court granted a first funding request for an expert the previous week, after she requested and received the GSR case file from SLED, but counsel explained she had just learned that morning the person she hired was not actually an expert in GSR. (R.p.26, line 22-p.27, line 6). Counsel argued GSR was "very, very scientific" and she needed an independent expert to explain to the jury that there were environmental factors that could contribute to particles being found on a person's hands, such as the work they did for a living. (R.p.27, line 24-p.29, line 1).

The State pointed out that defense counsel had the results from the GSR tests from "the outset," but it was only the previous week that counsel requested SLED's entire case file "that led to the generation of the report." (R.p.29, lines 8-12). The State noted the expert it intended to

call would testify she found particles consistent and associated with GSR on petitioner's hands, but she could not say the particles were *in fact* GSR. (R.p.27, lines 18-23; p.30, lines 7-15). The State further noted its expert would testify to the information counsel alluded to, including how easily GSR could transfer to someone's hands and what factors might lead to a false positive result. (R.p.30, lines 7-15; p.34, line 22-p.35, line 4).

The trial court denied the motion for a continuance, ruling:

> As far as the GSR and the motion to continue because of that, I do understand where the Defense is coming from and I would encourage you to go ahead and figure out who you can get to take a second look at this on behalf of [petitioner]. I'm more than happy to sign whatever funding orders are necessary to make that happen. At the same time, it also sounds as if the SLED agent would be in a position to address some or most, if not all, of the Defense concerns.

(R.p.32, line 17-p.33, line 11). The next day, defense counsel renewed the motion for a continuance and explained she attempted to contact two experts, who did not return her calls. (R.p.59, line 24-p.60, line 5). The court told the parties he would hold in abeyance any ruling on the motion, and would entertain a motion for a mistrial, should the court find the defense was entitled to an independent expert following the testimony of the SLED expert. (R.p.60, line 15-p.61, line 5). On the third day of trial, counsel updated the court that her search for a GSR expert continued to be unsuccessful. (R.p.242, line 20-p.243, line 7).

Subsequently, the State called Jennifer Stoner (Stoner) from SLED as an expert in GSR. (R.p.311, line 11-p.314, line 5). In this case, Stoner examined samples taken from petitioner's hands. (R.p.318, lines 7-17). Stoner testified she found one round particle consistent with GSR on the back of petitioner's right hand. (R.p.319, lines 4-11). Stoner explained "consistent with" meant the particle "may have an environmental source." (R.p.319, lines 11-13). Stoner testified she also found one particle on petitioner's left palm and several on the back of his left hand that

were associated with GSR. (R.p.319, lines 13-14; p.320, lines 2-3). Stoner explained "associated with" was a particle with only a single element or combination of two elements, whereas GSR must contain all three elements of barium, antimony, and lead. (R.p.319, lines 14-25). Stoner clarified further that particles consistent or associated with GSR could come from an environmental source, such as the use of certain power tools. (R.p.320, lines 4-23).

Based on her findings, Stoner testified it was her belief the particles came from firing a gun, but she admitted she could not definitively say the particles were GSR because they did not contain all three elements. (R.p.320, line 24-p.321, line 5, p.321, lines 15-23). Further, Stoner admitted she did not know if petitioner fired a gun or if the particles were transferred to his hands when the victim shot him. (R.p.321, line 24-p.322, line 6).

On cross-examination, defense counsel emphasized how easy it was for a person to pick up GSR particles:

> [DEFENSE COUNSEL]: When – and you already stated that when identifiable gunshot residue is on a person that has been shot, you can't tell whether it's because the person shot a gun or because they had been shot, correct?
>
> [STONER]: That's correct.

(R.p.324, lines 3-7). Counsel further stressed Stoner did not find any actual GSR particles from the samples taken from petitioner's hands:

> [DEFENSE COUNSEL]: How many gunshot residue particles were found in this case?
>
> [STONER]: I do not have any.
>
> [DEFENSE COUNSEL]: So none?
>
> [STONER]: Particles of gunshot residue, no.
>
> [DEFENSE COUNSEL]: Correct. So in this case you just simply can't tell whether [petitioner] fired a gun or not, correct?

[STONER]: (Non-verbal response).

(R.p.324, line 23-p.325, line 5). Counsel also reiterated both of these points during re-cross-examination. (R.p.327, lines 7-13).

At the close of the State's case, defense counsel renewed her motion for a continuance, which the trial court denied, stating:

> THE COURT: [W]hen Agent Stoner testified, in all candor, it wasn't testimony that the Court found terribly damning from the State's perspective. Clearly there was particulate matter found. But my recollection of her testimony and my notes reflect that she was not able to definitively say that GSR was present because only some particles were found and not all the particles that one would typically find.

(R.p.402, line 11-p.403, line 1). The court also noted Stoner testified it could not be determined if the particles came from petitioner shooting a gun, being in close proximity to one, or from being shot. (R.p.403, lines 18-24).

The record demonstrates the trial court did not abuse its discretion in denying petitioner's motion for a continuance. *See McMillian*, 349 S.C. at 21, 561 S.E.2d at 604 (holding the denial of a continuance will not be disturbed absent a clear abuse of discretion resulting in prejudice). First, petitioner has failed to demonstrate what evidence another GSR expert could have produced and the record does not reveal any other points which could have been raised on petitioner's behalf. *See Williams*, 321 S.C. at 459, 469 S.E.2d at 51-52 (upholding the denial of a continuance where there was no showing that any other evidence or points could have been raised on petitioner's behalf). During direct examination, Stoner testified she only found particles associated and consistent with GSR on petitioner's hands, and admitted she did not find any actual GSR particles. (R.pp.318-21). Moreover, Stoner explained the particles she found could have come from an environmental source, rather than a gun. (R.pp.319-20). Stoner also

admitted she could not determine whether petitioner actually fired a weapon or if the particles were transferred to his hands after the victim shot him. (R.pp.320-22). Such testimony was not particularly prejudicial to petitioner, and was more likely to be beneficial because the jury heard from the State's own expert about the lack of GSR particles on petitioner's hands.

Further, during cross and re-cross-examinations, defense counsel emphasized that Stoner found no GSR on petitioner's hands, how hard it was to determine where GSR particles came from, and how easy it was for a person to pick up the particles. (R.pp.324-25). Those were the points counsel alluded to during her motion for a continuance, and the record demonstrates counsel raised them sufficiently and repeatedly before the jury. Accordingly, it is unclear what other evidence or point petitioner hoped to bring to the jury's attention through the testimony of an additional GSR expert, and the trial court did not err in refusing to grant a continuance.

Second, the denial of the motion for a continuance did not prevent petitioner from presenting a complete defense where the record shows defense counsel had adequate time to prepare for trial, and had a thorough understanding of this issue. *See Babb*, 299 S.C. at 454-55, 385 S.E.2d at 829 (holding the denial of a motion for a continuance is rarely disturbed based on the contention that defense counsel did not have adequate time to prepare). As noted, counsel had the results of the GSR tests from "the outset," and it was only SLED's case file that she requested the week before trial. (R.pp.26-27; p.29). Nothing prevented counsel from hiring an expert in the months following her appointment, yet it was only the week before trial that she requested and received funding for an expert.[3] *See Babb*, 299 S.C. at 455, 385 S.E.2d at 829 (upholding the denial of a motion for a continuance where counsel was appointed a week and a

[3] As explained in more detail below, petitioner had fired at least one previous attorney. Current counsel was appointed on November 7, 2014—more than three months before trial. (R.p.30, line 25-p.31, line 3).

half prior to trial, despite petitioner's contention counsel did not have adequate time to prepare).

With no explanation on the record to the trial court, defense counsel stated during the motion hearing she learned the day of trial the person she hired was not an expert. (R.pp.26-30). There is no evidence in the record to support petitioner's contention the court violated his due process rights as an indigent defendant or treated him unfairly where the court gave counsel the funding necessary to hire the first expert, gave her the opportunity to find a second one, told her that he would sign any further funding request as required, and specifically stated he would entertain a motion for a mistrial if needed, depending on the nature of the SLED expert's testimony. (R.pp.32-33; pp.60-61). The record shows counsel understood the GSR issue, had the opportunity to hire a qualified expert, and was prepared to present a defense at trial, and the court did not err in refusing to grant a continuance. *See Babb*, 299 S.C. at 454-55, 385 S.E.2d at 829 (holding rulings on such motions depend upon the particular facts and circumstances of each case).

Finally, it is important to note the context in which the lower court denied the continuance, and the delay tactics petitioner previously used. Prior to trial, petitioner had fired at least one defense attorney. (R.p.9, lines 10-17). The morning of trial, petitioner attempted to relieve current counsel, telling the court to "go ahead without" him, and that his family was going to hire a new attorney because he was being "railroad[ed]." (R.p.7, lines 2-17). The court tried to inform petitioner he would be at a disadvantage if he did not participate in his defense, stating:

> THE COURT: Mr. Walker, I need – before you leave sir, I desperately need to tell you something. Okay, sir?
>
> [PETITIONER]: You all can go with the trial without me. I won't be here.

> THE COURT: You realize, Mr. Walker, that you will be at a disadvantage if you go forward without you being present –
>
> [PETITIONER]: It doesn't matter. I'm already at a disadvantage. Y'all can call out and take my case in. My momma will get [another attorney] and he'll take my case and y'all can go from there. I don't give a damn.
>
> THE COURT: The record should –
>
> [PETITIONER]: It's going to happen without me.
>
> THE COURT: The record should reflect that Mr. Walker was quite adamant and was walking out of the courtroom as I was trying to address him about the disadvantage that he may very well be in if the case goes forward without him being present. He has decided to leave the courtroom.

(R.p.7, line 18-p.8, line 12). Counsel made a motion to be relieved, stating that "[u]p until this morning [petitioner] seemed very pleased with my services." (R.p.8, lines 16-19).

The trial court found petitioner's actions were an effort to delay his trial and petitioner voluntarily absented himself from the proceedings by his conduct and his expressed statements. (R.p.10, line 24-p.11, line 22). Noting defense counsel was prepared to move forward, the court stated he would proceed with the case. (R.p.11, lines 7-8; p.11, lines 15-16).

Following a recess and voir dire, defense counsel informed the trial court the family did not have the means to hire another attorney and wanted to keep her. (R.p.16, line 22-p.17, line 3). Subsequently, counsel told the court the State made a plea offer, but petitioner prohibited her from relaying it to him. (R.p.18, line 5-p.19, line 7). The court attempted to do so; however, petitioner continually refused to listen and repeatedly interrupted the court, insisted counsel was fired, threatened to sue because "all this stuff is staged," and consistently stated he was not going to be a part of the trial, and he wanted to go back to the detention center. (R.p.19, line 8-p.23, line 24). Petitioner once again left the courtroom and the court ordered defense counsel to

continue as his attorney.[4] (R.p.23, line 25-p.25, line 17).

The delay tactics petitioner used are similar to those utilized by the defendants in *Babb* and *Williams*, in which the Court upheld the denials of a motion for a continuance. In *Babb*, the defendant refused to hire an attorney and was ultimately appointed counsel from the public defender's office. *Babb*, 299 S.C. at 452-53, 385 S.E.2d at 828-29. The Supreme Court affirmed Babb's convictions, holding, in part, any shortage of time to prepare a defense was the fault of the defendant and his delay tactics, and a continuance was properly denied. *Id.* at 455, 385 S.E.2d at 829. Similarly, the Court in *Williams* held the refusal to grant a continuance was proper where the defendant had retained counsel fifteen months prior to trial, yet waited until the day of trial to move to relieve counsel, and counsel stated he was "comfortable proceeding with the representation." *Williams*, 321 S.C. at 459, 469 S.E.2d at 52.

Here, petitioner attempted, for at least the second time, to delay his trial by firing his attorney. As defense counsel told the trial court, she had previously met with and spoken to petitioner, including the night before trial, and he never indicated any problems with her representation, so she was surprised by his attempt to relieve her. Further, counsel stated she was ready to move forward and comfortable arguing the pending motions before the court. After a lengthy and thorough attempt to both inform petitioner of the dangers of not appearing at trial and to relay a plea offer to him, the court found it was clear petitioner was engaging in delay tactics and the court would proceed with the case. The record demonstrates counsel was working without the benefit of any input from petitioner during trial as he repeatedly refused to take part in his own defense. Accordingly, petitioner cannot now complain where his conduct placed

[4] Before trial began each subsequent day, petitioner sent a note to the court refusing to appear. (R.p.54, lines 8-18; p.239, line 17-p.240, line 2; p.406, lines 4-13). However, petitioner was in court for the verdict and sentencing. (R.p.468, lines 7-11).

counsel in the unenviable position of arguing a motion for a continuance following petitioner's own numerous delay tactics. *See Babb*, 299 S.C. at 455, 385 S.E.2d at 829 (noting a party cannot complain of an error which his own conduct has induced).

Therefore, the trial court did not abuse its discretion in denying the motion for a continuance where petitioner failed to demonstrate how the ruling prevented him from presenting a complete defense, and the decision of the Court of Appeals is supported by a fair reading of the record and certiorari is not warranted.

Any Error Was Harmless Beyond a Reasonable Doubt

Regardless, any error in denying the motion for a continuance was harmless beyond a reasonable doubt. Whether an error is harmless depends on the circumstances of the particular case. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). The error's materiality and prejudicial character must be determined from its relationship to the entire case. *Id.*; *see also State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (listing the factors of a harmless error analysis, including the importance of the witness's testimony, whether the testimony was cumulative, the extent of cross-examination, and the overall strength of the State's case) (citation omitted).

Here, testimony from a defense expert would have been cumulative to the information elicited from the SLED expert, including the lack of GSR particles on petitioner's hands, the possible environmental sources of particles, and the inability to determine whether the particles were from firing a gun or from being shot. Defense counsel also thoroughly cross-examined the SLED expert and took the opportunity to point out to the jury the general weakness of the test results, in that the samples revealed no GSR particles on petitioner. Such testimony was likely beneficial to petitioner rather than prejudicial.

Additionally, the State presented a strong case against petitioner, such that the SLED expert's testimony likely had little impact on the jury's guilty verdict. The jury heard from witnesses about the plan between petitioner and two co-defendants to rob a man in Enoree and that the victim died as a consequence. The victim told a friend and investigators before he died that the men were there to rob him, shot him, and took his belongings. Further, at least one bullet that hit the victim was fired from the gun found in the yard where petitioner and a co-defendant were seen, and which belonged to that co-defendant.

Accordingly, while respondent submits the trial court's ruling was not error and the subsequent decision by the Court of Appeals is supported by the record, any alleged error was harmless beyond a reasonable doubt as it could not have influenced the jury's verdict.

CONCLUSION

Respondent submits petitioner failed to show the questions presented warrant certiorari review. For the foregoing reasons, the Court should deny the petition for writ of certiorari and let stand the decision of the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: _____

SHERRIE BUTTERBAUGH
S.C. Bar No. 101477

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

September 13, 2017.

RECEIVED
SEP 13 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM LAURENS COUNTY
Frank R. Addy, Circuit Court Judge

Op. No. 2017-UP-169 (S.C. Ct. App. filed Apr. 19, 2017)

THE STATE,

Respondent,

v.

DAVID LEE WALKER,

Petitioner.

Appellate Case No. 2017-001582

PROOF OF SERVICE

I, Sherrie Butterbaugh, of counsel for the Respondent, certify that I served two (2) copies of the Return to Petition for Writ of Certiorari via U.S. mail to Petitioner's attorney of record, John H. Strom, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 13th day of September, 2017.

SHERRIE BUTTERBAUGH
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305