STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Darlington County
Honorable Roger E. Henderson, Circuit Court Judge

THE STATE,

Respondent,

v.

JOEY LATWAN GIBSON,

Appellant

Appellate Case No. 2016-001585.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

The trial court erred by denying defense counsel's motion to suppress the results of Appellant's gunshot residue tests where law enforcement had no probable cause to arrest Appellant for murder at the time of the tests and where the trial court erred as a matter of law in concluding that Appellant "implicitly" consented to the search.

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting the results of a GSR test conducted on Appellant without a warrant and prior to his arrest when officer testimony and body camera evidence presented *in limine* demonstrated that Appellant consented to have his hands swabbed for GSR, and when the potential for the destruction of the GSR evidence provided an exigency which excused any warrantless search, and when any error in the GSR kit's execution proves harmless. Respondent additionally submits that a warrantless swab for GSR is not a search under the strictures of the Fourth Amendment.

STATEMENT OF THE CASE

Appellant Joey Latwan Gibson was indicted by the Darlington County Grand Jury for the murder of Gary Evans Walker, as well as for the possession of a weapon during the commission of a violent crime. (R. pp. 457-60).

Appellant proceeded to trial beginning July 18, 2016. (R. p. 1). Attorneys James Scruggs, III, Nathan Scales, and Rachel Gainey of the Fourth Circuit Public Defender's Office represented him. (R. p. 1). On behalf of the State, Deputy Fourth Circuit Solicitor Kernard Redmond and Assistant Solicitor Patti Parker prosecuted the case. (R. p. 1).

A jury convicted Appellant of both charges after a four-day trial. (R. p. 438, line 17 – p. 439, line 15). The Honorable Roger E. Henderson, who presided over the trial, sentenced Appellant to a term of fifty years for murder and to a consecutive term of five years for possession of a weapon during the commission of a violent crime. (R. p. 446, lines 18-25).

This appeal timely follows. (R. p. 449).

STATEMENT OF FACTS

Gary Evans Walker visited his dad before dark on August 19, 2014. (R. p. 81, lines 1-23). He left to walk home about 45 minutes later, and was gunned down one block away. (R. p. 82, line 14 – p. 84, line 25). When law enforcement arrived within minutes of the gunfire, they identified Walker's unresponsive body laying at the edge of the roadway, with his feet pointing towards the house where Appellant Joey Gibson lived. (State's Exhibit 6; R. p. 87, line 21 – p. 88, line 21; R. p. 110, lines 1-7; R. p. 135, lines 1-5; *see* State's Exhibit 17). Four shell casings lay on the ground next to Walker. (R. p. 88, lines 22-25; R. p. 91, lines 8-17). One bullet fragment was recovered from underneath his body. (R. p. 136, lines 12-23). Another stray bullet had gone through the window of the house across the street. (R. p. 111, lines 8-10). No gun was recovered during the course of investigation into Walker's death. (R. p. 167, lines 5-7).

There were no actual witnesses to the shooting. Someone nearby, Harry James, called 911 to report the shooting. (R. p. 99, lines 10-21). The person whose house was stricken with a stray bullet, Cecelia Green, also spoke with responding law enforcement at the scene. (R. p. 141, lines 7-10). Green was dropped off at her home across the street a few minutes prior to the shooting. (R. p. 229, lines 13-18). She was not sure of the exact time, but recalled that it had just gotten dark outside. (R. p. 229, lines 7-8). When she got out of the car, she saw Appellant "sitting outside by himself" at the house across the street. (R. p. 229, line 20 – p. 230, line 8; *see* State's Exhibits 17 and 20).

Ivory Stevenson dropped Green off at her home. She too recalled seeing Appellant on his grandmother's front porch across the street from Green's. (R. p. 252, lines 21-24). She waved at him. (R. p. 252, lines 10-20). Then, as she drove away on a parallel street, Stevenson heard three

or four gunshots and witnessed sparks "like somebody was shooting firecrackers." (R. p. 255, line 9 – p. 256, line 3).

Yet another passerby, Shelton Ham, was driving down Green's street at the time of the shooting, saw gunfire, slammed on the brakes, and saw the victim's body fall. (R. p. 260, line 15 – p. 261, line 5).

From these neighbors and passersby, law enforcement learned that after the shooting, two subjects emerged from the side-yard of Appellant's residence and walked, then ran, away towards South Main Street. (R. p. 140, line 15 – p. 141, line 22). One had shoulder-length dreadlocks and wore a red shirt. (R. p. 141, lines 18-20). The other was taller with short hair and a white shirt. (R. p. 141, line 21). Yet another individual was seen running behind the residence wearing a purple or blue shirt. (R. p. 141, lines 17-18). It was determined that these three people were Appellant, his brother Quinton Gibson, and their cousin Antonio Gregg. (R. p. 140, lines 19-25).

Green identified Quinton Gibson and Antonio Green as the two seen running away. (R. p. 230, line 21 – p. 231, line 2). They were "coming from the side" of the house. (R. p. 236, line 5). She "asked them what happened and they said, they didn't know." (R. p. 249, lines 2-9). Green also saw Appellant "just standing there" in the front yard after the shooting. (R. p. 231, lines 12-18). Then, "when they took off running, he took off running," but Appellant ran around the house to the backyard. (R. p. 231, lines 18-22; R. p. 243, lines 10-16). Green ran over to the victim, who passed away nearly immediately. (R. p. 232, lines 4-6). Walker had been shot a total of five times, including at least two shots to the back. (R. p. 374, line 3 – p. 376, line 24).

As for the address where Walker lay, "there were no lights on in the house" when law enforcement arrived. (R. p. 137, lines 17-19; State's Exhibit 4). "No one was outside." (R. p.

137, line 19). Appellant Joey Gibson was inside the darkened residence and came to the door when Officer Rodriguez with the Darlington Police Department knocked. (R. p. 113, line 14 – p. 114, line 1). He was wearing a "blue or purple" shirt and had a rag in his right hand. (R. p. 117, lines 13-14; R. p. 119, lines 6-9; State's Exhibit 37, Track 1 at 16:10 to 17:16). The rag was blue, and Appellant "was kind of wiping his hands" with it when officers came to the door. (R. p. 143, lines 7-8; Defense Exhibit 3, Track 2 at 8:05 to 10:21). His hair was pulled up. (R. p. 119, lines 10-12).

Upon initial contact, Appellant "stated he did not know what was going on. He then said he heard three shots. He looked out the window and saw two guys running that way and pointed towards South Main Street." (R. p. 114, lines 3-7). He could only describe them as black males. (R. p. 143, lines 12-15). When Officer Rodriguez asked Appellant who it was laying deceased in the roadway at the edge of Appellant's front lawn, Rodriguez recalled Appellant saying, "I can see him from here that I don't know who that is." (R. p. 114, lines 7-12; State's Exhibit 37, Track 1 at 16:10 to 17:16). Then Appellant went back inside his house. (R. p. 114, lines 15-17). Investigator Toney Flowers was asked by a Darlington officer to conduct a GSR kit on Appellant. (R. p. 144, lines 1-9).

Also after the shooting, Quinton Gibson and Antonio Gregg were brought back to the crime scene. (R. p. 142, lines 1-10). All three of these individuals, considered suspects, had statements taken later that night. (R. p. 145, lines 3-10). Statements given by Appellant's brother Quinton Gibson and cousin Antonio Gregg presented a sequential and corroborating version of events.

Gregg testified that he was in the backyard before the incident with Quinton, working on cranking up a 1983 Oldsmobile. (R. p. 276, line 12 – p. 277, line 11). Quinton paused to ask

Gregg if he heard something, at which point Gregg did hear "some shots going off." (R. p. 277, lines 17-20). Gregg stated he went around the side of the house, saw the victim lying down, got scared, and decided to remove himself from the situation by hurrying away down the road with Quinton. (R. p. 277, line 22 – p. 278, line 4). When Quinton and Gregg "made it down the road [Quinton's] mama was pulling in her house and" they told her what they saw. (R. p. 278, lines 11-14). Quinton and his mother lived next to the laundromat on South Main Street. (R. p. 130, lines 21-23). Not long after they arrived there, Gregg made his statement to law enforcement. (R. p. 281, lines 1-15).

Quinton testified about the totality of his and Appellant's joint ventures on the day of the shooting. (R. p. 290, lines 3-10). Quinton was with Appellant when he drove out to Willow Tree Road, "the country," and fired a pistol which he believed to be a .9 millimeter. (R. p. 293, lines 4 -22). According to Quinton, Appellant brought the gun out there. (R. p. 294, lines 3-5). Later that day, Quinton met up with Gregg and they went to a family gathering at Quinton's grandmother's house, where Appellant lived. (R. p. 290, lines 11-13; R. p. 296, line 8 – p. 297, line 3). Their grandmother fell ill. (R. p. 297, lines 5-18). Soon thereafter, the only people left at the house were Appellant, Quinton, and Gregg. (R. p. 298, lines 12-14). Quinton testified that Gregg got a phone call and walked around the side of the house. (R. p. 299, lines 10-11). Then, Quinton saw his brother shake hands with somebody in the front yard by the road (R. p. 299, lines 15-25). According to Quinton, the way his brother spoke to the stranger "put [him] on alert." (R. p. 300, lines 9-10). His conscience told him "to go home that night." (R. p. 300, lines 12-17). Quinton went to leave and Gregg called him into the backyard to help work on the car. (R. p. 301, lines 14-22). While he was helping with the car, he heard gunshots. (R. p. 302, lines 13-23). Quinton, poised to jump the fence and run from the backyard, decided not to leave Gregg and stuck with

him, running to the front of the house and eventually down the road to his house on South Main Street. (R. p. 303, line 14 – p. 306, line 14).

During this swift decision to flee, Quinton recalled coming around to the front of his grandmother's house, putting his foot on the bottom step, looking up and seeing a purple shirt—the color he knew his brother was wearing—and a chained door preventing anybody from entering the room inside. (R. p. 304, line 22 – p. 305, line 5). Because the door with the chain had no knob, Quinton recalled that Appellant "had a chain through the door through the wall and he had a lock on it, so he was trying to get into the room." (R. p. 305, lines 5-7). Then Quinton and Gregg ran by Cecelia Green, telling her that he did not know what happened. (R. p. 306, lines 4-14). Quinton emphasized at trial that he ran because he was scared and wanted to look out for himself. (R. p. 314, lines 3-12). From his mother's house, Quinton was taken to the police station and, over the course of a month, gave a number of varying statements because he did not "want to see [his] brother locked up" for murder. (R. p. 309, lines 5-15; R. p. 310, lines 17-23).

Appellant's own statement aligns with Quinton's up to the moments prior to the shooting. He elaborated on his actions from earlier in the day, describing that he and his brother Quinton went to their cousin's house "out in the country." (R. p. 146, lines 11-18; State's Exhibit 2 at 26:10 to 42:20). While they were there, Appellant fired a gun one time. (R. p. 146, lines 19-25; R. p. 160, lines 17-19).

Otherwise, Appellant's story diverges from Quinton and Gregg's at the point when Appellant recounts that he was at the house alone, inside, watching TV for fifteen to twenty minutes, and then heard four or five shots. (State's Exhibit 2 at 7:20 to 14:00). Appellant said that he stayed inside after the shots and only peeked outside. (State's Exhibit 2 at 19:00 to 23:00). Appellant's timeline regarding his placement before and after the shooting does not align

with that provided by the neighbors and passersby who testified to seeing Appellant outside just minutes before the shooting, and immediately after. (*Cf., e.g.*, R. p. 141, lines 17-18; R. p. 252, lines 10-24). Appellant's statement additionally included some inconsistencies from his initial conversation with law enforcement during the knock-and-talk at his residence. During his recorded statement, he became "unclear of which way the subjects ran" away from the residence, or even if he saw them. (R. p. 168, lines 9-23; State's Exhibit 2 at 17:55 to 25:20). During his statement, Appellant did volunteer that the locks on the door of his grandmother's house were broken. (State's Exhibit 2 at 9:00-9:30). He was wearing a dark blue or purple shirt. (*Id.*).

Out in the country, law enforcement verified Quinton and Appellant's statements when they took Quinton to the address and recovered a .9 millimeter casing at the spot where Quinton told them Appellant had fired the gun. (R. p. 165, lines 1-8). It became the fifth .9 millimeter shell casing made part of the investigation in this case. The four shell casings recovered near the victim's body were .9 millimeter as well. (R. p. 188, lines 8-20). Ballistics analyses done by SLED after the shooting determined that all of the collected cartridges were fired from the same gun. (R. p. 367, lines 12-16; R. p. 368, lines 8-10). SLED was also able to test one fired bullet recovered from the scene which was consistent with a .9 millimeter. (R. p. 366, line 19 – p. 367, line 5).

As presented at trial, one of Appellant's cousins, Kendrick Gregg, sold Appellant a .9 millimeter pistol about two weeks before the murder. (R. p. 171, line 21 – p. 172, line 23). Appellant initiated the sale and paid $98 for it. (R. p. 172, line 24 – p. 173, line 25). The gun came with three bullets loaded in the clip. (R. p. 174, line 22 – p. 175, line 3).

Appellant's cellmate Corey Rowell also testified at trial. He first volunteered to speak with law enforcement in January 2016, which was about eighteen months after the murder. (R. p.

332, lines 5-11). Rowell was housed with Appellant beginning in May 2015. (R. p. 332, line 22 – p. 333, line 2). Appellant told Rowell that he regretted shooting the victim, and that it happened in front of his house. (R. p. 333, lines 8-22; R. p. 335, lines 2-5). Appellant told Rowell he went into his house and "turned the lights off because he never knew what happened." (R. p. 334, lines 7-8; R. p. 335, lines 2-5). Appellant also said the gun was "somewhere around the dog house or something like that." (R. p. 334, lines 11-12).

As for the GSR test conducted on the swabs taken from Appellant's hands at the scene, former SLED trace evidence analyst Whitney Berry issued a report with the following results:[1]

(A) Right Palm: one particle of GSR and one particle consistent with GSR.

(B) Right Back of Hand: multiple particles of GSR.

(C) Left Palm: one particle of GSR and one particle consistent with GSR.

(D) Left Back of Hand: multiple particles of GSR and one particle consistent with GSR.

(R. p. 352, lines 17-25; R. pp. 452-56).

Berry opined that this yielded a positive test for GSR given the high volume of particles determined to exist on Appellant's hands. (R. p. 353, lines 1-19). By comparison, a GSR analysis conducted on Appellant's brother Quinton yielded one particle of GSR on the back of his left hand. (R. p. 348, lines 11-18). Quinton's t-shirt was tested and yielded a positive result with multiple particles of GSR and multiple particles consistent with GSR, but there was no way to determine how long that GSR has been present. (R. p. 349, line 18 – p. 359, line 4; R. p. 355, lines 11-13). Appellant's clothing was not tested. (R. p. 355, lines 3-21).

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[1] Citing to a source outside of the record, Appellant states that SLED trace analyst agent Whitney Berry has been found to have reported inaccurate GSR results, requiring investigation and corrective action. (Br. of App., pp. 6-7). In response, Respondent's counsel inquired and SLED confirmed that the GSR analysis conducted in this case was not subject to any recent corrective action. (Aug. 25, 2017, Ltr. to Ct.).

ARGUMENT

I. The trial court was correct to deny Appellant's suppression motion. Officer testimony and body camera evidence presented *in limine* demonstrates that Appellant consented to have his hands swabbed for GSR, and that the potential for the destruction of the GSR evidence provided an exigency which excused any warrantless search. Any error in the GSR kit's execution also proves harmless given the remainder of the evidence available in support of the kit's execution and Appellant's guilt. Finally, a warrantless swab for GSR is not a search subject to the strictures of Fourth Amendment.

The Fourth Amendment to the United States Constitution protects the people's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; *cf.* S.C. Const. art. I, § 10. Before it can apply, however, it must be determined whether the search or seizure complained of constituted an actual intrusion against one's reasonable expectation of privacy. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511 (1967).

Appellant asks this Court to reverse his convictions because law enforcement did not pause their processing of the murder scene in Appellant's front yard to obtain a search warrant for Appellant's person before asking Appellant if he would allow his hands to be swabbed for gunshot residue (GSR). Appellant complied with the request on-scene. He was not in custody. In response, the State posits that not only did Appellant consent to the test, but the test itself did not infringe upon any private aspect of Appellant's person. Rather, Appellant had only to hold out his hands. Hands that, up until such time as Office Flowers initiated the GSR swab, were holding, swinging, rubbing, and otherwise handling a blue rag in the presence of law enforcement on a sweat-inducing night in August.

When taken together, Appellant's consent to the test, the likelihood that Appellant was somehow involved in the murder based upon initial impressions from the scene, and the

ephemeral character of any GSR present upon Appellant's hands at the time law enforcement responded, the State submits that no Fourth Amendment violation occurred. Additionally, the GSR test itself does not interfere with any expectation of privacy, as it only requires a superficial act upon a publicly exposed portion of the body.

Issue Specific Facts

Appellant moved to suppress the results of the GSR kit performed at the crime scene. (R. p. 11, lines 17-22). The GSR swab occurred prior to his arrest. (R. p. 38, lines 19-24). In support of suppression, Appellant argued (1) that completion of the GSR kit constituted a search of Appellant's body for the purposes of Fourth Amendment analysis, (2) that there was insufficient probable cause to excuse the warrantless GSR test, and (3) no exceptions to the warrant requirement applied. (R. p. 11, line 23 – p. 48, line 10).

The State presented two witnesses at the suppression hearing. Maureen Valazack, Lieutenant over investigations with the Darlington City Police Department, testified first. Throughout the course of her testimony, it was established that the first thing she did when she arrived at the crime scene was speak to the officers who had already responded. (R. p. 15, lines 19-20). She (1) observed the deceased victim laying on the roadway in front of the address responded to, (2) noted whom the officers had spoken to on the scene, (3) noticed all the lights were out at the address, and (4) observed that no one who lived at the home was outside even though someone had already spoken with Appellant, who did live there. (R. p. 14, line 24 – p. 16, line 1).

Firsthand, Valazack knocked on Appellant's door. "He came to the door and all the lights were off and [she] asked him why were all the lights off" and he said it "was, because there was a shooting and that he was afraid, something to that effect . . . ." (R. p. 17, lines 4-17). "He was

carrying a blue washcloth in his hand and he kept, like, rubbing this washcloth." (R. p. 18, lines 7-8). He said he was "not coming out there and getting shot." (R. p. 17, lines 17-21). Valacack described that this answer "raised a red flag." (R. p. 17, line 24). Appellant also told Valazack that "he was inside watching TV when he heard the shots." (R. p. 19, lines 17-18). Moreover, Appellant denied knowing the victim laying in the roadway in front of his house. (R. p. 18, lines 1-4).

Secondhand, Valazack learned that someone saw Appellant in the front yard prior to and immediately following the shooting. (R. p. 16, line 19 – p. 17, line 3; R. p. 26, line 25 – p. 27, line 11). This was inconsistent with Appellant's story. She learned that Appellant initially told either officer Melton or Rodriguez that "he heard some shots and he saw two males walk from it." (R. p. 16, lines 7-15).

As a result of the totality of the information obtained and observed at the scene, Valazack ordered another officer to run a GSR kit on Appellant:

> That was my call. Because some of the witnesses they observed Joey in the front yard at the time of the shooting and they observed him right after the shooting running to the back of the house and they described him wearing, I believe [ ] a purple or a dark blue shirt. And when he came to the door he was wearing a purple shirt.

(R. p. 18, lines 13-18; *see also* R. p. 28, line 22 – p. 29, line 22).

While Valazack gathered that information secondhand through officer accounts, she then "actually went and talked to" one neighbor Cecelia Green and one other witness at the scene personally.[2] (R. p. 30, lines 15-25; R. p. 31, lines 14-24). She testified that when she got that

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[2] On redirect, Valazack was asked to clarify the sources and depth of information she received before ordering the GSR kit:

> Ivory Stevenson told one of the officers that she had just dropped her cousin off, Cecilia,

information and "saw the rag in [Appellant's] hand," she ordered the GSR because "that potential evidence could be gone" if she had not acted. (R. p. 31, lines 4-9). Valazack had earlier testified that it was "extremely hot" and "very humid" and in the neighborhood of ninety or more degrees that day. (R. p. 20, lines 14-16). She noted that SLED's time frame for executing a GSR kit is six hours because GSR only lasts so long on someone's hand before coming off. (R. p. 20, lines 1-13).

The State's second witness at the suppression hearing was Officer Toney Flowers who executed the GSR kit on Appellant. He testified that once he received the order to do the kit, he located Appellant sitting on his front porch steps by himself. (R. p. 33, lines 18-23). Flowers approached him, made an introduction, told him he needed to collect samples from his hands for a GSR kit, and Appellant, Flowers believed, "said okay." (R. p. 34, lines 1-7). Flowers noticed the blue washcloth in Appellant's hands. (R. p. 40, lines 2-4). He asked Appellant to leave it on

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> her cousin off who lives across the street. As she was dropping her off – when she dropped her off she was driving by the [the address on Kirven Street], she looked over and she saw Joey Gibson and another subject in the front yard. As soon as she got to, not even a block away, she made a right, I mean, a left onto King Edwards Street, which is just around the corner. If you drove it, it would probably take, I don't know, maybe twenty something seconds to get to the end of the street, to the turn and as she was coming around to another street which is kind of this like a U-turn that she made, she heard the gunshot.

(R. p. 29, line 23 – p. 30, line 14).

However, during cross-examination, Valazack testified that Stevenson had left the scene. (R. p. 25, lines 17-24). Thus, it is unclear whether Valazack received Stevenson's account firsthand, secondhand, or on the day following the murder.

What is clear, however, is that Stevenson's trial testimony does not contradict Valazack's as Appellant contends. Appellant writes that Stevenson "would testify at trial that she did not talk to police on the night of the shooting." (Br. of App. at 9). The record instead reflects that Stevenson did not testify on this point at all; she was never called upon to state when she spoke to law enforcement. (R. p. 255, line 2 – p. 258, line 24).

the front porch as they walked over to do the GSR kit. (R. p. 43, lines 8-14). Appellant asked what the samples did, and Flowers explained the swabbing process. According to Flowers, Appellant seemed to understand the request and never objected. (R. p. 34, lines 5-15).

Appellant followed Flowers to the trunk of his car to execute the kit. (R. p. 43, lines 15-18). Another officer, Melton, accompanied them. (R. p. 34, lines 19-25). This officer had a bodycam and the State played "that portion . . . that shows the GSR being done" for the court during the suppression hearing.[3] (R. p. 39, lines 1-15). The bodycam footage corroborates Flower's *in limine* testimony. (Defense Exhibit 3, Track 2 at 15:00 to 24:00). Notably, any discussion between Flowers and Appellant which occurred as they walked from the front step of Appellant's home down about half a block to Flowers' vehicle is inaudible. (Defense Exhibit 3, Track 2 at 15:20 to 15:48).

Following this presentation, the parties presented thorough argument on the points discussed below. (R. p. 46, line 5 – p. 55, line 16). Primarily, Appellant argued there was time to secure a warrant for the GSR kit and no attempt to do so, and that no recognized exception to the warrant requirement applied *because, at the time for the GSR test, the only evidence they had that Appellant may have been involved was his mere presence at the scene.* According to Appellant, this did not amount to probable cause. (R. p. 47, line 16 – p. 49, line 18).

In response, the State challenged whether the GSR test was a search because all the test requires is the rubbing of a magnet over the hands of the subject. (R. p. 50, line 10 – p. 51, line 1). The State also argued that if the court determined the GSR kit to be a search, that the body

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[3] Melton's bodycam footage was marked State's Exhibit 1 for viewing during the suppression hearing, but it was not admitted into evidence. (R. p. 6, line 4; R. p. 38, line 25). Melton's bodycam video was later entered into evidence as Defense Exhibit 3 and has been made part of this Record on Appeal. (R. p. 8, line 10; R. p. 240, lines 11-22; R. p. 249, lines 13-21).

cam video displayed that Appellant consented to it, and that the risk of losing the traces of any existing GSR further justified the swab under the exigent circumstances exception. (R. p. 51, line 4 – p. 54, line 14).

The Ruling Below

The court did not rule on whether the GSR swab was a search, stating "that's really not the issue." (R. p. 55, lines 17-21). The trial court limited its finding to whether an exception the Fourth Amendment applied to the swab. (R. p. 55, lines 21-23). It ultimately found that two exceptions applied. (R. p. 57, lines 10-14).

First, the court found that under the totality of the circumstances, Appellant consented to the GSR swab, noting that consent "doesn't have to be expressed[,] it can be implied." (R. p. 55, line 23 – p. 56, line 5). In so ruling, the court pointed out that the officer "very casually almost asked him, are you willing to perform the GSR, and the defendant, [said] yeah." (R. p. 56, lines 5-8). "There's nothing to indicate to [the court] that it was not consented to." (R. p. 56, lines 8-9).

Second, the court found that the exigent circumstances exception to the search warrant requirement applied because there was the potential for the destruction of GSR evidence given that Appellant was rubbing his hands with a blue washcloth when he greeted the first officer at the door. (R. p. 56, line 22 – p. 57, line 11). The court noted that Appellant continued holding onto the rag as the second officer greeted him some unspecified amount of time afterwards, that it was "a hot, muggy, August night" where "you move around and you sweat" and making "it easier to wipe off [the GSR] with the rag." (R. p. 57, lines 3-9).

The court also found these exceptions coupled with probable cause (R. p. 56, lines 9-22). Specifically, the court pointed out that Appellant was more than merely present at the scene. (R.

p. 56, lines 11-13). "[W]e've got him saying I was inside watching TV, he's in the house with the lights off which is a little bit strange, quite frankly. . . . If I understand correctly, the entire house was dark. . . . That lends to the probable cause because we got people saying he was there [outside], him denying he was there." (R. p. 56, lines 13-22). Also in support of its finding of probable cause, the court assigned additional suspicion to Appellant's use of the washcloth. (R. p. 57, lines 1-2).

Issue Preservation

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge" as was done in this case. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). "Because the evidence developed during trial may warrant a change in the ruling, the losing party must renew his objection at trial when the evidence is presented in order to preserve the issue for appeal." *State v. Mueller*, 319 S.C. 266, 268, 460 S.E.2d 409, 410 (Ct. App. 1995). Appellant renewed his objection to the outcome of the suppression hearing prior to the introduction of the GSR kit. (R. p. 197, lines 12-14). Appellant again renewed his objection prior to the introduction of the GSR kit results. (R. p. 347, lines 13-22). The issue is thus preserved.

Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Gaster,* 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings,* 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (quoting *Clark v. Cantrell,* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

More specifically, "South Carolina appellate courts review Fourth Amendment determinations under a clear error standard." *State v. Provet,* 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013). "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence [in the record] to support the ruling." *State v. Wright,* 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011).

The Fourth Amendment

The Fourth Amendment's prohibition of unreasonable search and seizure requires evidence seized in violation of that Amendment be excluded from trial. *State v. Khingratsaiphon,* 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (citing *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684 (1961)). "Because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *State v. Herring*, 387 S.C. 201, 210, 692 S.E.2d 490, 494-95 (2009) (citing *Katz v. United States,* 389 U.S. at 357, 88 S.Ct. at 514). These exceptions are "specifically established and well delineated." *State v. Abdullah,* 357 S.C. 344, 350, 592 S.E.2d 344, 348 (Ct. App. 2004). They include consent and the existence of exigent circumstances. *Id.*at 351, 592 S.E.2d at 348; *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). The State bears the burden of justifying that a warrantless search falls into one of the above-prescribed exceptions. *State v. Abdullah*, *supra* at 350, 592 S.E.2d at 348.

A. <u>The record only demonstrates that Appellant consented to the request for the GSR swab.</u>

"The constitutional immunity from unreasonable searches and seizures may be waived by valid consent." *Palacio v. State*, 333 S.C. at 514, 511 S.E.2d at 66 (citing *Katz v. United States*, *supra*). Consent must be given voluntarily, and its existence "is determined from the totality of the circumstances." *Id.* "Whether a consent to search was voluntary or the product of duress or

coercion, express or implied, is a question of fact." *State v. Wallace*, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977). Knowledge of the right to refuse consent is not a prerequisite for voluntariness, as "our state standard does not require a law enforcement officer conducting a search to inform the defendant of his right to refuse consent." *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041 (1973)). "The lack of such warning is only one factor to be considered in determining the voluntary nature of the consent." *Id.*

Officer Flowers' testimony and the corroborating bodycam footage presented during the suppression motion support the trial court's finding Appellant consented to the swab. (R. p. 34, line 1 – p. 46, line 22; Defense Exhibit 3, Track 2 at 15:00 to 24:00). Appellant never balked in submitting to the test. (*Id.*). He asked questions and freely conversed with Flowers. (*Id.*). Though not audible in the bodycam footage, Flowers testified that he explained the GSR test to Appellant as they walked multiple car lengths to Flowers' vehicle. (R. p. 34, lines 1-15; Defense Exhibit 3, Track 2 at 15:20 to 15:48). Flowers also testified that during this time he asked Appellant if he minded the test being performed and Appellant "did not object to it." (R. p. 41, line 24 – p. 42, line 4).

During this entire interaction, Appellant was not in custody. (R. p. 38, lines 19-24). Additionally, no circumstances inherent in the execution of the GSR kit support an inference of force or coercion. The exchange was at all times friendly. (Defense Exhibit 3, Track 2 at 15:00 to 24:00). Appellant exhibited a consensual demeanor. (*Id.*). At the time Flowers approached Appellant, Appellant had voluntarily exited his house and had already talked to officers. Of additional note, Appellant at no time presented any testimony to contradict the court's finding of consent. Appellant did not contradict the giving of consent at the scene, at trial, or otherwise.

The record being void of any indication that Appellant did not consent to the GSR swab, the trial court correctly found that Appellant waived immunity from any search inherent in the completion of a GSR kit. *Palacio v. State*, 333 S.C. at 514, 511 S.E.2d at 66 ("Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent."); *see State v. Page*, 169 N.C.App. 127, 134, 609 S.E.2d 432, 437 (N.C. Ct.App. 2005) (upholding trial court's finding of consent where officer testimony demonstrated that defendant did not withdraw his consent and continued to cooperate during GSR test administration).

B. Evidence in the record shows that the potential for the destruction of any GSR evidence coupled with existing probable cause called for the application of the exigent circumstances exception to the search warrant requirement.

The search warrant requirement "may be overcome" when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King,* 563 U.S. 452, 459-60, 131 S.Ct. 1849, 1856 (2011) (internal quotation omitted). "The Fourth Amendment does not prevent an officer from making a warrantless entry and search if the officer reasonably believes there is a risk that the evidence will be destroyed before he or she can obtain a search warrant." *State v. Dobbins, Jr.*, No. 2013-002134, 2017 WL 2960786, at *3 (S.C. Ct. App. filed July 12, 2017) (Shearouse Adv. Sh. No. 26 at 21) (citing *United States v. Grissett*, 925 F.2d 776, 778 (4th Cir. 1991) ("The police need not . . . produce concrete proof that the occupants of the room were on the verge of destroying evidence; rather, the proper inquiry focuses on what an objective officer could reasonably believe."); *id.* (finding a reasonable officer could "reasonably conclude" that a room's occupants would try to dispose of drug evidence before an officer could

obtain a warrant, especially when police had already identified themselves prior to smelling the odor of marijuana).

In these instances, the exigent circumstances exception to the search warrant requirement applies, wherein "from an objective standard, a compelling need for official action and no time to secure a warrant exist." *State v. Abdullah*, 357 S.C. at 351, 592 S.E.2d at 348. "Under the exigent circumstances exception, '[a] fairly perceived need to act on the spot may justify'" a warrantless search. *State v. Dobbins, Jr.*, *supra* (quoting *State v. Herring*, 387 S.C. at 210, 692 S.E.2d at 494).

> Law enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause. Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution.

Kentucky v. King, 563 U.S. at 467, 131 S.Ct. at 1860-61 (holding exigent circumstances exception applies when police do not create the exigency by engaging or threatening to engage in conduct violative of the Fourth Amendment) (internal quotation omitted).

i. *Evidence in the record supports the finding of probable cause at the time the GSR kit was executed because the officer had reason to believe Appellant was involved in the shooting given Appellant's relation to the environment to which the officer responded.*

For the exception to apply, there must also exist a showing of probable cause. *Id.* "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013). "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal" at the time of the warrantless act. *State v.*

Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006).

Probable cause is evident from the record presented at the suppression hearing. Consider what was known by Officer Valazack at the time she ordered the GSR kit. Valazack learned from witnesses across the street that Appellant was outside in his front yard just moments before the shooting. At all times, Appellant was witnessed wearing the same color shirt he wore when he opened the door to Valazack. (R. p. 18, lines 13-18; *see also* R. p. 28, line 22 – p. 29, line 22). One witness who saw him drove just seconds down the road past him before she heard the gunshots. (R. p. 30, lines 2-14).

Before Valazack initiated conversation with Appellant, he was holed away in a darkened house, even though all the neighbors were outside watching the scene. (R. p. 17, lines 8-21). He did not want to come outside. (R. p. 17, lines 17-23). He said he had been inside watching TV when he heard the shots. (R. p. 19, lines 15-18). But bodycam footage exemplifies the close quarters in which the murder occurred. Appellant's own front door was just nine steps away from the edge of the road where the body lay. (Defense Exhibit 3, Track 2 at 15:00 to 15:06). The victim's feet pointed towards Appellant's front stoop. (*Id.*). The neighborhood witnesses did not identify anyone other than Appellant as being on the front porch or in the front yard immediately before or after the shooting (Quinton and Gregg were witnessed emerging from the side of the house, not the front where the victim's feet pointed).

Appellant was also handling a washcloth during his interactions with law enforcement. (R. p. 18, lines 7-8). This act alone does not naturally accompany Appellant's own alibi of watching TV. Moreover, it looked to Valazack as if Appellant was rubbing his hands on a washcloth after a shooting on a hot muggy night. (*See* R. p. 31, lines 4-9).

In totality, Valazack was presented with circumstances and information which would

lend to a reasonable, objective belief that Appellant was involved in the shooting. Appellant was more than merely present at the scene because there were conflicting accounts of his whereabouts preceding and succeeding the shots. Bearing in mind the aforementioned factors, it is reasonably difficult to believe that Appellant knew nothing about the victim or the shooting and was inside watching TV when he was the only person witnessed outside on the stoop moments before. Considering the conflicting accounts and adding to it an officer's on-site judgment regarding a suspect's body language, veracity, and other non-verbal communications, evidence exists in the record to support the court's finding of probable cause.

ii. *Because GSR can only be reliably retrieved within a short window of time, swabbing a suspect's hands for the substance constitutes an exigent circumstance in this case because Appellant was witnessed acting in a manner which could destroy the evidence.*

In regards to swabbing a suspect's hands for GSR, the exigency exception need apply. As testified to by a Maryland detective in a similar case, "chemical residue on a suspect's hands degrades 'in a short amount of time,' and is easily destroyed or contaminated if the suspect perspires, washes or urinates on his hands, or rubs his hands on his clothing." *Jones v. State*, 213 Md. App. 483, 491, 74 A.3d 802, 806 (2013) ("Maryland State Police guidelines recommend that a sample be collected within three hours after the suspected discharge of the firearm"). The test itself only "consists of multiple small swabs that are rubbed on a suspect's hands and the webbing of the fingers to collect any chemical residue given off by a discharged firearm." *Id.* (finding GSR swab a reasonable warrantless search executed incident to a lawful arrest). The District Court of Maryland has held that a warrantless, pre-arrest GSR swab is appropriate if supported by probable cause "in light of the ready destructibility of the evidence sought." *United States v. Pettiford*, 295 F.Supp.2d 552, 560-61 (D. Md. 2003). In so holding, the federal court

noted that if the detective "had waited for a warrant before ordering the GSR test, he would have increased [the defendant's] opportunity to destroy the evidence by simply washing his hands." *Id.*

In this case, Office Valazack testified that SLED's protocol for accepting GSR samples for testing requires the sample be taken within six hours of the event. (R. p. 19, line 24 – p. 20, line 5). This is because "it will come off of your hand." (R. p. 20, lines 6-9). Valazack testified that the protocol is "to try to get [the test done] as soon as possible" after the event to prevent spoliation because "you can wipe it off." (R. p. 20, lines, 6-13). If a swab is taken too long after the event, SLED will not even test the samples provided by the local law enforcement agency. (R. p. 20, lines 17-20).

Appellant's initial encounters with law enforcement officers responding to the scene support the necessity of swabbing on-site and without a warrant. As noted by the trial court, he came to the door holding a blue washcloth, wiping his hands. (R. p. 18, lines 7-8). According to Valazack, when she saw the blue rag in Appellant's hands on that humid, sweat-inducing night in August, she recognized a need to act in order to preserve any potential GSR. "[H]e had the towel in his hand and it just seemed strange that he kept rubbing it and in [Valazack's mind,] if he was involved in this, then that potential evidence could be gone." (R. p. 31, lines 4-9). Moreover, the execution of the GSR kit caused only minimal disturbance upon Appellant, who willingly complied with the request. (Defense Exhibit 3, Track 2 at 15:00 to 24:00). The test itself was not intrusive. Appellant only had to hold out his hands. (Defense Exhibit 3, Track 2 at 19:15 to 21:09). Then they were dabbed with the swabbing instruments by Officer Flowers. (*Id.*). From start to finish, the test itself lasted less than two minutes, taking approximately thirty seconds per palm to complete. (*Id.*).

Given Valazack's suppression hearing testimony, the court correctly found the exigency exception to apply. The need to preserve evidence outweighed the minimal intrusion upon Appellant that the GSR kit itself required, making the warrantless act objectively reasonable under the totality of the circumstances. *Kentucky v. King*, 563 U.S. at 467, 131 S.Ct. at 1860-61.

C. Any error in the trial court's failure to suppress the introduction of the GSR kit results is harmless because bodycam footage corroborates the finding of probable cause, and because there otherwise exists overwhelming evidence of Appellant's guilt.

Admission of erroneously seized evidence may be harmless error. *State v. Herring*, 387 S.C. at 215, 692 S.E.2d at 497. The error will be deemed harmless where Appellant's "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Gillian,* 373 S.C. 601, 610, 646 S.E.2d 872, 876 (2007). Where a court turns to a harmless error analysis after finding that evidence introduced at trial should have been suppressed, the harmless error determination rests upon the "materiality and prejudicial character of the error in relation to the entire case." *State v. Jenkins*, 412 S.C. 643, 651, 773 S.E.2d 906, 909 (2015). "Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules." *Id.*

As an initial harmless error consideration, regardless of the strength of the *in limine* testimony in demonstrating probable cause, the accompanying bodycam footage corroborates and enhances the factors lending to the determination of probable cause in this case. The remainder of Melton's bodycam footage, a portion of which was shown during the suppression hearing, clearly shows Appellant holding a washcloth or rag through the duration of his contact with Melton and Valazack and up until Flowers escorted him to his vehicle to complete the GSR kit. (Defense Exhibit 3, Track 2 at 7:20 to 13:00). Appellant, who appears expressive with his

hands, waves the rag, and wraps the rag around and in his hands, and at times rubs his hands across the rag. (*Id.*). Another bodycam video introduced by the State at trial, that of Officer Rodriguez, additionally shows Appellant coming to the door of a darkened house with a rag in this hands. (State's Exhibit 37, Track 1 at 16:09 to 17:16; R. p. 115, line 24 – p. 117, line 10). These videos lend credence to the exigency.

The bodycam video additionally lends credence to the probable cause determination, showing Valazack's interaction with Appellant. Appellant told her from the outset that he had been "in the house" "all night" and he was "watching TV." (Defense Exhibit 3, Track 2 at 6:30 to 7:09). This statement alone directly contradicts the witness accounts known by Valazack at the time she ordered the GSR test. Valazack testified that when she ordered the GSR test, she had learned that witnesses saw Appellant in his yard before and after the shooting. Appellant was also wearing the color shirt that witnesses had identified. (R. p. 18, lines 13-18; *see also* R. p. 28, line 22 – p. 29, line 22). It was clear from the outset that Appellant was not "in the house" "all night" as he represented to Valazack.

Moreover, in regards to the irrefutable establishment of guilt, gunshot residue is not necessary or conclusive in establishing a defendant's guilt beyond a reasonable doubt. It is just one way to establish the involvement of the accused. Other evidence exists in the record which similarly establishes Appellant's guilt. Much of it required the jury to determine whose testimony was worthy of their assignment of credibility.

Appellant's own recorded statement was inconsistent with the witnesses who placed him in his front yard immediately before and after the shooting. One neighbor said Appellant was "just standing there" in the front yard after the shooting before he ran around to the back of the house. (R. p. 231, lines 12-22). But Appellant said he had been watching TV *for fifteen to twenty*

minutes when he heard the shots. (State's Exhibit 2 at 13:50 to 14:00). Then, Appellant said he waited a minute before he checked out what caused the gunfire. (State's Exhibit 2 at 22:00 to 23:00).

Not only did this testimony conflict with neighborhood witnesses, it also conflicted with that of Appellant's brother and cousin. Quinton Gibson and Antonio Gregg both testified that they left Appellant in the front of the house and went around the side yard to the back where they were working on a car at the time of the gunfire. (R. p. 276, line 12 – p. 277, line 20; R. p. 301, line 14 – p. 302, line 23). Quinton and Gregg were then identified as running away from the house from the backyard (necessarily exiting from the side of the house). (R. p. 230, line 21 – p. 231, line 2; R. p. 236, line 5). The clothing worn by Appellant also matched the neighborhood witness and Quinton Gibson's identification of the person in the dark blue or purple shirt. (State's Exhibit 2; R. p. 141, lines 17-18; R. p. 304, line 22 – p. 305, line 5).

Quinton's testimony additionally called into question Appellant's telling law enforcement that he did not know the victim. (*E.g.*, State's Exhibit 37, Track 1 at 16:10 to 17:16). Quinton recalled Appellant shaking hands with the person walking by the front of the house and speaking to him as if he knew him. (R. p. 299, lines 16-25). It put him on edge and caused him to leave the front yard. (R. p. 300, lines 9-25). Quinton also recalled running to the front of the house and, in a rapid memory, witnessing his brother wearing a purple shirt struggling to get into the front door even though the door was had no knob and appears from the testimony to have been chained from the inside. (R. p. 304, line 22 – p. 305, line 7). This detail about the lock comports with Appellant's statement wherein he spoke about how the locks on his grandmother's door were broken. (State's Exhibit 2 at 9:00 to 9:30). The broken lock also explains why Appellant

was seen running from the front of the house to the back, and was at home when law enforcement arrived—he couldn't get in the front door.[4]

The remainder of evidence demonstrates that the State presented a case-in-chief demanding a jury to return a verdict of Appellant's guilt beyond a reasonable doubt even absent the admission of the positive GSR test results. Appellant purchased a .9 millimeter pistol shortly before the murder, matching the caliber of the shell casings and a fired bullet recovered from the crime scene. (R. p. 171, line 21 – p. 172, line 23; R. p. 188, lines 8-20; R. p. 366, line 19 – p. 367, line 5). The shell casing found out in the country where Appellant and his brother both said Appellant had shot a gun earlier that day was a .9 millimeter as well. (R. p. 165, lines 1-8). Additionally, one of Appellant's cellmates testified that Appellant admitted that he shot the victim and felt bad about it. (R. p. 333, lines 8-22, R. p. 335, lines 2-5).

There can be no error warranting reversal where the totality of the evidence against Appellant is so complete that no other rational conclusion can be reached.

D. Because a GSR swab only requires the swiping of a magnet over the front and back of each hand, the warrantless act was akin to fingerprinting an individual and consequently was not a search necessitating any Fourth Amendment analysis.

The trial court explicitly refused to rule on the State's argument that the GSR swab was not a search. (R. p. 55, lines 17-21). However, the aforementioned application of two exceptions to the search warrant requirement is predicated upon a finding that the challenged action is indeed a search subject to the Fourth Amendment. As argued below and included herein as an

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[4] This detail also makes it less plausible that in the time that Appellant waved at Ivory Stevenson as she drove by, then got up off his front stoop, walked around to the back of the house, and sat down and started watching TV, all in the short amount of time it took Stevenson to drive around to the parallel street where she heard the gunshot and saw sparks. (*See* R. p. 252, line 15 – p. 257, line 21).

additional sustaining ground, Respondent submits that swabbing a suspect's hands for GSR does not constitute a search for Fourth Amendment purposes because it does not involve any bodily intrusion. The swab does not affect an area wherein a defendant enjoys a reasonable expectation of privacy. (R. p. 50, lines 10-25).

Neither the United States Supreme Court nor our State courts have ruled upon this issue. A number of jurisdictions have upheld the warrantless swabbing of a suspect's hands for GSR incident to lawful arrest. *United States v. Simmons*, 380 Fed.Appx. 323, 330 (4th Cir. 2010) (adopting magistrate's conclusion following evidentiary hearing "that Simmons was lawfully arrested and that, given the inherent destructibility of gun-shot residue evidence, the police were permitted to run the GSR test without a warrant"); *United States v. Johnson*, 445 F.3d 793, 795-96 (5th Cir. 2006) ("Because the presence of gun powder on his hands was relevant evidence that Johnson (or merely time) could have eventually removed or destroyed, if his arrest was valid, the performance of the gun powder residue test was lawful, and the admission of the results at trial was proper."); *United States v. Bridges*, 499 F.2d 179 (7th Cir. 1974) (warrantless swab taken without consent "no more offensive to [the defendant's] person than fingerprinting or photographing"); *Jones v. State*, *supra*, 213 Md.App. at 503, 74 A.3d at 814 (finding officer testimony established "temporal and practical barriers that greatly decreased the feasibility of waiting to obtain a search warrant"); *Sen v. State*, 301 P.3d 106, 117, 2013 WY 47 (Wyo. 2013) (giving weight to law enforcement's testimony that GSR "is usually invisible to the naked eye, and that it can be wiped or rubbed away"); *People v. Allen*, 376 Ill.App.3d 511, 520, 875 N.E.2d 1221, 1228 (Ill. 2007) (relying on *Bridges*, *supra*, and finding hand swab "so minor an imposition that the defendant suffered no true humiliation or affront to his dignity"); *Lawler v. State*, 276 Ga. 229, 234, 576 S.E.2d 841, 847 (Ga. 2003) ("Swabbing for blood or gunshot

residue [at the station after arrest] was not an unconstitutional search."); *State v. Riley*, 201 W.Va. 708, 717, 500 S.E.2d 524, 533 (W.Va. 1997) (GSR swab "consistent with the general recognition that superficial examination of a lawfully arrested individual for evidence of gunpowder residue is not violative of the Fourth Amendment") (upheld in *State v. Boyd*, 238 W.Va. 420, 796 S.E.2d 207 (W.Va. 2017)).

Federal and state courts readily discuss the propriety of a warrantless GSR swab upon a finding of exigent circumstances and/or consent. *See id.* (also discussing inherent exigency); *United States v. Pettiford*, *supra*, 295 F.Supp.2d at 560-61 (finding "that exigent circumstances existed in light of the ready destructibility of the evidence sought" and that the swabbing itself "was, therefore, only a minimal intrusion to Pettiford's privacy"). In *State v. Coplon*, 138 N.C.App. 48, 530 S.E.2d 313 (N.C. Ct. App. 2000), the North Carolina Court of Appeals upheld the denial of a suppression motion wherein a defendant who was not under arrest and who initially refused to comply with the GSR test was swabbed for GSR without a warrant while he awaited treatment at a hospital. 138 N.C.App. at 51-54, 530 S.E.2d at 316-18. That court premised its holding upon a state-specific statute, but ultimately applied the recognized exigent circumstances exception. *Id.* at 54, 530 S.E.2d at 318. In so holding, that court noted that "a gunshot residue test is a relatively non-intrusive procedure which requires the presence of the suspect." *Id.*

Notably, the bevy of cases focus not only on destructibility of GSR, but upon the lack of humiliation caused by the nature of the test, each finding that no bodily intrusion has occurred which would render the warrantless swab unreasonable. In discussing applicable exceptions to the search warrant requirement, courts turn to *Cupp v. Murphy*, 412 U.S. 291, 295, 93 S.Ct. 2000, 2003 (1973). *See United States v. Pettiford, supra*; *State v. Riley*, *supra; Jones v. State*,

supra; *see also United States v. Jones*, 215 F.3d 1322, 2000 WL 690182 at *3 (4th Cir. 2000) (*unpublished*) (*per curiam*). In *Cupp*, the United States Supreme Court held that the non-consensual, warrantless taking of fingernail scrapings from a suspect not in custody was a search entitled to Fourth Amendment protections. 412 U.S. at 294, 93 S.Ct. at 2003. However, based upon the existence of probable cause at the time the scrapings were taken, the coupling of "the very limited intrusion" that occurred and "the ready destructibility of the evidence" of blood found underneath the suspect's fingernails led the Court to refuse to adopt any notion that the search violated the Fourth Amendment. It instead upheld the conviction. *Id.* at 296, 93 S.Ct. at 2004.

However, not all warrantless collections of evidence are subject to mandatory analysis under the Fourth Amendment, especially concerning evidence which can be found on the hands of an accused. The United State Supreme Court in 1969 envisioned a narrowly defined scenario in which fingerprints could be obtained without a warrant and without detention. "[B]ecause of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *Davis v. Mississippi*, 394 U.S. 721, 727, 89 S.Ct. 1394, 1397-98 (1969) (concerning warrantless transport of an individual to the police station for fingerprinting). The Court premised its dicta upon fingerprinting being "a much less serious intrusion upon personal security than other types of police searches and detentions," noting it "involves none of the probing into an individual's private life and thoughts that mark interrogation or search," that it lacked any opportunity to repeatedly harass a person to submit to multiple tests, as it only need be conducted once, and that it was inherently reliable as a crime-solving tool. *Id.* "Finally, because there is no danger of destruction of fingerprints, the limited detention need not come

unexpectedly or at an inconvenient time." *Id.* Later reconsidering this dicta in a similar factual context, the Court reiterated that little "implies that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment." *Hayes v. Florida*, 470 U.S. 811, 816, 105 S.Ct. 1643, 1647 (1985) (also concerning warrantless transport of an individual to the police station for fingerprinting).

Courts have since held in various contexts that fingerprinting is not a search under the Fourth Amendment. *See, e.g., United States v. Farias–Gonzalez,* 556 F.3d 1181, 1188 (11th Cir. 2009) (stating that "[t]he police can obtain both photographs and fingerprints without conducting a search under the Fourth Amendment"); *Stehney v. Perry,* 907 F.Supp. 806, 823 (D.N.J. 1995) (holding that "the taking of a fingerprint is not a search even though it involves touching and pressing, and reveals physiological traits too minute to be considered exposed to public view in any meaningful sense"); *Rowe v. Burton,* 884 F.Supp. 1372, 1384 (D.Alaska 1994) (stating that "the Supreme Court has recognized that one does not have an objectively reasonable expectation of privacy in one's likeness or fingerprints under the Fourth Amendment"); *Johnson v. Massey,* No. 3:92 CV 178(JAC), 1993 WL 372263, *5 (D.Conn. Sept. 17, 1993) (ruling that inasmuch as the plaintiffs' fingerprints were "mere physical characteristics" that were "constantly exposed to the public," they were not subject to the protections of the Fourth Amendment).

By parity of reasoning, Respondent submits that like fingerprinting, swabbing or dabbing a suspect's hands for the presence of GSR causes no bodily intrusion which would demand the execution of a warrant prior to the swab. "The GSR test consists of dabbing part of the subject's hands, primarily the web of flesh between the thumb and forefinger, with a cloth pad or swab.

The sample is then scanned by an electron microscope for three rare elements that are usually only found together in gunshot primer." *United States v. Jones*, *supra* (*unpublished*) ("Given the existence of probable cause, the very limited intrusion to Jones' privacy interest, and the ready destructibility of the evidence sought, the GSR test was a reasonable search under the Fourth Amendment" which was conducted pursuant to a lawful arrest) (swab occurred in relation to a different crime than the one for which defendant was taken into custody). The video of Officer Toney Flowers' execution of the GSR swab exemplifies the lack of intrusion upon a person required by the test. (Defense Exhibit 3, Track 2 at 15:00 to 24:00). In fact, the test at bar falls outside of any analogy which may be drawn to *Cupp*, *supra*, because (1) the swab was conducted on-scene and did not require suspect transport, (2) the swab required no invasion of the plain surfaces of the body as in a scraping from the underside of a fingernail, but rather only required Appellant to hold his hands out for dabbing, and (3) because the swab occurred without protest. The act itself was akin to taking one's fingerprints. *See Hayes v. Florida*, 470 U.S. at 816, 105 S.Ct. at 1647.

While an overwhelming number of jurisdictions uphold searches similar to the one conducted in this case under exceptions to the search warrant requirement, the analyses conducted by these courts refuse to categorize the GSR swab as an unreasonable search and seizure by nature. *Cf. State v. Beasley*, 205 Ariz. 334, 336-37, 70 P.3d 463, 465-66 (Ariz.Ct.App. 2003) (finding the warrantless swab for GSR constituted a search, but upholding the search as reasonable due to it being "less invasive than fingerprinting"). "Certainly, it cannot be said that the limited application of a dry, sticky swab upon Appellant's hands enhanced Appellant's embarrassment in any significant manner." *Commonwealth v. Simonson*, 148 A.3d. 792, 801, 2016 PA Super 207 (Pa.Super.Ct. 2016) (concluding GSR swab conducted incident to lawful

arrest "has a negligible intrusion upon an individuals' privacy and that it serves an important function in promoting vital governmental interests) (also noting that the "founding era provides this Court with no guidance on whether the gunshot residue swab test . . . is exempted from the warrant requirement"). Irrespective of the microscopic nature of the data sought, this collection of holdings focuses upon the consistent, unrelenting exposure of a suspect's hands to the general public as justification for the warrantless collection of potential evidence in addition to the ephemeral nature of the evidence sought to be obtained. It is undisputed by the variety of jurisdictions cited above that the presence of GSR is evanescent. It is also undisputed that the test law enforcement utilizes to discover the presence or absence of GSR requires only a superficial examination of an area of the body which does not enjoy a reasonable expectation of privacy due to it being highly visible to the public eye. But what is more, is that a warrantless swab is necessary for the promotion of legitimate governmental interests such as identifying, arresting, and prosecuting individuals involved in deadly shootings. With the Fourth Amendment aimed to protect against unreasonable searches and seizures, and with no jurisprudence deeming the warrantless swab—in this case and in others—unreasonable, the Fourth Amendment exceptions need not be applied. The greater interest in this scenario is providing surety to the public that those who may have caused harm to another will be discovered, and the evidence preserved for future adjudication.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm Appellant's convictions and sentences for murder and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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October 26, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Darlington County
Honorable Roger E. Henderson, Circuit Court Judge

THE STATE,

Respondent,

v.

JOEY LATWAN GIBSON,

Appellant

Appellate Case No. 2016-001585.

CERTIFICATE OF COMPLIANCE

The undersigned certified that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "*Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.*"

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