

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM PICKENS COUNTY  
General Sessions Court  
Letitia H. Verdin, Circuit Court Judge

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Case No. 2015-GS-39-01893  
Case No. 2015-GS-39-01895

Appellate Case No. 2017-002042

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**RECEIVED**

**Sep 03 2020**

**SC Court of Appeals**

The State,

Respondent,

v.

Jaron Lamont Gibbs,

Appellant.

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PETITION FOR REHEARING

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Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Appellant, Jaron Lamont Gibbs, respectfully petitions for rehearing of his appeal, decided August 19, 2020 (Published Opinion No. 5760), and for oral argument, as previously scheduled and as requested by counsel for Appellant. In support of his petition, Appellant states as follows:

I. Affirmance of Admission of Testimony under Rule 701, SCRE.

Appellant raised a claim of error with respect to the admission of opinion testimony offered through the lead investigator, Michael Arflin, with respect to the

functioning and mechanics of firing certain types of revolvers, because Arflin was not qualified as an expert under the requirements of Rule 702 of the South Carolina Rules of Evidence and the related South Carolina case law. Prior to the issuance of the Court's decision, Appellant advised the Court of his intention to also rely on supplemental authority pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules, citing the Supreme Court's decision in *Hamrick v. State*, 426 S.C. 638, 828 S.E.2d 596 (2019), decided subsequent to the filing of the briefs of the parties in the Court of Appeals.

The Court of Appeals held that Arflin's testimony was properly admitted as lay opinion testimony under Rule 701, SCRE, because the testimony was based on Arflin's personal knowledge. Citing Rule 602, SCRE, the Court found that the key feature of lay testimony is the witness's personal knowledge, not whether the subject of the testimony is beyond the jury's ordinary experience. This holding overlooked key language of Rule 701, which provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

*See* Rule 701, SCRE (emphasis added). In this case, two requirements of Rule 701 are not met. As in *Hamrick*, the testimony was not rationally based on the perception of the witness, an investigator who did not arrive on the scene until some period of time after the firearm discharged and did not personally perceive the firing of the weapon. *Cf. Hamrick*, 426 S.C. at 648, 828 S.E.2d at 601. As in *Hamrick*, how a firearm functions and discharges is a matter requiring expertise. *Cf. id.* (finding accident reconstruction to be a matter requiring expertise). The testimony given by Arflin required "special

knowledge,” whether through his experience or training, and it therefore was within the ambit of Rule 702 governing expert testimony, not Rule 701 governing lay testimony.

The Court’s own opinion acknowledged that the subject of Arflin’s testimony was outside the knowledge base of ordinary jurors, specifically noting that “this subject matter may have been foreign to some members of the jury.” This acknowledgement goes to the heart of the issue. The functioning and manner of discharge of a firearm is a matter of technical or specialized knowledge, and it can be admitted, if at all, only under Rule 702, not Rule 701.

Rule 702 provides that matters of scientific, *technical*, or other *specialized knowledge* that will assist the trier of fact are proper subjects of expert testimony, where the witness is qualified as an expert by knowledge, skill, experience, training, or education. *See* Rule 702, SCRE. The Court misapprehended that first-hand or personal knowledge by a witness removes the subject matter from the purview of “specialized knowledge.” To the contrary, as Rule 702 contemplates, an appropriate source of an expert witness’s technical or specialized knowledge is *personal knowledge*, since the witness is qualified “by *knowledge*, skill, experience, training, or education.” *See* Rule 702, SCRE (emphasis added). A medical professional’s testimony about the functioning of an organ or the characteristics and progression of a disease may be based on his *personal knowledge*, but that does not mean his knowledge is not “specialized.” What controls whether the issue falls under Rule 701 or Rule 702 is not the source of the witness’s knowledge but the matter about which he is testifying – whether it is a matter involving scientific, technical, or other specialized knowledge. In this case, the functioning and mechanics of the discharge of specific firearms is a matter of technical,

specialized knowledge and properly evaluated under Rule 702, not Rule 701. The Court should grant rehearing, address the arguments and authorities contained in Appellant's Final Brief and Final Reply Brief, and find the foundation requirements of Rule 702 for admission of this witness's testimony were not met.

The source and extent of the witness's knowledge are germane in the evaluation of the foundational requirements for admission of his testimony under Rule 702. Arflin's specific testimony about familiarity with revolvers was limited to a single question and answer:

Q Are you familiar with revolvers?

A Yes, ma'am.

R. p. 338, lines 15-16. This question and answer were simply inadequate to allow the trial court, conducting its gatekeeping function, to make the necessary findings to establish the foundation required under Rule 702 for admission of Arflin's testimony about how single- and double-action revolvers operate and discharge. *See Hamrick*, 426 S.C. at 649, 828 S.E.2d at 601-02; *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474-75 (2012); *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009); *State v. Rose*, 423 S.C. 382, 392, 814 S.E.2d 529, 534 (Ct.App. 2018). Without satisfying the foundational requirements, the testimony was inadmissible. It also was prejudicial, and not harmless, because it undermined the defense's theory that the gun discharged through recklessness or accident during the pushing and swatting that occurred between Appellant and Raby, in keeping with Appellant's testimony. For all the reasons set out in Appellant's briefs,

incorporated herein by reference, the admission of this testimony was prejudicial error and warrants reversal.

This Court should rehear the issue of Arflin's opinion testimony; find it pertained to a matter requiring "special knowledge, skill, experience, or training" so as to be inadmissible under Rule 701; find that the requisite foundational requirements were not met for admission under Rule 702; and find the error in its admission was not harmless.

II. Improper Closing Argument and Demonstration.

Appellant also raised a claim of error with respect to the prosecutor's demonstration and argument based on Arflin's testimony that "this is what would have had to have happened for this gun to go off because guns do not accidentally go off." R. p. 445, line 22 – p. 446, line 1. The Court of Appeals held that this argument was permissible advocacy based on the evidence. If the Court grants rehearing and finds Arflin's testimony was admitted in error, it also should find this argument was impermissible, because the only arguable evidentiary basis for this argument was Arflin's testimony. If the Court does not rehear as to Issue I, however, it nonetheless should rehear this issue.

The state's closing argument must be confined to the evidence in the record and the reasonable inferences that may be drawn from that evidence. *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010); *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004); *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997); *State v. Copeland*, 321 S.C. 318, 326, 468 S.E.2d 620, 625 (1996); *cf. Clark v. Cantrell*, 339 S.C. 369, 384, 529 S.E.2d 528, 536 (2000) (demonstrative evidence must be "a fair and accurate representation of the evidence to which it relates"). The Court's decision

misapprehended that the prosecutor's argument was supported by the record or the reasonable inferences from the record. Although Arflin testified to the mechanics of cocking and pulling the trigger to fire different types of revolvers, he was not asked and did not express the opinion that a revolver cannot fire accidentally. He was not asked and did not testify about malfunction that could occur due to the age or condition of a revolver, such as the one Appellant had that was old and described as a "piece of junk." He did not testify that the gun could not have discharged as the result of someone's pushing or swatting it. In fact, his testimony about how a revolver fires was not absolute but was qualified as "kind of the rule," *see* R. p. 356, lines 18-19, and no testimony was elicited as to conditions that might create exceptions to that so-called rule and allow for a revolver to discharge accidentally. The record contained no evidence related to the possibility of malfunction or accidental discharge, and therefore the solicitor's argument was improper.

It was also highly prejudicial, as it directly impacted the defense's contention that the weapon simply went off in the pushing and swatting between Appellant and Raby. *See Huggins*, 325 S.C. at 107-08, 481 S.E.2d at 116-17 (reference to statement, not in evidence, that defendant had a plan and offered money to someone to kill the victim was highly prejudicial and fundamentally unfair in her trial for his murder and for conspiring to commit his murder); *State v. Cannon*, 229 S.C. 614, 617-19, 93 S.E.2d 889, 890-91 (1956) (argument that insurance existed and the defendant had murdered the deceased for the purpose of collecting \$4,000, where there was no evidence from which that conclusion could be drawn, was prejudicial because the case was tried on the theory that insurance was the motive). The Court should rehear this issue and find reversible error.

### III. Cumulative Prejudice.

Appellant also made a cumulative prejudice argument, which the Court of Appeals did not address because it found no error with respect to Issue I or II. If the Court grants rehearing and finds errors, but finds them not sufficiently prejudicial standing alone to require reversal, it should hold that, in combination, the errors so prejudiced Appellant as to deny him the fairness required by due process. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3; *State v. Blurton*, 342 S.C. 500, 512-13, 537 S.E.2d 291, 297-98 (Ct.App. 2000) (finding cumulative effect of improper comments in closing argument and erroneous exclusion of evidence warranted reversal), *rev'd on other grounds*, 352 S.C. 203, 573 S.E.2d 802 (2002) (finding additional error with respect to a jury charge); *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct.App. 1995) (reversing conviction based on combined effect of court's limitation of cross-examination and court's improper comments interjected during the trial).

### IV. Request for Oral Argument.

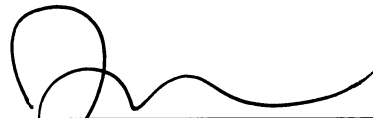
Prior to the coronavirus outbreak, the Court of Appeals had scheduled this case for oral argument to be held April 6, 2020. On March 23, 2020, counsel received email notice from the Court that argument was cancelled pursuant to the order governing operation of the appellate courts during the coronavirus emergency, issued by the Supreme Court on March 20, 2020. That notice advised that the Court would contact the parties concerning rescheduling. By letter from the clerk of the Court of Appeals dated March 31, 2020, the parties' attorneys were advised that they could request delaying a decision until after oral argument could be conducted. By letter dated April 15, 2020, counsel for Appellant requested that the Court not decide the case until argument could

be heard, even though the wait would delay a decision. Instead, the Court decided the case without argument. Appellant respectfully requests that the Court rehear its decision and grant oral argument before issuing its final determination of the issues presented in Appellant's briefs.

V. Conclusion.

For all the reasons outlined above, and based on all the authorities cited in the Final Brief and Final Reply Brief of Appellant, the Court should rehear this appeal, grant oral argument, find reversible error, and remand for a new trial.

Respectfully submitted,



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PROOF OF SERVICE

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I certify that I have served the petition for rehearing, by mailing a copy, postage prepaid, to counsel for respondent, Assistant Attorney General Caroline Scrantom, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211, on September 3, 2020.



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September 3, 2020

**VIA EMAIL TO:**

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The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

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RE: The State v. Jaron Lamont Gibbs  
Appellate Case No.: 2017-002042

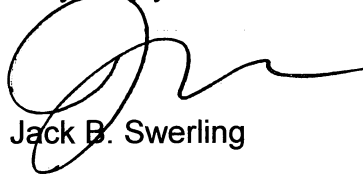
Dear Ms. Kitchings:

Enclosed for filing is the Petition for Rehearing, along with the Proof of Service, in the above referenced matter.

By copy of this letter, I am serving Caroline M. Scrantom, Senior Assistant Attorney General, with a copy of same by mail.

If you have any questions, do not hesitate to contact me.

Very truly yours,



Jack B. Swerling

JBS/ksr  
Enclosure

cc: Caroline M. Scrantom, Senior Assistant Attorney General  
Katherine Carruth Goode, Esquire  
Jaron Lamont Gibbs #00366858