STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

Appellate Case No. 2012-212800
Circuit Court Case No. 2006-GS-26-2998

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

LARRY CHESNUT,

APPELLANT.

INITIAL BRIEF OF APPELLANT

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Whether subsequent developments in the law have so undermined the foundation of State v. Huckie, 22 S.C. 298 (1885)—establishing the order of closing argument in joint trials—such that Huckie should be overruled to permit co-defendants who do not introduce evidence in a joint trial the right to the last argument even if another co-defendant does introduce evidence?

II.

Whether the trial court's denial of the Appellant's motion to permit the Appellant's co-defendant to make the final closing argument to the jury if the Appellant presented evidence violated the Appellant's Fifth, Sixth, and Fourteenth Amendment constitutional rights to present a defense and to testify in his own defense?

STATEMENT OF THE CASE

In 2006, the Horry County Grand Jury indicted the Appellant for murder. On August 13-17, 2012, the Appellant proceeded to a joint trial with his co-defendant Kendrick Chestnut. At the conclusion of the trial, the jury convicted the Appellant of the lesser-included offense of voluntary manslaughter and acquitted his co-defendant of all charges. The Honorable Steven H. John, presiding circuit judge, sentenced the Appellant to twenty years' imprisonment. This appeal follows.

STATEMENT OF FACTS

May 20, 2006, was the Appellant's twenty-eighth birthday. That afternoon, the Appellant's pregnant girlfriend, Christie Hucks ("Christie"), threw a party for the Appellant at the apartment complex where they lived. Following the party, the Appellant went out to further celebrate with his co-defendant Kendrick Chestnut ("Kendrick") and Christie's brother, the decedent, Joseph "Joey" Hucks. While the Appellant was gone, Christie opened a birthday card from the Appellant's daughter's mother which stated that she loved the Appellant. Upset at the card, Christie called her sister, Cynthia "Cindy" Evans ("Cindy"), who went to the apartment with her boyfriend Richard Day ("Day"). When the Appellant arrived home with Kendrick and the decedent in the early morning hours of May 21, 2006, Day, Cindy, and Christie were all present in the apartment. Tr. p. 335, line 15-p. 342, line 2. Day, Cindy, and Christie each gave extremely different versions of the subsequent events.

Day testified that after the Appellant arrived home, the Appellant and Christie walked to the kitchen when Day heard the Appellant yell that he had lost $400.00. Day then witnessed the Appellant push Christie up against a wall with both hands around her neck. Day testified that "[w]e all tr[ied] to stop him" by intervening and that the Appellant punched the decedent, who fell to the ground. The Appellant went back into the kitchen where he was followed by Cindy, but Kendrick attempted to prevent Day from following as well. Day then got around Kendrick and witnessed the Appellant on the ground biting Cindy's leg. Day pushed the Appellant up against the counter, but the fighting did not stop. Day then could no longer see Cindy, so he ran back through the kitchen and the living room to exit the home through the front door to try to find her. The decedent, Christie, and the Appellant were left in the kitchen when Day left the apartment. Day subsequently returned to the apartment after unsuccessfully looking for Cindy

and saw the decedent staggering out of the home with at least one visible stab wound. The Appellant and Kendrick then attacked the decedent, knocking him to the ground, and began kicking him. Day observed the Appellant making a stabbing motion, but he did not see the Appellant with a weapon. In Day's first statement to the police, he did not state that he observed the decedent being stabbed. Tr. p. 196, line 16-p. 207, line 2; p. 212, line 23-p. 13, line 20.

Cindy testified that the Appellant and Christie went to the kitchen after the Appellant arrived at the apartment. The Appellant and Christie then got into a verbal argument, which prompted Cindy and the decedent to enter the kitchen to calm the situation down. The Appellant then grabbed Christie by the throat and pushed her against the wall in the hallway. While the Appellant had Christie up against the wall, the Appellant managed to punch Cindy so hard that she fell to the floor. The Appellant pursued Cindy and continued punching her. She then threw a shoe at the Appellant, to which the Appellant responded by biting her leg. Cindy then hit the Appellant on the head with a vase three times. After this altercation, Cindy was left alone in the kitchen as everyone else went to the living room; while in the kitchen, Cindy heard the decedent say "don't touch my sisters" from the living room. Cindy snuck out of the back door, located in the kitchen, to get help but did not find anyone, so she tried to go back in the home. As she tried to get back in the home, however, she saw the Appellant in the kitchen standing next to a drawer, but did not see what, if anything, he got from the drawer. Cindy continued to try to find help outside from neighbors. When she came back to the apartment, she saw the decedent on the ground outside. Shortly thereafter, she saw Kendrick's car speeding away from the apartment. Tr. p. 276, line 1-p. 290, line 16.

Christie testified that the Appellant entered the home and was upset that $400.00 had been stolen from him. She told the Appellant that she wanted to talk to him, so they both entered

the kitchen. She showed the Appellant the card and the Appellant pushed her up against the refrigerator and told her that he loved her. She told the Appellant that he needed to leave, and the Appellant agreed to do so. The Appellant then walked back to the living room while the decedent and Cindy came into the kitchen to ask her if anything was wrong. Christie subsequently tried to walk back to the living room, but the Appellant grabbed her and pushed her up against a wall. Cindy tried to get the Appellant off of Christie, but the Appellant punched Cindy. In response, Cindy threw her shoe at the Appellant, and the Appellant attacked Cindy. Christie next saw the Appellant in the living room in an encounter with the decedent. The decedent had taken out his pocket knife and told the Appellant not to mess with his sisters. The Appellant tried to punch the decedent but the decedent swung the knife at the Appellant, cutting him. The Appellant went back to the kitchen as Christie went upstairs.[1] Christie came back downstairs and entered the kitchen where she saw the decedent at one end of the room and the Appellant and Kendrick at the other end of the room. Christie saw the Appellant holding a pair of scissors. Christie took the decedent out of the house through the front door, but he was attacked from behind by Kendrick, knocking the decedent to the ground. As the decedent was on the ground, Kendrick kicked him multiple times. Christie went to get help, and when she returned, the Defendant and Kendrick had left. Tr. p. 344, line 1-p. 364, line 24.

The police recovered a pair of scissors and a pocket knife from the scene. Tr. p. 546, lines 6-20. SLED ran DNA tests on the blood found on both items, and found that there were mixtures of two individuals' blood on each item. Tr. p. 598, lines 1-5. Neither the Appellant nor the decedent could be excluded from the blood found on the knife. Tr. p. 598, lines 5-7. The decedent was the major contributor to the blood found on the scissors while the Appellant's was

[1] Cindy's daughter and the Appellant's daughter were spending the night at the apartment and were in the living room asleep when the incident began. Christie testified that she took them upstairs as the altercation between the Appellant and the decedent began. Tr. p. 355, line 8-p. 357, line 4.

the minor contributor. Tr. p. 598, line 13-p. 599, line 2. The blade of the scissors measured 3.6 inches in length and the blade of the knife measured 2.3 inches in length. Tr. p. 673, lines 11-18.

The decedent suffered ten sharp force injuries. Eight of these injuries were 1.4 inches deep or less, but two injuries—one to the decedent's chest that punctured his heart and one to the decedent's left back—were at least four inches deep. The injury to the decedent's chest was fatal. He also had a blood alcohol content of .141 percent and a marijuana metabolite in his system. Tr. p. 649, line 24-p. 658, line 4; p. 662, line 22-p. 664, line 5.

While there was no direct testimony regarding the Appellant's injuries, Christie testified that she was aware that the Appellant was taken to the hospital due to his wounds from the altercation with the decedent and that was hospitalized "for a while." Tr. p. 410, lines 8-24. During the sentencing proceeding, the Appellant explained that he had suffered three stab wounds, one of which was life threatening, as it collapsed one of his lungs. He was hospitalized for approximately three weeks as a result of his injuries. Tr. p. 910, lines 17-25.

ARGUMENT

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 67 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." Id.

I. Subsequent developments in the law have undermined the basis for the rule, first set forth in State v. Huckie, 22 S.C. 298 (1885), that prohibits all defendants from making the final closing argument if one defendant introduces evidence in a joint trial such that Huckie should be modified to permit co-defendants in a joint trial to retain the right to the last argument even if another co-defendant introduces evidence at trial.

II. The trial court's ruling to prohibit the Appellant's co-defendant from making the final closing argument to the jury if the Appellant introduced evidence at trial violated the Appellant's constitutional right to testify at trial and the Appellant's Sixth Amendment right to present a defense at trial.

A. How the Issues Arose Below

At the close of the State's case, the Appellant and his co-defendant notified the trial court that they had concerns about the effect of either defendant presenting a defense. Tr. p. 745, line 9-p. 747, line 17. The trial court then proceeded *ex parte* with both defendants to address their concerns. The Appellant informed the court that he intended to present a substantial defense:

> Mr. Wilson: Your Honor, my Defendant wants to present evidence in this case ---
>
> The Court: Okay.
>
> Mr. Wilson: ---And witnesses, including testimony about his injuries and his hospitalization and all that, and the—obviously the problem for that is that once we do that, then the Co-Defendant then loses his last argument, as well as we losing our last argument.

Tr. p. 749, lines 1-8. The trial court agreed with the Appellant that the presentation of any evidence would result in both defendants losing the right to make a final closing argument, citing State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). Tr. p. 749, lines 9-25. Kendrick's attorney then explained that if the Appellant presented any evidence, then Kendrick would testify on his own behalf, which would be damaging to the Appellant due to the fact that the State would impeach Kendrick with his prior statements that incriminated the Appellant. Tr. p. 750, line 7-p. 753, line 14. The trial court then permitted the State to return to the courtroom where both defendants requested that the trial court allow Kendrick the final closing argument if he did not present any evidence even if the Appellant presented evidence. Tr. p. 755, line 4-p. 758, line 9. The trial court denied the motion, finding that it was bound by Crowe:

> [W]e're dealing with a—an established rule in the State of South Carolina that has been in existence for an extremely long period of time. I appreciate the circumstance that the Defendants and their attorneys have expressed to the Court ... but I do not find those reasons and those arguments to be sufficient to go against this longstanding and established procedure as established by our Supreme Court of the State of South Carolina. If the current Supreme Court, as its constituted, wants to overturn this rule that's been in existence for hundreds of years, they're gonna have to do that.

Tr. p. 759, lines 12-23.

The trial court then engaged in a colloquy with the Appellant regarding his decision to testify. The Appellant stated that he did not intend to present any evidence or testify. Tr. p. 761, line 19-p. 762, line 14. The Appellant then informed the trial court that the "sole reason for not presenting evidence is based on the discussion we had with the Court earlier ... about the last argument and the conflict that it caused between Defense counsel." Tr. p. 762, lines 19-22. Ultimately, neither the Appellant nor Kendrick presented any evidence, and both were permitted

to have the final closing argument to the jury following the State's closing argument, with the Appellant arguing first. The Appellant now contends that this Court should reverse the lower court's rulings.

B. Discussion

In State v. Huckie, 22 S.C. 298 (1885), the Supreme Court held that where one co-defendant introduces any evidence in a joint trial, all co-defendants lose the right to make the final closing argument to the jury. The Appellant contends, principally, that the Huckie rule should no longer be applied in light of changes to the understanding of joint trial which have eroded the initial underpinnings of the rule. The Appellant also contends that the operation of the Huckie rule in this case deprived the Appellant of his constitutional right to testify and his Sixth Amendment right to present a defense. To properly present this argument to this Court, the Appellant believes it is necessary to first briefly review the evolution of the rules governing the order of closing arguments. Next, the Appellant will examine the Huckie rule, in particular, in light of a modern understanding of the Confrontation Clause of the Sixth Amendment and joint trial jurisprudence in general, and will discuss why the Huckie rule should be modified under the common law. The Appellant will then engage in a prejudice inquiry based solely on the proposed modifications to Huckie. Finally, the Appellant will then discuss why the Huckie rule violated his constitutional right to testify and his Sixth Amendment right to present a defense, and why a new trial is warranted based on these violations.

1. South Carolina's History Establishing the Order of Closing Arguments in Criminal Matters

South Carolina is one of only two states—the other being North Carolina[2]—that permits a defendant in a criminal case to make the final closing argument to the jury if they do not present any evidence at trial. All other states, as well as the District of Columbia and the federal

[2] See Rule 10, N.C. R. Super. and Dist. Cts.; see also State v. Macon, 346 N.C. 109, 484 S.E.2d 538 (1997).

courts, grant the prosecution the ability to make the final closing argument to the jury. See Nicole Velasco, Taking the "Sandwich" Off of the Menu: Should Florida Depart from Over 150 Years of its Criminal Procedure and Let Prosecutors Have the Last Word?, 29 Nova L.Rev. 99, 121 (2004) (footnote 199).[3] South Carolina's practice regarding the order of closing argument in criminal cases derives from the common law, as no court rule establishes the procedure.[4]

South Carolina first set forth the order of closing arguments in criminal matters in State v. Brisbane, 2 S.C.L. (2 Bay) 451 (1802). In Brisbane, the Court noted that the defense had been given the opportunity to present the last argument, but decided to set forth a rule regarding the order of closing arguments in criminal cases "to settle a point of practice for the regulation of the bar in future." The Court held that "the same rule ought to prevail in the criminal courts of judicature, which had been laid down in the court of common pleas," *i.e.*, "[t]hat in all cases where a defendant called no witnesses, he should have the privilege of concluding to the jury." Id. The Court found it persuasive that "each individual ought to have every advantage which the aggregate had, otherwise there would not be a perfect reciprocity between the state and the citizen." Id.

In State v. Huckie, 22 S.C. 298 (1885), the Court took up, for the first time, how the rule of Brisbane would operate in a joint trial. The Court found that introduction of evidence by any co-defendant in a joint trial would trigger the rule permitting the State to give the final argument to the jury. The fundamental reasoning of this decision was that the trial was "an entirety": the

[3] At the time the article was written, Georgia and Florida also followed a system similar to South Carolina's. Georgia's system was changed in 2005 through legislative amendment. See Ga. Code Ann. §17-8-71. Florida's system, which permitted the defense the final closing argument so long as the only evidence introduced was the defendant's testimony, was changed by the Supreme Court of Florida in 2007 through the amendment of the Florida Rules of Criminal Procedure. See In re Amendments to the Florida Rules of Criminal Procedure-Final Arguments, 957 So.2d 1164 (Fla. 2007).

[4] Rule 140 of the proposed South Carolina Criminal Rules would have maintained the status quo of a significant portion of the common law, omitting only the requirement that the State make a closing argument on the law prior to the defendant's closing argument where the defendant has lost the right to make the final closing argument; however, those proposed rules have never been adopted.

state against the defense without regard for the individuality of each defendant. See id. at 300 ("A prosecution against several jointly for the same offence is an entirety, but one proceeding, without regard to the number of persons who may be charged"). This principle was further stated when the Court directly compared the argument in favor of the co-defendant having the final argument to a case where multiple defendants want to cross-examine witnesses:

> It has been held that this court cannot declare error in the refusal of the Circuit judge to permit more than one counsel for defendants to cross-examine a witness for the state, although the several defendants were represented by different counsel. State v. Sims, 16 S.C. 487. *For the same reasons* we cannot declare error in the refusal of the Circuit judge to allow the counsel of one of two defendants, the general reply in argument, the other defendant jointly indicted having examined witnesses in defence.

Id. at 301 (emphasis added).

The final development of the rule came with the Court's decision in State v. Gellis, 158 S.C. 471, 155 S.E. 849 (1930). In Gellis, the defendant did not present any testimony, but did introduce documentary evidence during the State's case-in-chief. 155 S.E. at 855. The Court held that the defendant's introduction of any evidence "either by offering witnesses in his behalf, or ... by the introduction of documentary evidence without calling witnesses" resulted in the defendant's loss of the final closing argument. Id.

Virtually every subsequent decision on the law of the order of closing arguments has dealt with some interpretation of the rules as set forth in Brisbane, Huckie, or Gellis. See generally State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972) (whether or not a severance is warranted due to the operation of Huckie); State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997) (whether or not a jury view is the introduction of evidence pursuant to Gellis); State v. Pinkard, 365 S.C. 541, 617 S.E.2d 397 (Ct. App. 2005) (whether or not a display of a defendant's tattoo constitutes the introduction of evidence). It does not appear that the

foundational underpinnings of these decisions, and of Huckie in particular, have been examined by South Carolina's appellate courts since their issuance.

2. The Development of Confrontation Clause and Joint Trial Jurisprudence Warrants Modification of Huckie's Rule

"While this Court adheres to the principle of stare decisis, it should not be applied to 'effect a petrifying rigidity' in common law." Elam v. Elam, 275 S.C. 132, 137, 268 S.E.2d 109, 112 (1980) (quoting Brown v. Anderson County Hospital Association, 268 S.C. 479, 486, 234 S.E.2d 873, 876 (1977)). "[Stare decisis] does not render immutable judicial formulations of common law rules." Brown at 487. "Stare decisis should be used to foster stability and certainty in the law, but, not to perpetuate error and injustice." Fitzer v. Greater Greenville South Carolina Young Men's Christian Association, 277 S.C. 1, 4, 282 S.E.2d 230, 231 (1981).

The Appellant contends there are multiple reasons for concluding that Huckie was wrongfully decided and that Huckie's rule should be modified. First, as described above, Huckie was an extension of Brisbane to joint trials. Huckie relied heavily on State v. Sims, 16 S.C. 487 (1884), in making this determination. The development of the Sixth Amendment's Confrontation Clause jurisprudence since both Sims and Huckie demonstrates that Sims, and, by extension, Huckie, was wrongfully decided. Second, Huckie relied heavily on its interpretation of joint trials as an "entirety." The development of joint trial jurisprudence since Huckie demonstrates that it incorrectly focused on the trial as an "entirety" and not as a trial of multiple individuals who each have their own rights. Third, the Appellant believes that a return to the reasoning of the decision in Brisbane—that "each individual ought to have every advantage which the aggregate had"—is proper and that Huckie's extension of Brisbane should be reconsidered. 2 S.C.L. (2 Bay) 451. Each contention will be addressed in turn.

a. Sims Was Wrongfully Decided, and Huckie's Reliance on Sims Warrants Modification of Huckie

In Sims, the Supreme Court held that it was not error for a trial judge to prohibit each co-defendant from individually cross-examining each of the State's witnesses. 16 S.C. at 486. Instead, the Supreme Court found that it was proper for the trial judge to limit cross-examination to one attorney. Id. In Huckie, the Supreme Court directly analogized the joint trial analysis engaged by the Court in Sims to the order of the closing argument issue before the Court. 22 S.C. at 301. The Court specifically held that it could not find error in the trial court's refusal to permit the co-defendant who did not introduce evidence from giving the final closing argument "[f]or the same reasons" as those given by Sims in limiting cross-examination to one attorney in a joint trial. Id.

While Sims has never been overruled, the Appellant respectfully submits that it is clear that its holding violated the modern understanding of the Sixth Amendment's Confrontation Clause. A trial court's complete deprivation of a criminal defendant's ability to cross-examine the witnesses against him would certainly not pass constitutional muster today. See United States v. Mills, 138 F.3d 928, 938 (11th Cir. 1998) ("A trial judge may not totally deny a defendant the opportunity to cross-examine a witness against him, whatever the time constraints, number of defendants being tried, or relationship between the defendants"). Indeed, the limitation of cross-examination on a particular *issue*, such as bias, violates the Confrontation Clause, so it logically follows that the total limitation of cross-examination *altogether* would be patent constitutional error. See Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) ("In this case ... the trial court prohibited *all* inquiry into the possibility that Fleetwood would be biased as a result of the State's dismissal of his pending public drunkenness charge. By thus cutting off all questioning ... the court's ruling violated respondent's rights secured by the Confrontation

Clause") (emphasis in original). Moreover, it does not appear that Sims' holding regarding the limitation of cross-examination has ever been cited by approval by any appellate court in this state aside from Huckie. Consequently, it is clear that Sims is an outlier that finds no support in either modern jurisprudence or this state's jurisprudence.

If the holding in Sims compelled the holding in Huckie, then Huckie's holding would be in serious jeopardy as well. The Appellant submits that a simple substitution of the correct holding in Sims in the Court's holding into the Huckie opinion would reflect a corresponding change in the Huckie rule:

> It has been held that this court **[must]** declare error in the refusal of the Circuit judge to permit more than one counsel for defendants to cross-examine a witness for the state, although the several defendants were represented by different counsel. State v. Sims, 16 S.C. 487. For the same reasons we **[must]** declare error in the refusal of the Circuit judge to allow the counsel of one of two defendants, the general reply in argument, the other defendant jointly indicted having examined witnesses in defence.

Huckie, 22 S.C. at 301 (emphasis added). Accordingly, a modern understanding of Sims demonstrates the need for a modern modification of Huckie. Huckie should be overruled in light of its clear reliance on a patently unconstitutional premise.

b. A Modern Understanding of Joint Trial Law Warrants Modification of Huckie

Even if Huckie's reliance on an incorrect decision in Sims is not sufficient to overrule Huckie, the Appellant also asserts that Huckie's doctrinal basis of the trial as an "entirety" is incorrect in light of modern joint trial jurisprudence. Accordingly, the Appellant respectfully submits that Huckie should be overruled on this basis as well.

As described above, in Huckie, the Court held that the case was an "entirety" because the case was the State versus the defense; consequently, introduction of evidence by any member of the "defense" was attributable to all. This view of defendants in a joint trial as a collective

instead of as individuals does not reflect a modern understanding of joint trials. As the United States Supreme Court has recognized:

> Guilt with us remains individual and personal, even as respects conspiracies. ... There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and *call for use of every safeguard to individualize each defendant in his relation to the mass.*

Kotteakos v. United States, 328 U.S. 750, 773 (1946) (emphasis added). Therefore, it is necessary for the courts to treat criminal defendants in joint trials as individuals lest they lose their individuality in a joint trial.

Furthermore, the modern joint trial jurisprudence requires that juries also view criminal defendants as individuals, not as collective defendants. This Court need look no further than the jury instructions given in this case to see how joint trials are not considered "entireties" but multiple trials against multiple defendants that happen to be consolidated into one proceeding:

> And I told you a couple of times, there's two Defendants. Kendrick Chestnut is charged with the crime of murder, and Larry Tyrone Chestnut is charged with the crime of murder, with also the lesser included offense of voluntary manslaughter. The case of each Defendant and the evidence and law concerning that Defendant *must be considered separately and individually.* Your verdict does not have to be the same for both Defendants.

Tr. p. 888, lines 11-18 (emphasis added). This instruction is standard in joint trials in South Carolina. See Hughes v. State, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001) ("A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial"). Moreover, similar instructions are routinely given across virtually every jurisdiction in joint trials. See generally United States v. Owens, 683 F.3d 93, 99 (5th Cir. 2012) (noting a similar instruction given by the District Court judge); Marlow v. State,

207 Ga.App. 269, 271, 427 S.E.2d 600, 602 (Ga.App. 1993) (noting that "[t]he trial court emphasized in its charge to the jury that each defendant must be considered individually").

Consequently, it is clear that the modern joint trial jurisprudence calls for the both the courts and for juries to evaluate defendants as individuals, and to take every precaution that they are treated as such. In disharmony with this modern practice, Huckie's rule does not "safeguard ... each defendant." Kotteakos at 773. Instead, Huckie's focus on the joint trial as an "entirety" removes the individual right—the ability to give the final closing argument if no evidence is presented—and places it in "the mass." Id. By placing the individual right with the collective defendants, each individual defendant loses their distinct right to make the final closing argument to the jury because they no longer have control over that right—their co-defendants do. This is not the result envisioned by the modern focus on individualization. Accordingly, the modern joint trial jurisprudence's clear abrogation of Huckie's foundation warrants reconsideration of Huckie's reasoning and result.

c. A Review of Brisbane Shows that the Proper Focus is the Individual, not the "Entirety"

Finally, in addition to the reasons given above, the Appellant believes that a reexamination of Huckie is warranted inasmuch as Huckie's focus on the "entirety" is contrary to Brisbane's focus on the individual. The Appellant submits that the inquiry needed in this case is similar to the inquiry engaged in by the Supreme Court in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). In that decision, the Court examined the history of a jury instruction which permitted "the jury [to] infer malice from the use of a deadly weapon." Id. at 600, 685 S.E.2d at 803. In reviewing the jurisprudence, the Court found that the earlier decisions concluding that the instruction was proper contained a qualification that "[t]he malice inference would ... have no place where the use of a deadly weapon was 'lawful.'" Id. at 605, 685 S.E.2d at 806.

However, the Court further found that the "the significant import of the qualifying term 'lawful' was effectively abandoned in our subsequent decisions." Id. In finding that the charge should only be given in very limited circumstances, the Court concluded that the earlier decisions "hew more closely to what we believe is the proper application of the charge than that expressed in" the later decisions abandoning the "lawful" qualification. Id. at 610, 685 S.E.2d at 809.

Concordantly, the Appellant believes that the earlier decision in Brisbane hews more closely to the proper understanding of criminal trial law than that set forth in Huckie. Brisbane recognized that "each individual ought to have every advantage which the aggregate had." 2 S.C.L. (2 Bay) 451. Brisbane, then, appears to identify the individuality of the defendant as the primary reason for adopting the rule. This principle is very similar to the concern for the individual shown by the modern joint trial jurisprudence. As has been shown, however, Huckie abandons the principle of placing the authority and decision to make the final closing argument with the individual and places the decision with the collective defendants. Under Huckie, no individual defendant controls his ability to make a final closing argument. Therefore, the individual defendant no longer has "every advantage which the aggregate had"—the advantage is lost because the control over the situation is lost. Given the modern focus on the individual in joint trials, the Appellant contends that a return to Brisbane's focus on the individual is warranted, and that Huckie should be modified to let "each individual ... have every advantage." 2 S.C.L. (2 Bay) 451.

d. Summary

Huckie's holding is predicated on a decision in Sims—a decision which would clearly be decided completely differently if it was heard anew today. Furthermore, Huckie's ruling departs significantly from the modern understanding of joint trials as well as from the individuality

concerns for adopting the closing argument rule in Brisbane. Given the extremely porous nature of Huckie's foundation and the modern focus of the individuality of defendants on trial, the Appellant respectfully submits that Huckie should be reconsidered.

3. Prejudice and Remedy

"The right to open and close the argument to the jury is a substantial right, the denial of which is reversible error." State v. Rodgers, 269 S.C. 22, 24-25, 235 S.E.2d 808, 809 (1977). Normally, a question concerning the issue of the closing argument arrives to the appellate courts of this state in one of two ways: (1) the defendant improperly lost the right to make the final closing argument to the jury; see State v. Mouzon, *supra*; or (2) the defendant in a joint trial lost the ability to make a final closing argument because of the introduction of evidence by a co-defendant; see State v. Smith, 387 S.C. 619, 693 S.E.2d 415 (Ct. App. 2010). Here, however, the Appellant did not lose the right to make a final closing argument; in fact, he did not even want to make such an argument. Instead, the Appellant wanted to introduce evidence and to permit his co-defendant to make the final closing argument to the jury. While the scenario presented by this case is somewhat different from the traditional avenues of appellate relief,[5] the Appellant respectfully asserts that a new trial should be ordered due to the prejudice suffered by the trial court's imposition of the Huckie rule.

The rule the Appellant proposes is simple: where a co-defendant introduces evidence in a joint trial, he loses the right to make the final closing argument to the jury. However, where a co-defendant introduces no evidence in a joint trial, he retains that ability to make the final

[5] The only decision based on similar facts that the Appellant is aware of is State v. Pinkard, 365 S.C. 541, 617 S.E.2d 397 (Ct. App. 2005). In that case, the defendant wanted to show his tattoo to the jury without losing the final closing argument. Id. at 543, 617 S.E.2d at 398. The trial court found that displaying the tattoo would constitute introducing evidence, and the defendant chose not to display the tattoo. Id. The Court of Appeals agreed with the trial court's ruling, and did not reach the question of prejudice. Id. at 544.

closing argument to the jury. Taking this case as an example, and assuming introduction of evidence by the Appellant but not by Kendrick, the order of the closing arguments would be:

1. The Appellant;
2. The State;
3. Kendrick.

This order would maintain the principle of Brisbane without the modification of Huckie.

While structuring the order of closing arguments in such a way would be novel to South Carolina, it is not unprecedented in other jurisdictions employing a closing argument rule such as Brisbane. Specifically, for decades, Florida permitted a co-defendant who did not introduce any evidence to have the final closing argument even if other co-defendants did introduce evidence and lost the ability to make the final closing argument. See Faulk v. State, 104 So.2d 519 (Fla. 1958) (upholding the rule and collecting cases applying the rule).[6] The Appellant respectfully asserts that this state should follow Florida's example and permit co-defendants who do not introduce evidence to have the final closing argument, even where other co-defendants have introduced evidence.

Turning to the question of prejudice, there are two types of trial errors: "(1) trial errors which are subject to harmless error analysis, and (2) structural defects in the constitution of the trial mechanism, which defy analysis by harmless error standards." Mouzon, *supra*, 326 S.C. at 204, 485 S.E.2d at 921 (citing Arizona v. Fulminante, 499 U.S. 279 (1991)). The Appellant contends that harmless error analysis is inappropriate for this issue. The complete deprivation of a criminal defendant's right to testify "is structural," and requires automatic reversal. State v. Rivera, 402 S.C. 225, 249, 741 S.E.2d 694, 707 (2013). Here, the Appellant did not testify

[6] North Carolina follows Huckie's approach. See State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976). Georgia, prior to the amendment of Ga. Code Ann. §17-8-71, also followed Huckie's approach. See Calhoun v. State, 135 Ga.App. 609, 218 S.E.2d 316 (Ga.App. 1975).

because of Huckie. Accordingly, the Appellant argues that the fact that Huckie prevented him from testifying places this case in the structural defect category, and automatic reversal is warranted.

In the event, however, that harmless error analysis is warranted on this issue, the Appellant contends that relief should still be granted. During the colloquy with the trial court regarding the question of the presentation of evidence by the defendants, the Appellant stated that he intended to present testimony regarding the severities of his injuries and his hospitalization. Tr. p. 749, lines 1-5. At sentencing, the Appellant revealed that he had been in the hospital for three weeks and that one of his lungs had collapsed as a result of his altercation with the decedent. Tr. p. 910, lines 17-25. None of this evidence was presented to the jury, and such evidence would have gone to the heart of the defense of self-defense. See State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (noting that the second element of self-defense requires that "the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger"). Furthermore, the Appellant's additional testimony and evidence would have certainly furthered his argument that he was acting in self-defense during his altercation with the decedent. Finally, the evidence against the Appellant was certainly not overwhelming, as he was convicted of the lesser-included offense of voluntary manslaughter and Kendrick was acquitted entirely. Had the additional evidence of self-defense been presented to the jury, there is a significant possibility that the Appellant would have been acquitted as well. Consequently, the Appellant contends that he has met his burden in demonstrating that he was prejudiced by the operation of Huckie in this case, and that a new trial is warranted.

4. The Appellant's Constitutional Right to Testify and Sixth Amendment Right to Present a Defense Were Unconstitutionally Chilled by the Operation of the Huckie Rule

Assuming, *arguendo*, that the subsequent erosion of Huckie's logical and legal foundation is insufficient to modify the rule, the Appellant contends that the Huckie rule should be changed because its operation unconstitutionally violated the Appellant's constitutional right to testify and his Sixth Amendment right to present a defense.

Laws "cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." United States v. Jackson, 390 S.C. 570, 582 (1968). "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." Id. "A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right." Id. at 583.

"The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." Rock v. Arkansas, 483 U.S. 44, 51 (1987). These provisions include the Due Process Clause of the Fourteenth Amendment, the "Compulsory Process Clause of the Sixth Amendment," and the "Fifth Amendment's guarantee against compelled testimony." Id. at 51-53.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986). "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). "The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to

present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19 (1967).

The Appellant respectfully asserts that his constitutional rights were violated by the application of Huckie in this case. It is clear that the only reason the Appellant chose not to testify and chose not to present any evidence was the potential application of Huckie and the loss of the final closing argument of both defendants. Therefore, the exercise of his constitutional rights to testify and to present a defense was chilled by Huckie. Had the Appellant exercised his constitutional rights, Huckie would have punished him and his co-defendant by both defendants losing the final argument to the jury.

The Appellant is unaware of any South Carolina appellate court decisions addressing the constitutionality of Huckie, or of Brisbane, for that matter. Florida, however, did address a similar contention—at least with regard to the rule announced in Brisbane—in Preston v. State, 260 So.2d 501 (Fla. 1972). In Preston, the criminal defendant lost the right to a final closing argument by presenting multiple witnesses at trial and argued, *inter alia*, that "the Rule violates due process by having a 'chilling effect' on a defendant's right to call witnesses, since if he exercises his right, he must forego his procedural right to conclude argument before the jury." 260 So.2d at 503. The Supreme Court of Florida agreed with the defendant that "the Rule operates to [d]eter the exercise of his Sixth Amendment right to call witnesses," but did not agree with the defendant that such deterrence rose to the level of a "chilling effect" as described in Jackson. Id. at 504. The Supreme Court of Florida further found that

> The basic choice confronting every defendant, guided by counsel, is whether, on balance, it is strategically desirable to call defense witnesses. Evaluation of that option depends on many factors like the weight of the State's case, the probable impact on the State's case of the cross-examination of State witnesses by the defense, the relative significance of the testimony of the defense witnesses

> to be called, possible avenues of rebuttal which the defense presentation may open up for the prosecution to explore, and anticipation of the witnesses' impression on the jury. There is no basis for concluding that the one additional factor in the calculus on which appellant focuses—the entitlement to the concluding argument before the jury—is so weighty that its presence overwhelms the ability of the defense to make a rational and intelligent choice.

Id.

The Appellant does not disagree with Preston's reasoning in terms of addressing the constitutionality of Brisbane, and, to be clear, the Appellant does not contend that Brisbane is unconstitutional. The Appellant, however, does believe that Preston's rationale only underscores the importance of reconsidering Huckie. As the Supreme Court of Florida recognized, a criminal defendant with the individual right of Brisbane has the ability to make a rational and controlled decision to present testimony with the calculated risk of losing the final closing argument. Huckie, however, is different. Huckie requires that *all* defendants suppress *all* evidence in support of their defenses in order for *any* defendant to have the final closing argument. In this sense, not only does Huckie chill the exercise of one defendant's constitutional rights, it chills the exercise of multiple defendants' constitutional rights in every case. The suppression of constitutional rights only worsens when the number of co-defendants is increased. It is not difficult to envision a ten-defendant joint trial, and Huckie operating to chill the exercise of all of the co-defendants' constitutional rights simply in order for each defendant to retain the right to the final closing argument. See generally United States v. Castillo-Valencia, 917 F.2d 494, 497 (11th Cir. 1990) (noting that the appeal arose out of "a joint trial of all ten defendants").

Moreover, a defendant, such as the Appellant, must not only consider what evidence the State has introduced, but what evidence his co-defendants, who now have no ability to give a final closing argument and thus nothing to lose by introducing evidence, may introduce based on

his decision to present testimony. That was precisely the danger that occurred in this case, as the Appellant was concerned that Kendrick's incriminating statements would be introduced through cross-examination of Kendrick by the State if Kendrick testified. This consideration only further demonstrates Huckie's damaging damper on the exercise of constitutional rights.

Given all of the above, the "one additional factor in the calculus," the impact of Huckie, is so overwhelming on all defendants'—including the Appellant's—choices to present their own defense and additional evidence that it is unconstitutional. Preston, *supra*, 260 So.2d at 504. The rule should be abandoned in favor of a rule that renews focus on the individual decision whether or not to introduce testimony and evidence, and permits defendants to properly consider the factors outlined in Preston without having to also be concerned about the impact the decision will have on all other co-defendants in the case. Such an individualized rule would be constitutional. See Preston.

The Appellant now turns to the question of prejudice. The complete deprivation of a criminal defendant's right to testify "is structural," and requires automatic reversal. State v. Rivera, *supra*, 402 S.C. at 249, 741 S.E.2d at 707. However, the denial of a criminal defendant's Sixth Amendment right to present a defense is subject to harmless error analysis. See State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008). Since the Appellant's right to testify was violated by Huckie, the Appellant contends that automatic reversal is warranted. However, to the extent necessary to do so, the Appellant renews his earlier-stated contention that the constitutional error in this case was not harmless inasmuch as the evidence he sought to present would have gone to the heart of the defense.

5. Summary

The Appellant recognizes that he is challenging the validity of a rule that has been in effect in South Carolina since 1885, and he does not make such a challenge lightly. As has been shown, however, the logical underpinnings of Huckie have been eroded by subsequent law dealing with Confrontation Clause rights and joint trial procedures. The decision also appears to be a marked departure from the original decision—Brisbane—setting forth the common law rule regarding the order of closing arguments. Furthermore, the rule clearly chilled the exercise of the Appellant's Fifth, Sixth, and Fourteenth Amendment rights in this case. Finally, the Huckie rule works multiple harms in every joint trial, as it invariably chills the exercise of multiple defendants' constitutional rights. Huckie does not "call for use of every safeguard to individualize each defendant in his relation to the mass"; instead, Huckie treats all defendants in a joint trial as if they were one defendant acting together. Kotteakos, *supra*, 328 U.S. at 773. Huckie's procedure is outmoded and should be changed. In recent years, the Supreme Court has been willing to reexamine longstanding rules of criminal procedure in light of modern conditions. See generally Belcher, *supra*, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The Appellant requests that the same reconsideration be given to Huckie.

CONCLUSION

The Appellant's conviction for voluntary manslaughter should be reversed, and this matter should be remanded for a new trial.

Respectfully submitted,

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ATTORNEY FOR APPELLANT.

This 26th day of August, 2013.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

Appellate Case No. 2012-212800
Circuit Court Case No. 2006-GS-26-2998

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

LARRY CHESNUT,

APPELLANT.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

The Appellant proposes that the following be included on the record on appeal:

1. Trial Transcript pp. 184-504; pp. 540-678; pp. 745-774; p. 888; pp. 909-911;
2. Indictment

I certify that this designation contains no matter which is irrelevant to his appeal.

Respectfully submitted,

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ATTORNEY FOR APPELLANT.

This 28th day of August, 2013.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

Appellate Case No. 2012-212800
Circuit Court Case No. 2006-GS-26-2998

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

LARRY CHESNUT,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Initial Brief of Appellant and one copy of the Designation of Matter in the above-entitled case has been served upon opposing counsel, Salley W. Elliott, Assistant Deputy Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 28th day of August 2013.

JEREMY A. THOMPSON
ATTORNEY FOR THE APPELLANT

SWORN TO BEFORE me this 28th day of August, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 7/10/2022