

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
John C. Few, Circuit Court Judge

Opinion No. 2010-UP-356 (S.C. Ct. App. filed 7/12/2010)
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S C Supreme Court

THE STATE,

RESPONDENT,

V

DARIAN K. ROBINSON,

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THIS OPINION HAS NO PRECEDENTIAL VALUE IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v

Darian K. Robinson, Appellant

Appeal From Greenville County
John C. Few, Circuit Court Judge

Unpublished Opinion No 2010-UP-356
Submitted June 1, 2010 – Filed July 12, 2010

AFFIRMED

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PER CURIAM Appellant, Darian K Robinson, was convicted of murder and possession of a weapon during the commission of a violent crime and was sentenced to life without parole. Robinson appeals, asserting the trial judge denied him his right to confrontation by ruling certain evidence relevant to his defense was inadmissible until such time as Appellant established all four elements of self-defense, resulting in shifting the burden to Appellant and denying him the right to confront the State's witnesses during the State's case-in-chief. We affirm.¹

FACTUAL/PROCEDURAL BACKGROUND

This case involves the shooting death of William Godwin (Victim) on January 26, 2005. Latrice Atkinson, Appellant's live-in girlfriend and the cousin of Victim, testified that in the early hours of the morning before the shooting, she and Appellant argued, at which time Appellant hit Latrice in her face. Later in the morning, one of Latrice's relatives asked her what was wrong with her eye. Latrice then observed a mark under her eye. When the relative pointed the injury out to Keith Williams, the father of Latrice's children, Keith questioned Latrice about what happened. Latrice told him what occurred but indicated Keith should not be concerned because she intended to take care of the matter. Keith learned from one of their children that the incident took place in front of the children, but Latrice insisted she would handle the problem by speaking to Appellant's father. Her injuries consisted of a small bruise under her eye and a swollen lip.

Sammy Groves testified that on January 26, he came into contact with Appellant outside the Boulder Creek apartment where Appellant lived with Latrice. At that time, Appellant told Sammy that he had been fighting with

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

Latrice and that he had "smacked" her, resulting in both Keith and Victim confronting Appellant about the matter. Appellant was concerned about the situation with Victim and Keith. Sammy advised Appellant he should "fight," and Appellant responded that he had a .38 caliber gun.

Around 11:30 that night, as Sammy and Appellant were still outside talking, Latrice arrived at her apartment with Latrice's mother, Paulette Edens, and Latrice's two children. As they approached, they saw Appellant standing in front of the door talking to Sammy. Appellant began asking Latrice why she was "telling these lies," and then told her, "You're people ain't going to be rolling up on me, sitting in the parking lot like they going to do something to me." Appellant further stated, "They don't know who I am" and referred to why others "call him 187."² Appellant was telling Latrice that her family and her children's father were not going to be "coming at him" and threatening him. Sammy testified Appellant told Latrice she needed to stop sending her people at him, or he would "lay them down." After putting her children to bed in her apartment, Latrice went two doors over to her mother's apartment for their customary time of drinking coffee.

Victim, who often joined his cousin and aunt in drinking coffee, then arrived at the building and asked Appellant and Sammy where Latrice was. Sammy told Victim she was at her mother's apartment. Victim went inside Paulette's home, came back out shortly thereafter, drove off for a short period of time, and then returned to Paulette's apartment. During Victim's departure, Sammy went to his girlfriend's apartment to retrieve his phone for Appellant to use. When Sammy returned, they went inside Latrice and Appellant's apartment and Appellant used the phone to make two calls, one of which was to ask for a ride. Thereafter, "some guys" arrived at the apartment looking "amped up, like [there] was about to be a fight." Appellant then walked past the group of people to Paulette's door. As he passed by, he told the group, "ain't no use in y'all catching a misdemeanor." Sammy then heard gunshots coming from Paulette's apartment. When Appellant stepped out of the apartment, he had a gun down by his side.

² A witness qualified as an expert in the area of street slang testified the term "187" derives from that section of the California Penal Code for murder, and is the term used for murder.

Latrice testified she, Victim, and her mother were in her mother's kitchen when they heard a knock on the door. Latrice opened the door and let Appellant into the home. Appellant followed behind Latrice as she walked to the kitchen, and he continued to confront Latrice about telling lies and her family threatening him. Latrice indicated to Appellant that she did not know to what he was referring. When he would not explain, Latrice told Appellant she was not going to keep asking, and she joined her mother and Victim sitting at the kitchen table. Appellant was upset and mad, and as he continued to talk about Latrice's family, Victim stood up and started walking toward Appellant. According to Latrice, Victim had stopped walking and rested his hand against the wall. Victim asked Appellant what he meant by "family" and whether he was referring to Victim. Appellant then took his hands out of his pockets and Latrice heard two, loud firecracker sounds and then three or four more shots. Victim fell to his knees and then to the ground. Appellant turned around and walked out the door.

During cross-examination, Appellant proffered the testimony of Latrice regarding Victim's prior conviction. Out of the presence of the jury, Latrice testified she had learned Victim had been in jail on a murder charge, but denied remembering having a discussion with Appellant about it. She testified, however, she did remember a conversation between Victim and Appellant referring to "the smell of blood or hurting somebody or killing somebody that leaves you with the memory of blood," and that both Victim and Appellant were nodding and agreeing with one another on the subject. The trial judge found testimony of Latrice's knowledge of Victim's conviction irrelevant as it did not show Appellant's knowledge, but found testimony about the blood conversation between Appellant and Victim admissible. Also during her cross-examination, Appellant sought to elicit testimony from Latrice regarding Latrice's sister, Jeanetta, and a man she had dated named Rocko. When asked about a time Rocko "had put his hands on Jeanetta," the State objected and the trial judge sustained the objection to that question, as well as to a question concerning Appellant's presence during a confrontation between Victim and Rocko. The trial judge gave Appellant the opportunity to thereafter proffer the testimony of Latrice regarding an incident where Victim "put his hands on" Rocko because Rocko had hit Jeanetta, and whether Rocko related the incident between him and Victim in

front of Appellant Latrice did not remember the confrontation between Victim and Rocko being discussed in front of Appellant but did remember having a conversation with Appellant wherein she related to Appellant the incident that occurred between Jeanetta and Rocko The trial judge sustained the State's objection to this proffered testimony in part because Latrice denied knowledge of the discussion regarding the incident between Victim and Rocko taking place in Appellant's presence

The State also called Paulette to the stand, who testified that when Appellant entered her home, he came into the kitchen and stood near Latrice as the two bickered back and forth After Appellant stated, "I'm tired of y'all and y'all family," Victim got out of his chair and started walking and then stopped When Victim was shot, he slumped to his knees and fell forward After Appellant shot Victim, he turned around and walked out the door as if he had not done anything

Victim was pronounced dead at the scene He suffered a total of three gunshot wounds, with a gunshot to the head being the fatal wound

Appellant took the stand in his defense He admitted that the night before the shooting he hit Latrice in her face According to Appellant, Victim later came to the apartment Appellant shared with Latrice several times that day On the first trip, Victim was upset and barged into the apartment, asking what was going on between his cousin and Appellant Victim indicated Antonia told him Latrice had injuries to her face He then warned Appellant before leaving the apartment that he would kill Appellant if he was still there when he returned Less than an hour later, Victim appeared again at the apartment and stated he had already told Appellant if he was still there and he discovered something was wrong with Latrice, he was going to kill Appellant Victim then walked away, slamming the apartment door About one hour later, Victim returned to the apartment a third time, "bammin' on the door" This time Appellant did not open the door, but went to an upstairs window and indicated to Victim he did not want any trouble Victim continued to knock on the door a few minutes and then left Victim returned a fourth time, about twenty to thirty minutes before Latrice came home, and again knocked on the door At this point, Appellant maintains he was scared and nervous about Victim's actions Victim stayed in the area about five

minutes before he eventually left in his car. As Appellant was looking out the window, he saw Sammy outside and yelled down to him. Appellant then put on his jacket, which he knew held a gun in the pocket, and went outside to talk to Sammy in order to ask Sammy if he could use his phone. Appellant explained to Sammy what had occurred and told him about threats made to him by Keith and Victim. Sammy retrieved his phone and Appellant then made a phone call to his friend Travis, asking for a ride.

Five to ten minutes after Appellant called Travis, Latrice and her mother arrived at the apartment. At that time, Appellant asked Latrice why she kept sending her family there to threaten him. Latrice acted as if she did not know what he was talking about. After Latrice put her children to bed, she went over to her mother's apartment. Victim then arrived and asked where Latrice was. After Sammy told him she had gone to her mother's, Victim went into Paulette's apartment. Appellant testified he decided to go to Paulette's because when Latrice first arrived she indicated she needed to talk to him and he had not finished discussing the situation with her family with her. Further, because his ride had arrived, he wanted to lock up their apartment and needed to take the keys to Latrice.

Appellant knocked on Paulette's door and Latrice let him into the apartment. Latrice walked into the kitchen, while Appellant stood between the kitchen and living room trying to explain to Latrice what had been happening. Appellant told Latrice she needed to stop sending her family to threaten him. Latrice acted as if she did not know what was going on and had not said anything to her family. At some point, Victim stood up and said, "Who are you talking to? Me?" Appellant described Victim as walking toward him in a "rush" with his hand balled up and running toward him. Appellant testified he was much smaller than Victim and did not know if Victim possessed a weapon or was going to try to fight him. Appellant stated he was intimidated and feared he was about to be hurt. As Victim rushed toward him, Appellant pulled his gun out and started shooting out of fear.

During the State's presentation of evidence, the trial judge ruled various testimony that the defense sought to elicit on cross-examination, including that discussed in regard to Latrice, was inadmissible for various reasons including, but not limited to, his determination the evidence was irrelevant, it

was relevant but the relevance was outweighed by other factors, and the proffered testimony showed the witness denied knowledge. After the State rested, Appellant proffered certain testimony of his sister, Alicia, seeking to introduce evidence of Appellant's knowledge before the shooting that Victim had been convicted of murdering his stepfather. The judge granted the State's motion in limine to exclude the conviction, based upon the fact that the violence associated with the conviction was not directed toward the Appellant and it was not closely connected in point of time or occasion, but noted his ruling was preliminary and subject to change.³ The judge further sustained the State's relevancy objection to defense counsel's question to Appellant's sister as to whether she knew that Keith owned or possessed a gun.

At the start of Appellant's testimony, the trial judge initially ruled evidence concerning Appellant's interaction with Keith on the day of the shooting, proffered to show Appellant's state of mind in regard to self-defense, was inadmissible because the evidence at that point did not support a charge of self-defense. However, after hearing Appellant's testimony and further argument of counsel, the judge changed his mind and determined self-defense should be submitted to the jury. The judge further noted his reconsideration of the matter raised a question of what additional evidence should be allowed. The only evidence pointed out by defense counsel at this juncture was evidence of the interaction between Keith and Appellant, and evidence of Victim's prior conviction. The trial judge thereafter ruled evidence concerning Keith's actions toward Appellant on that day was

³ See State v Day, 341 S C 410, 419-20, 535 S E 2d 431, 436 (2000), State v Amburgey, 206 S C 426, 429, 34 S E 2d 779, 780 (1945) (holding, in murder prosecution of one pleading self-defense against an attack by deceased, evidence of other specific instances of violence on deceased's part is inadmissible, unless the instances of violence were directed against defendant or, if directed against others, were so closely connected in point of time or occasion with the homicide as reasonably to indicate deceased's state of mind at time of the homicide, or to produce reasonable apprehension of great bodily harm)

relevant and admissible. He further ruled admissible evidence of Victim's prior conviction.

Thereafter, Appellant testified regarding a conversation he had with Victim in which Victim stated he had been to jail, and "whatever he went to jail for he used to taste blood." At certain times when Victim was around Appellant, Victim would indicate he had committed the murder of his stepfather. Appellant further testified that on the evening of January 26, 2005, before Victim made his first appearance at the apartment, Keith came over and asked Appellant what happened between him and Latrice. Appellant stated that Keith was upset, wanting to know why Appellant hit Latrice in front of Keith and Latrice's daughter. During this time, Appellant observed that Keith held a gun in his hand. Keith indicated Antonia had been the source of his information regarding Latrice's injury. When Victim later came over and said the same thing to him, and indicated the source of information was Antonia, Appellant began thinking Victim and Keith had been in contact about the matter. This made Appellant scared, and he felt he needed to talk to Latrice so she could explain things to her family. Appellant maintained when he decided to go to Paulette's apartment he did not believe he was walking into a violent situation, because he did not think Victim would do anything in front of his aunt, Paulette. However, because he had been threatened repeatedly that day, when Victim rushed toward him with his hands balled up, Appellant feared for his life and he started shooting. At the close of the evidence, upon the request of the defense, the trial judge informed the jury he took judicial notice of the fact that Victim had been convicted of second degree murder in North Carolina in 1989.

After closing arguments but prior to the court charging the jury, defense counsel made a motion for mistrial arguing the trial judge's initial rulings that excluded certain evidence relevant to his self-defense claim precluded him the right to confront the State's witnesses and created a shift in burden. The trial judge asked counsel to point to specific instances, other than that of a witness concerning whether she knew Appellant had knowledge of Victim's conviction, where an objection was made during cross-examination resulting in the defense being unable to present the evidence. Counsel asserted "Keith Williams and his connection," the murder conviction of Victim, Latrice's knowledge regarding Keith ever having a gun, and the

showing of the gun to Appellant on the night in question had also been excluded. The trial judge found Appellant had not been denied the right to confront Latrice, as she was present during the entire trial and Appellant could have recalled her. The judge inquired as to whether Appellant would like to call Latrice and put her on the stand, but Appellant declined. The trial judge charged the law of self-defense to the jury. The jury ultimately returned guilty verdicts on both the murder and weapons possession charge.

ISSUE

"Whether the court denied appellant his right to confrontation and legitimate cross-examination of state's witnesses about matters probative of self-defense where the court prohibited cross-examination of State's witnesses until such time as the court deemed there was evidence establishing all four elements of self-defense, since this ruling was procedurally unfair, and it also was burden shifting?"

STANDARD OF REVIEW

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v Council, 335 S C 1, 12, 515 S E 2d 508, 514 (1999). The power of a court to grant a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes stated into the record by the trial court. State v Stanley, 365 S C 24, 34, 615 S E 2d 455, 460 (Ct App 2005). "A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." Id. "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." Id.⁴

⁴ Although Appellant does not specifically assert the trial judge erred in denying his motion for mistrial, it is only in his motion for mistrial that he raised the issue he now argues on appeal. We therefore find the proper standard of review to apply is that for a ruling on a motion for mistrial.

LAW/ANALYSIS

Appellant contends he was denied his right to confront witnesses against him when the trial judge ruled certain evidence relevant to his self-defense claim inadmissible, finding the evidence was not a legitimate area of cross-examination until all four elements of self-defense were established. He asserts this ruling was burden shifting, that Appellant had the right to confront the witnesses during the State's case-in-chief, and the ruling was arbitrary and unreasonable. We find no reversible error.

"The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses." State v Holder, 382 S C 278, 283, 676 S E 2d 690, 693 (2009)

The right to present a defense is not unlimited, but must bow to accommodate other legitimate interests in the criminal trial process. The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission.

State v Lyles, 379 S C 328, 342-43, 665 S E 2d 201, 209 (Ct App 2008) (internal citations and quotation marks omitted). Included in the defendant's Sixth Amendment right to confront his accusers is the right to a meaningful cross-examination of an adverse witness, but this does not mean the trial court conducting a criminal trial loses its usual discretion to limit the scope of cross-examination. State v Turner, 373 S C 121, 130, 644 S E 2d 693, 698 (2007). Rather, "trial courts retain wide latitude, insofar as the Confrontation Clause is concerned, to impose reasonable limits on such cross-examination based on concerns about, among other things, prejudice, confusion of the issues, or interrogation that is only marginally relevant." Id. "[A]s to cross-examination specifically, the Confrontation Clause 'guarantees only an

opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish "' State v Stokes, 381 S C 390, 401-02, 673 S E 2d 434, 439 (2009), quoting United States v Owens, 484 U S 554, 559 (1988) In Stokes, the court held admission of extrinsic evidence of a witness's prior inconsistent statement did not violate defendant's Sixth Amendment right of confrontation at a murder trial, even though the witness denied making the statement, where defendant had an opportunity to cross-examine the witness given that the witness appeared at trial, was available for cross-examination, could have been recalled after the extrinsic evidence was admitted, and was not restricted in any way from testifying Id at 398-403, 673 S E 2d at 438-441

The only argument made by Appellant to the trial judge regarding the denial of his right to confront the State's witnesses and a resulting shifting of the burden was in his motion for mistrial There, the discussion of excluded evidence centered around the testimony of Latrice, and Appellant pointed to the following specific evidence as having been improperly excluded (1) evidence the witness knew Appellant had knowledge of Victim's conviction, (2) "Keith Williams and his connection," (3) the murder conviction of Victim, (4) Latrice's knowledge regarding Keith ever having a gun, and (5) the showing of the gun to Appellant on the night in question On appeal, although Appellant points to several rulings of the trial judge excluding evidence from Sammy, Latrice and Alicia in his recitation of the facts, he only specifically argues error in regard to the exclusion of evidence from Latrice Further, while Appellant does also mention in his summary of excluded evidence that of Sammy regarding whether the neighborhood was unsafe and whether it was common for people in the area to carry guns, these matters clearly were not raised in Appellants motion for mistrial⁵ Thus, the

⁵ It should further be noted the trial judge did not exclude this evidence from Sammy on the basis that Appellant had not yet shown the four elements of self-defense were present Rather, the trial judge sustained the objection to the unsafe neighborhood question and why people would carry guns finding only marginal relevance, and determined the relevance was outweighed by the need to focus the issues and avoid confusing the jury with extraneous matter See Rule 403, SCORE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair

only exclusion of evidence Appellant argues on appeal that is preserved for review involves the testimony of Latrice⁶ Though Appellant now asserts error in the exclusion of testimony from Latrice regarding a confrontation between the boyfriend of Latrice's sister, Rocko, and Victim when the boyfriend hit Latrice's sister, as well as testimony from Latrice regarding her knowledge of Victim's prior murder charge, trial counsel did not specifically point to the exclusion of the evidence from Latrice regarding the confrontation between Rocko and Victim Thus, the only argument preserved for review is the exclusion of Latrice's testimony regarding Victim's prior conviction

As noted by the trial judge, Latrice's knowledge of Victim's murder conviction was irrelevant, as it did not show Appellant's knowledge Accordingly, this evidence would not be relevant to the issue of Appellant's self-defense Therefore the trial judge did not err in excluding it See Rule 401, SCRE (providing evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence), State v. Stokes, 339 S C 154, 159, 528 S E 2d 430, 432 (Ct App 2000) (stating evidence should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate the facts)

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence ") As to the testimony from Sammy regarding whether it was common for people in that area to carry guns, the trial judge sustained the State's relevancy objection without comment The judge did not find that all the elements of self-defense would have to be shown before this evidence became admissible

⁶ Further, while Appellant mentions the exclusion of certain evidence from Appellant's sister, Alicia, in his recitation of relevant facts, he does not argue any error in the exclusion in his brief At any rate, this testimony was not from a State's witness, but from Appellant's own witness, and was not ruled inadmissible during cross-examination, but during direct Thus, there would be no merit to any argument that this evidence was wrongfully excluded cross-examination of a State's witness thereby denying Appellant his right of confrontation

Additionally, the trial judge took judicial notice of Victim's prior conviction, and the jury was therefore apprised of that conviction. Further, evidence of Appellant's knowledge of Victim's prior conviction was admitted through Appellant's testimony. See State v. Mercer, 381 S C 149, 163, 672 S E 2d 556, 563 (2009) (finding no prejudice from the exclusion of cumulative evidence)

Even if we were to find trial counsel's general assertion of error in the exclusion of Latrice's testimony sufficiently preserved Appellant's argument concerning Latrice's proffered testimony in regard to the incident between Victim and Rocko, we conclude the trial judge correctly found the testimony of Latrice concerning the alleged incident between Victim and Rocko was inadmissible because Latrice testified she did not remember the confrontation between Victim and Rocko being discussed in front of Appellant. The proffered testimony of Latrice showed only that Appellant knew of the incident occurring between Rocko and Jeanetta, and not that Appellant had knowledge of a confrontation between Rocko and Victim. Thus, this evidence likewise would not be relevant to support Appellant's claim of self-defense.

Finally, we find no merit to Appellant's assertion that the exclusion of Latrice's testimony in the State's case-in-chief violated her right to confrontation. See Turner, 373 S C at 130, 644 S E 2d at 698 (holding the trial courts retain wide latitude, insofar as the Confrontation Clause is concerned, to impose reasonable limits on such cross-examination based on concerns about, among other things, prejudice, confusion of the issues, or interrogation that is only marginally relevant), Stokes, 381 S C at 401-02, 673 S E 2d at 439 (holding as to cross-examination specifically, the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish). Even if the excluded matters complained of by Appellant were relevant such that admission would have been proper during cross-examination, Appellant either elicited the evidence through other means or was given the opportunity to present the evidence when the trial judge changed his ruling and determined self-defense would be submitted to the jury. Before Appellant had concluded the presentation of evidence, the trial judge specifically asked what additional evidence the

defense would like to present based upon this reconsideration of self-defense, and counsel only pointed to the incident between Keith and Appellant on the day of the shooting and evidence concerning Victim's prior conviction. The trial judge ruled both of these admissible, and Appellant then presented evidence on both. As noted by the trial judge in his ruling on Appellant's motion for mistrial, Latrice remained present throughout the trial and was available for Appellant to recall, but he failed to take advantage of that opportunity. Appellant cites no law in support of his proposition that he was entitled to present this evidence on cross-examination during the State's case-in-chief such that any opportunity to subsequently recall the State's witness would be ineffective and he was thereby denied his Sixth Amendment right of confronting witnesses against him. See Stokes, 381 S C at 398-403, 673 S E 2d at 438-441 (wherein the court held admission of extrinsic evidence of a witness's prior inconsistent statement did not violate defendant's Sixth Amendment right of confrontation at a murder trial, even though the witness denied making the statement, where defendant had an opportunity to cross-examine the witness given that the witness appeared at trial, was available for cross-examination, could have been recalled after the extrinsic evidence was admitted, and was not restricted in any way from testifying). Further, we are persuaded beyond a reasonable doubt that, even if any violation of the Confrontation Clause occurred, it was so insignificant that it did not affect the verdict and further find that Appellant has failed to show he was unfairly prejudiced by any limitation on cross-examination of Latrice. See Turner, 373 S C at 131, 644 S E 2d at 698 (noting it is reversible error if the defendant establishes he was unfairly prejudiced by the limitation on cross-examination, and finding no reversible error where the gist of the evidence Appellant desired was elicited through other testimony), State v Whaley, 290 S C 463, 465, 351 S E 2d 340, 341 (1986) (recognizing a criminal defendant is entitled to a fair trial, not a perfect one), see also Stanley, 365 S C at 34, 615 S E 2d at 460 (holding a defendant must show both error and resulting prejudice in order to be entitled to a mistrial).

As to Appellant's assertion that the trial judge's rulings excluding evidence on cross-examination somehow shifted the burden to him, he makes no argument and cites no law in support of this proposition. Accordingly, it is deemed abandoned on appeal. See First Sav Bank v McLean, 314 S C 361, 363, 444 S E 2d 513, 514 (1994) (holding an issue is abandoned where

the appellant fails to provide argument or supporting authority), Wright v Craft, 372 S C 1, 20, 640 S E 2d 486, 497 (Ct App 2006) (noting an issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court), Mulherin-Howell v Cobb, 362 S C 588, 600, 608 S E 2d 587, 593-94 (Ct App 2005) (providing when an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal)

For the foregoing reasons, we find no error in the trial judge's denial of Appellant's motion for a mistrial. Accordingly, his convictions are

AFFIRMED

HUFF, SHORT, and WILLIAMS, JJ, concur

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V

DARIAN K ROBINSON,

PETITIONER

Appeal from Greenville County

John C Few, Circuit Court Judge

Opinion No 2010-UP-356

PETITION FOR REHEARING

Petitioner Darian K. Robinson requests rehearing pursuant to Rule 221(a), SCACR, because this Court may have overlooked two central facts when finding “no reversible error” in this case. The first is this Court must have overlooked *the fundamental trial error* in not allowing cross-examination of the state’s witnesses about facts relevant to self-defense until the judge was satisfied there was evidence of all four elements of self-defense. That causes problems as it did here where the defense *is expected to recall state’s witnesses* that should have been cross-examined as the trial naturally progressed.

Here, the state successfully argued petitioner should be blamed for not recalling a hostile witness, his former girlfriend who was in the center of this dispute, to cross-examine her. This was

after she in so many words on direct insinuated petitioner shot the decedent in cold blood where the decedent did not pose a threat to petitioner. What occurred in this case was so extraordinarily unusual on rulings denying cross-examination about matters of self-defense, and expecting petitioner to recall a hostile witness and blaming him for not doing so that cites to similar self-defense cases in which this occurred should not be expected. Regardless, petitioner cited State v. Washington, 67 S C 76, 623 S E 2d 836 (Ct App 2006), which is almost identical case to the present one and petitioner here requested that this Court issuing a ruling about a pattern that *may be developing* based on these two cases.

In any event, if this is a respect for the memory of the decedent tactic by solicitors it must yield to petitioner's constitutional right to confrontation. The trial judge ruled petitioner could not "attack the victim," and that is a matter often urged by solicitors in a misguided manner. Further, the scope of cross-examination in South Carolina is broad, and legitimate cross-examination cannot be limited. State v. Brewington, 267 S C 97, 226 S E 2d 249 (1976), State v. Jones, 343 S C 562, 541 S E 2d 813 (2001).

Again, what happened in this case is eerily similar to what happened in State v. Washington, 67 S C 76, 623 S E 2d 836 (Ct App 2006), so as to suggest a concerted effort on the part of solicitors to deny defendants asserting self-defense the same procedural rights as other defendants when it comes to the constitutional right to confront and cross-examine witnesses. It also appears to be a determined strategy by solicitors to force defendants in this situation to waive their right to remain silent and to take the witness stand if they are to obtain a self-defense instruction to which they would otherwise be entitled to during a fair and proper trial with cross-examination of the witnesses as they are called by the state.

In Washington, the judge agreed with the solicitor in Charleston and similarly refused to allow defense counsel to cross-examine the state's witnesses about evidence relevant to self-defense until such time as petitioner took the stand and established self-defense. See also State v. Washington, Op No 26526, (filed August 4, 2008) 2008 WL 2952020 (S C). The problem was that once the judge deemed self-defense had been established because of the defendant's testimony, the defense *had been robbed of corroborating evidence* of its self-defense claim that state's witnesses would have been forced to acknowledge was present had cross-examination not been limited.

For example, the state's main witness, Cropper, Washington's former girlfriend and the present girlfriend of the decedent in that case, acknowledged in camera that she made the decedent put his gun in the trunk when she was with him. The jury never heard this corroborating evidence, and Washington's testimony that the decedent was looking for the gun inside his car at the time of the fatal encounter stood without corroboration.

Here, as seen, the judge also reasoned that until there was evidence presented establishing all four elements of self-defense, cross-examination about facts relevant to self-defense could not be elicited during cross-examination of the state's witnesses. That was fundamentally unfair, since one of the primary purposes of cross-examination is having the jury hear concessions of facts unfavorable to its case, and favorable to the defense.

Further, defense counsel correctly argued here the judge's ruling violated petitioner's right to confront the witnesses against him. See State v. Mitchell, 378 S C 305, 662 S E 2d 493 (Ct App 2008). That right to confrontation is based in the Sixth Amendment to the United States Constitution. See State v. Ladner, 373 S C 103, 644 S F 2d 684 (2007).

The court's ruling that petitioner had to attempt to establish all four elements of self defense before he could cross-examine state's witnesses about evidence relevant to self-defense was fundamentally unfair. See State v Fuller, 297 S C 440, 442 443, 377 S E 2d 328, 330 (1989), McAninch, Fahey, Coggiola, The Criminal Law of South Carolina (5th ed 2007) at pp 542 550

Defense counsel correctly argued it was impracticable to establish self-defense prior to the defense testimony. In essence, a criminal defendant pursuing a self-defense claim is denied the same procedural cross-examination as any other defendant under the trial court's reasoning and ruling here. That ruling was respectfully arbitrary, and rather than guidance for the bench and bar petitioner has been blamed in procedural rulings for evidentiary objections and motions which, most respectfully, lose sight of the fact that a procedural bar is a rule of fairness to the trial judge not a rule of affirmance. All of the matters raised before this Court were fully and fairly argued to the trial judge, often during colloquies with trial judge.

Second, the Court's application of a mistrial standard in this case is very troubling. The mistrial motion was based on certain evidentiary rulings by the judge regarding evidence of self-defense that, again, were fully and fairly argued to the trial judge and those arguments were rejected during the trial. This is when the judge offered petitioner a third rate right to recall Latrice and let the jury hear from her yet another time as petitioner's witness so petitioner may be able to get a small measure of self defense evidence out of her at great risk. Petitioner requests rehearing, and he respectfully requests that this Court should reconsider the evidentiary cross-examination issues individually rather than using his mistrial motion as both a shield and a sword.

For example, the Court finds fault with trial counsel for not raising the issue of Sammy not being allowed to testify that was common for people to carry guns in that neighborhood during his mistrial motion. This evidence was essential to the jury's understanding of this case. Further, to the

extent the judge excluded this evidence based on Rule 403, SCRE, that ruling was an abuse of discretion since it was critical the jury have a true picture of the environment in which this case arose

Other evidentiary matters

As this Court will also recall, Defense counsel argued the judge's ruling violated petitioner's right to confrontation "You can't *let them go backwards and then cross-examine the state's witnesses in a defense case* Those witnesses have already testified. The opportunity for cross-examination is gone at that point" Counsel argued this was burden-shifting because the defense had to present evidence of each element of self-defense during the state's case-in-chief which was not practicable R 728, l 4 – 729, l 20 (emphasis added)

For example, defense counsel noted the evidence that Latrice was aware that her cousin, the decedent, had been convicted of murder R 728, ll 4 – 17 The judge responded that petitioner could have recalled Latrice as a witness during his case Defense counsel told the judge *that was not an acceptable solution* given his right to cross-examine and confront the state's witnesses R. 732, l 22 – 733, l 11 Defense counsel argued he had been denied the right to cross-examine the state's witnesses "*from day one*" R 733, l 13 – 734, l 1 (emphasis added)

The judge then said that the defense *was not entitled to attack the character of the victim* The judge once again stated that *until there was evidence of each element of self-defense*, that the defense could not attack the character of the victim R 735, l 1 – 736, l 3

Other self-defense evidence during the state's case-in-chief

When petitioner attempted to get before the jury testimony from Latrice about a confrontation between the decedent and her sister's boyfriend, the solicitor again objected on relevance grounds R 215, l 1 – 217, l 4 Latrice ultimately denied that she remembered that she

and petitioner were told that the decedent had confronted her sister's boyfriend, and the decedent "put his hands on him about Rocko" about hitting his sister R. 223, l 23 – 224, l 11

The judge ruled this incident was not relevant Defense counsel countered that the confrontation was relevant in this case Defense counsel noted the fact that the decedent had attacked Rocko as a result of *what Rocko did to Latrice's sister was connected* what happened in this case and relevant Defense counsel argued he should be allowed to pursue this line of questioning R. 225, l 1 – 228, l 6

Defense case and the continued fight over "establishing self-defense"

During the defense case Alicia Robinson testified, out of the presence of the jury, that petitioner was aware that the decedent had killed his stepfather R. 409, l 6 – 411, l 20

Defense counsel argued the obvious relevance of this evidence that petitioner knew of the decedent's prior murder conviction A long colloquy followed in which the judge questioned defense counsel about the fact petitioner was apparently illegally armed R. 412, l 4 – 421, l 8

Defense counsel argued that petitioner's awareness of the decedent's prior murder conviction was relevant to the issue of petitioner's "reasonable apprehension" of the decedent. R. 421, l 9 The judge ruled that the evidence of the decedent's North Carolina murder conviction could not be admitted through Robinson R. 423, ll 9 – 11

When defense counsel asked Robinson about her conversation regarding whether or not Keith Williams, the father of Latrice's children, owned or possessed a weapon the solicitor objected Defense counsel noted that Williams had contact with petitioner on the night of the shooting The judge sustained the objection R. 434, l 4 – 435, l 9

Petitioner's easily understandable contention throughout this case has been that the state should not be allowed to mandate that petitioner first establish self-defense before he is entitled to

exercise his constitutional right to confrontation and cross-examination of the adverse state's witnesses against him. Given this fundamental constitutional right, petitioner respectfully requests rehearing, and full consideration of his evidentiary issues which all revolve around the denial of his right to present his self-defense claim in an orderly manner without the needless violations of his right to confrontation and right to cross-examine the state's witnesses as they are called to testify.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 27th day of July, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

John C Few, Circuit Court Judge

THE STATE,

RESPONDENT,

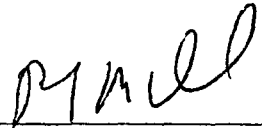
V

DARIAN K ROBINSON,

PETITIONER

CERTIFICATE OF SERVICE

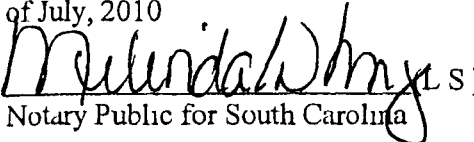
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, this 27th day of July, 2010



Robert M Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of July, 2010



Notary Public for South Carolina

My Commission Expires October 30, 2018

The South Carolina Court of Appeals

The State, Respondent,

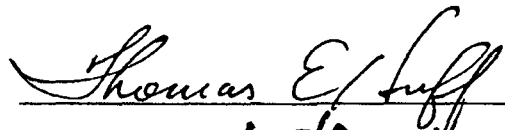
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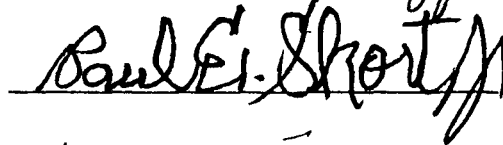
Darian K Robinson, Appellant


The Honorable John C Few
Greenville County
Trial Court Case No 2005-GS-23-05874
2005-GS-23-05889

ORDER DENYING PETITION FOR REHEARING

PER CURIAM After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing
It is, therefore, ordered that the Petition for Rehearing be denied

 J Huff

 J Short

 J Williams

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

John C Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V

DARIAN K. ROBINSON,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M DUDEK
Deputy Chief Appellate Defender for Capital Appeals

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court denied appellant his right to confrontation and legitimate cross-examination of state's witnesses about matters probative of self-defense where the court prohibited any cross-examination of state's witnesses until such time as the court deemed there was evidence establishing all four elements of self-defense, since this ruling was procedurally unfair, and it also was burden shifting?

STATEMENT OF THE CASE

Appellant was indicted by the Greenville County grand jury for the offenses of murder and possession of a firearm during a violent crime R 762 - 765 His case was called to trial on July 16, 2007 before the Honorable John C Few and a jury Christopher D Scalzo and Nihar Manhar Patel represented appellant Leigh Booth Paoletti was the Assistant Solicitor R 1

At the conclusion of the trial on July 19, 2007 the jury found appellant guilty on both counts R 756,1 19 – 757,1 5 The judge sentenced appellant to life imprisonment without parole based on his prior record R 760,1 23 – 761,1 1

This appeal follows

ARGUMENT

The court denied appellant his right to confrontation by ruling evidence relevant to appellant's defense were not legitimate areas of cross-examination until there was evidence establishing all four elements of self-defense. Defense counsel correctly this was burden shifting and that appellant had the right to confront the state's witnesses during the state's case-in-chief. The judge's ruling was arbitrary and unreasonable.

Relevant Facts

Samuel Groves lived near appellant and his girlfriend, Latrice, at the time of the January 26, 2005 housing project shooting. R 86, l 4 – 88, l 2. Latrice's cousin, William Godwin, was the decedent. R 88, ll 1 – 15.

As will be seen infra, what occurred in this case was that appellant hit Latrice the night before his fatal encounter with Godwin, and appellant wanted to show the jury that it was known Godwin was a convicted murderer, and that Godwin reacted physically and violently when he thought a relative had been harmed by a boyfriend. Appellant also wanted to show that guns were commonplace in the unsafe neighborhood. All of this went to appellant's reasonable apprehension of harm at the time of his fatal altercation with Godwin, and therefore his defense of self-defense.

Groves told the police that appellant admitted to him that he "smacked Trice [Latrice, the girlfriend] and the cousin [the decedent] came and confronted him. Again the baby's daddy [Keith Williams, the father of Latrice's children also] "confronted him." R 90, ll 11 -15.

Groves admitted appellant asked him for advice about what he should do where the decedent threatening him because he hit Latrice. Groves said he told appellant that he should stand up for himself. "I told him to fight [the decedent]." "He told me that he had a gun." R 90, l 11 – 92, l 14.

When appellant's girlfriend came back to the apartment they shared the following evening Groves remembered that appellant told her "to stop sending her family at me or your peoples at me or something of that nature right there Stop sending people at me " R 92, ll 19 – 23

Groves' claimed that before appellant ultimately entered the apartment where his girlfriend was inside with her mother and the decedent, he told the group of men standing outside "Ain't no use in ya'll catching a misdemeanor " R 96, ll 4 – 16 Groves testified appellant then entered the apartment and then he heard gunshots shortly thereafter Groves stated that appellant came out of the apartment with "a gun down to his side " R 97, l 15 – 98, l 8 Appellant would later testify, and he denied making the "misdemeanor" statement

When appellant attempted to cross-examine Groves about the fact neighborhood was not a safe place to live to why many people carried guns, the judge sustained the solicitor's relevance objection He rejected defense counsel's argument that this testimony was relevant to rebut the state's claim that appellant armed himself solely to shoot the decedent R 102, l 22 – 105, l 14

Groves testified that appellant told him that both the decedent and Keith Williams, the father of Latrice's children, had confronted him earlier in the day R 109, ll 4 – 19 Groves recalled that appellant asked to use his cell phone before the shooting occurred Groves described appellant's call as "a distress call " There would later be testimony from appellant that he was attempting to get out of the housing project because of the threats being made against him because he had hit Latrice R 110, l 7 – 114, l 7

Defense counsel also asked Sammy Groves if it was common for other people in the area to have guns The solicitor again objected to the relevance of this testimony The judge again sustained the relevance objection R 118, l 19 – 120, l 20

Appellant's girlfriend, Natasha Latrice Atkinson, testified she was appellant's girlfriend at the time of the shooting. Appellant shared an apartment with her, and her two children. R 130, l 5- 132, l 17

Latrice testified on the night before the shooting she argued with appellant, and that appellant hit her in the face in front of her children. R 133, l 14 – 136, l 10. Latrice said this angered her because she never even argued with the father of her children in front of the children. R 136, l 11 – 139, l 21

Latrice testified that appellant confronted her when she returned home the following evening about "telling these lies. Your people ain't going to be rolling up on me, sitting in the parking lot like they're going to do something to me." R 143, l 11 – 144, l 23

Latrice added that appellant used the number "187" when referring to himself. R 145, ll 1 – 8. There would later be state's evidence this was a gang code for murder that originated from §187 of the California Penal Code, the murder statute. R 145, ll 1 – 8. Defense counsel attempts to keep this prejudicial evidence from coming before the jury were unsuccessful. R 145, l 2 – 150, l 3

The fatal encounter

Latrice remembered as she was drinking coffee with her mother that the decedent came to her apartment. R 152, l 22 – 153, l 5. Latrice recalled that appellant later came to the door as the three of them were talking, and Latrice also let appellant inside where the decedent was sitting with her mother. R 157, l 5 – 160, l 8

Latrice said appellant continued to complain to Latrice about her family threatening him. Latrice recalled at this point the decedent got out of his chair, and asked appellant "What do you mean by family?" Latrice testified that appellant then pulled the gun out of his pocket, and "you

heard two loud firecrackers sounds at first ” R 160, l 3 – 161, l 23 Appellant would later testify that the decedent, who was a large man, had ‘rushed’ him immediately before the frightened appellant shot him R 165, l 16 – 167, l 17

Dr Michael Ward, the pathologist, testified the decedent was shot once in the head, once in the chest, and once in the abdomen R 320, l 7 – 331, l 12 Importantly Dr Ward testified the decedent fell forward which indicated “there was some momentum,” meaning corroborating evidence the decedent was moving towards appellant when he was shot R 336, l 12 – 337, l 14

The decedent’s prior murder conviction and the judge’s continued ruling on self-defense

Out of the presence of the jury Latrice acknowledged she knew the decedent had been in prison, and that the decedent had been in prison for “some sort of murder charge ” R 179, l 16 – 181, l 22 Latrice also remembered appellant and the decedent had talked and they both referred to “the smell of blood” and “hurting somebody or killing somebody that I guess it leaves you with the memory of blood or something you don’t forget ” Latrice said she remembered the conversation about smelling the presence of blood vividly because appellant and the decedent were both talking about it and how it affected them once they had been exposed to it R 181, l 13 – 183, l 21

The judge ruled that there was no any evidence yet in the case that appellant knew the decedent had committed a murder, and that could not be heard by the jury R 184, l 24 – 185, l 15

Defense counsel would later argue that for a long period of time “that the judge ruled that self-defense had to be established prior to being relevant” R 728, ll 4 – 8 The judge acknowledged he ruled there had to be evidence to support “*all the elements [of self-defense]* before something that was unrelated to the case *other than to prove self-defense* became relevant and therefore became admissible ” R 728, ll 9 – 13 (emphasis added)

Defense counsel argued the judge's ruling violated appellant's right to confrontation "You can't let them go backwards and then cross-examine the state's witnesses in a defense case Those witnesses have already testified The opportunity for cross-examination is gone at that point" Counsel argued this was burden-shifting because the defense had to present evidence of each element of self-defense during the state's case-in-chief which was not practicable R 728, l 4 – 729, l 20

For example, defense counsel noted the evidence that Latrice was aware that her cousin, the decedent, had been convicted of murder R 728, ll 4 – 17 The judge responded that appellant could have recalled Latrice as a witness during his case Defense counsel told the judge that was not an acceptable solution given his right to cross-examine and confront the state's witnesses R 732, l 22 – 733, l 11 Defense counsel argued he had been denied the right to cross-examine the state's witnesses "*from day one*" R 733, l 13 – 734, l 1 (emphasis added)

The judge then said that the defense was not entitled to attack the character of the victim The judge once again stated that until there was evidence of each element of self-defense, that the defense could not attack the character of the victim R 735, l 1 – 736, l 3

Hannah Paulette Edens, Latrice's mother and the aunt of the testified after Latrice R 228, l 23 – 231, l 8 Edens testified when she returned with Latrice from their janitorial job that evening appellant was "outside my daughter's door talking to Sammy" R 231, ll 11 -16

Other testimony

Edens recalled at the time of the fatal incident that the decedent was seated at her dining room table She remembered appellant knocked on the door at that time R 236, l 4 – 237, l 25

Once inside, Edens said that appellant and Latrice were bickering back and forth R 238, ll 2 – 4 Edens remembered appellant said he was tired of them having their family threaten him

Edens recalled at this point the decedent got out of his chair, and Edens said appellant shot him. She said appellant then turned around, and “walked out of the door as if he hadn’t did a thing,” R 239, l 15 – 241, l 7. Defense counsel objected to Edens’ characterization of appellant as he was leaving the apartment. That objection was overruled. R 241, ll 8 – 16.

Other self-defense evidence during the state’s case-in-chief

When appellant attempted to get before the jury testimony from Latrice about a confrontation between the decedent and her sister’s boyfriend, the solicitor again objected on relevance grounds. R 215, l 1 – 217, l 4. Latrice ultimately denied that she remembered that she and appellant were told that the decedent had confronted her sister’s boyfriend, and the decedent “put his hands on him about Rocko” about hitting his sister. R 223, l 23 – 224, l 11.

The judge ruled this incident was not relevant. Defense counsel countered that the confrontation was relevant in this case. Defense counsel noted the fact that the decedent had attacked Rocko as a result of *what Rocko did to Latrice’s sister was connected* what happened in this case and relevant. Defense counsel argued he should be allowed to pursue this line of questioning. R 225, l 1 – 228, l 6.

Defense case and the continued fight over “establishing self-defense”

During the defense case Alicia Robinson testified, out of the presence of the jury, that appellant was aware that the decedent had killed his stepfather. R 409, l 6 – 411, l 20. The judge then asked if there was any evidence that appellant did not know the decedent was inside the apartment where the decedent was sitting at the time appellant entered. Defense counsel argued that the answer to that question did not change the relevance of this evidence that appellant knew of the decedent’s prior murder conviction. A long colloquy followed in which the judge questioned defense counsel about the fact appellant was apparently illegally armed. R 412, l 4 – 421, l 8.

Defense counsel argued that appellant's awareness of the decedent's prior murder conviction was relevant to the issue of appellant's "reasonable apprehension" of the decedent R 421, l 9 The judge ruled that the evidence of the decedent's North Carolina murder conviction could not be admitted through Robinson R 423, ll 9 – 11

When defense counsel asked Robinson about her conversation regarding whether or not Keith Williams, the father of Latrice's children owned or possessed a weapon the solicitor objected Defense counsel noted that Williams had contact with appellant on the night of the shooting The judge sustained the objection R 434, l 4 – 435, l 9

Appellant testifies

Appellant testified that on the day of the shooting the decedent was continuously threatening him The decedent told appellant at one point that if he was not gone when he returned that he would kill him R 466, l 1 – 471, l 9 Appellant's said he tried to convey to the decedent that he did not want any trouble R 471, ll 10 – 15 Appellant testified that he was scared because Keith, the mother of Latrice's children, and the decedent were both threatening him that day R 476, l 13 – 478, l 21

Appellant acknowledged he confronted Latrice about "sending your family around" to threaten him after he had hit Latrice R 479, ll 14 – 23 Appellant remembered that he had called his friend Travis for a ride so that he could get away from the apartment complex before there was any trouble R 478, ll 2 – 4

Appellant said at the time of the fatal incident, which occurred inside the apartment, that he again told Latrice that her family had been threatening him all day R 490, l 16 – 491, l 5 Appellant recalled at this point the decedent got of his chair, and "he walks at me [more] like a

rush he had his hand balled up and ran towards me now I'm thinking that I am going to get hurt and I'm scared " R 491, ll 15 – 24

The solicitor objected that this line of questioning was not relevant The judge this time stated he was going to overrule the objection, but he wanted further clarification about the testimony R 492, l 2 – 494, l 11

Appellant said he could not safely retreat from the situation and that is the reason he shot the decedent when he rushed him R 498, l 2 – 503, l 4 Appellant said he left with Travis following the shooting and he admitted he hid at a local motel because he was scared Appellant said he saw himself displayed on television as a fugitive and possibly armed Appellant was scared that the police would shoot him R 508, l 7 – 509, l 16 Appellant also testified he never used the term "187" to refer to himself R 509, l 17 – 510, l 9

The judge finally revealed that he would charge self-defense based on appellant's testimony The judge said he was still concerned that appellant had not established the element that "he was without fault in bringing on the difficulty" However, the judge said "*so I m gonna change my mind and I think self-defense is going to be charged*" R 537, l 9 – 538, l 5 (emphasis added) The judge then agreed the jury could hear that the decedent had a prior conviction for murder R 648, l 15

The judge told the jurors immediately before closing arguments that he was taking judicial notice "of the fact that the victim in this case was or had been convicted of second degree murder in North Carolina in 1989 " R 676, ll 16 – 19

As seen above, defense complained that the judge's prohibiting cross-examination of state's witnesses until such time as he deemed all four elements of self-defense were established denied appellant his right to confront and cross-examine the state's witnesses Counsel also argued that the

judge's ruling was impermissibly burden shifting Counsel finally argued that recalling witnesses after the judge deemed self-defense was established was not an acceptable alternative for the right of cross-examination during the state's case-in-chief

Discussion

Appellant had the right to cross-examine the state's witnesses during the state's case-in-chief where they had evidence that was relevant and corroborative of appellant's self-defense claim The judge's reasoning that appellant had to establish evidence of all four elements of self-defense before he could cross-examine the state's witnesses about evidence relevant to it was burden shifting, and it denied appellant his right to confrontation, and effective cross-examination Appellant had the right to develop his self-defense claim where the state's witnesses had evidence relevant to it The state's right to present its case-in-chief does not entitle it to have only testimony with inferences favorable to its case, and against any defense or lesser-included defense the defendant may later seek See State v Gordine, 322 S C 296, 472 S E 2d 241 (1996)

Further, the scope of cross-examination in South Carolina is broad, and legitimate cross-examination cannot be limited State v Brewington, 267 S C 97, 226 S E 2d 249 (1976), State v Jones, 343 S C 562, 541 S E 2d 813 (2001)

What happened in this case similar to what happened in State v Washington, 67 S C 76, 623 S E 2d 836 (Ct App 2006), wherein the judge similarly refused to allow defense counsel to cross-examine the state's witnesses about evidence relevant to self-defense until such time as appellant took the stand and established self-defense See also State v Washington, Op No 26526, (filed August 4, 2008) 2008 WL 2952020 (S C) The problem was that once the judge deemed self-defense had been established because of the defendant's testimony, the defense had been robbed of corroborating evidence of its self-defense claim that state's witnesses would have

been forced to acknowledge was present had cross-examination not been limited. For example, the state's main witness, Cropper, Washington's former girlfriend and the present girlfriend of the decedent in that case, acknowledged in camera that she made the decedent put his gun in the trunk when she was with him. The jury never heard this corroborating evidence, and Washington's testimony that the decedent was looking for the gun inside his car at the time of the fatal encounter stood without corroboration.

Here, as seen, the judge reasoned that until there was evidence presented establishing all four elements of self-defense, cross-examination about facts relevant to self-defense could not be elicited during cross-examination of the state's witnesses. That was fundamentally unfair, since one of the primary purposes of cross-examination is having the jury hear concessions of facts unfavorable to its case, and favorable to the defense.

Further, defense counsel correctly argued here the judge's ruling violated appellant's right to confront the witnesses against him. See State v Mitchell, 378 S C 305, 662 S E 2d 493 (Ct App 2008). That right to confrontation is based in the Sixth Amendment to the United States Constitution. See State v Ladner, 373 S C 103, 644 S E 2d 684 (2007).

The court's ruling that appellant had to attempt to establish all four elements of self-defense before he could cross-examine state's witnesses about evidence relevant to self-defense was fundamentally unfair. See State v Fuller, 297 S C 440, 442-443, 377 S E 2d 328, 330 (1989), McAninch, Fahey, Coggiola, The Criminal Law of South Carolina (5th ed 2007) at pp 542-550. Defense counsel correctly argued it was impracticable to establish self-defense prior to the defense testimony. In essence, a criminal defendant pursuing a self-defense claim is denied the same procedural cross-examination as any other defendant under the trial court's reasoning and ruling.

here That ruling is arbitrary and unreasonable, and appellant respectfully suggests guidance from this Court is needed for the benefit of the bench and bar

Appellant had the right to present evidence regarding the confrontation between the decedent and Rocko over Rocko hitting the decedent's relative – Latrice's sister This was another violent intervention by the decedent, and it was relevant to show how the decedent reacted violently and threatened people when he thought that they had hurt a member of his family See State v Day, 341 S C 410, 535 S E 2d 431 (2000) Why should appellant not have reasonably thought a similar violent reaction was not going to follow the decedent's threats where appellant hit Latrice?

Similarly, Latrice's testimony that she was aware of the decedent's prior murder charge was relevant It was not conclusive evidence on whether the jury should conclude appellant had further reason to fear the decedent who was threatening him However, the definition of relevant evidence is broad It is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" See Rule 401, SCRE, State v Alexander, 303 S C 377, 401 S E 2d 146 (1991), State v Schmidt, 288 S C 301, 342 S E 2d 401 (1986), Collins, South Carolina Evidence, §9 1 at pp 241-247 (2000 ed)

Further, defense counsel correctly argued that recalling Latrice at the conclusion of his case was not an acceptable alternative to his right to confront and cross-examine the state's witnesses as the state's case was be presented The state, in essence, under the trial court's ruling, was allowed to put forth its theory of the case without any inconvenient truths being elicited on cross-examination The judge reasoned appellant could pursue the "unforgettable smell of blood" testimony because it was a "double edged sword" which cut against appellant also

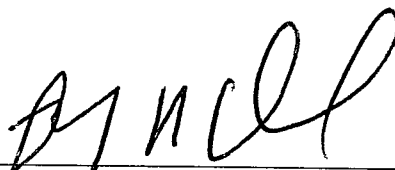
The only certain thing in this case is that this Court does not have to draw inferences from the record. The judge announced that there would be no evidence of self-defense allowed until he determined the record had established all four elements of self-defense. The judge was true to his word on the unsafe neighborhood evidence, the people carrying guns evidence, the refusal to allow appellant to elicit that Latrice was aware of the decedent's prior murder, and the refusal to allow appellant to pursue Latrice's alleged lack of memory about what the decedent did to Rocko. See State v Green, 318 S C 426, 458 S E 2d 73 (1995)(evidence of strong drug activity in the area should not have been excluded where it was relevant to show *why* the police were stopping people)¹ Appellant was denied his right to meaningful cross-examination, and the ruling was burden shifting. The trial court's arbitrary procedural ruling was fundamentally unfair, and it should not stand.

¹ The evidence was relevant here to show *why* appellant was carrying a gun in this self-defense case.

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

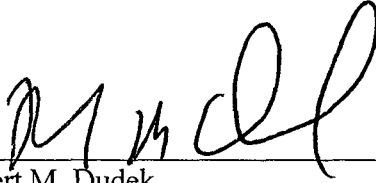
ATTORNEY FOR APPELLANT

May 29, 2009

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings "

May 29, 2009

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

John C Few, Circuit Court Judge

THE STATE,

RESPONDENT,

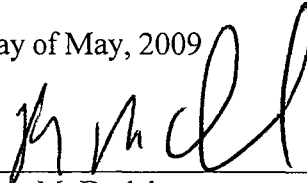
V

DARIAN K ROBINSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, Senior Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm 519, Columbia, SC 29201, this 29th day of May, 2009

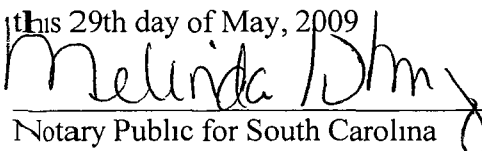


Robert M Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me

this 29th day of May, 2009

 (L S)
Notary Public for South Carolina

My Commission Expires October 30, 2018

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Greenville County
Honorable John C Few, Circuit Court Judge**

THE STATE,

Respondent,

vs

DARIAN KYLE ROBINSON,

Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the court denied appellant his right to confrontation and legitimate cross-examination of state's witnesses until such time as the court deemed there was evidence establishing four elements of self-defense, since this evidence was procedural[ly] unfair, and it also was burden shifting?

COUNTER STATEMENT OF ISSUES ON APPEAL

I Whether Appellant's argument that the trial judge denied his right "to confrontation and legitimate cross-examination of state's witnesses until such time as the court deemed there was evidence establishing four elements of self-defense" is not preserved for appellate review, where Appellant did not make the same argument in a contemporaneous objection and he cannot bootstrap this omission by his subsequent motion for a mistrial, which he made immediately before the trial judge's jury charge?

II Whether Appellant can show a prejudicial abuse of discretion resulting from the trial judge's rulings on evidence supposedly pertaining to Appellant's claim of self-defense, where (1) the evidence at issue was irrelevant or otherwise inadmissible when initially proffered because there was absolutely no evidence of self-defense at that time, (2) the trial judge ultimately admitted virtually all of the evidence in question and permitted Appellant to present it for the jury's consideration, and (3) Appellant, apparently for strategic reasons, refused to recall the key prosecution witness at issue (his girlfriend) and cross-examine her on matters pertaining to self-defense even though she was still present in the courtroom?

STATEMENT OF THE CASE

Darian K. Robinson (Appellant) is currently incarcerated in the Correctional Institution, of the South Carolina Department of Corrections, as the result of his Greenville County, South Carolina convictions for murder and possession of a firearm during a violent crime, and his sentence of life imprisonment without parole (LWOP). The Greenville County Grand Jury indicted him at the March 15, 2004 term of court for murder and possession of a firearm during a violent crime. Christopher D. Scalzo and Nihar Manhar Patel, Esquires, represented him on these charges. Assistant Thirteenth Circuit Solicitor Leigh B. Paoletti prosecuted the case for the State.

Appellant received a jury trial before the Honorable John C. Few on July 16-19, 2007. The jury found Appellant guilty of both offenses, and Judge Few sentenced him to LWOP based upon his prior convictions.¹

Appellant timely served and filed a Notice of Appeal. This appeal follows.

¹ His prior convictions include armed robbery, burglary in the second degree and kidnapping. The State complied with S.C. Code Ann. § 17-25-45 (Supp. 2007), by serving trial counsel with notice of its intention to seek an LWOP sentence on July 3, 2007. **R pp 758-59**

ARGUMENT

Assuming that Appellant's argument is preserved for this Court's review, even though not raised until he made his mistrial motion, immediately before the trial judge's jury charge, Appellant cannot show a prejudicial abuse of discretion resulting from the trial judge's rulings on evidence supposedly pertaining to his claim of self-defense because (1) the evidence at issue was irrelevant or otherwise inadmissible when initially proffered because there was absolutely no evidence of self-defense at that time, (2) the trial judge ultimately admitted virtually all of the evidence in question and permitted Appellant to present it for the jury's consideration, and (3) Appellant, apparently for strategic reasons, refused to recall the key prosecution witness at issue (his girlfriend) and cross-examine her on matters pertaining to self-defense even though she was still present in the courtroom

Respondent submits that Appellant's argument is not preserved for this Court's review because he did not raise the same argument in a contemporaneous objection, and he cannot bootstrap this omission by his subsequent motion for a mistrial, which he did not make until immediately before the trial judge's jury charge. Alternatively, Respondent submits that Appellant cannot show a prejudicial abuse of discretion resulting from the trial judge's rulings on evidence supposedly pertaining to his claim of self-defense because (1) the evidence at issue was irrelevant or otherwise inadmissible when initially proffered because there was absolutely no evidence of self-defense at that time, (2) the trial judge ultimately admitted virtually all of the evidence in question and permitted Appellant to present it for the jury's consideration, and (3) Appellant, apparently for strategic reasons, refused to recall the key prosecution witness at issue (his girlfriend) and cross-examine her on matters pertaining to self-defense even though she was still present in the courtroom.

A Proceedings in the trial court

Based on *State v Day*, 341 S C 410, 419-421, 535 S E 2d 431, 436-437 (2000), the State made a motion *in limine* to bar introduction of evidence that the victim had a 1989 conviction for second degree murder because of the remoteness of the conviction and because Appellant could not

meet the other criteria for admission of this conviction. The State further argued that the conviction would only have any relevance if there was evidence presented that Appellant was aware of it. After entertaining arguments from both parties, the trial judge ruled that the conviction should not be mentioned until he was presented with *in camera* evidence establishing that Appellant knew of the conviction at the time of the shooting. **R pp 2-8**

Thereafter, the State presented two eyewitnesses to the shooting of William Godwin (the victim) on January 27, 2005. Latrice Atkinson and her mother, Paulette Evans. These women were the first cousin and maternal aunt, respectively, of the victim. The shooting occurred in Mrs. Evans' Greenville County, South Carolina, apartment. The only other persons present were Appellant and the victim. Neither witness' testimony supported any element of a self-defense charge.

Latrice testified that she and Appellant had an argument early in the morning of January 26, 2005, that Appellant hit her several times during the argument, that her face was visibly bruised, and that she did not see Appellant during the rest of the day, until she and her mother returned from her mother's janitorial job around 11:20 p.m. Inferably, he was talking to Sammy Groves when she arrived, but he soon began asking her why she had been telling her family "these lies." He also told her that the family members were not going to be "rolling up" to him and "sitting in the parking lot like they [are] going to do something to me. They don't know who I am." He also said that he was "187," which is street slang for murder and has its origin in the California Penal Code section for the crime of murder. **R pp 128-45**

Both women testified that after Latrice and Mrs. Evans took her daughters into her apartment and she put her daughters to bed, Latrice went to Mrs. Evans' apartment to have coffee, which they routinely did. They were soon joined by the victim, who frequently drank coffee with them.

Appellant knocked on the door after they had been enjoying themselves for several minutes in Mrs Evans' kitchen, and Latrice went to the door, unlocked it and let him into the apartment. Although the victim and the women were seated, Appellant stood the whole time. He was upset and he immediately began complaining again about her family intervening in their lives. At some point, the victim got up from his seat, walked closer to Appellant, stopped and asked him that he meant by her family. Appellant immediately pulled his gun from his pocket and fired two shots. He then fired three or four more shots, and the victim fell to his knees before falling face first to the floor. Appellant left the apartment. Both women testified that the victim was unarmed at the time of the shooting, the victim had not threatened Appellant verbally or physically before the shooting, the victim did not rush Appellant, and that the victim did not have anything in his hands when Appellant shot him. **R pp 145-47, 153-78, 186-222, 228-53**

Sammy Groves testified that he and Appellant had a conversation outside of Appellant's apartment on the night of January 26, 2005, in which Appellant told him that Appellant and Latrice had been fighting. Appellant also said that the victim and Keith Williams, the father of Latrice's children "had come at him about fighting her." Groves told Appellant he should fight them. However, Appellant said that he had a .38 gun. Groves confirmed that Appellant had told Latrice, upon her arrival at the apartment complex, that "you need to stop sending your family at me or your people at me." **R pp 85-92**

Before Appellant went to Mrs Evans apartment, the victim arrived and asked the men where Latrice was. Groves told him that she at her mother's apartment and the victim went there. At that point, Appellant borrowed Groves' cell phone, which Groves retrieved from his residence, and brought into the apartment. Appellant and Latrice shared. Appellant made two calls. Groves

described one as a “distress call,” and he testified that he thought that Appellant had called for a ride. Soon, “some guys” arrived and they all went outside. These men were “amped up” and ready to fight. Rather than leave the complex, Appellant walked past the group, telling them that “ain’t no use in y’all catching a misdemeanor.” About five minutes after Appellant had entered Mrs. Evans’ apartment, Groves heard five gunshots, and Appellant walked out of the apartment with the gun at his side. **R pp 92-97**

On his cross-examination of prosecution witness, Groves, Appellant attempted to ask Groves whether the apartment complex where the shooting occurred was “not the safest of neighborhoods.” Appellant claimed that he wanted to establish that there are “other reasons for why” he had the gun. **R pp 102-04**

The trial judge sustained the State’s relevancy objection. He found that whatever marginal relevance this evidence had was “outweighed by the need to focus on the issues and avoid confusing the jury by bringing in extraneous matter.” However, he added that “I’m not saying that you can’t present that evidence. I’m [only] sustaining one objection to one question as to one witness.” **R pp 104-05** The trial judge later sustained the State’s objection to Appellant’s question, which Groves answered in the negative, of whether it was “common” for Groves to know people who have guns. **R pp 118-19**²

Latrice Atkinson, again one of only three eyewitnesses to the homicide (including Appellant), also testified for the prosecution. On Appellant’s cross-examination of Latrice, Appellant elicited that the father of her children, Keith Williams, lived in Spartanburg, and that Appellant and Williams had known one another before she began dating Appellant. **R pp 174-75** He also elicited evidence

² Groves denied knowing that the victim had a “conviction for murder.” **R p 121**

about the first time that she had met the victim, her cousin, William Godwin **R pp 177-78**

At that point, the trial judge granted Appellant's request to address a matter of law outside of the jury's presence. *In camera*, he elicited evidence that the victim had told her that he had "been in jail before." Although he did not tell her why, other family members told her that it was "some sort of murder charge." When the victim later discussed it with her, he explained that the charge arose from something happening to his mother. **R pp 182-83**

She never discussed this with Appellant, although she did recall hearing a conversation between Appellant and the victim. This took place after Appellant had beaten her on another occasion. The men were discussing "the smell of blood" and the memory of what happens when a person kills someone. She was not sure what they were discussing, and both men seemed to be in agreement with each other. Again, she denied ever discussing with Appellant that the victim had a conviction for killing someone. **R pp 181-93**

The trial judge ruled that this testimony was inadmissible because her knowledge of the victim's conviction was not connected to Appellant, and because there was no evidence that he was aware of the conviction. However, the trial judge ruled that Appellant could elicit the conversation between Appellant and the victim in which the men discussed the "the taste of blood," if Appellant wished to do so. **R pp 183-85**

Before Appellant began his recross-examination of Latrice, the trial judge allowed another *in camera* hearing. At this point, Appellant asked Latrice whether she and Appellant were present when Rocco, the boyfriend of Latrice's female counsel, Jeanetta, said that the victim "had put his hands on" Rocco because Rocco had hit Jeanetta. Latrice denied remembering this and explained that *she* had told Appellant about the incident between Rocco and Jeanetta. However, that incident

occurred three or four years before Latrice and Appellant began date She admitted that Rocco made a statement “about Will [the victim] saying something different,” but, Rocco never explained what the statement was **R pp 222-24**

Appellant argued that this query was relevant to her credibility because she could be impeached through the testimony of an unidentified individual The trial judge sustained the State’s relevancy objection **R pp 224-28**

Before Appellant presented his case-in-chief, the State noted that he was planning to call his sister as a witness, and that she would presumably testify that Appellant was aware of the victim’s conviction The State noted that it had “multiple objections” to his testimony So the trial judge listened to her testimony *in camera* **R pp 405-08**

Alicia Robinson, Appellant’s sister, testified *in camera* that she and Appellant had a conversation in “a summer month” before the shooting about how the victim was provoking her The victim was dating her sister, who lived there as well Appellant told her that she needed to get him out of her house, and he told her that the victim had been to jail for killing his stepfather **R pp 408-11**

The trial judge sustained the State’s objection, after listening to lengthy arguments by Appellant He found that the conversation that Appellant had presented *in camera* was “not connected in point of time” to the offense, and he found that the 1989 conviction was not “closely connected in point of time or occasion” to the killing, so as to reasonably indicate Appellant’s state of mind He also was concerned that Appellant was, as a matter of law, not without fault in bringing on the difficulty, in light of *State v Slater*, 373 S C 66, 644 S E 2d 50 (2007), and *State v Santiago*, 370 S C 153, 634 S E 2d 23 (Ct App 2006) **R pp 408-23**

The trial judge sustained the State's objection to Appellant's question of whether his sister knew that Keith Williams owned or had possession of a weapon **R p 434** On cross-examination, it became clear that Alicia Robinson had not seen Appellant on the day of the shooting **R p 439**

The judge initially refused to reverse any of his previous rulings because he was concerned that Appellant was not without fault in bringing on the difficulty, as a matter of law under *Slater* and *Santiago* **R pp 731-39, 492-96** However, the trial judge ultimately reversed many of his earlier rulings *See R pp 526-41, 640-50, 666-73*

As a result, Appellant was permitted to testify that (1) the victim had come to his apartment on four separate occasions on January 25, 2005, and at least twice threatened to kill him if he had harmed Latrice and did not leave the apartment complex, (2) that Keith Williams, the father of Latrice's children, had also come by once that day and threatened him for hitting Latrice in front of her daughters, (3) that Williams had brandished a gun when he made the threat, and it appeared to Appellant that both the victim and Williams had been together or had heard the same information from the same person, Jeanetta, (4) that the victim had a tattoo on his arm which signified that he was a "gunman," (5) and that the victim had previously killed his stepfather, which Appellant referred to as a murder Even though Appellant claimed that he did not think that the victim would act out on the threats previously made that day because he behaved better when around Mrs Evans, as he was at the time of the shooting, Applicant claimed that the previous threats and his knowledge of the prior killing by the victim caused him to be scared and nervous This was why he armed himself when he went to Mrs Evans' apartment to talk with Latrice about her family interfering in their personal lives on the night of the shooting **R pp 731-32, 462-91, 494-507, 511-12, 541-53**

Also, the trial judge subsequently instructed the jury that he was taking judicial notice "of

the fact that the victim in this case was or had been convicted of second degree murder in North Carolina in 1989 ” **R p 676, ll 16-19**

Immediately before the trial judge’s jury instructions, however, Appellant moved for a mistrial. He argued that the trial judge had ruled that “self-defense had to be established” before the proffered evidence relating to self-defense could be relevant. The trial judge explained that he had ruled that “there had to be evidence to support all of the elements [of self-defense] before something that was unrelated to the case other than to prove self-defense became relevant and therefore became admissible ” **R p 728**

Appellant contended that the effect of the trial judge’s ruling was to preclude “the defense’s right of confrontation during the State’s case,” that the opportunity for cross-examination was lost at that point, and that it was insufficient to recall witnesses in Appellant’s case in defense. He therefore moved for a mistrial based upon the order in which he had to challenge the State’s case to preserve the issue for appellate review. **R pp 728-29**

The trial judge asked what specific evidence had been precluded, and he asked if it was testimony by Latrice that the victim had the prior conviction. Appellant agreed that he was complaining about that ruling, but he stated that he was also referring to her testimony about Keith Williams’ “connection ” The trial judge did not recall any proffered testimony through her about Williams. Because Appellant was complaining about an infringement on his right to confront witnesses, the trial judge noted that Latrice was still present and he asked why Appellant did not simply call her. Appellant contended that his right was to confront her during the State’s case. **R pp 729-33**

Appellant further contended that “self-defense was relevant from Day 1 ” It was his position

that this excluded evidence should have been admitted to begin to establish his claim of self-defense. He further contended that the trial judge's suggestion that he call Latrice was done "out of context," and that this was "forcing the defense to put the witness up." He claimed that the alleged error was not curable and it was "burden-shifting." **R pp 733-35**

The trial judge, however, noted that the mistrial motion did not preserve the issue for appellate review. **R p 734, ll 4-6** Further, in denying the motion, he correctly observed that

[I]n an ordinary case when self-defense is not an issue, you are not entitled to attack the character of the victim[]

R p 735, ll 2-5 He likewise correctly explained that

Before you can attack the character of a victim, there has got to be some evidence that makes self-defense relevant. As I am sitting here in the State's case, it is impossible to look forward into your case to see whether or not evidence is going to come forward that might make self-defense as an issue. I have no choice. I don't think as an evidentiary matter but to foreclose the attack of the character of the victim during the State's case when it is not yet clear and self-defense is ever going to be an issue. That is my view of it.

R p 735, l 15 - p 736, l 1

B Appellant's argument, which he first raised in his motion for a mistrial, is not preserved for appellate review because he did not raise it by contemporaneous objection.

Although Appellant proffered the testimony discussed above and he disagreed with the trial judge's ruling that otherwise inadmissible and irrelevant evidence could not be introduced absent some proof that the shooting was in self-defense, he did not contemporaneously argue that the trial judge's rulings violated his Sixth Amendment right to confront witnesses or that the rulings unconstitutionally shifted the burden of proof to him. Rather, he first argued this after closing arguments and after the trial judge had initially charged the jury. **See R pp 728-36** This did not

preserve the issue for appellate review

In *State v Sullivan*, 310 S C 311, 314, 426 S E 2d 766, 768 (1993), the Court noted that an appellant must object at his first opportunity to preserve an issue for appellate review. Other cases, more tedious than difficult to enumerate, stand for the proposition that a contemporaneous objection is required to preserve an error for appellate review. *E g*, *State v Crowley*, 226 S C 472, 85 S E 2d 714 (1955) (an objection to evidence must be contemporaneous and must be upon a specified ground), *State v Prioleau*, 345 S C 404, 411, 548 S E 2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error), *State v Black*, 319 S C 515, 462 S E 2d 311 (Ct App 1995), *State v Wilkins*, 310 S C 81, 425 S E 2d 68 (Ct App 1992)

Further, if a party fails to make a proper contemporaneous objection to the admission of evidence, he cannot later raise the issue by a motion for mistrial. *See State v Atchison*, 268 S C 588, 235 S E 2d 294 (1977), *State v Lynn*, 277 S C 222, 226, 284 S E 2d 786, 789 (1981) (“Failure to contemporaneously object to [a] question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial”), *See also State v Groome*, 274 S C 189, 192, 262 S E 2d 31, 32 (1980) (“Failure to contemporaneously object to the questions now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial”), *McElveen v Ferre*, 299 S C 377, 381, 385 S E 2d 39, 41 (Ct App 1989) (upholding the trial court's denial of a motion for a new trial where the error was not preserved), *Idaho v Higgins*, 122 Idaho 590, 836 P 2d 536, 550 (1992) (the trial court had no basis to grant a new trial where the issue was not properly preserved during the trial), *Louisiana v Marcotte*, 817 So 2d 1245, 1250 (La Ct App 2002) (“In our opinion, a motion for new trial does not preserve or revive an issue not properly and timely raised by objection. This is true

because, by the time a new-trial motion is made, the trial court has lost its best opportunity to correct the error at issue”), *Schacher v Dunne*, 109 Or App 607, 820 P 2d 865, 867 (1991) (“An error that is not preserved cannot properly form the basis for a motion for a new trial”), *Carlson Mining Co v Titan Coal Co*, 343 Pa Super 364, 494 A 2d 1127 (1985) (noting a trial court may only award a new trial on questions that are preserved), 66 C J S *New Trial* § 17 (1998) (“Although there is some authority to the contrary, generally matters not properly pleaded, or put in issue, or preserved, may not be raised on a motion for a new trial”)

In the present case there was no contemporaneous objection on the same ground advanced in support of Appellant’s mistrial motion. Therefore, the present argument is not properly before this Court on appeal.

C Appellant cannot show any prejudice from the trial judge’s rulings

Alternatively, the Court should reject Appellant’s argument because he cannot show any conceivable prejudice resulting therefrom. “The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal.” *Gambell v Int l Paper Realty Corp*, 323 S C 367, 373, 474 S E 2d 438, 441 (1996) “[T]he trial judge must have wide discretion on the innumerable questions of relevancy before him.” *State v Anderson*, 253 S C 168, 182, 169 S E 2d 706, 712 (1969) To warrant reversal, an Appellant “must show both the error of the ruling and resulting prejudice.” *Recco Tape & Label Co v Barfield*, 312 S C 214, 216, 439 S E 2d 838, 840 (1994), *State v Hamilton*, 344 S C 344, 353, 543 S E 2d 586, 591 (Ct App 2001) See also *Fields v Reg'l Med Center Orangeburg*, 363 S C 19, 26, 609 S E 2d 506, 509 (2005) (citations omitted) (finding that to warrant a reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting

prejudice, i e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof), Rule 103, SCRE (providing that “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected”)

Likewise, the trial court has broad discretion in determining the general range and extent of cross-examination *State v Smith*, 275 S C 164, 268 S E 2d 276 (1980) The United States Supreme Court has explained that “[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish ” *Delaware v Fensterer*, 474 U S 15, 20 (1985) “[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on [] cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant ” *Delaware v Van Arsdall*, 475 U S 673, 679 (1986) *See also Taylor v Illinois*, 484 U S 400, 410 (1988) (“The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence”)

The South Carolina Supreme Court has also held that

The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers *State v Saltz*, 346 S C 114, 551 S E 2d 240 (2001) This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination *Id* On the contrary, trial courts retain wide latitude, insofar as the Confrontation Clause is concerned, to impose reasonable limits on such cross-examination based on concerns about, among other things, prejudice, confusion of the issues, or interrogation that is only marginally relevant *Id*

State v Turner, 373 S C 121, 130, 644 S E 2d 693, 698 (2007) *See also State v Compton*, 366 S C

671, 681, 623 S E 2d 661, 666 (Ct App 2005) (“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 ’ ‘This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination”) (citing *State v Graham*, 314 S C 383, 385, 444 S E 2d 525, 527 (1994) and *State v Aleksey*, 343 S C 20, 33-34, 538 S E 2d 248, 255 (2000))

Here, Appellant cannot show any conceivable prejudice resulting from the trial judge’s ruling “For a defendant to argue self-defense, the record must demonstrate that "(1)[he] was without fault in bringing on the difficulty, (2) [he] actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief, and (4)[he] had no other probable means of avoiding the danger " *State v Chatman*, 336 S C 149, 153, 519 S E 2d 100, 103 (1999) *See also Slater* The prosecution’s evidence did not provide any support for any element of a self defense charge To the contrary, the State’s evidence was that Appellant murdered William Godwin in cold blood

Therefore, the evidence that Appellant proffered was irrelevant to any issue before the jury when he originally proffered it For example, under Rule 405(b), SCACR

In cases in which character or a trait of character of a person is an essential element of a defense, proof may also be made of specific instances of that person’s conduct

The notes to the Rule specifically indicate that Rule 405(b) is identical to the federal rule and is consistent with prior South Carolina case law *See* Note to Rule 405, SCACR In *State v*

Amburgey, 206 S C 426, ___, 34 S E 2d 779, 780 (1945), the Court held that

The rule has long been established in this State that evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant, or, *if directed against others were so closely connected in point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide or to produce reasonable apprehension of greatly bodily harm*

citing *State v Hill*, 129 S C 166, 123 S E 817 (1924) (emphasis added) *See also Day*, 341 S C at 419-421, 535 S E 2d at 436-37

“Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused *State v Brown*, 321 S C 184, 186-87, 467 S E 2d 922, 923-24 (1996) (citation omitted) Further, Rule 405(a), SCRE, provides that “[i]n all cases in which evidence of character or a trait of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion On cross-examination, inquiry is allowable into relevant specific instances of conduct ”

Therefore, under limited circumstances, evidence of the victim's reputation for violence and turbulence, and evidence of his prior conviction might be relevant if “so closely connected in point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of greatly bodily harm ” *Amburgey*, and *Day, supra* ³ However, this evidence is irrelevant and inadmissible in the absence of any evidence that Appellant shot the victim in self-defense *See Quintana v State*, 452 So 2d 98, 100

³Alicia Robinson's testimony that Appellant told her that he knew of the victim's conviction was inadmissible hearsay **R pp 408-11**

(Fla 1st DCA 1984) (evidence establishing the victim's reputation for violence may not be admitted without the proper predicate demonstrating an overt act by the victim indicating to the defendant the need for self-defense), *Milton v State*, 245 Ga 20, 22, 262 S E 2d 789 (1980) (The defendant may present evidence of the victim's general reputation or character for violence “only when there has been a prima facie showing (by the defendant) that three elements are present that the deceased was the assailant, that the deceased assailed defendant, and that defendant was honestly seeking to defend himself’ *Curtis v State*, 241 Ga 125, 126(1) (243 SE2d 859) (1978)”), *State v Anderson*, 785 S W 2d 596, 600 (Mo App 1990) (“In the case at bar the defendant did not make a *prima facia* showing from the evidence of the elements of self-defense justifying the use of deadly force The literal reading of § 563 033 prohibits the battered spouse syndrome where the defendant has not been able to raise the issue of self-defense This is consistent with the law in other states”) (citations omitted), *State v Walters*, 284 Kan 1, 10, 159 P 3d 174 (2007) (defendant on trial for murder, after laying a proper foundation by evidence tending to show that he or she acted in self-defense, or in defense of another, may introduce evidence of the turbulent and quarrelsome character of the deceased), *State v Ruane*, 912 S W 2d 766, 779-81 (Tenn Crim App 1995) (Before proof that the victim was the first aggressor may be admitted on the direct testimony of any witness, the question of self-defense must be raised by evidence in the record Words and statements of counsel are not sufficient The trial court must then determine if there is a factual basis underlying the proffered testimony, and whether the probative value of the evidence must outweigh any prejudicial effect)

Because Appellant was the only other eyewitness to the shooting, only his testimony could provide evidence of self-defense and make the otherwise inadmissible evidence relevant and

admissible⁴ His constitutional right to not testify undermines his argument that the proffered evidence should have been admitted through his prosecution witnesses, and then he could present evidence warranting a jury instruction on self-defense. There was simply no guarantee that he would testify and provide evidence of self-defense. The trial judge's ruling did not compel his testimony or shift the burden of proof to him.

Rather, he simply was not entitled to a self-defense charge in the absence of it. Indeed, if the trial judge had permitted the introduction of the proffered evidence, even though there was no evidence to support a jury charge on self-defense, then Appellant could sit back, not offer any evidence and conjure up a defense from a caldron full of otherwise irrelevant, prejudicial and inadmissible evidence that improperly attacked the victim's character and the character of the residents in neighborhood where the shooting occurred. He did not have any right to do this, and the trial judge would have abused his discretion by allowing it. *Cf., State v Adams*, 354 S C 361, 378, 580 S E 2d 785, 794 (Ct App 2003) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and

⁴ The State disagrees with the trial judge's decision to admit the conviction, for the reasons argued by the Assistant Solicitor below. Additionally, the State submits that the trial judge's initial ruling that he was not without fault in bringing on the difficulty was correct as a matter of law, since he deliberately went to his mother-in-law's apartment, armed with a pistol, to have a discussion with Latrice about the subject matter that caused the victim to threaten to kill him earlier in the day. Appellant could have simply left the apartment complex. *See Slater, supra, Santiago supra* (finding defendant was not without fault in bringing on difficulty where he brought a loaded gun to the victim's home), *State v Strickland*, 147 S C 514, 143 S E 404 (1928) (one cannot seek another for purpose of raising a difficulty and abetting a wrong, and plead self-defense), *State v Trammell*, 40 S C 331, 18 S E 940 (1894) (one who enters a room and provokes a quarrel is not entitled to assert self-defense). Appellant was certainly not without fault in bringing on the difficulty. However, the State's argument is submitted because the trial judge ultimately decided to submit self-defenses to the jury.

are obligated to give great deference to the trial court's judgment ") (internal citations omitted) ⁵

While a defendant has the right to exercise his privilege against self-incrimination and not testify, if he cannot complain about the exclusion of testimony that is necessarily predicated on his testimony for its introduction, if he fails to testify *E g , Brown v State*, 340 S C 590, 594, 533 S E 2d 308, 310 (2000) ("The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions") (citation omitted)

More importantly, Appellant's contention that he was entitled to a mistrial lacks any plausible merit for two additional reasons. First and as discussed, the trial judge changed his mind on a number of key rulings. Based upon his ultimate rulings on the matters proffered by Appellant, the jury heard Appellant's testimony testify (1) that the victim had come to his apartment on four separate occasions on January 25, 2005, and at least twice threatened to kill him if he had harmed Latrice and did not leave the apartment complex, (2) that Keith Williams, the father of Latrice's children, had also come by once that day and threatened him for hitting Latrice in front of her daughters, (3) that Williams had brandished a gun when he made the threat, and it appeared to Appellant that both the victim and Williams had been together or had heard the same information from the same person, Jeanetta, (4) that the victim had a tattoo on his arm which signified that he was a "gunman," (5) and that the victim had previously killed his stepfather, which Appellant referred to as a murder. Even though Appellant claimed that he did not think that the victim would act out on the threats previously

⁵ Indeed, this seems to have been the real purpose underlying the evidence proffered on cross-examination

made that day because he behaved better when around Mrs Evans, as he was at the time of the shooting, Applicant claimed that the previous threats and his knowledge of the prior killing by the victim caused him to be scared and nervous. This was why he armed himself when he went to Mrs Evans' apartment to talk with Latrice about her family interfering in their personal lives on the night of the shooting. **R pp 454-55, 462-91, 494-507, 511-12, 541-553** Also, the trial judge subsequently instructed the jury that he was taking judicial notice "of the fact that the victim in this case was or had been convicted of second degree murder in North Carolina in 1989." **R p 676, ll 16-19**

At trial, the only specific points that Appellant contended had excluded were testimony by Latrice that the victim had the prior conviction, and her testimony about Keith Williams' "connection." **R pp 729-33** This evidence would have been merely cumulative to Appellant's testimony and its exclusion was not prejudicial. *See State v Mercer*, Op No 26582, 2008 WL 5479611, 7 (S C S Ct, Feb 19, 2009) (because excluded evidence was presented to the jury through other witnesses, defendant sustained no prejudice from the exclusion of the cumulative evidence), *Commerce Center of Greenville Inc v W Powers McElveen & Assocs Inc*, 347 S C 545, 559, 556 S E 2d 718, 726 (Ct App 2001) ("Generally, there is no abuse of discretion where the excluded testimony is merely cumulative of other evidence proffered to the jury") *See also People v Evans*, 104 Ill App 3d 598, 432 N E 2d 1285, 1290 (Ill App 1982) (error of trial court, in prosecution for aggravated battery, in excluding evidence of victim's prior conviction for murder, offered by defendant to show reasonableness of defendant's apprehension of imminent harm as part of his self-defense theory, was harmless, because defendant was not prevented from establishing his knowledge of victim's background and developing basis for his defense, so that error complained of

could not have influenced jury's verdict), *Com v Hoey*, 57 Mass App Ct 1114, 785 N E 2d 427 [(Table), 2003 WL 1477773 (Mass App Ct , March 24, 2003)] (any error in exclusion of record of assault victim's prior conviction did not give rise to substantial risk of miscarriage of justice, where on cross-examination defendant testified to his personal knowledge of victim's reputation for violence and stated, without objection, that “[the victim] has quite a record of being arrested for violence, assault and batteries[.]” and that he knew that victim had engaged in “many fights, bar fights[,]” and further suggested that victim's hot temper was inflamed by consumption of alcohol)

The second reason Appellant cannot show prejudice is that Latrice was still present and available to be called to the stand. However, Appellant deliberately chose not to avail himself of the opportunity to call her and examine her about these matters. Moreover, calling her as a witness and further examining her about these two matters would not have adversely impacted any right of his, since he had already lost the right to last argument by testifying. Also, there was no real danger that she would have been viewed as a witness who was sympathetic to him.

Finally, Appellant complains on appeal about exclusion of the incident that supposedly occurred between “Rocco” and the victim. He further contends that it was error to exclude the evidence the offense occurred in a bad neighborhood. However, he did not present these arguments in support of the mistrial motion. They are therefore barred under *Sullivan* and *Wilkins, supra*. Moreover, he did not present any evidence that would support the admission of either of these two matters. Therefore, the trial judge’s ruling must be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that Appellant’s conviction and sentence of LWOP should be affirmed.

made that day because he behaved better when around Mrs Evans, as he was at the time of the shooting, Applicant claimed that the previous threats and his knowledge of the prior killing by the victim caused him to be scared and nervous. This was why he armed himself when he went to Mrs Evans' apartment to talk with Latrice about her family interfering in their personal lives on the night of the shooting. **R pp 454-55, 462-91, 494-507, 511-12, 541-553** Also, the trial judge subsequently instructed the jury that he was taking judicial notice "of the fact that the victim in this case was or had been convicted of second degree murder in North Carolina in 1989." **R p 676, ll 16-19**

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By  _____
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on behalf of WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

June 1, 2009

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Greenville County
Honorable John C Few, Circuit Court Judge**

THE STATE,

Respondent,

vs

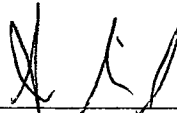
DARIAN KYLE ROBINSON,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S C 56, 650 S E 2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses)

This 1st day of June, 2009



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**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Greenville County
Honorable John C Few, Circuit Court Judge**

THE STATE,

Respondent,

vs

DARIAN KYLE ROBINSON,

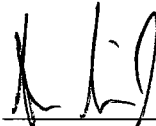
Appellant

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr , on behalf of William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing three (3) copies of the same in the United States mail, addressed to his attorney of record, Robert M Dudek, Esq , SCCID, Division of Appellate Defense, 1330 Lady St , Suite #401, Columbia, SC 29201

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

This 1st day of June, 2009



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

John C Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V

DARIAN K ROBINSON,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The state's argument that appellant later introduced some of its self-defense evidence ignores the fact that denying a defendant his right to confrontation by ruling evidence relevant to the defense are not legitimate areas of cross-examination until there was evidence establishing all four elements of self-defense is fundamentally unfair. It is beginning to look like an organized strategy of some solicitors in this state to deprive a defendant of a fair trial in a self-defense case under the guise of protecting the decedent's reputation. Defense counsel correctly the judge' ruling was burden shifting, that it was impractical to expect the defense to establish self-defense during the state's case, and that appellant had the right to confront the state's witnesses during the state's case-in-chief.

As stated, what occurred in this case is nearly identical to what happened in State v Washington, 67 S C 76, 623 S E 2d 836 (Ct App 2006), which was reversed on an evidentiary error but affirmed in result in State v Washington, 379 S C 120, 665 S E 2d 602 (2008). Washington was a Charleston case where a different judge refused to allow relevant cross-examination until such time as all four elements of self-defense were established. It shows an apparent concerted effort by some solicitors to deny defendants their right to a fair trial during a murder-self-defense case under the guise of protecting the decedent's character from attack. Appellant respectfully submits this Court should strongly hold that not allowing relevant cross-examination about self-defense during the state's case-in-chief is a violation of the defendant's right to confrontation and reversible error.

The state argues that the judge ultimately admitted "virtually all of the evidence in question," and that appellant did not recall the key prosecution witness and cross-examine her on matters pertaining to self-defense. " Respondent's brief at 2. That is a clear

admission that the trial judge was altering the natural course of the trial to appellant's disadvantage. Appellant had the *Constitutional right* to confront and cross-examine the witnesses against him as they testified. He was not obligated to establish the four elements of self-defense, and then have the burden of recalling prosecution witnesses if he desired a fair trial.

As seen, appellant attempted to cross-examine Sammy Groves about the fact their neighborhood was not a safe place to live to explain why many people carried guns. The judge sustained the solicitor's relevance objection. The judge rejected defense counsel's argument that this testimony was relevant *to rebut* the state's claim that appellant armed himself solely to shoot the decedent. R. 544, l. 22 – 547, l. 14.

Defense counsel also asked Groves if it was common for other people in the area to have guns. The solicitor again objected to the relevance of this testimony. The judge again sustained the relevance objection. R. 560, l. 19 – 562, l. 20.

As this Court will recall, out of the presence of the jury Latrice, appellant's girlfriend, acknowledged she knew the decedent had been in prison, and that the decedent had been in prison for "some sort of murder charge." R. 622, l. 16 – 624, l. 22. Latrice also remembered appellant and the decedent had talked and they both referred to "the smell of blood" and "hurting somebody or killing somebody that I guess it leaves you with the memory of blood or something you don't forget." Latrice said she remembered the conversation about smelling the presence of blood vividly because appellant and the decedent were both talking about it and how it affected them once they had been exposed to it. R. 624, l. 13 – 626, l. 21.

The judge ruled that there was not any evidence yet in the case that appellant knew the decedent had committed a murder, and that this evidence therefore could not be heard by the jury R 627, l 24 – 628, l 15 Defense counsel would argue that for a long period of time “that the judge ruled that self-defense had to be established prior to [this self-defense evidence] being relevant” R 728, ll 4 – 8 The judge **acknowledged he had ruled** there had to be evidence to support “*all the elements [of self-defense]* before something that was unrelated to the case *other than to prove self-defense* became relevant and therefore became admissible” R 728, ll 9 – 13 (emphasis added) This directly counters the state’s argument that appellant complained too late

Defense counsel correctly argued the judge’s ruling violated appellant’s right to confrontation “You can’t let them go backwards and then cross-examine the state’s witnesses in a defense case Those witnesses have already testified The opportunity for cross-examination is gone at that point” Counsel argued this was burden-shifting because the defense had to present evidence of each element of self-defense during the state’s case-in-chief which was not practicable R 728, l 4 – 729, l 20

For example, defense counsel noted the evidence that Latrice was aware that her cousin, the decedent, had been convicted of murder R 728, ll 4 – 17 The judge responded that appellant could have recalled Latrice as a witness during his case Defense counsel told the judge that was not an acceptable solution given his right to cross-examine and confront the state’s witnesses R 732, l 22 – 733, l 11 Defense counsel argued he had been denied the right to cross-examine the state’s witnesses “*from day one*” R 733, l 13 – 734, l 1 (emphasis added) The state’s argument to contrary in its brief is untenable

The judge then said that the defense was not entitled to attack the character of the “victim ” The judge once again stated that until there was evidence of each element of self-defense, that the defense could not attack the character of the victim R 735,1 1 – 736,1 3

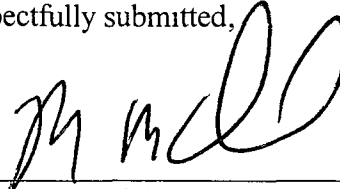
With all due respect the trial judge misapprehended the fact that a self-defense case is not an attack on the character of the decedent Unfortunately, a self-defense case during a murder trial cannot also be a feel good exercise for the decedent’s family

The confrontation problem continued throughout the trial as appellant outlined in his initial brief The state’s right to present its case-in-chief does not entitle it to have only testimony with inferences favorable to its case, and against any defense or lesser-included defense the defendant may later seek See State v Gordine, 322 S C 296, 472 S E 2d 241 (1996) The scope of cross-examination in South Carolina is broad, and legitimate cross-examination cannot be limited State v Brewington, 267 S C 97, 226 S E 2d 249 (1976), State v Jones, 343 S C 562, 541 S E 2d 813 (2001), State v Mitchell, 378 S C 305, 662 S E 2d 493 (Ct App 2008) That right to confrontation is based in the Sixth Amendment to the United States Constitution See State v Ladner, 373 S C 103, 644 S E 2d 684 (2007) Appellant should be granted a new trial

CONCLUSION

By reason of the foregoing argument, and the arguments in appellant's initial brief, appellant's conviction should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

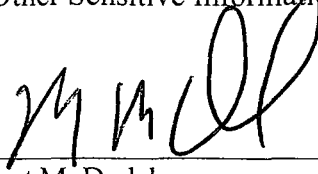
Robert M Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT

May 29, 2009

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings"



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT

y 29, 2009

STATE OF SOUTH CAROLINA

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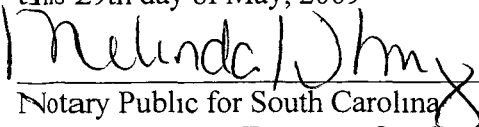
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, Senior Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm 519, Columbia, SC 29201, this 29th day of May, 2009.



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of May, 2009

 (L.S.)
Notary Public for South Carolina
My Commission Expires October 30, 2018