THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF GENERAL SESSIONS

Appellate Case No. 2012-213631

Edward B. Cottingham, Circuit Court Judge

Case No. 2012-GS-26-00859

State of South Carolina, ... Respondent,

v.

Rickey Mazique, ... Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Appellant, Rickey Mazique, was indicted for Armed Robbery by the Horry County Grand Jury. A pre-trial hearing was held on November 8, 2012. A jury trial was held on November 15-16, 2012, the Honorable Edward B. Cottingham presiding. The Appellant was represented by initially by Melinda A. Knowles at the pre-trial hearing and by Melinda A. Knowles and James C. Galmore at the start of the trial. On the day of the trial and prior to the selection of the jury, the Appellant was allowed to proceed self-represented. Galmore and Knowles were required to sit with the Appellant to assist if requested by the Appellant. The Appellant proceeded throughout the trial and sentencing self-represented. The State was represented by Joshua D. Holford and Bradley C. Richardson at trial. Brenda R. Babb was the court reporter for the pre-trial hearing and trial of the case. The jury returned a verdict of guilty on the charge of armed robbery. The Appellant was sentenced to twenty-five years incarceration. The Appellant timely filed notice of appeal. J. Falkner Wilkes substituted as counsel prior to briefing of the case and represents the Appellant on the appeal of this case.

ARGUMENT

I. IN LIGHT OF THE APPELLANT'S TIMELY MOTION THE COURT ERRED IN REFUSING TO CONDUCT A PROPER HEARING AND APPOINTMENT OF SUBSTITUTE COUNSEL.

The Appellant's case was set for trial the week of November 8, 2012. Due to some conflict, the exact nature of which is unclear from the record, the trial was rescheduled for the following week. On November 8th the court heard a limited number of pretrial motions. During the hearing the Solicitor announced that the State would be proceeding to trial the following week only on the armed robbery charge. 3. At the pre-trial hearing the Appellant moved the court to relieve his attorney (Knowles) and have another attorney appointed. 3, l. 20-21. The court summarily denied the motion without inquiry. 4. l. 4-5. The Appellant, arguing his own motion, was quick to recognize and point out that the court had ruled without even hearing his grounds for the motion. 4, l. 11-16. The court indicated that it would listen to the Appellant's grounds but then cut the Appellant off before he finished. 4, l. 20-24. The trial judge never conducted a proper inquiry into the basis for the Appellant's motion to have new counsel appointed.

In the Appellant's case the trial court's failure to conduct a through inquiry resulted in a lack of record for this Court to affirm the trial court's denial of the Appellant's motion. It was the trial court's duty to create a record when requested and the failure to do so has prejudiced the Appellant. When a defendant raises a seemingly substantial complaint about counsel, the judge "has an obligation to inquire thoroughly into the factual basis of defendant's dissatisfaction." Hart, 557 F.2d at 163; *see also* Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir. 1982), *cert. denied*, 461 U.S. 916, 103 S.Ct. 1896, 77 L.Ed.2d 285 (1983); *Schwarzer, Dealing with*

Incompetent Counsel — The Trial Judge's Role, 93 Harv. L.Rev. 633, 652 (1980); *cf.* Wood v. Georgia, 450 U.S. 261, 272, 101 S.Ct. 1097, 1104, 67 L.Ed.2d 220 (1981) (holding that mere possibility of a conflict of interest triggers duty to inquire). The trial court must make the kind of inquiry that might ease the defendant's dissatisfaction, distrust, or concern. Hudson, 686 F.2d at 829. That inquiry should be on the record. Smith v. Lockhart, 923 F.2d 1314 (8th Cir. 1991).

An inquiry into the reasons for a defendant's dissatisfaction with his or her lawyer is necessary for the trial court to determine whether good cause for substitution of counsel exists. *See* United States v. Welty, 674 F.2d 185, 188 (3d Cir. 1982); United States v. Mullen, 32 F.3d 891 (4th Cir. 1994). A motion for new counsel filed as little as thirty-two days prior to trial has been deemed timely. *See* United States v. Mullen, 32 F.3d 891 (4th Cir. 1994). In this case the Appellant had timely filed a motion for new counsel on September 14, 2012, almost two months prior to the hearing. 57-58; Motion. Despite the timely motion, the matter was not brought before the court until the Appellant raised it in his pre-trial motion the week before the trial. 57. The trial court apparently did not have a copy of the motion during the hearing. 3. When it was raised by the Appellant the court refused to conduct an inquiry when informed that the motion had been filed by the Appellant. 3, l. 15-21. It was therefore error for the court to refuse to conduct a proper inquiry.

Despite the lack of a proper inquiry and resulting sparsity of record, through the Appellant's repeated attempts to raise the issue the record in pieces shows a number of reasons the Appellant was dissatisfied with appointed counsel. One of the Appellant's particular points of dissatisfaction with his counsel was counsel's intentional waiver of the Appellant's right to a preliminary hearing without the Appellant's knowledge or consent. Knowles admitted that she

had waived the Appellant's right to a preliminary hearing without the Appellant's consent and that it was her office policy to waive all preliminary hearings. 12, l. 20-13, l. 1. The court denied the Appellant's motion to relieve appointed counsel on that basis. 6. The Appellant alleged other grounds for his dissatisfaction with his attorney, including the failure to obtain evidence relating to certain tape recordings which the State had transferred onto a CD for trial. 6-8. Again the court did not allow the Appellant to complete his arguments, summarily cutting off the Appellant. 7-8. The Appellant appears to have been attempting to argue based on his attorney's handling of alleged discrepancies in the dates and times shown on video's and those indicated in the police reports. As it turns out, the discrepancy in the dates turned out to be a valid point that he later established during the trial. The Appellant went on to articulate additional grounds for his dissatisfaction with Knowles. 9-12.

An additional point of dissatisfaction was the attorney's handling of the issue involving the evidence seized from the search of the girlfriend's residence. 12-13. Apparently cartons of cigarettes which the State claimed came from the robbery had been photographed and the cartons returned to the store before the defense attorney took steps to inspect them. 12-14. The Appellant took issue with the loss of his ability to establish from the information on the packaging that the cartons did not come from the particular store involved in this case. 13. The court cut the Appellant off. 12, l. 15-18. Before the Appellant could finish his argument, the court stated that his position was "ridiculous" and "absurd". 13, l. 6-9.

The Appellant's dissatisfaction with his attorney continued and he raised the issue of removing Knowles again. 16. The Appellant informs the court that he has other issues, lost trust, and that there is no line of communication with her. 16. Knowles informed the court that there

was indeed a total break down in communication. 6; 26-27. One of the Appellant's many issues with Knowles was that in the year the case had been pending she had not interviewed the State's key witness in the case. 15. The court then indicates that trying to change lawyers is a common tactic at the last minute to try and put off a trial. 16. In response, the Appellant indicates that he has affidavits "in here" showing that he has been "trying to get rid of my lawyer from the beginning." 17, l. 1-2. When the Appellant insisted that he did not want Knowles as his lawyer the judge gives him three choices, to use her, to proceed *pro se*, or to hire his own attorney. 18. Although the Appellant wanted another lawyer appointed, when told that he can not have one, the Defenadant said unequivocally that if he can't have another lawyer, he'll be his own lawyer. 18, l. 15-18.

After some discussion the court finally acknowledged that the Appellant had the right to represent himself, but that Knowles would "sit" with him. 18, l. 23-19, l. 2. The court says to Knowles that the Appellant has that right, but once he starts representing himself, "he cannot later get you. You can sit there and advise him if you -- you understand that?" 19, l. l. 6-8.[1] The Appellant continued to express his dissatisfaction with being forced to have Knowles even participate based on his lack of trust in her. 19, l. 3.

There is a lot of discussion about whether the Appellant was *pro se* and that Knowles is "sitting" with him. 18-21. The court held that Knowles was still representing him because of the Appellant's statements that he didn't want to be *pro se*, he just didn't want Knowles. 20-21. Judge ruled that Knowles would continue until the Appellant said that he wanted to go pro se. 21. Knowles asked the judge to inquire of him again specifically what the Appellant wanted to do,

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[1]This was incorrect as a self-represented defendant may at any time request counsel.

but the judge refused, stating that he would do that on the day of trial. 21. The judge said that he didn't want to fall into that trap. 21. Discussion continues with Knowles bearing some of the brunt of the court's comments. 21-24. The court ordered Knowles to continue and denied the Appellant the right to file his own motions. 24. The court then stated that it will hear the *Jackson v. Denno* motion and possibly some other motions. 26. The court then continued without ever having conducted a through inquiry. As a result it refused to substitute counsel or allow the Appellant to represent himself.

Particularly relevant are the court's comments to the jury after the verdict was rendered which reveal the lack of an unbiased decision in the court's consideration of the Appellant's motion. "Well I have a rule a defendant will accept the [Attorney] that the Court appoints or he can pay for his own lawyer or he can represent himself but I'm not going to let a defendant decide [for] me who his lawyer is." 349, l. 3-6.

Here, considering the timeliness of the Appellant's motion to substitute counsel and the total break-down in communication between Knowles and the Appellant, it was error for the trial court not to conduct a proper inquiry and substitute counsel.

II. THE APPELLANT WAS DENIED THE RIGHT TO SELF REPRESENTATION AT A CRITICAL STAGE OF THE PROCEEDINGS.

Despite the Appellant's unequivocal statement that, given the choices he would proceed *pro se,* the pre-trial hearing continued to the *Jackson v. Denno* issue with Knowles representing. During the *Jackson v. Denno* hearing the Appellant attempted to make an objection. 33, l. 14-15. The judge told the Appellant to be quiet that instructed him that if he had a problem, to "take it through his lawyer." 34. The Appellant then responded that he had no communication with

Knowles and that "she was not his lawyer". 33, l. 21-22. The Appellant subsequently stated repeatedly that he did not want Knowles and that he would represent himself. 34, l. 9-11. The court failed to conduct a *Faretta* hearing even though Knowles pointed that: "Your Honor, you said a minute ago that you would only remove me if he said on the record to you that he did not want me and he wanted to represent himself." 16-18. 34. For some reason the court immediately responded that "I haven't heard him say that." 34, l. 19-20. Even the State asked that the court to conduct a proper inquiry on whether the Appellant wanted to waive his right to an attorney and proceed pro se. 35. The court still failed to conduct a *Faretta* hearing.

Knowles pointed out that the Appellant had stated "outright the wanted to represent himself." 35, l. 16-17. Again, no *Faretta* inquiry was made, instead, the court berated Knowles as "trying to get out" of the case, told her that she was raising her voice, and that he was leaving her in the case. 35. 19-20. Without further inquiry, the court ruled that it wouldn't allow the Appellant to represent himself until the trial. 35. The judge stated that "At the appropriate time, if he wants to represent himself, I'll deal with it. *I'm not gonna deal with it until this Jackson v. Denno hearing is over*." 35, l. 23-36, l. 3.

During the *Jackson v. Denno* hearing the Appellant, in an attempt to represent himself, tried to raise an issue with one of the recordings. 45. The Appellant was again instructed by the court to talk to Knowles. 45. The Appellant stated again that he would represent himself. 45. Ignoring the Appellant and addressing only Knowles, the court stated that she would continue representing the Appellant. 45. The Appellant stated in no uncertain terms that repeatedly that he wanted to represent himself:

> The Court: Please -- Ms. Knowles, let me say this to you. This is a serious case. In spite of him, I want you to continue in the case---

Mr. Mazique: I want to represent myself.
The Court: Ms. Knowles, you will continue to represent him --
Mr. Mazique: I want to represent myself.
The Court: --- and continue to prepare for trial. If next week, he wants to represent himself, I'm gonna give him that opportunity.
Mr. Mazique: I want to represent myself at this hearing right now.
The Court: But I want you to prepare him for trial and do everything you can to ---
Mr. Mazique: This is a crucial part of my trial. This is pretrial ---
The Court: If he wants to represent -- he wants to represent himself ---
Mr. Mazique: ---and I want to represent myself right now. I don't want her representing me.

T. 45, l. 20-T. 46, l. 15;

Knowles reiterated to the court: "He wants to represent himself --. 47, l. 12. Refusing to conduct an inquiry the court stated: "I'm not going to do that now. I want him to have a lawyer under these technical issues." 47, l. 15-16. Although Knowles pointed out that the Appellant wanted to represent himself and question the witness the court still refused: "No, I'm not going to permit that at this time. Have a seat; let's proceed." 47, l. 20-21. The court in no uncertain terms refused to conduct a *Faretta* hearing or allow the Appellant to represent himself or question the witness. 47.

Several times during the remainder of the hearing the Appellant attempted to act in his own defense, but was ordered to sit down and be quiet. 51-52. The Appellant was not allowed to question the officer and the court asked Knowles if she wanted to "inquire as to authenticity?" 53, l. 4-5. Knowles asked two questions and quit. 53. The Appellant attempted to continue the inquiry but was ignored, and the court instructed the witness to step down from the stand. 53.

Again the Appellant asked specifically if the court was going to allow him to represent himself at trial, why couldn't he represent himself at this hearing to lay the foundation for his apparent objection. 54. And again, the court expressly stated that it was "not gonna do it at this

time." 55. To which the Appellant stated that the court was letting him know "that this whole hearing was a sham." 54, l. 19-20. The Appellant explained to the court that he wanted to represent himself at the pretrial hearing because it was the most important part of the trial: "You Honor, and I'm asking you, you say you're trying to help me and I'm telling -- I'm explaining to you, I understand the law. I understand that the pretrial proceeding is the most important part of the trial." 55, l. 16-19. The court still refused to conduct a *Faretta* hearing.

At the end of the pre-trial hearing the court inquired of the Appellant's attorney when she first learned that the Appellant did not want her to represent him. 57. During this questioning by the court as to what would be attorney client privilege, the Appellant was saying: "Don't do that. Don't do that." 57, l. 6. The court asked if it was "Last night?" 57, l. 7. Knowles said that she knew the last time that she met with the Appellant, which was "the last time we spoke last month." 57, l. 4-5. Apparently, a motion to relieve counsel had been filed at least one month, and as much as two months, earlier. 57-58. Clearly not a last minute stall tactic.

A week later, on the day of trial, the Appellant again insisted on representing himself. 8. The court finally inquired about self-representation, citing State v. Bryant. 8-11. The Appellant's right to proceed *pro se* was discussed, and the judge gave the Appellant adequate warnings as to self-representation. 29. The judge told the Appellant that he does not know the law of evidence, hearsay or what is admissible or not admissible, and that representing himself was pure "folly". 30-31. Given the alternative between having the two lawyers that were present or self-representation, the Appellant again insisted on self-representation. 31. The Court inquired if Appellant wanted help picking jury. 34. The Appellant declined help from the two attorneys and proceeded to represent himself throughout the jury strike process. 34.

Then, despite having struck his own jury, the Appellant was again denied the right to self-representation when the second attorney sitting as stand-by counsel interjected a response waiving any objection by the defense to the selection of the jury. 57, l. 11. The jury composition subsequently changed when one alternate juror was excused. Shortly thereafter, and still before the jury was sworn, the Appellant raised a Batson challenge.[2] 63-64. The court refused to conduct a Batson hearing based on there having been no objection made. 64. Stand-by counsel's unwanted participation and waiver of the Appellant's right to a Batson hearing therefore prevented the Appellant from challenging the composition of the jury.

The Sixth Amendment guarantees criminal defendants the right to representation by counsel at every critical stage of the prosecution. Turner v. Calderon, 281 F.3d 851, 879 (9th Cir. 2002). The Sixth Amendment right to counsel extends to all critical stages of a criminal proceeding. *See, e.g.*, Missouri v. Frve. 132 S.Ct. 1399, 1405 (2012); Lafler v. Cooper, 132 S.Ct. 1376, 1385 (2012); Smith v. Murray, 477 U.S. 527, 535-36 (1986). A critical stage of trial is "any stage that may significantly affect the outcome of the proceedings" Traylor v. State, 596 So.2d 957, 968 (Fla.1992).

The Sixth Amendment further guarantees every criminal defendant the "right to proceed without counsel when he voluntarily and intelligently elects to do so." State v. Barnes, 27322 (S.C. 1-15-2014) *citing* Faretta, 422 U.S. at 807. Faretta established that a defendant has an independent fundamental right guaranteed by the Sixth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, to represent himself at all stages of criminal proceedings if he elects to do so. A trial court cannot force a defendant to

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[2] Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

accept counsel or refuse to dismiss a court appointed counsel if the defendant elects to represent himself. *See* Parker v. State, 1976 OK CR 293.

In addition to the Sixth Amendment, the right to represent one's self is also protected by the South Carolina Constitution. The South Carolina Constitution provides that every criminal defendant has the right to represent himself and makes no distinction between capital and non-capital defendants. S.C. Const., art. 1, § 14; State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997). Additionally, the United States Supreme Court has interpreted the United States Constitution as providing a right to self-representation. *See* Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) ("The Sixth Amendment, when naturally read, thus implies a right of self-representation."). State v. Starnes, 388 S.C. 590 (2010). *See also*: McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

Here, although the court indicated several times that the Appellant was entitled to represent himself, it refused to conduct a proper Faretta hearing, or allow him to represent himself at the pre-trial stage of the case. Then at trial the Court further denied the Appellant the right to self-representation by allowing stand-by counsel to actively participate and waive the Appellant's right to challenge the composition of the jury at the end of the jury selection process. In doing so the Court forced a mixed representation against the Appellant's wishes which resulted in the loss of the Appellant's right to a Batson hearing.

While the court may have thought that it was "folly" for the Appellant to represent himself, it was clearly the Appellant's right to do so. And, as can be seen from the record, when a proper inquiry was conducted, the court found the Appellant sufficiently capable of conducting his own defense. There was therefore, no basis on which to deny his right to conduct his own

defense at the pretrial stage case or to allow stand-by counsel to participate at the trial over the Appellant's wishes.

The erroneous denial of the Appellant's right to self-representation constitutes reversible error. Error in this case is not subject to mitigation. "As with the right to self-representation, denial of the accused's right to testify is not amenable to harmless-error analysis." State v. Rivera, 402 S.C. 225 (2013) *citing* State v. Rosillo, 281 N.W.2d 877 (Minn.1979). "The right of a defendant in a criminal case to act as his own lawyer is unqualified ...." Williams v. Bartlett, 44 F.3d 95, 99 (2d Cir. 1994) (*quoting* United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965)) (*emphasis in* Williams). Moreover, a court's denial of the right to self-representation is not subject to harmless error analysis, and requires automatic reversal of a criminal conviction. *See* Johnstone v. Kelly, 808 F.2d 214, at 218 (2nd Cir. 1986); U.S. v. Green (D.Conn. 2-1-2013). In the present case, the court's denial of the Appellant's clear and repeated requests to represent himself, require a reversal of the Appellant's conviction.

III. THE STATE'S FLAGRANT AND REPEATED COMMENTS TO THE JURY WHERE HIGHLY PREJUDICIAL AND INFLAMMATORY AND INTENDED TO TAKE ADVANTAGE OF SELF-REPRESENTED APPELLANT.

The State in this case repeatedly made flagrant and inflammatory comments to the jury. In opening statements the solicitor told the jury that he personally believed that the Appellant was guilty: "I believe that Mr. Mazique, this defendant, did commit the crime of armed robbery." 69, l. 14-15. I submit to you that at the end of the evidence presented today that you will be as firmly convinced beyond a reasonable doubt as I am that Rickey Mazique did go into a Kangaroo on September 29th, 2011, a little after 2 a.m., and he did with a weapon, he had a handgun, present it to this victim, Ms. Tonia Branton, and rob her at gunpoint." 69, l. 20-70, l. 1. The solicitor went

to say: "At the end of this trial I'll ask you to find Mr. Mazique guilty of the charge that he has committed armed robbery, thank you. 72. l. 10-12.

Throughout closing arguments the solicitor put himself personally into the issue of credibility of the witness on whose credibility the issue of the consent to search turned: "I've spoken with Ms. Reeves on a couple of occasions before coming into Court. You know what, I was surprised myself to hear that she had been threatened. I had not heard that from her before." 340, l. 16-19.

The solicitor then argued facts not in record: "I had my assistant look up this morning how much is a carton of cigarettes, Newports run about $50 a carton. We're talking about $3,000 worth of merchandise." 340, 13-16.

The solicitor's comments were egregious, putting his personal belief and righteousness of his cause into the issue of guilt or innocence: "It is my duty to prosecute the person I believe who committed the crime. If I though Rickey Mazique did not commit this crime I would not be standing in front of you today." 345, l. 7-11. "After you've listened to all the law, after you've seen all the evidence, after you've heard all the witnesses I'm confident that you will find beyond a reasonable doubt that you're as firmly convinced as I am that this defendant Rickey Mazique on or about September 29th, 2011, in the early hours of the morning walked into that Kangaroo store in Horry, South Carolina, presented a handgun and robbed Ms. Branton at gunpoint." 344, l. 12-19. Even more egregious the solicitor concluded with a personal request for the jury to find the Defendant guilty: "Ladies and gentlemen, I ask you to find the only verdict that you could in this case, that you find this defendant guilty of armed robbery, thank you." 344, l. 20-23. The solicitor's comments were numerous and flagrant.

Here the solicitor's reference to his own personal evaluation of guilt of the Appellant as some apparent safeguard in the system, constituted an improper reference to preliminary determinations of fact. Our supreme court has repeatedly condemned closing arguments that lessen the jury's sense of responsibility by referencing preliminary determinations of the facts. *See, e.g.*, State v. Thomas, 287 S.C. 411, 412, 339 S.E.2d 129 (1986) (*citing* Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984)); State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982); State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981). "These statements to the jury are improper because they inject an arbitrary factor into jury deliberations. The danger is that a juror might be persuaded to rely on the opinion of others instead of exercising his independent judgment as to the facts. . . ." Thomas, 287 S.C. at 412-13, 339 S.E.2d at 129.

In this case the solicitor let the jury know that he personally had reviewed the case and determined that the Appellant was guilty before he proceeded to take this case to trial. By doing so he implied that the Appellant had the protection of the solicitor's righteous judgment before he was brought to court to face the jury. This is precisely the type of statement that has been held to lessened a juror's sense of responsibility to independently determine the facts of this case by permitting him or her to rely on the opinions of the police investigators, and the solicitor. *See* Thomas, 287 S.C. at 412, 339 S.E.2d at 129 (condemning solicitor's comment that the case had already been examined by a magistrate and a grand jury, and that a preliminary hearing had been held). Such statements are improper. *See* State v. Rudd, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct.App. 2003).

While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle."

State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2027) (*quoting* State v. Under, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). "A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). Here the solicitor's opening and closing remarks were rank with improper comments and violated just about every rule.

In reviewing a solicitor's closing argument, the court must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990). Here, the number of improper statements, including those tending to lessen the jury's responsibility to independently determine the facts, deprived the Appellant his right to a fair trial and constituted a denial of due process.

Although the Appellant did not object to the solicitor's improper comments, this case presents an exception as the comments were flagrant, numerous, and highly prejudicial. See Toyota of Florence v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994).

As a further exception, and potentially a novel issue, this case involves an obvious attempt by the solicitor to take advantage of the self-represented defendant. The repeated and flagrant nature of the violations indicate either an intent to take advantage of the self-represented Appellant or, a complete disregard for the duty of a prosecutor in making closing argument. As a result, the State should not be allowed to raise the self-represented Appellant's failure to object to its improper statements as a defense. "Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent

forfeiture of important rights because of their lack of legal training. While the right does not exempt a party from compliance with relevant rules of procedural and substantive law, it should not be impaired by harsh application of technical rules." *See* Haines v. Kerner. 404 U.S. at 520; Birl v. Estelle. 660 F.2d 592, 593 (5th Cir. 1981); Traguth v. Zuck. 710 F.2d 90, 95 (2d Cir. 1983); Forshev v. Principi, 284 F.3d 1335, 1357-58 (Fed. Cir. 2002).

Due to the numerous improper comments of the solicitor, the Appellant's case should be reversed.

IV. COURT DENIED APPELLANT'S REQUEST TO REQUIRE STATE TO OFFER THE ENTIRE AUDIO OF APPELLANT'S POLICE INTERVIEW.

The State chose to play for the jury a shortened and incomplete version of the audio tape from the Appellant's police interview. It appears that the State divided the Appellant's police interview onto two discs and offered only one, or part of one, in the State's case-in-chief. 254-255; 258; St. Ex. 2; Def Ex. 1. The Appellant objected to the introduction of only a portion of the interview, requesting that the whole interview be played for the jury. 256-258; 250-251.

The Appellant argued his right to require the complete statement or recording under Rule 106, SCRE, and the doctrine of completeness. When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. Rule 106, SCRE; *see also* State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004), In Cabrera-Pena, the Court held that the "rule of completeness" was applicable to allow the defendant to develop the full substance of a conversation when the prosecution witness testified to only portions of the conversation.

Contrary to both Rule 106, SCRE and the doctrine of completeness, the trial court denied the Appellant's request, holding instead that the State could offer only a portion of the interview. The court stated that if the Appellant wanted to have any other part of the interview offered, he would have to do it in his case. This forced the Appellant to put up evidence which he should not have been required to do. Then when the Appellant attempted to offer the additional portions of the audio or video tapes, the court ruled that the Appellant could not enter just a portion of the tape as did State: "If he wants the rest of it, that's it. I'm not going to let him pick and choose; it may be out of context, now let that be certain." 253, 4-8. Although it was pointed out that the court had allowed the State to pick whatever portion of the audio it wanted to introduce, the court stated repeatedly "No, I'm not going to let him pick and choose." 252-253.

The Appellant was forced to "introduce" the entire audio tape that had been redacted over his objection in the State's case, just to play the remainder of the tape for the jury. 265-266. Ironically, when the Appellant attempted to play a portion of the same tape, the State objected to just a portion of the audio tape being played. 256, l. 1-6; 269, l. 17-23.When the court discussed that playing the remainder of the tape would cause the Appellant to lose last argument the Appellant attempted to argue that the tape offered by the State was only a portion of the interview and that he simply wanted the jury to hear the portion that the State did not offer. The court rejected the Appellant's argument. This put the Appellant in the position of having to introduce evidence which, from the record, it appears that he would not otherwise have had to introduce had the court properly applied Rule 106.

The court improperly forced the Appellant into choosing between introducing evidence he though was important, which the State should have had to offer, or lose last argument. The

Appellant had earlier indicated that he would not testify. 263. l. 1-6. The court indicated that there were no other witnesses, and that the Appellant would not testify but, that the Appellant wanted to call back Chatfield. 262, l. 2-7. The purpose for recalling Chatfield was to allow the Appellant to cross examine him on the portion of the audio that the State did not play for the jury. The same was true as to Stanton, who the Appellant attempted to question about portions of the store surveillance and in-car video. 261-262.

The Appellant indicated a clear reluctance to having to introduce evidence in his case in chief, but indicated that it was necessary to present the entirety of the interview to the jury: "Yes sir, I have to." 262. l. 2-8. It is clear that the court's earlier ruling denying the Appellant's request to have the whole audio played when offered by the State limited the Appellant's ability to fully cross-examine the State's witnesses. This forced the Appellant to put up the remaining portion of the audio and put up the two officers to complete what should have been allowed cross-examination during the State's case. Of course this resulted in the Appellant's loss of last argument.

In a criminal prosecution, where a defendant introduces no testimony, he is entitled to the final closing argument to the jury. *See* State v. Crowe, 258 S.C. 258, 188 S.E.2d 379, *cert. denied*, 409 U.S. 1077 (1972). The right to open and close the argument to the jury has been described as "a substantial right, the denial of which is reversible error," *see* State v. Rodgers, 269 S.C. 22, 24-25, 235 S.E.2d 808, 809 (1977). Such an error is still subject to harmless error analysis. State v. Mouzon, 326 S.C. 199 (1997).

Application of harmless error analysis shows that the error here was not harmless beyond a reasonable doubt. If the Appellant had been allowed to argue last, then he could have more

adequately addressed the issues raised by State in its closing, most of which were grossly improper. Because the solicitor had last argument, the Appellant could not respond to the solicitor's repeated improper statements: "It is my duty to prosecute the person I believe who committed the crime. If I though Rickey Mazique did not commit this crime I would not be standing in front of you today." 345, l. 7-11. Or that the jury would be as "firmly convinced as I am that this defendant .... presented a handgun and robbed Ms. Branton at gunpoint." 344, l. 12-19. Or the solicitor's personal request for the jury to find the Appellant guilty: "Ladies and gentlemen, I ask you to find the only verdict that you could in this case, that you find this defendant guilty of armed robbery, thank you." 344, l. 20-23. Thus, it cannot be concluded that the loss of last argument was harmless beyond a reasonable doubt. *See* State v. Mouzon, 326 S.C. 199 (1997); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992), *cert. denied*, 507 U.S. 927 (1993). Because there is a reasonable possibility that this error might have contributed to the conviction, the Appellant's conviction should be reversed.

V. REFUSAL OF COURT TO REQUIRE THE STATE TO PROVIDE THE APPELLANT A COPY OF THE OFFICER'S HANDWRITTEN NOTES FOR CROSS-EXAMINATION.

During the Appellant's cross-examination of detective Chatfield it was revealed that Chatfield had written notes about the case that he did not turn over in discovery. 201.These contemporaneous "investigative notes" were used by Chatfield to prepare his report which, were sometimes not produced until a month or two later. 293, l. 2-13. Upon learning of the notes, the Appellant moved the court to compel Chatfield to produce them for review. The State argued that the Appellant is not entitled to the notes, "under the rules." 201, l. 17-18. The court ruled that the Appellant was not entitled to the detective's handwritten notes.

The need for the notes was apparent. During the Appellant's cross-examination of Chatfield the Appellant established that none of Chatfield's synopsis or reports in the case stated that the Appellant confessed to the robbery. This was completely contrary to Chatfield's synopsis or other reports provided in discovery. In fact, Chatfield's report actually said that the Appellant "would not admit to robbing the store." 290-292; 292, l. 7-11. Chatfield tried to explain the discrepancy by claiming that he sometimes wrote his reports "a month later or two." 293, l. 293. Because the reports and summaries provided in discovery were clearly inconsistent with Chatfield's testimony, the contemporaneous handwritten notes would be of value to the defense. Cross examination could not be effective without them. Especially true where the notes contain the details of the investigation including statements given to Chatfield by witnesses which would be properly discoverable. SCRCrimP. Rule 5. The failure of the court to allow the Appellant to review those notes hindered his ability to effectively cross-examine Chatfield and discover any additional discrepancies in Chatfield's testimony.

The right to discovery extends past the limits of Rule 5. Here because Chatfield's notes were clearly necessary for impeachment purposes, the Appellant is afforded a Constitutional right to the material. "The Due Process Clause of the Constitution requires the United States to disclose information favorable to the accused that is material to either guilt or to punishment." United States v. Padilla, No. CR 09-3598, 2011 WL 1103876, at *5 (D.N.M. Mar. 14, 2011) (Browning, J.). In Brady v. Maryland, the Supreme Court explained that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In Giglio v. United States, 405 U.S. 150 (1972), the Supreme

Court extended the prosecution's disclosure obligation to evidence that is useful to the defense in impeaching government witnesses, even if the evidence is not inherently exculpatory. See405 U.S. at 153; United States v. Torres, 569 F.3d 1277, 1282 (10th Cir. 2009) ("Impeachment evidence is considered exculpatory for Brady purposes."); Douglas v. Workman, 560 F.3d 1156, 1172-73 (10th Cir. 2009) ("[N]o distinction is recognized between evidence that exculpates a defendant and 'evidence that the defense might have used to impeach the [United States"] witnesses by showing bias and interest.'" (*quoting* United States v. Bagley, 473 U.S. 667, 676 (1985)); United States v. Abello-Silva, 948 F.2d 1168, 1179 (10th Cir. 1991) ("Impeachment evidence merits the same constitutional treatment as exculpatory evidence.").

Here the Appellant's cross-examination revealed that there were inconsistencies between the trial testimony and the police report of Detective Chatfield as to the time and dates of the offense. The Appellant also established that there was a discrepancy between Chatfield's report and Chatfield's evidence log. As some sort of assurance as to his accuracy Chatfield raised the issue of his investigative notes in his testimony when cross-examined about errors in his summary reports. Despite having raised the notes to establish some accuracy on his part, the Appellant was denied the right to review or cross-examine Chatfield on those notes. As a result, Appellant was denied effective cross-examine or impeachment of Chatfield.

VI. DENIAL OF RIGHT TO EFFECTIVE CROSS EXAMINATION OF OFFICERS

A. IMPROPER LIMITATION OF THE APPELLANT'S ABILITY TO EFFECTIVELY CROSS-EXAMINE THE WITNESSES.

During his cross-examination of Detective Chatfield, the Appellant was able to reveal discrepancies in Chatfield's paperwork. 208. During further cross-examination the Appellant,

referring to an evidence log, attempted to cross examine Detective Chatfield about a blue mesh bag. Chatfield testified that he was pretty sure that "we didn't take a blue mesh bag; if it's not in the pictures we didn't take it." 228, l. 4-6. Chatfield then admitted that the document to which the Appellant was referring was not accurate. 229, l. 8-10. The document was Chatfield's own evidence log. 227, l.10. At a rather effective point of the Appellant's cross-examination of Chatfield the solicitor simply interrupted with beginning an inappropriate dialog with the judge. 228. Then when the Appellant attempted to respond, the Solicitor began addressing the Appellant directly. 227, l. 22-23. After the court stated "It's cross examination" indicating that it would allow the Appellant to continue, the State just continued talking. 227-228. The solicitor complained that "He's just handing around papers none of which are in evidence and questioning the witness about them." 228. l, 14-17. The Appellant pointed out that they were Chatfield's reports and attempted to submit them as an exhibit. 228, l. 18-23. The court denied them as evidence and didn't allow further cross-examination because "Nobody has introduced anything about a blue bag." 228, l. 20-21. It is unclear exactly what the ruling was based on, but the court said: "The relevance isn't an issue in this case, let's get on to something else. It's not necessary for the jury's consideration as to what occurred. They're the finders of the facts and the blue bag was not introduced into evidence in this courtroom and is not before the jury and not going to be. You can't tell the State what they want to introduce." 229, l. 1-8.

The record shows that the Appellant was making a valid point in trying to point out additional inconsistencies in Chatfield's report and his testimony or recollection. As Chatfield was testifying on cross-examination that the police didn't take a blue mesh bag in evidence in the search, the solicitor interrupted and announced to the court that there was a blue bag that had

been taken into evidence, but not offered at trial. 227, 11-13. It became clear that a blue mesh bag had in fact been taken into evidence by Chatfield, In the Appellant's attempted to challenge Chatfield's testimony and recollection of events the Appellant attempted to offer into evidence a document produced by Chatfield which the Appellant believed would show additional inconsistencies between Chatfield's report and his testimony. 229. The court refused to allow the document to be introduced. 229. At the point the Appellant was attempting to explain the relevance of his offer of the document as evidence the judge chastised the Appellant and stated before the jury, "you are beginning to waste the jury's time. It's 6:00. ..... I'm not going to let you waste this jury's time any further. Now you've got to conclude your examination." 229, l. 13-20.

The Appellant was not allowed to play the interview audio to impeach Chatfield's testimony during cross-examination. 216. The court ruled that the Appellant could not question Chatfield as to the tapes having been altered from original. 249. When the officer stated that he could look into someone's eyes and tell when they were being truthful, and that he believed Reeves was truthful the day he questioned her, the Appellant followed up that if she was a truthful person why would she make up that she felt threatened. 231. The judge stopped the witness from answering that question. 231. The court then stopped the Appellant from asking other questions by *sua sponte* interjecting that each question had been asked and answered. 232. The Appellant objected to the termination of his cross-examination of Chatfield. 232.

The Appellant's cross-examination of Officer Scales was likewise unduly limited. The Appellant attempted to play store surveillance video. 296. The State did not oppose the Appellant offering his copy of the video into evidence. The Court would not allow the Appellant to play the tape, or portion of the tape, for the jury. It allowed the Appellant to offer the tape into evidence as

an exhibit, but would not allow it to be published to the jury stating, "the jury wants to play your own copy they can." 295, l. 23-296, l. 1. All of the foregoing constituted undue restrictions on the Appellant's right to effective cross-examination of the State's witnesses as well as a limitation on the Appellant's right to offer evidence in his own defense.

B. REFUSAL OF THE COURT TO MAKE PRE-TRIAL HEARING TRANSCRIPT OF OFFICER'S TESTIMONY AVAILABLE FOR APPELLANT TO USE AT TRIAL FOR CROSS-EXAMINATION.

Detective Chatfield testified at the Appellant's pre-trial hearing a week prior to trial. The Appellant indicated that he would be representing himself at trial and requested that a transcript of Chatfield's from the hearing be made available to him for preparation for trial. H.56. The court stated that "Unfortunately, we don't have a -- if they were available, I'd make them available to you --: " 25-26. Obviously, the court could have ordered a copy of Chatfield's testimony be prepared for the following week's trial, but it chose not to do so. The court's refusal to make available the transcripts limited the Appellant's ability to properly cross-examine Detective Chatfield during the trial of the case.

VII. THE COURT ERRED IN REFUSING TO ALLOW THE APPELLANT TO USE WITNESS'S PENDING CHARGES TO EXAMINE FOR BIAS, MOTIVE, ETC.

The Appellant attempted to impeach the robbery victim (Branton) with evidence that she had charges pending with the solicitor's office at the time of trial. When the Appellant attempted to question the witness if she had ever been arrested before, the Appellant's question was cut off by the judge. 242. The denial of the Appellant's inquiry into the witness' pending charges without allowing the Appellant an opportunity to explain how it was relevant or proper was improper.

Evidence of a witnesses pending charges is appropriate when it is offered for impeachment purposes. Rule 608 provides in pertinent part that "bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c) "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'", State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (*quoting* State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)).

Here the trial court erred under Rule 608(c), SCRE, by preventing the Appellant the right to cross-examine Branton about the specifics of any pending charges. Appellant's inquiry of pending charges was appropriate where it sought to expose Branton's possible bias, motive, or prejudice. The Appellant in this case was attempting to ask Branton about her pending charges. (Although the Appellant did not proffer the information when cut off by the judge, records available to the court through clerk's record at the time of trial indicated that Branton had did have pending charges with the solicitor's office.)[3] The number of charges pending against Branton, and the severity of the potential sentences, the evidence was probative on the issue of bias and should have been admitted. Pending charges in the same office that was prosecuting the Appellant's case would create the possibility that Branton would give biased testimony in an effort to have the solicitor highlight to her future trial judge how she had cooperated in the instant

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[3]Although the Appellant did not proffer the details of the victim's arrest he sought to question her on, public records available through S.C. Judicial site appear to indicate multiple pending charges for the victim, including: Toni Michelle Branton M974124 - 0186-Drugs / Manuf., poss. of other sub. in Sch. I,II,III or flunitrazepam or analogue, w.i.t.d. - 1st offense.)

case. The excluded evidence had "a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity" of Branton's testimony. , State v. Jones, *supra*. Under similar circumstances it was held to be error under Rule 608(c) to improperly limit the scope of a Appellant's cross-examination. *See* State v. Peterson. In this case, the improper limitation of the scope of the Appellant's cross-examination could reasonably have affected the result of trial. It is therefore reversible error.

VIII. THE PREJUDICIAL EFFECT OF CUMULATIVE ERRORS REQUIRES REVERSAL OF THE APPELLANT'S CONVICTION.

In this case the cumulative effect of the foregoing errors prevented the Appellant from being afforded a fair trial. An defendant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine. State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). The errors must adversely affect [a defendant's] right to a fair trial to qualify for reversal on this ground. *Id.* In this regard, our courts have "stressed on more than one occasion, the Constitution entitles a criminal Defendant to a fair trial, not a perfect one." *Id.* (*quoting* State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998). In this case the record shows a multitude of substantial issues that, even if not singularly, certainly in combination prevented the Appellant from having a fair trial. Reversal is therefore required under the doctrine of cumulative error.

CONCLUSION

Based on the foregoing, the conviction and sentence of the Appellant should be reversed.

Respectfully submitted,

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Counsel for Appellant

April 25, 2014.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF GENERAL SESSIONS

Appellate Case No. 2012-213631

Edward B. Cottingham, Circuit Court Judge

Case No. 2012-GS-26-00859

State of South Carolina, ... Respondent,

v.

Rickey Mazique, ... Appellant.

DESIGNATION OF MATTER

Appellant designates the following matter to be included in the record on appeal.

Transcript of proceedings pages:
Pre-trial hearing September 7, 2012, pages 1-12;
Pre-trial hearing November 8, 2012, pages 1-62;
Trial November 15-16, 2012, pages 1-354.
Motions Filed by defense;
Exhibits: St. 1-4;10;11;12;16; D-1;D-2

I certify that all of the matter designated was matter presented to the lower court and is relevant to the appeal of this case.

Respectfully submitted,

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Counsel for Appellant

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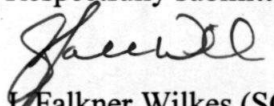
CERTIFICATE OF SERVICE

I certify that I have served a copy of the Initial Brief of Appellant and the Designation of Matter on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 25th day of April, 2014, addressed as follows:

Salley W. Elliott
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

Respectfully submitted,



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April 25, 2014

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Dear Ms. Kitchings,

Enclosed please find the Appellant's Initial Brief, Designation of Matter, and Certificate of Service.

Sincerely,

J. Falkner Wilkes

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