

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ANDERSON COUNTY

J C Buddy Nicholson, Jr , Circuit Court Judge

THE STATE,

RESPONDENT,

V

RAYMONDEZE L RIVERA ,

APPELLANT

FINAL BRIEF OF RESPONDENT

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I There is no support for his claim that the trial court relieved defense counsel in this case. Instead, the record reveals that defense counsel waived the presentation of a closing argument after the Appellant in his testimony admitted committing the murder of Asha Wiley with malice aforethought, that he intended to kill others as a result of the victim's revelation of his identity and that he had killed others, including Kwana Burns. Since the issue asserted is not preserved for this Court's review, the appeal must be dismissed.	24
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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

The trial judge violated Rivera's Sixth Amendment right to counsel by summarily relieving defense counsel from representing Rivera simply because Rivera rejected counsel's advice and elected to testify

RESPONDENTS COUNTER-STATEMENT OF THE ISSUE

Where the trial judge never relieved counsel and counsel continued to represent and make motions on the Appellant's behalf, the fact that counsel waived the right to make a closing argument and the Appellant concurred in not making an argument did not cause a Sixth Amendment violation, particularly where no objection was made. Further, where the Appellant testified that he, in fact, committed the murder he was charged with involving Asha Wiley, as well as planning to kill others and killing others presented defense counsel with a difficult strategic issue concerning argument

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Raymondeze L. Rivera, was indicted on February 20, 2007 by the Court of General Sessions for Anderson County for murder State v. Raymondeze Lamon Rivera, 2007-GS-04-650 R p 327. The indictment charged Rivera with the December 10, 2006 murder of Asha Wiley. On February 11-13, 2008, the Appellant appeared in court for a jury trial on the charge before the Honorable J. C. Nicholson, Jr., presiding Judge. He was represented by Robert A. Gamble and Scott Thomason of the Anderson County Public Defenders Office. The prosecution was handled by Tenth Circuit Solicitor Chrissy Adams and Assistant Solicitor Rame Campbell. On February 13, 2008, the jury returned a verdict of guilty of murder R 321, Tr p 439, ll 8-19. Rivera was sentenced by Judge Nicholson to life imprisonment R 325, Tr p 443, ll 2-5.

The Appellant, through Robert Gamble, made a notice of appeal which was timely served on February 20, 2008. This appeal follows.

STATEMENT OF THE FACTS

This case involves the death of Asha Wiley on December 10, 2006.

Rivera's Competency to Stand Trial

At the outset of the trial on February 11, 2008, a competency hearing was held R 1-12, Tr p 6-17. In the report, presented to the trial court, it indicated that Rivera had an impulse control disorder and antisocial personality disorder and antisocial personality traits. Counsel Robert Gamble, in response to the court's inquiry on whether Rivera had been able to help communicate for trial indicated it was not a direct yes or no, but that "it's been explosive at times with regard to representing Mr. Rivera." R 2, Tr p 7, ll 8-10.

The defense called Dr Mayank Dalal, a forensic psychiatrist with the South Carolina Department of Mental Health Pursuant to a February 2, 2007 court order, Dr Dalal evaluated Rivera on March 26, 2007 R 3-4, Tr 8-9 He found Rivera very cooperative, normal, alert, logical and coherent R 6, Tr 11 Dr Dalal opined that Rivera had impulse control disorder, axis one and an adjustment disorder with depressed mood He found the depressed mood is brought by the stressor of the charges and possible penalty he is facing R 9, Tr 14 He concluded he was competent to stand trial R 10, Tr 15

Dr Dalal declared at the present the impulse control disorder did not affect his thinking about the charges R 10, Tr 15 He stated though he found antisocial personality traits, he did not make a diagnosis of antisocial personality disorder R 11, Tr 16 He stated it was a possibility that he had antisocial personality disorder, but it would not bear on his competency to stand trial R 12, Tr 17

Judge Nicholson then concluded Rivera was competent to stand trial R 12, Tr 17

There was a pretrial Jackson v Denno hearing concerning the admissibility of a statement given by Rivera to Lt John Zamberlin of the Anderson Police Department of December 16, 2006 concerning the deaths of Asha Wiley and Kwana Burns R 15-41, Tr 137-163 Judge Nicholson concluded the statement was freely and voluntarily given waiving his constitutional rights R 41-44, Tr 163-66

After the ruling, the Court was advised that the statement, when admitted, would be a redacted statement, removing any reference to the request of Rivera that the prosecutors seek the death penalty and references to the murder of Kwana Burns R 44-49, Tr p 166, l 18 - p 169,

The State's Theory

On Sunday, December 10, 2006, Asha Wiley, a twenty-seven year old single mother, went Christmas shopping for her 8 year old daughter at the Anderson Mall. While there, she met the Appellant. Somehow, she became immediately infatuated with him and they shopped together. She even introduced Rivera to a friend, Ladgen Anderson. Asha told her best friend, Joya about him. They agreed to go out to eat and then to the movies together that evening.

Asha went back to her home and let him inside. During the evening, they had sex and he eventually strangled her to death. R 51, Tr 174. He then attempted to clean up the crime scene. He left out the back door and moved her car.

Suspicion began when Asha did not show up for work on Monday. This resulted in unanswered calls to her home and even a co-worker's check up at her home. However, not seeing her car, she left.

Again on Tuesday, her absence from work increased concern. When co-workers again checked her home, not seeing the car, they checked the front door and found it locked. Frightened to find the back door unlocked, they called the police. Her body was found upstairs in the bedroom.

Eventually, the police learned the man Asha met at the mall was Raymondeze Rivera. He was eventually arrested in Douglasville, Georgia. There, he gave the police a statement where he described brutally strangling and killing Asha while she begged for her life.

The State's Witnesses

Jacqueline McDonald, director of New Foundation group home for adolescents, in December 2006 testified Wiley was getting her masters degree. She said they were in class on

Saturday, December 9, most of the day R 53-57, Tr 176-180 She said that they went to church on Sunday morning together

After church, she told Asha to go shopping for her daughter R 58, Tr 181 At around two, she spoke with her and learned of some things she had bought She described Asha as excited at that time because of the items she had bought for her daughter R 58-59, Tr 181-82

She testified that Monday the victim did not show up for work at New Foundations R 59, Tr 182 It was unusual for her not to show up or call McDonald testified she called several times on Monday and went by the apartment and saw her car was not there R 60, Tr 183

On Tuesday, December 12, McDonald continued to telephone Asha without an answer She again went to the house with a friend and checked the front door which was locked and then found the back door was unlocked R 61, Tr 184 She then went to the apartment manager's office and had the police called R 61-62, Tr 184-85 McDonald testified that Asha Wiley's nine year old child, Kaiya, was at her grandmother's home for the holiday R 62-63, Tr 185-86

Kalah Jordan, another counselor of New Foundations, testified that Wiley was the type of person that lived with her cell phone R 66, Tr 189

Jordan stated she spoke with Wiley Sunday afternoon by telephone when she was at Ross Department Store R 69-70, Tr 192-93 She told Jordan that she was headed toward Anderson Mall to buy for her daughter Jordan stated that Wiley agreed to call her when she got home to do her hair R 69, Tr 192 However, Jordan began calling Wiley at 4 00 and 7 00 p m and then kept calling and left messages, but Wiley didn't answer Jordan also tried to "instant message" her from the computer without response Jordan stated this was unusual because Wiley always would call back R 70, Tr 193

Jordan stated that Monday, Wiley did not show up for work and Jordan kept calling her and trying to contact her on the computer R 70, Tr 193 Jordan said on Tuesday when Wiley again did not show up, she first went to her house and then the management office While there, Jackie McDonald pulled up McDonald noticed Wiley's car parked in a different location R 72, Tr 195 The police were then called and arrived at the apartment R 72-73, Tr 195-96

Nikkia Robinson, a neighbor of Asha Wiley, testified she saw her in the evening on Sunday R 77, Tr 200 Wiley's car was parked in her normal spot next to the apartment Wiley was with a fellow and a Buick was parked next to hers R 78-79, Tr 201-02 the next morning, Robinson did not see either Wiley's car or the dark burgundy Buick with hubcaps in front of the apartment R 80-81, Tr 203-04 Later, she saw Wiley's car parked in a different spot than she normally parks R 81, Tr 204

Joya Joseth, Wiley's best friend, described Wiley's getting her own apartment in 2002 R 87-88, Tr 210-11 She stated she talked on the telephone with Wiley that Sunday while Wiley was at the Mall R 90-91, Tr 213-14 They spoke three or four times At one point she received a text message from Wiley which stated "I just met a dude that I would marry next week if he asked me" R 93, Tr p 216, ll 11-14 In a subsequent conversation, Wiley described to Joseth the man's nationality, his license tag, his name, and his hair while she was driving R 95, Tr 218

Joseth said she heard a man in the background during the conversation she had with Wiley around 7 30 p m R 95-96, Tr 218-19 She said it was the man she met at the Mall

Joseth stated she did not talk with Wiley after that She thought it was unusual for Wiley not to have called her back to discuss the man she met on Sunday R 96, Tr 219 She tried

calling Wiley's house and cell phone and knew it was something

On Tuesday, when she was contacted by police, she described to police the man described by Wiley and the make and state of license on the car Wiley told her about R 97-98, Tr 220-21

Ladgen Anderson, a friend of the victim since college, recalled December 10 when he saw Wiley at the Anderson Mall R 103, Tr 226 He said Wiley was not by herself when he saw her at the F Y E Store In their conversation, Wiley was describing a CD she was buying and showed him pictures of her daughter R 104, Tr 227 Wiley introduced Anderson to the person she was with He was light-skinned, not too tall, wearing blue jeans, a red jacket, boots, and a red hat R 105, Tr 228 Anderson identified the defendant R 105, Tr p 228, ll 3-6 He said she did not mention his name R 105, Tr 228

Later, after he learned of Wiley's death, eh attempted to prepare a composite sketch on December 15 R 107-09, Tr 230-32

Todd Caron of the Anderson County Sheriff's Department described his process in preparing the sketch R 111-120, Tr 234-243

Mike Walters of the Anderson Police Department described the investigative leads he used after speaking with Joya Joseth and Ladgen Anderson He said they were looking fo a black male with Hispanic features, light-skinned, good hair and quiet R 129, Tr 247 Further, although stating he was from Georgia, his car had a Florida license plate and had a burgundy bottom and white top R 130, Tr 248 He was wearing a red hat, red jacket, and blue jeans and name was either Raymon, Raymond, or Raymondeze R 130, Tr 248 He also retrieved surveillance tapes from the Mall R 131, Tr 249

William Brooks of Belk in the Anderson Mall described the videotape he reviewed from

December 10 R 134-35, Tr 252-53 He verified that Wiley made a purchase that date and documented where it showed Wiley and the individual in the red jacket R 135, Tr 253

Similarly, *James Walker of Goody's Family Clothing*, presented a video from his store of December 10, 2006 R 139-140, Tr 257-58

Dr Brett Woodard the pathologist, performed an autopsy on the victim R 147, Tr 265 He testified that Wiley died from strangulation resulting in asphyxia R 148, Tr 266 He stated the pressure around her neck was on and off over a period of time and was not a one-time strangulation R 148-49, Tr 266-67 He found bruising above her ear consistent with a blow and bruises on her shins consistent with falling off the bed R 150, Tr 268 He stated his findings were consistent with the person being choked, then revived then choked again and revived again over time R 152, Tr 270

Kelly Chapman, who assisted the pathologist, described the sexual assault evidence collection kit R 154-55, Tr 272-73

Lt John Zamberlin of the Anderson Police Department testified concerning the investigation R 156-217, Tr 274-335 The incident became suspicious due to the fact the victim's vehicle was found two buildings away, that her back door was open, and her keys could not be located R 158, Tr 276 Lt Zamberlin attempted to track down a red and white car belonging to someone possibly named Raymond Ramirez R 159, Tr 277 He also reviewed the surveillance videos He viewed Rivera in the Belk's video wearing the distinctive red jacket at 3 15 p m and exit at 3 35 R 161, Tr 279 He viewed the victim in Belk's at 6 27, wearing dark pants and purple jacket At Goody's, the victim and Rivera are viewed together at 4 43 p m R 163-64, Tr 281-82

Lt Zamberlin testified that 2 days after the body was found he determined that the prepay cell phone was to a false address. However, he was able to track usage to Douglasville, Georgia R 168-69, Tr 286-87. On Friday, December 15, the federal marshals service was contacted with the composite sketch and cell phone record. The marshals located the car and followed the Appellant. The car was stopped once it was determined the tag belonged to a BMW R 172, Tr 290. The marshals took Appellant into custody and carried him to the Douglas County Sheriff's Department at 8 30 p m R 172-73, Tr 290-91.

At that point, Rivera signed a consent to search form allowing the search of the vehicle in Zamberlin's presence R 173, Tr 291. When the car was searched, the title belonged to Rivera with a Sarasota address R 176, Tr 294. The distinctive red jacket seen in the video was found within the vehicle R 176-77, Tr 294-95. Also, they found a red stocking cap, consistent with the video R 178, Tr 296.

Zamberlin described the December 16, 2006 waiver of rights by Appellant R 179-181, Tr 297-99. He stated he told Rivera that he wanted to talk about a homicide. The Appellant smiled and then put his head down. He asked for a lawyer on the night of the 16th R 183, Tr 301.

After they returned to Anderson, he began to work on extradition R 184-85, Tr 302-03. When he returned to Georgia on December 20 to get prints, Rivera requested for Zamberlin to talk to him R 187, Tr 305. Zamberlin testified that Rivera requested that he wanted to be in jail alone and he wanted to see a chaplain when he got to (Anderson) jail R 190, Tr 308. He said if he got these things in writing from the prosecutor, he would cooperate fully R 189-193, Tr 307-311.

After Lt Zamberlin received the matters in writing from the prosecutor, he returned to Douglas County on December 21. The Appellant signed a waiver of rights form R 201, Tr 319. The jury was then advised concerning the statement he gave concerning the death of Asha Wiley R 204-211, Tr 322-29.

Rivera s Statement to Police

Zamberlin testified that he wrote the written statement for Appellant R 206, Tr 324. Appellant declared he traveled from Washington, DC to Anderson. He stated he met Wiley there near the bungee jump. He said she told him she did not give out her number to strangers, but he gave her his cell phone number R 207, Tr 325.

Rivera stated he did not have his keys. He asked her to go get food and then followed her to McDonalds. After they ate inside, Rivera asked Wiley to the movies R 207, Tr 325. He followed her back to her apartment and went inside her apartment.

He stated the victim asked him if he wanted some Grey Goose which she got him R 207, Tr 325. They then played two hand spades as a drinking game R 207, Tr 325.

Rivera described watching a DVD and then began having sex on the floor. Rivera refused to let her go to the bathroom after and described her peeing on the floor R 208, Tr 326. They went back to the couch and they fell asleep. Rivera described her waking up and shaking claiming she needed sugar and a banana. She said he was trying to kill her because he would not let her get sugar R 208, Tr 326.

He described wanting to go upstairs and they went up into her bedroom, had sex again on the bed and fell asleep R 208, Tr 326. When she woke up, she wanted to go to the bathroom and he followed her there and then they returned to the bed R 208, Tr 326. Rivera described

trying to have sex again, but she refused R 209, Tr 327

Rivera described next going down to the kitchen and getting a steak knife to put against her throat She woke up and Rivera told her they were going to have sex again and they did He then cut some cords from the printer and tied her hands behind her back and her legs Rivera next put a sheet over her head The victim asked him not to kill her and said she was all her daughter had R 209, Tr p 327, ll 10-12 Rivera next turned up the TV and choked her with a cord and she peed on the bed again They fell off the bed and the cords on her legs broke R 209, Tr 327 He next took the pillowcase off her head

After she said she was the only thing her daughter had, she asked him if he had a daughter when Rivera said he did, the victim told him he did not have to kill her, that it's her fault and she wouldn't say anything R 209, Tr 327

Rivera next told Lt Zamberlin that he went back downstairs and put on his clothes and came up and put the pillowcase back on Wiley's face R 209, Tr 327 She was crying and told him about a friend Joya who she had told about the type of car he had and that he was from Atlanta R 210, Tr 328

Rivera stated at that pint he put the cord around her mouth, started strangling her again, and she peed on the floor again R 210, Tr 328

Rivera told Zamberlin that he checked to see if she was dead and she was He but the cords off her wrists and mouth He began wiping everything down using a rag and cleaning supplies R 210, Tr 328 He washed the knife, the shot glasses, and wiped the Grey Goose and refrigerator door

Rivera also got Wiley's cell phone and erased his name He got a trash bag and put the

banana, bra, panties, cords and cards in it. He got a douche bottle, cleaned the victim and wiped her down "from head to toe." R 210, Tr 328. He then got some clothes and re-dressed her. He cleaned up blood beside her. R 210, Tr 328.

Rivera said he next went and found Wiley's car keys and moved her car. He then threw away the keys into a dumpster. He then moved his own car and then returned through the back door and got the bag. He left out the back after he heard someone pull up in the front in a car. He threw the bag into the dumpster and left. He said he drove to Atlanta. R 211, Tr 329.

Lt Zamberlin stated that they were unable to find suitable prints on the items that remained at the apartment, including the Grey Goose, playing cards, and car. Further, since the dumpster trash had already been taken to the landfill, they were unable to locate the other items. R 212-13, Tr 330-31.

Lt Zamberlin testified that Appellant waived extradition and returned to Anderson on December 28. R 213, Tr p 331, ll 11-12. Rivera was given his own cell and spoke with a preacher. However, it was learned that Wiley was not a diabetic. R 213, Tr 331.

Investigator Mike Baskin testified that he was with Anderson Police Department in September 2006. R 217, 18, Tr 335-36. He described the crime scene photographs he took. R 220-230, Tr 338-348. He also described the blood taken from Rivera, by consent on December 29, 2006. R 221, Tr 339. He also described transporting the victim's blood standard and material from the autopsy to SLED. R 225, Tr 343.

Ms Rainey Williams of Metro PCS, a prepaid cell phone provider, testified concerning a warrant on the usage of a telephone number 941-301-6113. R 233-36, Tr 351-54. She said the subscriber was only listed as Raymond with an address in Sarasota, Florida. R 235-36, Tr p

353-54 She said the account was active through December 15, 2006 R 237, Tr p 355 She testified about a series of telephone calls made to 803-235-9410 by this cellphone using *67 to mask the number There were 2 calls on December 12, nine calls on December 13, one call on December 14 and two calls on December 15 R 242-43, Tr p 360-61 The calls were made there cellphone towers in Atlanta, College Park and Douglasville, Georgia R 247-48, Tr p 365-66

Sheree Brown a forensic technician with SLED testified about her receipt of the rape kit R 249-50, Tr p 367-368

Adrienne Riley a SLED forensic DNA analyst, testified that she was able to detect the presence of urine in the victim's middle sofa cushion, comforter/bedspread, and matters R 253, Tr p 371

Robin Taylor another SLED forensic DNA technician, testified about the testing she did on the materials in comparison with the victim's and Appellant's DNA standards She opined that DNA consistent with the victim was located on her own left hand fingernail scrapings, but she could get no profile on the right hand nail scrapings R 260, Tr p 378

Concerning the vaginal and rectal swabs from the victim, she identified the existence of semen in both that matched the DNA profile of Rivera R 261-62, Tr p 379-380 This opinion was to a reasonable degree of scientific certainty R 362, Tr p 380

The Defense Case

Next, defense counsel advised the trial judge concerning their discussions with Rivera concerning his right to testify

MR GAMBLE Your Honor, we've taken this hour and a half to talk with our client, Mr Rivera, Mr Thomason and I have **Both of us have advised him we think there's no profit for him taking the**

stand, no advantage in it, whatever He has made a decision that he wishes to testify in this case **It is against the advice of both his counsel**, and we have both advised him in regard to his Fifth Amendment rights, but it's his decision, and his alone We have left it at that

THE COURT Did he appear to understand the conversation that you had with him for the last hour and a half?

MR GAMBLE Yes, sir And he appeared to know what I have told him for the last year, your Honor At almost every meeting I had with him, I told him that he did not have to take the stand, he did not have to testify But that was his decision to make and not my decision to make

R 264-65, Tr p 382-83

Judge Nicholson next made specific inquiry of Rivera concerning his rights to testify and his right to remain silent R 265-69, Tr p 383-387 Rivera declared at the conclusion that he wished to testify The court next inquired again of counsel Gamble

Q All right Mr Gamble, anything else you would like to ask your client concerning his right to testify, his decision to testify or not testify?

MR GAMBLE No, your Honor **He's got his mind made up**

THE COURT Anything you would like to ask?

MR THOMASON I would just like to reiterate Mr Gamble's position **We have gone over this ad nauseam with Mr Rivera and we have explained to him the pitfalls of doing this, and he is bound and determined that that's what he wants to do And we have advised him in strenuous terms that we do not think it would be in his legal best interest** And, yet, having been given that advice, he stills wants to testify

THE COURT Okay Is that correct, Mr Rivera?

THE DEFENDANT **That ' s correct**

The Trial Testimony of Raymondeze Rivera

Raymondeze Rivera then testified concerning his involvement in the murder of Asha Wiley R 271, Tr p 389 Counsel asked him in a narrative question to tell his story R 272, Tr p 390 At that point, Rivera then immediately brought up another murder victim, Kwana Burns and wanted to begin his narrative two weeks before the death of Wiley R 272, Tr p 390, l 12-15 The trial court interrupted and took the matter outside of the jury's presence The following cautionary discussion occurred between the trial court and the Appellant

COURT Mr Gamble and Mr Rivera, the way I understood you were talking about Kwana Burns, who is the second victim and there's charges for murder pending against you in that charge Now, you can say whatever you want to say on the witness stand I'm not trying to restrict that At this point in time I have one of two choices I can either admonish the jury to disregard any mention of Kwana Burns, do you understand? Or we can ignore it and go on However, if you keep on insisting on talking about Kwana Burns and the death of Kwana Burns, then you have opened the door and I'm going to allow the State to have a mini-version trial of the second murder if it takes the rest of the week and all next week Do you understand?

(The defendant nods head up and down)

But I'm not trying to tell you what to say on the witness stand The only thing I'm telling you, if you continue, to talk about Kwana Burns, the State's going to try that second murder trial this week On direct -- I mean, excuse me, on cross and rebuttal Do you understand what I'm telling you?

THE DEFENDANT Yes, sir

THE COURT Now, it's your choice You can say what you want and I'm not trying to restrict you from saying whatever you want to say on your statement That's your right You can do that I'm just trying to advise you of the consequences if you continue to talk about the death of Kwana Burns Do you understand?

(Defendant nods head up and down)

Yes or no?

THE DEFENDANT Yes, sir

THE COURT All right Mr Gamble, Mr Thomason do you want me to give a curative instruction to the jury? Or do you want to leave it as it is now?

MR GAMBLE Leave it as it is, your Honor No curative instructions would be requested I don't like curative instructions I find it just calls the jury's attention to what you're trying to cure

THE COURT I understand But I'm offering it and I will do it It's been waived, is that correct?

MR GAMBLE That's correct

MR THOMASON I concur with Mr Gamble

THE COURT Mr Rivera, do you understand what I have told you?

THE DEFENDANT Yes, sir

THE COURT Do you need more time to talk to your attorneys about what I have told you?

THE DEFENDANT No, sir

THE COURT Do you understand? I'm not restricting you from talking about Kwana Burns and the death, the killing or whatever transpired Do you understand? If that's what you want to do I'm just telling you about the consequences of doing that Do you understand? That's your decision

THE DEFENDANT Yes, sir

THE COURT Not mine nor your attorneys Do you understand?

THE DEFENDANT Yes, sir

THE COURT We'll start back 1 45 give your attorneys an opportunity to talk to you Do you understand?

THE DEFENDANT Yes, sir

THE COURT During the lunch break And we'll start back at 1 45 You can get on the witness stand and say whatever you so choose Do you understand?

THE DEFENDANT Yes, sir

R 273-75, Tr p 391, l 1- 393, l 7

After lunch, the inquiry concerning the decision to testify continued after an apparent plea offer was rejected R 277, Tr p 395, l 6-13 Counsel Thomason then presented for the record

MR THOMASON Could I put something on the record just a moment? Just for the record, since we broke for lunch, we have once again been through extensive negotiations involving resting our case, continuing with the testimony, or entering into a negotiated guilty plea -- or a guilty plea After going through all that again, Mr Rivera has decided that he, once again, wishes to take the witness stand and testify He understands the pitfalls in so doing and the ramifications of going into certain areas of testimony that may have certain horrible consequences to him

R 277, Tr p 395, l 15-25

Rivera then continued with his narrative testimony where he continued to divert to the situation with Kwana Burns while his counsel attempted to direct him to the Wiley matter R 278-79, Tr p 396-397 He stated that he was at the Belk Store on December 10 because he was notified that Kwana Burns was working there that date R 279, Tr p 397 He stated that he had contact with Burns and that he received her card with her cellphone number on it and that they decided to meet at 3 30 He stated that he followed Burns to her apartment that day, but a male friend showed up, so Rivera returned to the Anderson Mall R 279, Tr p 397 It was at that time that he met Asha Wiley R 279, Tr p 397, l 25 He stated around 4 30 PM, he met her outside of Goody's and she asked him to help her pick out jewelry and that she was shopping for her daughter They exchanged telephone numbers R 280, Tr p 398

Rivera testified that he decided to leave the mall at that time and to call Kwana Burns, but she did not answer. Rivera stated he returned to the Mall to meet with Asha Wiley and called her from the payphone he called Burns from R 280, Tr p 398. Wiley advised him that she was inside a music store and he went there. At that time he met her acquaintance, Adrienne Ladgen Anderson. He told the Appellant that he was friends with Wiley and was preparing to move from Anderson because he had been robbed. While there, Rivera stated he asked Wiley if she wanted to go to a movie and she stated that she did. R 281, Tr p 399.

Since she said she had not eaten, they went to McDonald's. They then decided to ride in one car and wanted to drop her car off at her apartment, so he trailed her to her apartment. He spilled some Sprite in the car. R 281, Tr p 399.

He stated that he initially had no intention of going into the apartment, but Wiley invited her in. R 282, Tr p 400. They had a drinking session with Grey Goose Vodka playing two man spades for a shot. R 282, Tr p 400. They decided to watch a movie while waiting for the movie to start. R 282, Tr p 400. He chose a Bruce Lee movie. While on the couch, he claimed they began to kiss which next led to having sex. He described getting angry due to the alcohol and pushed her to the floor and held her there. She told him that she was a diabetic and needed him to get a banana from the refrigerator. R 282-83, Tr p 400-401. He told her he did not believe her.

At that time, the victim began to cry and said he was trying to kill her. R 283, Tr p 401. He then went into the kitchen and got the banana and then she began to eat it. R 283, Tr p 401.

He said they fell asleep on the couch. He said that the couch was uncomfortable and asked to go upstairs. She told him that her bedroom was filthy, but he stated it was OK. However, he described the room as filthy when he got up there and could not understand how a

female could live like that with kids R 283, Tr p 401 He said they began to have sex again upstairs and ended up falling asleep again R 284, Tr p 402

Around 2 AM he said he went back downstairs to erase his number from her phone and saw that she had sent a text message to Joya Joseth At that point, he became angry "because my whole accomplishment was to come up here to Anderson County to eliminate Mrs Kwana Burns " R 284, Tr p 402, ll 8-10 He stated he then went into the kitchen to get a knife and intended "to cut Asha Wiley's throat while she was sleeping " R 284, Tr p 402, ll 11-12 As he entered the bedroom, the victim saw he had the knife He next cut printer cords and used them to tie her hands behind her back and put a sheet over her head R 284, Tr p 402

Mrs Wiley then told him that she was the only person in her daughter's life and begged for Rivera not to kill her R 284-85, Tr p 402-03 Rivera stated that he wanted to know the whereabouts of Joya Joseth R 284, Tr p 402 He was told she lived in Vance and he got a phone number, but Wiley refused to give her address R 285, Tr p 403, ll 3-5 Irritated, Rivera stated that he began to choke her and she continued to cry and peed in the bed and asked him to take the sheet off her so she could talk to him R 285, Tr p 403, ll 7-10

At that time, he stated that the victim begged for her life because she only had her daughter to live for and asked him if he had a daughter Tr p 403 He stated that because of the information and events that had transpired and that she had given him information to Joseth that he had to kill her R 285, Tr p 403, ll 16-19

He then proceeded to choke her and she fell to the floor and he put the sheet over her head He testified that he told her to pray "because this is the last time that she will be on this earth " She cried and said a prayer At that time, he strangled her "and I believe it took me two

minutes to execute her ” R 285-86, Tr p 403-404, l 2

He testified that he went downstairs and retrieved his clothes, a rag and cleaning supplies R 286, Tr p 404 He began to wipe down “the crime scene ” He wiped down Wiley and douched her and cut the cords he had on her He said that he then dressed her R 286, Tr p 404 He decided to move Wiley’s car and moved it two apartments down and returned to the apartment He then collected the items including the playing cards, her clothes from th day before, the douche bottle, and cords He stated that he heard a knock on the door and saw a female outside Apparently, the female left and he went upstairs to make sure that he had taken care of the evidence R 287, Tr p 405 He made sure his information was not in the cell phone He stated that he felt that everything was taken care of so he left for Atlanta R 287, Tr p 405

Rivera testified that he then called Kwana Burns and Burns answered the telephone R 287, Tr p 405 He stated he began to talk with Burns and claimed that she lied to him and said she was at her aunt’s house because he knew where she was with the male friend in Greenville R 287, Tr p 405

Rivera said at that time his plans changed because he planned to kill Kwana Burns at her apartment He said he went to an hotel in Atlanta to re-plan his reason on coming to Anderson R 287-88, Tr p 405-406

Upon questioning from counsel, Rivera denied ever contacting Wiley after this point R 288, Tr p 406 He stated that he later again called Kwana Burns and gave him her new address R 289, Tr p 407 He stated that they then scheduled to meet each other on Wednesday and to leave her kids with a relative R 289, Tr p 407

On cross-examination, he expanded on the scheduled meeting with Burns He said she

finally showed up at the Shell station off Mall Road in Anderson and he followed her. When they arrived at her home, Burns introduced her to her son and daughter and Rivera helped bring in groceries. He stated that they watched a movie with Kurt Russell. R 291, Tr p 409. At one point, Burns left him at the home while she went to get some food from her aunt and cousin. At that point, Rivera stated that he surveyed the home to make sure every room was clear and "I made sure that I had a place to kill Kwana Burns at that time [and] I also made sure that I had some things to wipe her down with." R 292, Tr p 410, ll 13-19. He waited for her to come back and she returned with her cousin and daughter. At 10:30 another person came over to clean the oven. R 293, Tr p 411.

After they left, he stated that he asked Burns to drop off her 2 year old daughter, but Burns stated that it was a new house and she did not want her to sleep by herself. He told Burns that he would leave around 7 am.

Rivera testified that he had "positively identified" Burns two weeks before. He said that it was understood that he was spending the night because he did not feel like driving back that late to Atlanta after a movie. R 295, Tr p 413.

While watching the movie, she kissed him and told him that she was thinking about him all day. R 295, Tr p 413. He stated that he began to take off Burns shirt and she got upset and started getting loud. When she moved back and sat with her daughter "I decide to kill MS Burns." R 296, Tr p 414. He asked her to go to the hallway so he would not wake up the daughter. However, he had to force her to her bedroom after she fell down and tried to grab a lamp pole to hit him. R 297, Tr p 415. He stated he told Mrs. Burns what he planned to do and "explained to Mrs. Burns that this wasn't my first killing somebody." R 297, Tr p 415, ll 10-

13 The following occurred

Q What? You explained to her what? Excuse me?

A I explained to Mrs Burns that this was my first time killing somebody

Q But it wasn't, was it?

A It wasn't

Q Was Asha the first one?

A No I explained to Mrs Burns that --

THE COURT Solicitor, don't go there Okay?

MS ADAMS Yes, sir

A I explained to Mrs Burns that I was, just had been on TV with the sketch that you seen yesterday And I explained to Mrs Burns that I'm a wanted man and that she needs to follow my directions if she wanted to live I also explained to Mrs Burns that upon following my directions that I would spare her daughter, _____ Jackson I asked Mrs Burns to take off her clothes She refused She began to get loud again, began to try to fight me At that time Mrs Burns started screaming for her daughter, _____, who was sleeping on the sofa at the time I couldn't believe that she did that **So I ended up choking Mrs Burns, which took two minutes to kill her** I then seen her daughter who was standing at the door

R 297-98, Tr p 415-416

He described initially planning to kill the daughter, but decided not to because he had a daughter He said he then wiped down Kwana Burns , the bottle, the remote control, the doorknobs, the toilet, the kitchen area, and anyplace he felt his fingertips might be R 298, Tr p 416 He then hogtied Kwana Burns and placed the daughter on top of the victim and left "On my way back to Georgia I thought about what I did and I knew that Joya Joseth was still out there I decided to track Joya Joseth down and planned to kill her " R 299, Tr p 417, ll 3-9

He confirmed that he called the cell phone numbers of Wiley and Burns after their death

to hear their voice He stated that Mrs Burns was an assignment and that he was sent here R
300-01, Tr p 418-419 He stated that he killed Asha Wiley because she was able to identify him
and had leaked the information to Joya Joeth R 302-03, Tr p 420, l 11- p 421, l 9 He said it
came back to Kwana Burns

ARGUMENT

I There is no support for his claim that the trial court relieved defense counsel in this case. Instead, the record reveals that defense counsel waived the presentation of a closing argument after the Appellant in his testimony admitted committing the murder of Asha Wiley with malice aforethought, that he intended to kill others as a result of the victim's revelation of his identity and that he had killed others, including Kwana Burns. Since the issue asserted is not preserved for this Court's review, the appeal must be dismissed.

In contradiction to the claims of the Appellant, certain salient facts demand rejection of his Sixth Amendment claim:

- 1 *Counsel Gamble and Thomason were never relieved from representing Rivera at trial.*
- 2 *Counsel knowingly waived their right to make a closing statement.*
- 3 *Rivera never objected to counsel's decision to not make a closing statement.*

Since counsel remained on the case through sentencing and the filing of a notice of appeal, Rivera's free-standing Sixth Amendment claim - made for the first time on appeal - must be rejected.

A Waiver of Right To Make A Closing Argument

The State submits that Rivera waived his right to make a closing statement. Since there is no Sixth Amendment requirement that a closing statement be made by counsel (or the Appellant), his claim must fail.

The right to present a closing argument at trial is of constitutional magnitude, regardless of whether the trial is before a judge or a jury. *Herring v. New York*, 422 U.S. 853, 864-65, 95

S Ct 2550, 2556, 45 L Ed 2d 593, 602 (1975) ¹ Indeed, the Supreme Court has in several recent instances expressly held that concessions from counsel, even absent express consent from defendant, were reasonable *See, e g Florida v Nixon* 543 U S 175, 188-92, 125 S Ct 551, 160 L Ed 2d 565 (2004) (finding that concession of guilt in capital case was reasonable strategy), *Yarborough v Gentry* 540 U S 1, 7-10, 124 S Ct 1, 157 L Ed 2d 1 (2003) (per curiam) (finding that it was not unreasonable strategy for counsel to “candidly acknowledg[e] his client's shortcomings” by conceding that client was a “bad person, lousy drug addict, stinking thief, jail bird”), *Bell v Cone* 535 U S 685, 701-02, 122 S Ct 1843, 152 L Ed 2d 914 (2002) (finding that it was not unreasonable strategy for counsel to waive closing argument such as to prevent the prosecutor from having further opportunity upon rebuttal closing “to depict his client as a heartless killer”)

In 1975, the United States Supreme Court discussed the issue of the denial of closing arguments in *Herring* At that time, the state of New York had a statute which granted a trial court the discretion to deny counsel an opportunity to make a summation of the evidence prior to judgment in a nonjury criminal trial *Id* At the close of the defense's case, Herring's attorney

¹The United States Supreme Court has observed

“It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt ” *Herring v New York* 422 U S 853, 862, 95 S Ct 2550, 2555, 45 L Ed 2d 593, 600 (1975) Given that a criminal trial is a fact-finding process, “no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment ” *Herring* 422 U S at 862, 95 S Ct at 2555, 45 L Ed 2d at 600

requested some time to “be heard * * * on the facts ” *Id* The court summarily denied his request pursuant to the statute, and proceeded with its determination of guilt *Id* The Supreme Court stated that the Sixth Amendment Right to Counsel, as applied to the states via the Fourteenth Amendment, had been found to mean that there should never be “restrictions on the function of counsel in defending a criminal prosecution ” *Id* The Court then noted, “[t]he right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process ” *Id* at 858

The Court then went on to state that the defense's closing argument, “is a basic element of the adversa[rial] factfinding process in a criminal trial ” *Id* Even where a case seems overwhelmingly in favor of the prosecution, defense counsel has a right to make a closing argument to a jury *Id* The *Herring* Court then noted there was considerable authority to suggest that “a total *denial of the opportunity* for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense ” *Id* (emphasis added)

While the *Herring* Court did find that the defendant had a right to a “summation of the evidence most favorable to him” the Court's holding was limited to a constitutional violation where a trial court affirmatively denied the defense's request for a closing argument *Id* at 864-65 There was nothing in *Herring* to suggest that its holding applied when there was merely an omission of a summation

“It is well-settled that the decision to waive an opening or closing statement is a commonly adopted strategy, and without more, does not constitute ineffective assistance of counsel ” *Fox v Ward* 200 F 3d 1286, 1296 (10th Cir), *cert denied* 531 U S 938 (2000) *see also United States v Haddock*, 12 F 3d 950, 955 (10th Cir 1993), *United States v Miller* 907

F 2d 994, 1000 (10th Cir 1990) see also *United States v Natanel*, 938 F 2d 302, 310 (1st Cir 1991) (holding that defense counsel's waiver of closing argument constituted a strategic decision) Moreover, "failure to make a closing argument is not ineffective assistance per se, there must be a reasonable probability that the omission affected the outcome " *Nutall v Greer*, 764 F 2d 462, 466 (7th Cir 1985) "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury " *Strickland v Washington*, 466 U S at 695, 104 S Ct 2052 **Given that the evidence of Rivera's guilt was quite strong-the outcome of the trial would not have been different had trial counsel presented a closing argument** *Accord U S ex rel Taylor v Barnett* 109 F Supp 2d 911, 923 -924 (N D Ill ,2000)

Regarding closing arguments, counsel's strategic decisions regarding what type of summation to make, or even whether to make a closing argument at all, also are difficult to challenge as objectively unreasonable See *Hovey v Ayers*, 458 F 3d 892, 9096 (9th Cir 2006) (observing that the Supreme Court has stressed "the deference owed to the choices made by defense counsel in crafting summations," citing *Bell v Cone*, 535 U S 685, 701-02, 122 S Ct 1843, 152 L Ed 2d 914 (2002), *Yarborough v Gentry*, 540 U S 1, 7-10, 124 S Ct 1, 157 L Ed 2d 1 (2003) (per curiam), *Florida v Nixon*, 543 U S 175, 192, 125 S Ct 551, 160 L Ed 2d 565 (2004))

The waiver of closing arguments does not automatically constitute ineffective assistance of counsel *State v Burke* 73 Ohio St 3d 399, 404-405, 1995-Ohio-290, 653 N E 2d 242 The Ohio Supreme Court has found that "debatable trial tactics do not establish ineffective assistance of counsel " *State v Conway*, 109 Ohio St 3d 412, 2006-Ohio-2815, 848 N E 2d 810, ¶ 101 Under many circumstances, the waiver of closing argument is a matter of trial strategy

People v Conley 118 Ill App 3d 122, 127, 73 Ill Dec 858, 454 N E 2d 1107 (1983) Our supreme court has recognized that “ “[m]istakes in trial strategy or tactics or in judgment do not of themselves render the representation incompetent ” ’ [Citations] In fact, counsel's strategic choices are virtually unchallengeable [Citation] Further, the fact that another attorney might have pursued a different strategy is not a factor in the competency determination [Citation] ”
People v Palmer 162 Ill 2d 465, 476, 205 Ill Dec 506, 643 N E 2d 797 (1994)

A criminal defendant's Sixth Amendment right to assistance of counsel includes a right to present a closing argument before a jury or judge *Herring v New York*, 422 U S 853, 95 S Ct 2550, 45 L Ed 2d 593 (1975), *State v Crooks*, 884 S W 2d 90, 93 (Mo App W D 1994) Although the right to present closing argument may be waived, there is a presumption against waiver *Crooks*, 884 S W 2d at 94 (citing *Johnson v Zerbst*, 304 U S 458, 464, 58 S Ct 1019, 1023, 82 L Ed 1461 (1938)) To find waiver of the right to closing argument, “the record must demonstrate its intentional relinquishment or abandonment ” Id

The initial issue before the Court is whether Rivera waived his right to present a closing argument The Missouri Supreme Court addressed this same issue in *State v Hale*, 472 S W 2d 365 (Mo 1971) Hale involved a non-jury case where at the close of all of the evidence, the trial court adjourned for a “short recess ” Id at 366 After reconvening, the trial court stated that it had “again reviewed the evidence” and then held an off-the-record discussion with the attorneys Id When the proceedings resumed on the record, the trial court, without expressly asking whether the parties desired to present a closing argument, proceeded to pronounce the defendant's sentence Id On appeal, the defendant claimed that the trial court erred by failing to allow his counsel to present a final argument Id In considering the defendant's claim, the Supreme Court

recognized a criminal defendant's constitutional right to present a closing argument, but held that the right “may be waived and may be lost by failing to request argument” *Id.* at 366-67. The Supreme Court emphasized the fact that the defendant “made no request to be permitted to argue his case to the court at the close of all the evidence, either before or after the court indicated its findings on the issue of guilty, and there [was] nothing in the record to show that such a request would have been denied” *Id.* at 367. Ultimately, the Supreme Court concluded that no error existed because the defendant had waived his right to present a closing argument. *Id.* Significantly, the Supreme Court did not require the trial court to expressly inquire of the defendant whether he was waiving his closing argument.²

Applying the principles articulated in *Hale* to this case, the record establishes that Defendant waived his right to present a closing argument. Defendant failed to request argument

²Numerous cases from other jurisdictions are in accord with *Hale*, including *Long v State*, 74 P 3d 105, 108 (Okla Crim App 2003) (“Where Appellant did not request closing argument or object when the trial court did not ask for the same, the right to argue is waived”), *State v Rojewski*, 202 Neb 34, 272 N W 2d 920, 923 (1979) (“In this case there was no denial of a request for argument because there was no request by the defendant for an opportunity to present an argument”), *State v Hebert*, 110 Hawai‘I 284, 132 P 3d 852, 858, 862 (2006) (same), *U S v Stenzel*, 49 F 3d 658, 662 (10th Cir 1995) (“We have found no cases imposing an affirmative duty on a court to offer counsel the opportunity to argue their case”), *U S v Davis*, 993 F 2d 62, 64 (5th Cir 1993) (“We emphasized that an affirmative waiver on the record is not required, rather, waiver may be inferred from a review of the entire record”) “While it may be that the opportunity to make final argument is required as a basic element of the adversary criminal process, such does not preclude a waiver of the same” under appropriate circumstances. *See Lee v State* 175 Ind App 17, 20-21, 369 N E 2d 1083, 1085 (1977) (citing *Herring* 422 U S 853). Failure to request closing arguments at the proper stage of trial proceedings when arguments would otherwise be heard waives the claim that the right to present closing arguments was improperly denied. *See Casterlow v State* 256 Ind 214, 217-18, 267 N E 2d 552, 553-54 (1971). In the absence of a showing that defense counsel requested final argument or was denied an opportunity to make one, it cannot be said that the trial court denied a defendant's right to make a closing argument. *See Lee* 175 Ind App at 21, 369 N E 2d at 1085.

at any time, to object when the trial counsel announced his intent to not present argument, or to request that the trial court set aside or withdraw the finding of guilt to permit oral argument. Additionally, nothing in the record suggests that had Defendant requested the opportunity to present a closing argument, the trial court would have refused such request. To the contrary, the court made inquiry of the Appellant if he wanted to make an argument. The Appellant knowingly and voluntarily waived his right to make a closing argument - either through his counsel or personally.

THE ACTUAL DECISION TO WAIVE A CLOSING ARGUMENT

The Petitioner testified in his own behalf at the trial. During his testimony, it is incontestable that Rivera admitted planning and killing Asha Wiley. In addition, Rivera admitted planning and killing others. Although the decision by Rivera to testify was against his counsel's advice, it is evident that the mere fact of rejecting that advice was not the basis for defense counsel's decision not to present a closing statement - it was the actual substance of the testimony and Rivera's affirmative admissions during his testimony that created the strategic need. Counsel plainly could have made a closing. However, in light of Rivera's testimony, trial counsel felt they were ethically restricted on what they could say in their closing argument.³

³ See SCACR RULE 407 -

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. **A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.**

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by good faith argument for an extension, modification or reversal of existing laws.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

See also, *A B A Criminal Justice Standards - The Defense Function*
Standard 4-5.2 Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter,
- (ii) whether to accept a plea agreement,
- (iii) whether to waive jury trial,
- (iv) whether to testify in his or her own behalf, and
- (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

The following occurred

THE COURT Any motions from the defendant?

MR. GAMBLE Yes, your Honor. Prior to warning our client about to take the stand or at the time we did, we also told him explicitly not to mention the Burns case. As you saw, he started out with the Burns case. He ended up with the Burns case after being told by your Honor, the Court, not to go into that case, being told by myself and Mr. Thomason not to go into that case. What he's left us with now is a confession to two murders.

The only argument I can make to a jury at this point in time is, "Thank you for being here." I mean, really, I cannot say anything to that jury and be ethical about it. Neither can Mr. Thomason. So, if he wants a closing statement, since he's gone loose on the witness stand, I think it's up to him to act in his own behalf to do it. Because we ethically cannot do it.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

Standard 4-7.7 Argument to the Jury

(a) In closing argument to the jury, defense counsel may argue all reasonable inferences from the evidence in the record. Defense counsel should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(b) Defense counsel should not express a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.

(c) Defense counsel should not make arguments calculated to appeal to the prejudices of the jury.

(d) Defense counsel should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

Standard 4-7.8 Facts Outside the Record

Defense counsel should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court can take judicial notice.

THE COURT I understand I understand Mr Rivera, if you want to make a closing statement to the jury, at the appropriate time I will give you that opportunity Do you understand?

(Defendant nods head up and down)

MR THOMASON I would just add that during the testimony I feel like I did my level best to keep him from going there He just absolutely would not do it So, I tried to limit the scope of my questioning as much possible

THE COURT Do you renew your directed verdict motion?

MR GAMBLE Sir?

THE COURT Do you renew your directed verdict motion?

MR THOMASON Oh, yes, sir We renew the directed verdict motion

THE COURT Well, I'm asking Mr Gamble He made it at the end of the State's case, you going to renew it?

MR GAMBLE I honestly don't believe I can after that testimony Scott -- well, maybe not

THE COURT Like I said, if there was any such animal as a directed verdict of guilty in a murder trial, I should be able to give one in this case, but I can't do that

MR GAMBLE I understand I can't in good conscience look at this Court, say I want a directed verdict after that testimony It would be totally irrational for me to do that

THE COURT I understand And let me put this on the record for summation During the voir dire, during the jury, I think we limited 20, 21 jurors had knowledge of the two killings through the newspaper, both parties made an effort, all statements were redacted concerning Kwana Burns, and the attorneys and prosecutor made every effort not to go into Kwana Burns' case However, Mr Rivera wanted to have his say, and he had it I told him the consequences, sent the jury out, gave him the consequences after he took the stand the second time, and he stated he came to Anderson to eliminate Kwana Burns He said, "I had planned to kill Kwana Burns at that time " I give the solicitor permission to further develop those facts concerning Kwana Burns Because I felt like he had opened the door and all parties made every effort not to go into the Kwana Burns issue at that time That was the Court's reason for allowing the solicitor to go

into it

Anything else? How long you need before opening statements, solicitor? Closing, excuse me?

MS ADAMS Not long, your Honor If you want to take a break

THE COURT Are you ready right now?

MS ADAMS Five minutes, that would be great

THE COURT We'll take about a five-minute break Okay

(Recess)

Mr Rivera, your attorneys explained they cannot make a closing argument on your behalf Do you want to make a closing argument to the jury?

THE DEFENDANT No, sir

THE COURT You do not?

THE DEFENDANT No, sir

THE COURT You understand I will give you the right to make a short statement to the jury?

THE DEFENDANT Yes, sir

THE COURT You do not want to exercise that?

THE DEFENDANT (Shakes head from side to side)

THE COURT All right Solicitor, how much time do you need?

MS ADAMS Not much, your Honor Five minutes

THE COURT All right Bring us the jury

R 305-07 Tr p 423 l 3- 425 l 17

DEFENSE COUNSEL WAS NOT RELIEVED BY TRIAL COURT

Subsequent to this discussion concerning the closing argument, the defense counsel team

continued to participate in the trial Counsel was asked if they had objections or exceptions to the instructions R 320, Tr p 438, ll 5-6 Counsel was asked if they had anything to present before the jury was brought in after it reached a verdict R 320, Tr p 438, ll 20-23 Counsel was asked after the verdict if they had any motions R 321, Tr p 439, ll 21-22 Counsel was asked by the court concerning sentencing

THE COURT All right Mr Rivera, if you'll please stand I'll be glad to hear from your attorneys or you on anything you would like to say concerning sentencing I believe the time is anywhere from 30 years to life Anything you would like to say?

THE DEFENDANT No, sir

THE COURT Mr Gamble?

MR GAMBLE No, sir

MR THOMASON No, sir

THE COURT Thank you very much On indictment 2007-GS-04-650, charged with murder, sentenced to the State Department of Corrections for a period of life

R 325, Tr p 443, ll 18-25

ANALYSIS

There was no “summarily relieving” of his appointed counsel by the trial court in this matter at any time for any reason, including the Appellant’s own decision to testify To the contrary, the record reveals that counsel still acted as counsel throughout the duration of the trial and afterwards, including the filing of the notice of appeal Since the perceived constitutional claim was not factually presented below, the appeal must be denied and exception dismissed

The Appellant asserts, in a conclusory fashion, that merely because appointed counsel did

not present a closing argument, that this created an automatic Sixth Amendment violation. However, as noted above, there is no per se Sixth Amendment violation when a closing argument is not done. This situation does not fall within the per se rules of U S v Cronk 466 U S 648 (1984), but instead is structured under the case by case analysis of Strickland v Washington, 466 U S 668(1984).

This issue was similarly addressed in Bell v Cone, 535 U S 685, 695-696, 122 S Ct 1843, 1850 - 1851 (U S ,2002). There, the United States Supreme Court rejected the claim that a waiver of a closing statement by a capital defense counsel would be a per se Sixth Amendment violation in rejecting Cronk analysis in favor of Strickland analysis in the waiver of a closing argument. The Court held

The aspects of counsel's performance challenged by respondent the waiver of closing argument -are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland's* performance and prejudice components. In *Darden v Wainwright* 477 U S 168, 184, 106 S Ct 2464, 91 L Ed 2d 144 (1986), for example, we evaluated under *Strickland* a claim that counsel was ineffective for failing to put on any mitigating evidence at a capital sentencing hearing. In *Burger v Kemp* 483 U S 776, 788, 107 S Ct 3114, 97 L Ed 2d 638 (1987), we did the same when presented with a challenge to counsel's decision at a capital sentencing hearing not to offer any mitigating evidence at all.

Bell v Cone , 535 U S 685, 697-698, 122 S Ct 1843, 1852 (U S ,2002)

Like the situation in Bell, Rivera's counsel were faced with a myriad of strategic hurdles in the trial due to the Appellant's plainly voluntary statement to law enforcement admitting the murder, the statistical presence of his DNA within the victim's body at the crime scene, the identification of Rivera with the victim at the Mall and through communications with the victim, Asha Wiley on the day of her death. The decision by Appellant, a person competent to stand trial to take the stand, although against his counsel's advice, was unchallengeable by the Court and

counsel, except through their own attempts at persuasion

However, as recognized above, it was not because Appellant did not follow counsel's advice that resulted in the strategic decision concerning the closing argument. Instead, it was what Appellant in his narrative testified that affected any effective closing argument by defense counsel. It was the actual testimony and plethora of admissions that impacted this, not the mere fact that the defendant went against the advice and chose to testify.

This case, and every case, stands on its own concerning the right to testify and the impact that it has on argument. Since closing arguments may be waived under the Sixth Amendment, the Appellant's conclusory (and incorrect) assertion that counsel was removed due to the decision to testify is illusory and wrong.⁴

Instead, since counsel was not relieved, the Sixth Amendment claim may be resolved under Strickland in another day in another forum. However, as presented in this appellate setting, it must be dismissed. Trial counsel was never relieved by the trial court.

CONCLUSION

For all the foregoing reasons, the appeal and judgment must be affirmed.

Respectfully Submitted,

HENRY D McMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

⁴Here, there is no claim that there was deliberate or dilatory conduct on the defendant's part that would act as a waiver of counsel. To the contrary, at all times he had counsel, even as he testified, albeit against his counsel's advice. Appellant's suggestion is wrong.

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ATTORNEYS FOR RESPONDENT

January 19, 2010

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

Appeal from Anderson County
J C Buddy Nicholson, Jr , Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

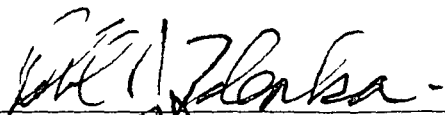
v

RAYMONDEZE L RIVERA,

Appellant

CERTIFICATE OF COMPLIANCE

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



DONALD J. ZELENKA
ATTORNEY FOR RESPONDENT

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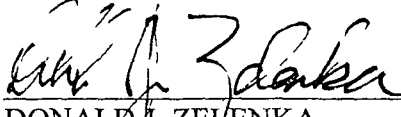
CERTIFICATE OF SERVICE

I, **Donald J Zelenka**, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing copies of the same in the United States Mail to the following

Joseph L Savitz, III Esquire
Senior Appellate Defender
S C Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served

This 19th day of January, 2010



DONALD J ZELEENKA
Assistant Deputy Attorney General