THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY
Court of General Sessions

W. Jeffrey Young, Circuit Judge

Appellate Case № 2015-000718

The State, ... Respondent,

vs.

Michael Vernon Beaty, Jr. ..... Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Procedural History

On June 30, 2013 Michael Vernon Beaty, Jr. was arrested and charged with the murder of Emily Anna Asbill. The State indicted him on September 10, 2013. He was tried before the honorable W. Jeffery Young and a jury on January 26-30, 2015. He was sentenced to life imprisonment without parole. A timely motion for a new trial was filed on February 9, 2015 This Motion was denied on March 20, 2015. Mr. Beaty filed a timely Notice of Appeal on March 27, 2015.

Factual History

The body of Emily Anna Asbill, age 19, was brought to the morgue in Newberry, South Carolina on the morning of June 30, 2013. Dr. Janet Ross performed the autopsy. The body of Ms. Asbill had been found in an "awkward position" on the passenger side floorboard of her automobile. Rec. on Appeal at 519, ll 24-25 to 520, ll 1-8. Dr. Ross observed injuries to her right forearm and both hands that were described as abrasions and were consistent with her hands and forearm having come in contact with the road while the car was moving. Rec. on App. at 501, ll 5-25 to 502, ll 1-5. Her blood alcohol was .239. Rec. on App. at 510, ll 16-17.

Dr. Ross noted a ligature mark on the front portion of the neck of Ms. Asbill. Dr. Ross initially described the ligature mark as being like a shoe lace or shoe string. Rec. on App. at 534, ll 5-14. There was no ligature mark on the back of the neck. Dr. Ross attributed this to the long hair of Ms. Asbill. Rec. on App. at 506, ll 9-22. However, the uncontradicted testimony at trial established that at the time of her death, Ms. Asbill's hair was "up in a ponytail, and she had it somewhat in a bun." Rec. on App. at 181, ll 10-11. Dr. Ross's testified her own autopsy report also

indicated Ms. Asbill's hair was in a pony tail. Rec. on App. at 540, ll 2-7. Dr. Ross further testified that no ligature mark on the back of the neck indicated the ligature mark resulted from someone pulling Ms. Asbill from behind. Rec. on App. at 526, ll 19-25.

She noted that the ligature mark, which she measured at 0.2 inches, appeared to get smaller in width. She did not measure the width of the smaller area. Rec. on App. at 522, ll 8-21. Mr. Beaty gave a statement to the investigating officers that he had pulled Ms. Asbill back into the automobile by her shirt, suggesting a possible cause of the ligature mark on her neck. Rec. on App. at 383, ll 24-25 to 384, ll 1-5. The State conducted no testing to disprove this theory. Dr. Ross took no measurements of the hem of the neck of the clothing Ms. Asbill was wearing. Rec. on App. at 521, ll 20-25. Nor was the clothing examined for the DNA of Mr. Beaty. Rec. on App. at 486, ll 3-18. Dr. Ross did not request nor did the crime scene investigators provide her with a copy of the statement of Michael Beaty. She reviewed the statement for the first time on the Friday before trial. Rec. on App. at 521, ll 8-19.

On the morning of June 29, 2013, Michael Beaty and Emily Anna Asbill decided to attend a memorial gathering for a friend of Michael Beaty who had died. The gathering consisted of friends of the deceased who had attended Thornwell School located in Clinton. Mr. Beaty and Ms. Asbill were in a relationship and had been living together in Greenville. They went to the party late in the afternoon after going together to several places that morning. The original plan was for Ms. Asbill to drive her car as Mr. Beaty intended to drink the various alcoholic beverages he had purchased. The exact time of their arrival and departure was not clear. The general agreement was they arrived in the late afternoon while it was still light. Rec. on App. at 381, ll 4-22. At the gathering they saw a mutual friend, Will Alexander, who had been at the gathering since about 1:30 in the afternoon. Mr.

Alexander has been a close friend of Mr. Beaty for most of their lives. The undisputed testimony was that Mr. Alexander was extremely intoxicated.

Somewhere around 10 pm, Mr. Beaty and Ms. Asbill decided to leave. They also agreed to take Will Alexander home. In his statement Mr. Beaty said they started out to go to the house of Mr. Alexander's parents on Lake Greenwood. After heading in that direction, Mr. Beaty realized his state of intoxication was such that he did not need to make the long trip to Lake Greenwood. He then headed toward the residence of his mother and stepfather, Cynthia and Henry Simmons. Mr. Simmons was a former principal at a local school in Clinton. Rec. on App. at 381, ll 18-22. During this portion of the trip Ms. Asbill attempted to jump from the moving automobile. Upon arriving at the residence, Mr. Beaty noticed Ms. Asbill was not responsive. He went around to the passenger side of the automobile and opened the door. He noticed blood on her arm and because of a prior history of cutting herself, assumed she had done so again. He then went to the house and awoke Mr. Simmons. Mr. Simmons came out to the automobile and found Ms. Asbill on the floor of the passenger side with her legs crossed and she appeared to be sitting on them. He felt for a pulse. When he found no pulse, he called 911. He also noticed the blood about her arms. Mr. Simmons was also aware of the history of Ms. Asbill having cut herself. See, Defendant's Exhibit № 14 (medical records confirming Ms. Asbill had a history of cutting herself). Rec. on App. at 143, l 20 to 145, l 11; 145, ll 5-17

When the EMS arrived, they found Ms. Asbill on the floor of the passenger side with her head back. They described her as being in "an awkward position." They removed her from the automobile and attempted to revive her. They opined that the pool of blood near the passenger door was most likely caused when they attempted to revive her. Rec. on App. at 179, 11 9 to 180, l 5.

See also 424, ll 14 to 425, l 9. They further described her hair as being in a bun, pulled up off her neck. They noticed the blood on her hands and arm. Rec. on App. at 168, l 20 to 169, l 4; 173, ll 18-23.

Crystal Roberts initially interviewed Mr. Beaty. Most of this interview was recorded on her cell phone. In the interview Mr. Beaty explained he did not know what had happened to Ms. Asbill. He explained she had cut herself previously and thought she had done so that night. He discussed their relationship which included the fact that, on occasions, Ms. Asbill would attack him. Rec. on App. at 251, ll 14-16; 388, ll 5-22 . Testimony at trial established that Ms. Asbill had bitten him in the past. Rec. on App. at 388, ll 5-22.

Officers from the State Law Enforcement Division (SLED) conducted an interview of Mr. Beaty during the early morning hours of June 30 until about 7:50 a.m. Rec. on App. at 258, ll 5-7. After Mr. Beaty had been home slightly over two hours, he was called back to the police station. He returned about 10:30 a.m. He remained until the 3:30 p.m. interview. Rec. on App. at 284, ll 8-16. In the 3:30 p.m. interview, Mr. Beaty told of an incident on the way home where Ms. Asbill attempted to jump from the moving car. He stated he grabbed her by the back of her shirt and held her until she calmed down. He did not report stopping the automobile. He stated he and Ms. Asbill had an argument over the fact that she had been paying too much attention to Will Alexander. Rec. on App. at 291, ll 5-12. This information from Mr. Beaty was never reported to the crime scene investigators or the pathologist. After he gave this statement, Mr. Beaty was arrested and charged with the murder of Emily Anna Asbill. *See also* State's Exhibits 4 and 5.

The crime scene investigators searched the automobile belonging to Emily Anna Asbill. They took numerous pictures of the interior and exterior of the automobile. They noticed small

drops of blood on the outside of the car and on the rear wheel. They noticed a small amount of blood on the right side of the front seat and on the edge of the passenger side door frame at the bottom. Rec. on App. at 404, ll 3-6; Otherwise no blood was noted on the interior of the automobile. There was no cast off blood in the interior of the automobile. The crime scene investigators were looking for any item that could have made the mark on the neck of Ms. Asbill. During the search of Ms. Asbill's automobile, they located numerous computer, cell phone, and USB cords as well as a scarf and lanyard. All items were tested for the DNA of Will Alexander, Emily Anna Asbill and Michael Beaty. No specific photographs were taken to document the location of where any of the tested items were found. A few items appear in routine pictures taken of the interior of the automobile. The crime scene investigators were not able to testify as to where any particular item was found if it were not pictured in the routine photographs. Rec. on App. at 427, l 2 to 429, l 10.

In taking possible DNA material from the computer cord, cell phone, and USB cords, a single swab was used to collect the material on both ends of the cord for testing. As a result of this method of gathering evidence, the State was unable to determine if the DNA from an individual was found on one end, the other end, or both ends of the cord. Rec. on App. at 476, ll 1-7; 477, 4-9. Thus the proof of the State failed to establish that Mr. Beaty's DNA was on both ends of the cord as would be required by their theory of the case.

Under the theory of the State, Exhibit 46, a USB cord, was used to strangle Ms. Asbill. This item contained DNA from Michael Beaty on one end, the other end, or both ends of the cord. It also contained DNA from Emily Anna Asbill in the middle of the cord and also on one, the other end, or both ends of the cord. The theory of the State, as demonstrated by the Solicitor during his direct examination of Dr. Ross, is that while Ms. Asbill was sitting in the passenger seat, Mr. Beaty

wrapped a USB cord around the neck of Ms. Asbill overlapping it in front of her neck. With the small end extended upward, he pressed the larger end against her neck, causing a rectangular bruise and abrasion, and pulled the cord upward using the smaller end. Dr. Ross did not note any bruising that would be consistent with manual strangulation. Rec. on App. at 504, ll 21-23; 526, ll 5-9. Allegedly this action ultimately strangled Ms. Asbill. Dr. Ross, however, never determined the exact size of the bruise and abrasion that she observed on Ms. Asbill's neck. Rec. on App. at 538, ll 16 to 539, l 3. As noted earlier, Dr. Ross assumed the absence of a mark on the back of the neck of Ms. Asbill was due to the hair of Ms. Asbill being down, notwithstanding the uncontradicted testimony of the EMS responder that the hair was in a bun and Dr. Ross's own notes that had the hair in a ponytail.

In its rebuttal argument, the State contended, for the first time, that the alleged strangulation took place inside the automobile after Mr. Beaty had arrived at his stepfather's house. They contended, with no facts in the record to support its position, there was an argument and Mr. Beaty took a USB cord and wrapped it around her neck as described above. They contended, again for the first time in its rebuttal closing, that Mr. Beaty was angry because Ms. Asbill was screaming in pain from her injuries, without any evidence of screaming. No cast off blood was found in the automobile. No blood was found around the neck of Ms. Asbill which, according to Dr. Ross, should have been there if she were fighting her attacker as one would expect. Rec. on App. at 514, ll 14-22. The back of the neck area of the shirt Ms. Asbill was wearing, which Mr. Beaty admitted to grabbing, was never tested by any means for Mr. Beaty's DNA or the blood of Ms. Asbill. Rec. on App. at 486, ll 3-18.

The defense presented expert testimony through Dr. Lindsey "Dutch" Johnson, a bio-

mechanical engineer, and Dr. Jonathan Arden, a forensic pathologist. Dr. Johnson conducted several tests to determine the cause of the injuries to Ms. Asbill. His tests are summarized in his PowerPoint presentation admitted as Court's Exhibit 1. Rec. on App. at ___. He obtained an identical automobile, identical clothing, and a female who fit the same physical description contained on the driver's license of Ms. Asbill. In his testing, he first attempted to see if he could duplicate the means of Ms. Asbill obtaining the injuries to her hands and arm without her falling out of the automobile. From his testing he first learned that if the subject were in a relaxed position, she would have fallen out of the automobile if she were leaning far enough out of the automobile so that her left hand and her right hand and forearm were touching the ground. Rec. on App. at 589, ll 8 to 590, l 12. He next learned that if the seat belt were fastened, the subject was not able to lean out of the automobile far enough to have sustained the same injuries to her hands and forearm. Rec. on App. at 596, ll 15-24.

The next test Dr. Johnson conducted was to determine the speed at which the automobile was traveling to cause the blood patterns on the automobile. He had a driver drive the automobile at various speeds to determine if he could duplicate the blood splatter pattern SLED had documented on the subject automobile. Based upon these tests, he concluded that the automobile was traveling approximately 30 to 35 miles per hour at the time Ms. Asbill was leaning out of the automobile and her hands and right forearm were making contact with the road. He testified that higher and lower speeds produced different blood splatter patterns. Rec. on App. at 583, l 9 to 584, l 20.

Dr. Johnson tested the ability of the driver to hold the subject from behind while the passenger was making contact with the road. To conduct this test, he placed clothing of the same make and from the same manufacturer as Ms. Asbill was wearing on the surrogate. He had her lean

out of the automobile. He attached a device that measured the amount of force being asserted to the clothing. From these tests he was able to determine approximately 23 pounds of pull was required to hold the surrogate in the automobile. This was greatly in excess of the 11 pounds needed to cut off the blood flow to her brain and render her unconscious. This force did not tear the clothing worn by the surrogate. Rec. on App. at 587, l 6 to 588, l 19; 572, ll 6-12.

Dr. Johnson also tested the clothing by stretching it. When the neck of the clothing was stretched, the pattern more closely matched the markings on the neck than did the USB cord. He noted that the USB cord would not stretch in his testing. In stretching the neck of the clothing, he noted that the width of the neck of the clothing was not consistent when stretched. The neckline varied in width from two millimeters to five millimeters. Rec. on App. at 600, ll 3-6. Five millimeters is approximately 0.2 inches. He noted that this more closely matched the mark on the neck which also varied in width. Dr. Ross also agreed that the mark on the neck of Ms. Asbill varied in width in different places, but she did not measure the more narrow width. Rec. on App. at 522, ll 7-21.

Also testifying for Mr. Beaty was Dr. Jonathan Arden, a forensic pathologist. Dr. Arden reviewed and agreed with Dr. Johnson's opinion and conclusions. Dr. Arden opined that the cause of death was positional asphyxiation caused by Ms. Asbill being rendered unconscious by the actions of Mr. Beaty in holding her from behind long enough for her to become unconscious. When she slid down onto the floorboard of the automobile, her ability to recover from the unconsciousness was compromised due to the awkward position she was in together with her high alcohol reading. The combination of these events caused her to die from asphyxia. Rec. on App. at 705, ll 9-16.

ARGUMENT

Introduction

Our Supreme Court, apparently, inconsistently interprets *Holland v. United States*, 348 U.S. 121 (1954). *Holland* calls upon trial and appellate courts to scrutinize circumstantial evidence very carefully, in order to determine the sufficiency of the evidence, before submitting a case to the jurors. *Holland*, moreover, is often cited for not giving the jurors the "exclusion of every other reasonable hypothesis" instruction. The evidence in this case was not sufficient to submit the case to the jury (Question I). In the alternative, the evidence required this cautionary instruction (Question V).

The evidence, furthermore, supported the trial court judge charging involuntary manslaughter (Question II). A prior statement by Ms. Asbill, about wanting to jump out of a moving car, while depressed, was relevant evidence because it made Mr. Beaty's statement more probable (Question VI).

The prosecution's conduct during trial also prejudiced Michael Beaty. The Solicitor capitalized on the trial judge's erroneous instruction that a jury trial is "a search for the truth in an effort to make sure that justice is done" (Question III). During closing arguments, the Solicitor "sandbagged" the defense by withholding his complete theory of the case until its "rebuttal" argument (Question IV). Because of the prosecution's repeated attacks on the defense, Mr. Beaty was prejudiced by the trial court not asking in *voir dire* about jurors' bias against criminal defense lawyers (Question VII).

Finally, the trial court's cumulative error warrants a new trial (Question VIII).

Question I

Did the State present substantial circumstantial evidence to prove that Michael Beaty committed the crime of murder with malice aforethought when the ligature mark only on the front of Ms. Asbill's neck was inconsistent with the State's theory of strangulation by wrapping a USB cord completely around her neck, and the State could not prove Mr. Beaty's DNA was on both ends of the USB cord as would be required by their theory of his holding both ends?

Our courts have long held that in a circumstantial evidence case, the "any evidence standard" is rejected and substantial circumstantial evidence is required to sustain a conviction. *State v. Arnold,* 361 S.C. 386, 605 S.E.2d 529 (2004); *State v. Lollis,* 343 S.C. 580, 541 S.E.2d 254 (2001); *State v. Martin*, 343 S.C. 580, 541 S.E.2d 254 (2000); *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989); *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924 (1955). "The circumstantial evidence presented by the State does not reasonably tend to prove [Mr. Beaty's] guilt, and fails this Court's well-settled directive that circumstantial evidence that is not substantial is insufficient to go to a jury." *State v. Odems*, 395 S.C. 582, 592, 720 S.E.2d 48, 53 (2011). *State v. Larmand*, Op. № 27562 (S.C.Sup.Ct. Re-filed December 23, 2015)(Shearouse Adv.Sh. № 50 at 12). The foundation for such a rule is found in *Jackson v. Virginia*, 443 U.S. 307 (1979) in which the United States Supreme Court said, "Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence . . . could be deemed a 'mere modicum.' But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id* at ___. Thus, the United States Supreme Court in *Jackson* established a constitutional floor as to the evidence required for conviction below which no state may go.

Much confusion, not only in South Carolina, but also in other states in our nation, exists as

to the proper standard of review by an appellate court in circumstantial evidence cases. When reviewing a circumstantial evidence case, an appellate court must let the jury resolve credibility issues. Credibility issues involve which witnesses to believe. Juries, and the trial judge, who observed the witnesses are in the best position to determine credibility of a witness. But in circumstantial evidence cases after credibility is resolved, the inference drawn from those facts can be reviewed equally well by an appellate court as well as a jury. Conclusions from the undisputed facts are not credibility issues. For example, Defendant A is accused of a burglary. The evidence against him is that witness B testified he bought the stolen HD television from A three weeks after the burglary. Defendant A denies he sold the television to witness B. Once defendant A is convicted, the jury has resolved the credibility of witness B against defendant A. An appellate court must accept that witness B was believed by the jury. But in such a case, the issue on appeal is not whether B is truthful, but assuming B is truthful, is there substantial circumstantial evidence sufficient to convict? Is the mere possession of a stolen item three weeks after a burglary proof that the defendant committed the burglary? With the factual issues being resolved, an appellate court is as well qualified as a jury to determine if there is substantial circumstantial evidence.

The question for this Court in reviewing the facts of this case, is whether there is any substantive difference between "substantial circumstantial evidence" and to "the exclusion of any other reasonable hypothesis." On three occasions our Supreme Court has cited with approval the law review article Irene Merker, Rosenberg, Yale L. Rosenberg, *"Perhaps What Ye Say is Based Only on Conjecture"— Circumstantial Evidence, Then and Now*, 31 HOUS. L. REV. 1371 (1995).[1]

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[1] These cases are *State v. Logan,* 405 S.C. 83, 747S.E.2d 444 (2013); *State v. Cherry,* 361 S.C. 588, 606 S.E.2d 475; (2004) and *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997).

In that article the authors stated:

> In the case of circumstantial evidence, however, the ultimate determination of guilt is based also on inferences from the evidence, and the court is in as good, if not better, position to assess the rationality of these inferences and whether they establish guilt beyond a reasonable doubt. Thus, use of the reasonable hypothesis standard for appellate sufficiency review would preserve the appropriate roles of judge and jury in circumstantial evidence cases.

Id. at 1416

As noted by another author:

> Because, as discussed, courts should err on the side of ensuring innocent persons are not convicted, rather than ensuring that the guilty are, they should employ a review mechanism that strives to reverse all unjust convictions, even if such a standard means reversing some proper convictions. The reasonable hypothesis of innocence standard is one such method.

Julie Schmidt Chauvin, Comment, *"For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOYOLA L. REV. 217, 245 (2007).

Georgia, by statute, has adopted the "to the exclusion of every other reasonable hypothesis" standard. *See* Ga. Code Ann. § 24-14-6 ("To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.).

In *Holland v. U.S.*, 348 U.S. 121 (1954), frequently cited as a basis for not giving a circumstantial evidence charge, the Court cautioned appellate courts to review circumstantial evidence cases with great caution. The Court said, "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." *Id.* at 129. The reason for such

caution, while not discussed in the opinion, is obvious. A circumstantial evidence case is the only type of case tried in our courts where every witness can tell the truth, but an innocent person be convicted.

Holland cautioned about the dangers associated with the prosecution relying on circumstantial evidence and explained the role of the trial judge in reviewing the sufficiency of the evidence:

> It is, of course, not for [courts] to prescribe investigative procedures, but it is within the province of the courts to pass upon the sufficiency of the evidence to convict. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done.

Holland, 348 U.S. at 135-36. *See also State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001) (Prosecutors "are 'ministers of justice and not mere advocates.' Their special 'responsibility carries with it specific obligations to see the defendant is accorded procedural justice....'" (citing *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) and Comment, Rule 3.8 of Rule 407, SCACR).

Because of the role of the trial court in reviewing circumstantial evidence as articulated in *Holland,* other states review a circumstantial evidence case by applying a "to the exclusion of every

other reasonable hypotheses" standard of review. *New Hampshire v. Roy*, 167 N.H. 276, ___, 111 A.2d 1061, 1075 (2015) ("[T]he reviewing court evaluates the evidence in the light most favorable to the prosecution and determines whether the alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt."); *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) ("This heightened scrutiny requires us to consider 'whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt.'"); (*U.S. v. Spradlen*, 662 F.2d 724 (11th Cir.1981) ("When reviewing the sufficiency of the evidence supporting a criminal conviction, the standard of review is whether, viewing the evidence and all reasonable inferences derived therefrom in the light most favorable to the government, the jury could conclude that the evidence is inconsistent with every reasonable hypothesis of the defendant's innocence."); *Garcia v. State,* 227 So.2d 209, 210 (1969) ("[T]he circumstances relied upon must be not only consistent with guilt, but inconsistent with innocence; and must even go further by excluding every reasonable hypothesis except that of guilt.); *LaPrade v. Commonwealth*, 191 Va. 410, 418, 61 S.E.2d 313, 316 (1950) ("[I]f the proof relied upon by the Commonwealth is wholly circumstantial, as it here is, then to establish guilt beyond a reasonable doubt all necessary circumstances proved must be consistent with guilt and inconsistent with innocence.")

On at least two occasions our Supreme Court, while using the substantial circumstantial evidence standard of review, has supported its conclusion by using the "to the exclusion of every other reasonable hypothesis" standard of review, once to reverse a conviction and once to affirm a conviction. As former Chief Justice Toal stated in her concurring opinion affirming the conviction, "Put another way, the circumstances proven are consistent with each other, and when taken together,

point conclusively to the guilt of Appellant to the exclusion of every other reasonable hypothesis." *State v. Daniels*, 401 S.C. 251, 263, 737 S.E.2d 473, 479 (2012). Support for this standard of review is also found in reversing the conviction in *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009) where, in footnote 2, after citing the "to the exclusion of every other reasonable hypophysis" standard, the Supreme Court stated "it nonetheless illustrates the lack of evidence against Petitioners." *Id.* at 626, 677 S.E.2d at 606.

As a practical matter, the "substantial circumstantial evidence" standard of review is the same as "to the exclusion of every other reasonable hypothesis" standard of review. After all, if two inferences from the evidence are equal or nearly equal in probability, the State has not negated innocence nor has it established substantial circumstantial evidence to prove its case.

The evidence in this case does not meet either standard. The evidence critical to attempt to establish the State's theory of the alleged murder comes down to two witnesses: Amanda Webb, the SLED DNA expert, and Dr. Janet Ross, the forensic pathologist. The State's theory, as expressed for the first time in their final closing argument, is that Ms. Asbill was in pain and creating a disturbance. Mr. Beaty, not wanting to listen to her, took a USB cord, wrapped it around her neck, pressed the big end against her neck to the extent that it caused an abrasion and bruise on her neck, but not hard enough to leave a bruise from his hand or fingers, and pulled the other end up with his other hand until she died. Rec. on App. at 821, ll21-25 to 823, ll 1-20. Supposedly all this was done in the front seat of the automobile with her struggling with bloody hands, but no blood was found on her neck, the neck of her clothing, or inside the car as Dr. Ross would expect if Ms. Asbill had struggled with him. Nor was there any evidence of any wounds on Mr. Beaty that would indicated he had been in a struggle.

No evidence exists that could establish that Mr. Beaty's DNA was found on both ends of the USB cord. When SLED took swabs from the USB cord, they used the same swab to test both ends. Rec. on App. at 475, ll 21 to 476, l 477, l 9. Therefore, the evidence does not establish that the DNA of Mr. Beaty was just on the small end, the large end, or both ends. Further, the amount of DNA found from Michael Beaty was, according to the State's expert, more in keeping with a casual touching rather than a firm grasp as would be required under the State's theory. The DNA of Ms. Asbill, whether on the small end, the large end, or both ends of the cord, was substantially greater than Mr. Beaty's DNA. Rec. on App. at 481, ll 17-21. She was the major contributor to the swab taken from the ends of the USB cord. Rec. on App. at 12-20. Mr. Beaty was the minor contributor. Rec. on App. at 482, ll 21-22. The levels of DNA of Ms. Asbill on the middle of the USB cord were more consistent with mere touching because the DNA was not as strong. Rec. on App. at 485, 10-11. The amount of DNA of Mr. Beaty was inconsistent with his having forcefully grabbed either end of the USB cord. As the automobile belonged to Ms. Asbill and was used by both, the DNA of both would be expected to be in the car and on items found in the car. They had been living together.

No DNA evidence established that Mr. Beaty forcefully grabbed both ends of the USB cord. No DNA evidence established that the USB cord was forcefully placed around the neck of Ms. Asbill. No evidence established that the ligature mark went completely around the neck of Ms. Asbill. If the State cannot establish substantial circumstantial evidence that the USB cord was used to strangle Ms. Asbill, then the State has failed in its proof.

As discussed above, the theory of the State is that the USB cord was wrapped completely around the neck of Ms. Asbill and tightly pulled. Again, while this may be a supposition suggested by the evidence at trial, this fact was simply not proven. Dr. Ross initially testified that because Ms.

Asbill's hair was down the mark did not go completely around the neck and the hair kept the cord from making a mark on the back of the neck. The facts of the case proved this assumption on the part of Dr. Ross to be incorrect. The testimony at the trial proved the hair of Ms. Asbill was pulled up off her neck and in a bun. Rec. on App. at 181, ll 1-15. The EMS person who observed her hair being up also noted there was no ligature mark on the back of her neck. Rec. on App. at 178, ll 4-9. Furthermore, Dr. Ross even admitted that her autopsy report stated the hair of Ms. Asbill was in a ponytail and she did not recall how long the hair was.[2]

Dr. Ross further gave her professional opinion that if there were no obstruction to the back of the neck, the most likely method of her being strangled was being pulled from behind. She testified:

> Q. (By Mr. Wise) And normally when you don't have a ligature on the back, just on the sides, that's an indication that the pulling was from behind?
>
> A. (By Dr. Ross) Correct.
>
> Q. And you speculate her hair was down?
>
> A. Correct.
>
> * * *
>
> Q. Did you get a description from the first person that saw her at the scene as to the condition of her hair in order to reach that conclusion?
>
> A. No, I didn't not [sic].
>
> Q. You did not. Did you think about asking them?
>
> A. No.

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[2] Even if the hair were just in a ponytail, under the State's theory, the ligature mark should have extended around her neck except for the small portion covered by part of the ponytail.

Q. So you simply speculate that the hair kept the ligature from bruising the back of her neck?

A. Correct.

Q. And absent that speculation, your conclusion would have been she was pulled from behind?

A. Correct.

Rec. on App. at 526, ll 22-25 to 527, ll 1-2; 527, ll 11-22.

As the undisputed evidence at trial was that the hair of Ms. Asbill was up, Dr. Ross supported the testimony of Dr. Johnson that Ms. Asbill was pulled from behind. Thus, Dr. Ross refutes the State's theory as to how the strangulation occurred. Unless the State now refutes the uncontested testimony as to the placement of Ms. Asbills hair, the State must concede its theory is not correct.

Dr. Ross further opined that the natural reaction for a person being strangled was to try and remove the pressure from the neck. She noted no scratching on Ms. Asbill's neck from fingernails. No blood from a bloody hand or finger was noted on the neck of Ms. Asbill. SLED did not report any cast off blood being found in the interior of the automobile as one would expect if there were a struggle with a person having bloody hands. No evidence presented by the State supported the theory of Dr. Ross that a USB cord was wrapped completely around the neck of Ms. Asbill. In fact, the evidence conclusively refuted this theory.

With means and manner of the strangulation upon which the State relies being disproved, the State is left with no substantial, if any, evidence to support its theory. What substantial circumstantial evidence establishes that the theory of the solicitor is correct? The theory established by the defendant's expert is not only plausible, but more plausible than the theory of the State. An objective review of the facts in this case does not leave the jury with two almost equal and plausible

theories. Under the facts of this case, no substantial circumstantial evidence has been established to support the theory of the State. The entire theory of the State is built upon speculation as to the means and manner as to the cause of the strangulation. Such speculation is not sufficient to convict.

This Court should reverse the conviction for murder.

Question II

Did the trial court judge err by denying Michael Beaty's request to charge involuntary manslaughter when Michael Beaty's statement to law enforcement and expert testimony supported giving the instruction, and prejudice resulted not only from omitting the instruction but also because the Solicitor equated recklessness with malice?

> Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating. Recklessness has also been defined as something more than mere negligence or carelessness ... a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof.

State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007) (internal quotations and citations omitted). *See also* S.C. Code Ann. § 16-3-60 ("criminal negligence is defined as the reckless disregard of the safety of others").

"The law to be charged to the jury is determined by the evidence presented at trial. . . . , [and] a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "In determining whether the evidence requires a charge of [a lesser included offense], the Court views the facts in a light most favorable to the defendant." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "If

there is ***any*** evidence warranting a charge on involuntary manslaughter, then the charge must be given." *State v. Reese*, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006) (emphasis added) *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). "To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *Knoten*, 347 S.C. at 302, 555 S.E.2d at 394. *See also State v. Brayboy*, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010) (reversible error not to charge involuntary manslaughter).

As set forth in the Statement of Facts, both Mr. Beaty and the State presented evidence that Ms. Asbill opened the car door, attempted to get out of the car, and Mr. Beaty pulled her back inside the car by her clothing. Rec. on App. at 380, l 16 – 383, l 3; and State's Ex. 5. Dr. Johnson conducted several tests. One test determined the position that Ms. Asbill's arms would have been in for her to get the road rash injuries to her arm and hands. Another test determined the speed of the car to explain the blood splatter pattern on the outside of the car. His testing also determined the amount of force necessary to pull on Ms. Asbill's clothing to keep Ms. Asbill from falling completely out of the car. His testing ruled out the use of the USB cord as the cause of the ligature mark on Ms. Asbill's neck and explained how the neckline of her shirt could create that mark. Rec. on App. at 551, l 5 – 607, l 9 and Court's Ex. 1. Dr. Arden concurred with Dr. Johnson's assessment of the injuries to Ms. Asbill's arm and hands and testified about the probability that Ms. Asbill died as a result of positional asphyxiation after she was pulled back inside the car and trapped in an awkward, cramped position on the floorboard of the car. Rec. on App. at 650, l 3 – 705, l 20.

The trial judge convened a charge conference in chambers and, later, on the record. Rec. on App. at 752, ll 8-9. Mr. Beaty requested and the State objected to the trial judge charging

involuntary manslaughter. Mr. Beaty argued that the evidence of his being "highly intoxicated" and his statement about pulling Ms. Asbill "back in the car resulting in her death" would allow the jurors "to find that there was gross negligence in the way he handled it" and the jurors could find involuntary manslaughter. The trial judge, nonetheless, ruled, "I don't think there is any evidence of involuntary or voluntary manslaughter in this matter. It's murder or not murder." Request to Charge No. 7, Rec. on App. at 753, l 25 –754, l 7; 756, l 19 – 757, l 8.

Based on the evidence in this case the trial judge nonetheless charged the jurors:

> [W]here a Defendant is suddenly placed in an emergency situation through no fault of his own, is compelled to act instantly to avoid an injury to another person, he is not negligent if he makes a choice that a person of ordinary judgment might make if placed in the same emergency situation and he is not required to make the best choice, but only one that is reasonable under the circumstances.

Rec. on App. at 752, ll 10-20; 757, ll 5-6; 834, ll8-15; and Defendant's Request to Charge No. 1 (citing *Singletary v. S. Carolina Dep't of Educ.,* 316 S.C. 153, 157, 447 S.E.2d 231, 233 (Ct. App. 1994)).

Closing arguments occurred after the charge conference. The Solicitor was "impressed" with and "very interest[ed]" in Dr. Johnson's testimony "on the biomechanics and some of the physics experiments that [Dr. Johnson] conducted." The Solicitor agreed with Dr. Johnson's opinion about the blood splatter interpretation and how the injuries to Ms. Asbill's arm and hands occurred was "very consistent with the evidence and seems to match." Rec. on App. at 815, l 13 – 816, l 7. But, knowing the trial judge planned to charge sudden emergency and not involuntary manslaughter, the Solicitor argued:

> But probably the most ridiculous thing about this [defense] theory is this, folks. The theory is that Michael Beaty was doing something

> heroic here. That his girlfriend was trying to hurt herself and he was trying to just get her back in the car. So wouldn't the logical thing to do there, or the thing to do if you are trying to safe [sic] somebody, to apply the breaks, pull the car over and get things under control? Their theory is going to require you to believe that for two minutes plus he keeps his foot on the accelerator, driving down the road, . . . leaning all the way out of the car, 30 miles an hour down the road, for long enough to leave these ligature marks and to strangle her to death. Just pull the car over. He's trying to save her, don't you just pull the car over? . . . . if she was unconscious with[in] 15 seconds, it would have been very easy just to slide her back into the seat, right? At this point she is not resisting trying to get out. But still he keeps the pressure up supposedly on her neck for two minutes to kill her. There again, doesn't make sense.

Rec. on App. at 818, ll 20 – 819, ll 23.[3]

After charging the jurors, the trial judge excused the jurors from the courtroom and asked, "Are there any other objections to the charge that has been made?"[4] Rec. on App. at 835, ll17-18-21. When discussing the trial judge's instruction on inferred malice, which was contrary to *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), counsel explained:

> Sudden emergency. You had the accident language in [the charge]. And that's the defense. So we need the criteria that there's a defense that's [an] alternate to malice, and the prejudice comes from directing them to how to infer malice and emphasis [placed on] it.

Rec. on App. at 838, l 25 – 839, l. 7. An alternative to malice, of course, is recklessness as further explained by the involuntary manslaughter instruction requested by Mr. Beaty. Counsel then argued:

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[3] Much of the Solicitor's closing argument pointed to Mr. Beaty's arguably inconsistent statements. "Although [Mr. Beaty arguably] had inconsistent stories, . . . he was entitled to a charge on involuntary manslaughter." *State v. Light*, 378 S.C. 641, 648, 664 S.E.2d 465, 468 (2008).

[4]The trial judge confirmed that the pre-charge requests to charge were preserved for appellate review. Rec. on App. at 839, ll 19-23.

> [I]n his closing argument, the final [rebuttal] argument, Solicitor Stumbo talked about why didn't [Mr. Beaty] just stop the car. And there's factors regarding intoxication, the time, a whole host of factors that go into why that was recklessness and would support a verdict for involuntary manslaughter, and Solicitor Stumbo has basically now equated reckless[ness] with malice and that [should] be cleared up. So we would renew our request to charge that and give them –

The trial judge interjected, "And I'm going to deny your request." Rec. on App. at 839, l 24 – 840, l. 12.

Later on, when making a record of what counsel would have told the jurors if they had been given an opportunity to respond to the Solicitor's rebuttal argument, counsel reminded the trial judge that the State "actually adopted a significant portion of what [Dr.] Dutch Johnson had testified to about how the injuries could have happened to the arms" and hands of Ms. Asbill. Rec. on App. at 845, ll 6-11.

Mr. Beaty moved for a new trial because the trial judge erred by not charging the jurors the law on involuntary manslaughter and providing that option on the verdict form. After reviewing the evidence of recklessness in Mr. Beaty's statement to investigators and summarizing the testimony of Dr. Johnson and Dr. Arden, Mr. Beaty argued:

> During closing arguments, the Solicitor pointed out the dangerousness associated with Mr. Beaty continuing to drive down the road while holding onto Ms. Asbill's shirt with her hanging out of the car. This argument gave the jurors the impression that they could convict Mr. Beaty of murder if they concluded he acted recklessly. The Court's instructions to the jurors reinforced this conclusion. Although the Court charged the doctrine of sudden emergency, which would be consistent with an involuntary manslaughter instruction, the Court denied Mr. Beaty's requests to charge involuntary manslaughter and explain recklessness.

> Evidence presented at trial thus supported the conclusion that Ms. Asbill's injuries resulted from the excessive consumption of alcohol and Mr. Beaty's recklessness, and her death was unintentional. "This is not the traditional strangulation type situation. [Mr. Beaty] was not attempting to strangle [Ms. Asbill] by placing his hands around [her] neck. As such, [his] actions were not the kind which would naturally tend to cause serious bodily injury or death. Under the facts of this case, [Mr. Beaty] was entitled to a charge on involuntary manslaughter." *State v. Chatman*, 336 S.C. 149, 153, 519 S.E.2d 100, 101-02 (1999).

New Trial Motion, pp. 1-3. The trial judge denied this motion. Rec. on App. at ___

In *Chatman*, "the evidence establishes that appellant was not attempting to strangle Victim with his hands." Chatman "testified that while on the ground he and Victim were facing one another and appellant had his shoulder pressed into Victim's neck." The "medical findings were consistent with sufficient force being applied to Victim's neck and further [these] findings were consistent with the Victim and appellant being face-to-face and appellant pressing his shoulder into Victim's neck." As a result, our Supreme Court held, as noted in Mr. Beaty's new trial motion, "Under the facts of this case, we think appellant was entitled to a charge on involuntary manslaughter." 336 S.C. at 153, 519 S.E.2d at 101-02.

Mr. Beaty's reckless actions also factor into the analysis. As seen, the trial court judge instructed the jurors about the law of sudden emergency, and the Solicitor argued the injuries caused by Mr. Beaty's recklessness was avoidable. As our Supreme Court long ago observed:

> The law of negligence and recklessness is the law of the avoidable accident. The gist of the charge of recklessness was that the collision could have been avoided. This necessarily implies that the State must prove beyond a reasonable doubt that the actions of the defendant were culpable, which excludes the theories of an unavoidable accident or one brought about by an intervening cause. Counsel was at liberty to argue to the jury that the collision was not the result of

> recklessness on the part of his client, and the jury, if convinced by the argument, would have exonerated the defendant.

State v. Tucker, 273 S.C. 736, 739, 259 S.E.2d 414, 415-16 (1979). "Reckless disregard for the safety of others signifies an indifference to the consequences of one's acts. It denotes a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof." *State v. Rowell*, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997) (citing *Tucker*).

In this case, the jurors could have reached one of two conclusions about how Ms. Asbill's death resulted from Mr. Beaty's intoxication and recklessness. First, based on Mr. Beaty's statement and Dr. Johnson's expert opinion, the jurors could have concluded that Ms. Asbill died from asphyxiation when Mr. Beaty pulled her back into the car, by grabbing the back of her shirt, while he continued to drive the car. Second, based on Mr. Beaty's statement and a combination for Dr. Johnson and Dr. Arden's expert opinions, the jurors could have concluded that Ms. Asbill passed out while Mr. Beaty pulled her back into the car, by grabbing the back of her shirt, while he continued to drive the car, and then died of positional asphyxiation after she was trapped in a awkward, cramped position on the floorboard of the car.

Both scenarios account for the physical evidence, including the ligature mark and the injuries to Ms. Asbill's arm and hands. It is these very scenarios that the Solicitor argued could have been avoided by Mr. Beaty simply stopping the car and safely returning Ms. Asbill to the inside of the car. The Solicitor focused on the legal requirement that the person confronted with a sudden emergency, "is not negligent if he makes a choice that ***a person of ordinary judgment*** might make if placed in the same emergency situation." *Spahn v. Town of Port Royal*, 326 S.C. 632, 637, 486 S.E.2d 507,

510 (Ct. App. 1997) (emphasis added) (quoting *Singletary* at 157, 447 S.E.2d at 233), *affirmed as modified on other grounds, Spahn v. Town of Port Royal*, 330 S.C. 168, 499 S.E.2d 205 (1998). By arguing that a person of ordinary judgment would have avoided these two scenarios, the Solicitor framed the jurors' deliberations as a choice between Mr. Beaty being "heroic" or guilty of murder. The Solicitor could do that because the trial judge declined to charge involuntary manslaughter. An involuntary manslaughter instruction would have provided the jurors an option that included Mr. Beaty's recklessness, resulting form his intoxication. As charged, the only choice for the jury was between a non-intoxicated person of ordinary judgment being "heroic" and a malicious person committing a murder.

The trial court judge erred by denying Mr. Beaty's request to charge involuntary manslaughter when Mr. Beaty's statement to law enforcement and expert testimony supported giving the instruction. Prejudice resulted not only from omitting the instruction but also because the Solicitor equated recklessness with malice. This Court should order a new trial.

Question III

Did the trial court judge err by informing the jurors during the court's opening instruction that a jury trial is "a search for the truth in an effort to make sure that justice is done" because that instruction is fundamentally incorrect, shifts the burden of proof, decimates the proper burden of proof and jury inquiry of whether the State had proved Michael Beaty's guilt beyond a reasonable doubt, calls upon the jurors to select between two competing versions of the correct truth, and diminishes defense counsel's credibility?

After swearing the jurors, the trial judge instructed:

> This is a real trial, which is a fundamental part of our democracy, and it is a search for the truth in an effort to make sure that justice is done. In searching for the truth and ensuring that justice is done is often slow, deliberative, repetitive.

Rec. on App. at 77, ll 6-7, 17-21.

The trial judge also instructed that the attorneys for the parties "are officers of this court who are sworn to uphold the integrity of the fairness of our judicial system and to help you as jurors in your search for the truth." Rec. on App. at 78, ll 6-9.

The trial judge further instructed, "[Y]our purpose is to determine the facts of this case" and explained the components of a jury trial. Rec. on App. at 79, l 14 – 83, l. 13. The trial judge then instructed, "[I]n determining what the true facts are in this case, you must decide what testimony of a witness is believable." Rec. on App. at 83, ll 13-15. The opening charge did not explain circumstantial evidence or reasonable doubt.

At the conclusion of the opening instruction, the trial judge offered the parties an opportunity to object, and Mr. Beaty requested a sidebar. Rec. on App. at 84, l 18 – 85 l. 7.

The Solicitor then began his opening statement by describing Ms. Asbill as a member of an extended family from the Clinton community, an animal lover that brought home strays, and a natural beauty. He asked, "What happened to the natural beauty and how did she come to die so young in this place that she'd grown up in?" Rec. on App. at 85, l 15 – 86, l 14. The Solicitor foreshadowed the jurors would be "given competing hypothes[es]," Rec. on App. at 97, l. 5-6, and contended:

> I'm telling you, after you see this evidence, and after you hear the testimony, there is only one – there is only one reasonable conclusion. You will be left with no alternative. There is only one conclusion. There is only one theory of this case that will leave you firmly convinced of his guilt.

Rec. on App. at 98, ll 19-24.

Later on, after opening statements, when the jurors were excused from the courtroom, Mr. Beaty explained, "[T]he objection that we made at the bench had to do with Your Honor discussing search for the truth" and telling the juror to find the "true facts" and reach a "just verdict." The trial judge acknowledged the instruction as "search for the truth and ensure justice." Counsel argued, "[A] reasonable juror would take [those remarks] as a jury instruction" explaining the jury's mission as "seeking the truth." Counsel pointed out *State v. Alekesy*, 343 S.C. 20, 538 S.E.2d 248 (2000) disfavors such an instruction and argued prejudice occurred when the Solicitor, during the State's opening statement, informed the jurors there would be "two competing theories and the jurors had to decide which one to believe. Basically that they had to pick which one was the most probable, the most believable, or in other words, which was the truth in the case." Counsel noted:

> [O]ur Supreme Court links the search for the truth and truth seeking to the law on circumstantial evidence and reasonable doubt, and we feel at this point the jurors are under the impression that they have a duty to seek the truth, to find what the true facts are, and that's the law in South Carolina.

Rec. on App. at 104, l 1 – 106, l. 8. But that is not the law in South Carolina.

Counsel noted the trial judge's "very strong instruction that [the jurors] have to accept the law as" the trial judge instructs it, meaning the jurors "will be sitting there through all this [trial] testimony believing they have to seek the truth." Rec. on App. at 79, l 21 – 80, l 12 and 106, ll 8-15.

Although acknowledging the instruction is "disfavored," the Solicitor argued, "[I]t's not particularly characterized as reversible error either." The State contended the "disfavored" instruction "does comport with what our justice system is about, which is finding – finding a verdict which speaks the truth."[5] Rec. on App. at 106, l 16 – 107, l 10.

[5] The Solicitor's position and subsequent reliance on this instruction is reminiscent of the State's stance in *State v. Anderson* regarding the Solicitor appearing as the sole witness before

The trial judge overruled the objection and denied Mr. Beaty's request for a curative instruction. Rec. on App. at 107, ll 1-20.

After four days of trial where the jurors heard competing theories, the Solicitor began his closing argument by placing a photograph of Ms. Asbill, the natural beauty, on the large screen and reminding the jurors, "This is the girl that was born in this county, grew up here, lived her life here over in Clinton here in Laurens County." Rec. on App. at 761, ll 7-23. *See* State's Ex. 2.

The prosecution continued to define the trial just as it had done during opening statements – that the jurors had to choose between two competing hypotheses. After attacking the defense as "ridiculous theories," Rec. on App. at 804, l 9, the Solicitor argued:

> The defense of accidental strangulation, the defense of positional asphyxiation, defies commonsense, and what they ask you to do is check you commonsense at the door and come back with a not guilty verdict. But there is a reasonable explanation for [what] happened. There is a very reasonable explanation for why this smiling girl, EA Asbill, became this, lying in a bed, not breathing, gone from this world.

Rec. on App. at 819, l 24 –820, l 6. Compare State's Exhibit 2 with State's Exhibit 29.

The Solicitor then argued, "One of these theories is reasonable and it passes the common sense test. One of these reasons – theories is not." Rec. on App. at 823, ll 19-21.

The Solicitor also embraced the "disfavored" instruction when he argued:

> And when you're able to do that and really filter everything through that filter of commonsense there's going to be one verdict that speaks the truth.

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the grand jury. Referring to precedent that disfavored the practice, the Solicitor contended, "But that [case] was nothing—that case did not say that we could not do it, they said they didn't like it." 312 S.C. 185, 186-87, 439 S.E.2d 835, 835 (1993). Because of this defiance, our Supreme Court "explicitly prohibit[ed] the practice of prosecutors appearing as the sole witness before the grand jury." *Id.* 312 S.C. at 187, 439 S.E.2d at 836.

> Now, that's what verdict means, folks. It's two Latin words, *verus dictum* [sic], that literally the word means. To speak the truth – or to speak truth. And we're confident that you're [sic] verdict will speak the truth at the end of this case, that Michael Beaty is guilty of murder.

Rec. on App. at 772, ll 4-12.

The Solicitor called for the jurors "to go back in that jury room, reason together as a group, and come out and speak the consciousness – you're the consciousness of the community as the jury, and speak the truth.[9] Rec. on App. at 803, ll. 9-12. The Solicitor implored the jurors to seek the truth that would bring justice for Ms. Asbill's family by finding Michael Beaty guilty of murder:

> This family was going to be celebrating her 21st birthday this coming Tuesday, February 3rd. But instead of now celebrating with her we go into a cemetery to remember her. Never again to go and have – Amanda, her sister, to be setting up a get-together for her 21st birthday with the girls. Her dad, Ashley, should be able to give her a hug on that day. Her momma should be able to take her to lunch and have a good time. Take her shopping. Instead of those things on Tuesday they'll be going to the graveyard with a tombstone. Malice, hatred, ill-will. You'll have an opportunity when you go back to that jury room to deliberate, speak as one mind because of the evidence you have using your good common sense and speak with one voice to Michael Beaty. Time's up on him.

Rec. on App. at 824, l 16 –825, l 6.

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[9] *See also* Rec. on App. at 762, ll 7-11, where the Solicitor informed the jurors they are "the consciousness of the community, that make the decisions in our criminal justice system on guilt and innocence." Our Supreme Court has cautioned trial judges not to "charge that the jury is acting for the community." *State v. Daniels*, 401 S.C. 251, 255, 737 S.E.2d 473, 475 (2012). "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." *Brown v. State*, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (internal quotations and citations omitted). This Court, therefore, should consider the Solicitor's telling the jurors that they were "the consciousness of the community" in connection with the State capitalizing on the trial judge's erroneous instruction that a jury trial is "a search for the truth in an effort to make sure that justice is done."

After closing arguments, Mr. Beaty reminded the trial judge about his "objection to the opening charge" and pointed out the prosecution "actually incorporated that language and used it in their argument." Counsel argued the Solicitor incorporating that language into the closing arguments "adds to the prejudice that resulted from that opening instruction." Rec. on App. at 848, ll 3-12.

Mr. Beaty moved for a new trial because "[t]he Court erred by instructing the jurors to search for the truth and find the 'true facts.'" His written motion reminded the trial judge, "In his closing argument, the Solicitor parroted this language and asked the jurors to render a verdict that speaks the truth." New Trial Motion, pp. 6-7.

The South Carolina Supreme Court long ago disfavored instructions like the one involved in this case. In *State v. Manning*, the trial court instructed:

> Beyond a reasonable doubt, in telling you that that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and *that is a doubt for which you can give a real reason.* That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted to. *A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason.* So it's to that degree of proof that the State is required to establish the elements of a charge.

305 S.C. 413, 415, 409 S.E.2d 372, 374 (1991) (emphasis supplied by the court). Our Supreme Court, accordingly, prohibited trial judges from telling jurors "to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant." *Id*, 305 S.C. at 416, 409 S.E.2d at 374. "Rather than conveying to the jury the principle that the State must affirmatively establish appellant's guilt by probative evidence beyond a reasonable doubt, this charge could mislead a reasonable juror to focus exclusively on appellant's explanation of the evidence to determine the

existence of reasonable doubt." *Id.* 305 S.C. at 417, 409 S.E.2 at 374-75. Our Supreme Court reaffirmed this analysis in *State v. Raffaldt*, 318 S.C. 110, 115-16, 456 S.E.2d 390, 393 (1995).[10]

In *State v. Needs*, the trial judge charged the jurors, "[Y]ou, the jury, must seek some other rational or logical explanation other than the guilt of the accused." And, a "reasonable doubt is a doubt which makes an honest, sincere, conscientious juror in search of the truth in the case hesitate to act." 333 S.C. 134, 151-52, 508 S.E.2d 857, 866 (1998). Our Supreme Court "strongly urge[d] the trial courts to avoid using" this language when instructing jurors about circumstantial evidence and reasonable doubt. 333 S.C. at 155, 508 S.E.2d at 867. In *Aleksey*, our Supreme Court again reminded, "Jury instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" 343 S.C. at 26-27, 538 S.E.2d at 251 (citing *Needs*). More recently, but more than two years before Mr. Beaty's jury trial, in *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012), our Supreme Court instructed trial judges to remove similar instructions from charge books.[11] "Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt." *Id.*

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[10] In *Raffaldt,* the trial judge instructed, "So in the consideration of circumstantial evidence, you must seek some reasonable explanation other than the guilt of the accused and if such reasonable explanation can be found, then you cannot convict upon circumstantial evidence alone." 318 S.C. at 115, 456 S.E.2d at 393.

[11] Despite this admonition to trial judges, Court Administration has not removed the erroneous jury instruction from the current version of *Suggested Jury Instructions—Criminal*, Chapter 3, Preliminary Charge, pp. 10-21 (found at http://www.sccourts.org/juryCharges/GSInstructions.2015.pdf (last viewed December 27, 2015). This Court, accordingly, should request Court Administration correct the errors in the suggested jury instructions for criminal cases.

The trial court's instruction prejudiced Mr. Beaty for five reasons. First, by including this language in the opening instruction, without any explanation of reasonable doubt or circumstantial evidence, the jurors listened to the entire trial testimony believing their duty was to "search for the truth in an effort to make sure that justice is done" in violation of *Manning, Raffaldt, Needs, Aleksey,* and *Daniels.* In fact, including this instruction in the opening charge is much more prejudicial than including it during the final instruction on the law because the jurors operate under the wrong impression for the entire trial—a full week in this case—about their role in a criminal trial. The instruction led the jurors to believe the very nature and sole purpose of a jury trial is to "search for the truth in an effort to make sure that justice is done." *See Daniels.*

Second, improperly instructing the jurors about their role in a criminal trial shifted the burden of proof and decimated the proper burden of proof and jury inquiry of whether the State had proved Mr. Beaty's guilt beyond a reasonable doubt. "[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560 (1979).

Third, in a case like this one, where the jurors were presented with two possible theories about the events leading to Ms. Asbill's death, instructing the jurors to "search for the truth in an effort to make sure that justice is done" focuses the jurors attention on Mr. Beatty's explanation of the events rather than the jurors' duty to determine whether the prosecution met its burden to prove Mr. Beaty's guilt beyond a reasonable doubt. *See Manning, supra,* where our Supreme Court specifically warned about this danger. The function of a jury is not to choose between two

competing theories, but to determine if the State, considering all the evidence, has proven the guilt beyond a reasonable doubt. *See Jackson, supra.* Additionally, reasonable jurors would interpret an instruction "to make sure that justice is done" as "extending beyond the defendant and the State, and include" Ms. Asbill. *Daniels*, 401 S.C. at 256, 737 S.E.2d at 475. The Solicitor's emotional plea about the loss for Ms. Asbill's family compounded the prejudice resulting from this misunderstanding about ensuring justice for the decedent.

Fourth, the prosecution, that acknowledged its "familiar[ity] with that line of cases"—*Manning, Raffaldt, Needs, Aleksey,* and *Daniels*—disfavoring the instruction, Rec. on App. at 106, l 18, seemed to use our Supreme Court's warnings about the dangers of this instructions as a roadmap for its opening statement and closing arguments. The State framed the trial as a choice between two competing theories or hypotheses. Prosecutors suggested the jurors should select the theory that would bring justice to Ms. Asbill and the community where her family lives. Knowing the instruction is "disfavored," the Solicitor parroted the "seek the truth" language during his closing argument and equated a verdict that "speaks the truth" with finding Michael Beaty guilty of murder. *See also State v. Swilling, infra*, discussing how the Solicitor capitalizing on the erroneous instruction compounds the prejudice.

Fifth, the ultimate effect of the improper instruction "was to diminish appellant's attorney[s'] credibility in the eyes of the jury." *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 821 (2001). During opening statement, Mr. Beaty explained that the State must prove "there is no other reasonable explanation than the guilt of the accused to convict Michael Beaty of murder." Rec. on App. at 102, l 24 – 103, l 3. During closing arguments, counsel stated, "If you go into the jury room and say to yourselves . . . Michael Beaty with a depraved heart, and with malice aforethought,

probably killed EA, what should your verdict be? Your verdict should be not guilty." Counsel then attempted to explain the concepts of reasonable doubt and circumstantial evidence. Rec. on App. at 773, l 17 – 775, l. 22; 782, ll 8-12; 790, l 7 – 791, l 17. *See State v. Logan*, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013) ("If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed."). Counsels' efforts were for naught because the jurors believed their mission was to "search for the truth in an effort to make sure that justice is done." *See, also Holland, supra.*

Finally, the judge's final instruction on the law did not cure the prejudice. When this Court "consider[s] the erroneous charge of the trial judge in connection with the efforts of the solicitor to" capitalize on the error and implore the jurors to seek the truth and find justice for Ms. Asbill's family "we do not think it can be said that His Honor's effort to correct the error which he had inadvertently made removed the prejudice to" Mr. Beaty. *State v. Swilling*, 246 S.C. 144, 152, 142 S.E.2d 864, 868 (1965) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

Mr. Beaty was prejudiced by the trial judge telling the jurors a trial "is a search for the truth in an effort to make sure that justice is done." The bench and bar, moreover, would benefit from a strong statement by this Court to avoid this language in jury instructions and argument by counsel. This Court should order a new trial.

Question IV

Did the trial court err in failing to require the State to open fully on the law and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America by his counsel not being able to respond to the new theory made by the State in its rebuttal closing argument?

The order of closing argument and the content of the argument should afford both parties a fair opportunity to present their side and refute the argument of the other side. This worthy goal is recognized in virtually every state in the union in which the government is required to fully open on the law and the facts, including its theory as to how and why the defendant committed the crime. The defendant, then having fully heard the State's theory, is able to refute that theory and give its theory. The government in its final argument then refutes the theory the defendant proposed as to why the defendant is not guilty. Such a procedure is equally fair to both sides. As one court has said "The rule is rooted in the concepts of due process and fundamental fairness. Simply put, it is unfair and often highly prejudicial for plaintiff's or State's counsel to avoid treatment of certain issues in the opening summation so as to deprive defense counsel of the opportunity to reply." *Bailey v. State.*, 440 A.2d 997, 1002 (Del. 1982).

Defense counsel made a motion before closing arguments that the State be required to open fully on the law and facts. The understanding of defense counsel was the State was going to follow such a procedure. Unfortunately, this did not occur in this case. The opening argument in "full" by the Solicitor consisted of only 12 pages. Rec. on App. at 761-772. Of those 12 pages, only three page were used to discuss the facts. Rec. On App. 769- 772. His "rebuttal" to the argument of the defense consisted of 34 pages, almost three times longer than his opening argument in "full" and ten times longer than his discussion of the facts in his opening argument at closing. Rec. on App. at 802-835.

In South Carolina no Rule of Criminal Procedure addresses the question of the order of argument to the jury.[12] The practice of the State opening only on the law and then closing fully on

[12] The South Carolina Supreme Court recently held a public hearing on Rule 21 which would require by a court rule that which the defendant contends is required by the due process

the facts after the defendant has given the closing argument is long on tradition but short on law to support that tradition. The early practice in South Carolina was for the State to open fully on the law and the facts. In *State v. Atterberry,* 129 S.C. 464, 124 S.C. 648 (1924), the Supreme Court held that the failure to require the State to open fully on the law and facts was reversible error. At that time Circuit Court Rule 59 provided, "The party having the opening in argument shall disclose his entire case and on his closing shall be confined strictly to a reply to the points made, and authorities cited by the opposite party."[13] In reversing the conviction of the defendant the Court said, "The defendant moved the court to require the solicitor to make the opening speech to the jury before the defendant's attorneys were required to make their arguments. This was refused. This was error." *Atterberry*, 129 S.C. at ___, 124 S.E. at 651. In his concurring opinion Acting Associate Justice Aycock stated the principle best when he said "It is but fair that the party who has the advantage of the last address to a jury should be required to open and apprise the opposing party of his views as to his entire case." *Id.* at ___, 124 S.E. at 651. As a matter of legal history, the State in South Carolina was required to open fully on the law and the facts.

The more recent practice developed when the Circuit Court Rules were changed. This change was noted in *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971). Again, the defense counsel requested that the State be required to open fully on the law and the facts. This request was denied by the trial judge. The Court noted that since the decision in *Atterberry,* Rule 59 of the Circuit Court

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clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America.

[13] Rule 59 in 1924 was part of the Code of Civil Procedure. The concurring opinion by Acting Associate Justice Aycock makes reference to the fact that nothing in the Code of Civil Procedure limits the application to civil cases. Rule 1 of the South Carolina Rules of Civil Procedure today does limit their application to civil cases.

Rules had been changed to Rule 58 and the rule then read, "The party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party." The Court in *Lee* concluded that "It follows that the trial judge, under the changed rule, was correct in holding that a solicitor is no longer required to make an opening argument to the jury on issues of fact." [14] *Lee,* at 318, 178 S.E.2d at 656. Thus began the more recent, but incorrect, practice of requiring the State to open only on the law and not the facts.

Today Rule 43(j) of the South Carolina Rules of Civil Procedure controls the order of argument in civil cases. This rule now provides that the plaintiff shall have the right to open and close at the trial of the case. The rule then concludes, "The party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter." With Rule 43(j) of the South Carolina Rules of Civil Procedure, the long practice in civil cases of plaintiff's lawyers "sandbagging" and saving their real argument for their last argument, came to an end. But the practice, without any support in the law, continues in the general sessions courts not based upon the law or logic, but upon misapplication of the civil rules.

The practice of "sandbagging" in a closing argument was a basis for reversal of a criminal conviction in *Bailey.* The Court said "Application of these authorities to the facts at hand compels us to reverse and remand the case for a new trial on the ground that the Trial Court abused its discretion in permitting the State to utilize the inherently prejudicial "sandbagging" trial strategy." *Id.* In South Carolina "sandbagging" by a prosecutor is not only approved but is actually legalized.

The majority of states and the federal courts require the prosecutor to open fully on the law and the facts. *See, e.g.* Fed. Rul Cr. Proc. 29.1; ARK. CODE ANN. 16-89-123; GA. CODE ANN. § 17-

[14] Again this was a change in the Code of Civil Procedure which the court had no problem applying to a criminal case.

8-71; NEV. REV. STAT. ANN 175.141; TENN. RULES OF CRIM. PROC. Rule 29.1; In Re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE-FINAL ARGUMENTS, 957 So.2d 1164 (Fla. 2007) *but see*, *Degadillo v. State*, 262 S.W.3d 371 (Tex. Ct. App. (2008). The treatise writers also support the requirement that the State open fully on the law and evidence. *See*, JACOB STEIN, CLOSING ARGUMENTS 2d, § 1:6 (2010) and 75A AM. JUR. 2D *Trial* § 448 (2010). In revising its rules as to closing argument the Florida Supreme Court noted "The statute provides that in accord with the common law, the prosecuting attorney shall open the closing arguments, defendant or his or her attorney may reply, and the prosecuting attorney may reply in rebuttal." *In re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE- FINAL ARGUMENTS*, 957 So.2d at 1166.[15] In commenting on the proposed amendment to Federal Rule 29.1 of the Federal Rules of Criminal Procedure, the committee said it "believes that, as the Advisory Committee Note has stated, fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply." H.R. REP. 94-247, 17, 1975 U.S.C.C.A.N. 674, 689

South Carolina should break with a practice that has no support in logic or the law and require that the State be required to open fully on the law and the facts. The current procedure in South Carolina simply permits the State to legally "sandbag" its argument and not afford the defense the opportunity to reply to new arguments that the State used in its closing. The inherent logic of this position has been acknowledged by this Court concerning reply briefs and oral argument. "An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued

[15] The Florida Supreme Court also noted that forty-seven states follow the common law.

in the appellant's brief." *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989). The reason of this rule in the appellate court is a party should have a fair chance to respond to matters raised by counsel in their briefs. The rule should also be applied to arguments before a jury.

In the present case the defendant can show actual prejudice. After the rebuttal argument of the State, the defendant asked for a mistrial or in the alternative an opportunity to give a brief reply to the new matter the State had brought up in its rebuttal argument. Rec. on App. at 836, ll 3-7. The trial judge declined to do either. Later defense counsel put on the record the new matters the State raised in its rebuttal. Rec. on App. at 842, ll 3-25 to 848, ll 1-12. Of particular significance were three arguments that the Solicitor included in his rebuttal argument to which the defendant had no opportunity to reply. He argued for the first time since the arrest of Mr. Beaty, that the alleged murder took place in the car on the street in front of the house of Mr. Beaty's stepfather. No facts support this position. Second, he argued for the first time since the arrest of Mr. Beaty, that the reason for the alleged murder was that Ms. Asbill was screaming and Mr. Beaty wanted to "shut her up." Rec. on App. at 18-25. No facts supported this position. Third, as part of his "rebuttal" PowerPoint presentation, the Solicitor took a statement of Michael Beaty out of context to which the defendant had no opportunity to reply. Rec. on App. at 847, ll 14-22.

None of the three arguments were responsive to arguments of defense counsel. All were new matters that should have been raised in the initial closing argument of the State. Without the opportunity by defense counsel to point out that there is no evidence in the record to support these arguments, the jury was left only with the authoritative statement of the Solicitor when they considered the evidence. A fair trial is not conducted when defense counsel hears for the first time

two crucial theories of the State and an out of context statement of the defendant in the State's rebuttal argument. If the State's case and argument is so strong, why is the State unwilling to open fully on the facts and its theory of the case? This Court should order a new trial.

Question V

Did the trial court err in failing to charge the law of circumstantial evidence as set forth in *State v. Edwards,* 298 S.C. 272, 379 S.E.2d 888 (1989) instead of the law as stated in *State v. Logan,* 405 S.C. 83, 747 S.E.2d 444 (2013) when the *Edwards* charge properly stated how a jury should review circumstantial evidence?

Based on *State v. Edwards,* 298 S.C. 272, 379 S.E.2d 888 (1989), Mr. Beaty's request to charge number 5 asked the trial judge to instruct the jurors:

> Every circumstance relied upon by the State [must] be proven beyond a reasonable doubt; and ... all of the circumstances so proven [must] be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

(hereinafter "*Edwards* Charge"). Rec. on App. at *.

"A key purpose of this cautionary charge . . . was to preclude conviction of the innocent. The modern American trend, however, has been to abandon the common law instruction concerning circumstantial evidence. This has the effect of creating the very danger that the [common law] rule sought to eliminate." Rosenberg, 31 Hous. L. Rev. at 1390. In fact, since *Edwards*, our Supreme Court has struggled with how trial courts should explain circumstantial evidence to jurors in a criminal case. In *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), the Court approved an alternate instruction that became mandatory after *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). Both *Grippon* and *Cherry* were three-to-two decisions, with the minority opinions wanting

to retain the *Edwards* Charge. But, in *Grippon* and *Cherry*, our Supreme Court, "never rejected the 'reasonable hypothesis' phrase [of the *Edwards* Charge] or found this phrase shifted the burden of proof." *Grippon*, 327 S.C. at 82, 489 S.E.2d at 463.

Just eighteen months before Mr. Beaty's trial, our Supreme Court revisited this issue and "modif[ied] *Grippon* and *Cherry* to allow the additional language provided . . . if requested by a defendant," by setting fourth a new instruction. *State v. Logan*, 405 S.C. 83, 99-100, 747 S.E.2d 444, 452-53 (2013) (herein after "*Logan* Charge"). In *Logan*, the majority opinion warned that "requiring a jury to inquire as to whether there is any other reasonable explanation other than the defendant's guilt comes perilously close to shifting the burden of proof from the State to the defendant." *Id.* 405 S.C. at 98, 747 S.E.2d at 451-52 (citing *Aleksey,* 343 S.C. at 26, 538 S.E.2d at 251 ("Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'")). Mr. Beaty, indeed, acknowledged the trial judge was bound by *Logan*, and his request to charge number 6 requested the *Logan* Charge, if the trial judge declined the *Edwards* Charge. Rec. on App. at 756, l 1 - 7 and *.

As seen in Question I, *Holland* discusses the government's obligation, as part of its duty "to see that justice is done," 348 U.S. at 136, to disprove leads presented to it by an accused. The *Logan* Charge, however, omits instructing the jurors the State's proof must "point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis," which implies that the prosecution has the burden of disproving every reasonable hypothesis inconsistent with guilt by proof beyond a reasonable doubt. Such an instruction is mandatory when an accused presents other defenses. "[W]hen self-defense is properly submitted to the jury, the defendant is entitled to a

charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt." *State v. Burkhart*, 350 S.C. 252, 262, 565 S.E.2d 298, 303 (2002). *And see Suggested Jury Instructions—Criminal*, pp. 294-95. The prosecution, likewise, has the "burden of disproving the defense of alibi." *State v. Bealin*, 201 S.C. 490, ___, 23 S.E.2d 746, 754 (1943). *And see Suggested Jury Instructions—Criminal*, pp. 275-76 and Ralph King Anderson, Jr., South Carolina Request to Charge—Criminal, 2007, § 6-19. "An alibi charge is considered especially crucial when the evidence is entirely circumstantial." *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). In a criminal sexual conduct case, if the accused raises the defense of consent, then "the state must prove beyond a reasonable doubt that the victim did not consent." *Suggested Jury Instructions—Criminal*, p. 278.

If the accused raises the defense of accident, then "the burden is on the State to prove beyond a reasonable doubt that the act was not an accident but was caused by the negligence or carelessness on the part of the defendant . . . or by unlawful activity by the defendant." *Suggested Jury Instructions—Criminal*, pp. 274-75. Although not giving this precise instruction, the trial judge did charge sudden emergency. Rec. on Appeal at 838, l 25 to 839, l 7. As seen in Question II, Mr. Beaty's statement to law enforcement provided an alternate explanation for the circumstantial evidence relied upon by the State that supported sudden emergency and involuntary manslaughter instructions. "The evidence presented at trial determines the charged jury instruction. The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Blurton*, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002) (internal quotations and citations omitted). The *Edwards* Charge requested by Mr. Beaty would have conveyed to the jurors that the prosecution had the burden of disproving Mr. Beaty's explanation with proof beyond a reasonable doubt. By

restricting the circumstantial evidence instruction, the *Logan* Charge interferes with the mandate that "the trial court must consider the facts and circumstances of the case in order to fashion an appropriate charge." *State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). In this case, not providing the *Edwards* Charge prejudiced Mr. Beaty by reducing the State's burden of proof.

Not providing the *Edwards* Charge, combined with instructing the jurors that a trial "is a search for the truth in an effort to make sure that justice is done," further prejudiced Mr. Beaty. Thus, when "considered as a whole" the juror instructions in this case are not "free from error." *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994). As seen in Question III, the Solicitor immediately seized on the "truth seeking" language, framed the trial as a choice between competing hypotheses, and focused the jurors on Mr. Beaty's explanation of the events. Yet, the jurors were never instructed that the prosecutors had the burden of disproving Mr. Beaty's explanation. As seen in Question IV, this prejudice was further compounded by the Solicitor's sandbagging during his "rebuttal" argument.

"[E]rroneous jury instructions are subject to a harmless error analysis," *Logan*, 405 S.C. at 94 (fn.8), 747 S.E.2d at 449 (fn. 8), but as the Supreme Court of the United States has observed:

> In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt.

Glasser v. United States, 315 U.S. 60, 67 (1942).

The trial judge's failure to instruct the *Edwards* Charge further prejudiced Michael Beaty because the credibility of his explanation of Ms. Asbill's injuries was central to the issues to be

determined by the jurors. In *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 809-10 (2009), our Supreme Court held, "[E]rror in charging that malice may be inferred by the use of a deadly weapon cannot be considered harmless. Evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge." Our appellate courts consistently find error prejudicial when the defendant's credibility is at issue. *E.g. State v. Anderson*, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) (error in qualifying witness as an expert not harmless when the "case turned solely on the credibility of the minor and of Appellant"); *Gilchrist v. State*, 350 S.C. 221, 228, 565 S.E.2d 281, 285 (2002) (Solicitor's improper vouching from State's witness, Ethridge, was prejudicial "because Gilchrist essentially presented a 'mere presence' defense, believing Ethridge was the only way the jury could convict Gilchrist."); and *State v. Bryant*, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) ("[T]e improper questioning pitted the officer's testimony against Bryant. Credibility was a critical issue in this case as Bryant and the officer were the only two witnesses present during the entire incident. We find that Bryant was unfairly prejudiced by the improper cross-examination.").

Michael Beaty was not obligated to provide an explanation to law enforcement that explained the State's circumstantial evidence. U.S. Const. Am. V and S.C. Const. Art. I, § 12. And the State was not obligated to introduce Mr. Beaty's statement to law enforcement. Nor was Mr. Beaty obligated to further support his statement to law enforcement with expert testimony. But once this evidence was admitted at trial, the trial judge was obligated to instruct the jurors about the State's burden to exclude Mr. Beaty's reasonable explanation with proof beyond a reasonable doubt. The *Edwards* Charge might not be appropriate in a case where the accused remains silent during the investigation and offers no evidence at trial. But, "at times, a separate framework is necessary to the jury's analysis of circumstantial evidence." *Logan*, 405 S.C. at 100, 747 S.E.2d at 453. In this case,

where the jurors heard Michael Beaty's explanation, the *Edwards* Charge was necessary to aid the jurors in understanding how to evaluate circumstantial evidence. At a bare minimum, the trial court should have instructed the jurors about the State's burden of disproving Michael Beaty's explanation with proof beyond a reasonable doubt.

This Court should order a new trial.

Question VI

Did the trial court err in excluding the testimony of Valerie Jones concerning a prior incident when Emily Anna Asbill threatened to jump from an automobile when such testimony was relevant to establish the fact that Ms. Asbill was attempting to jump from the automobile when she was restrained by Michael Beaty resulting in her death?

In his statement to officers of the State Law Enforcement Division, Michael Beaty made reference to the fact that Emily Anna Asbill had attempted to jump from the moving automobile and he had grabbed her from behind to keep her in the automobile. Rec. on App. at 371, ll 12-19. Thus, the statement by Mr. Beaty, introduced by the State, made evidence as to Ms. Asbill's propensity to jump from a moving automobile relevant to his defense.

Rule 401 of the South Carolina Rules of Evidence provides:

> Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The testimony of Valerie Jones that Ms. Asbill had expressed to her a desire to jump from a moving automobile makes the fact that on the night of the incident she attempted to jump from the automobile Mr. Beaty was driving "more probable . . . than it would be without it." Rule 402 of the South Carolina Rules of Evidence, permits relevant evidence to be excluded if it is excluded under any other rule or provision of the Constitution of the State of South Carolina of the

Constitution of the United States of America. The trial judge had ruled that the testimony was not admissible. Rec. on App. at 751, 5-22. He did not identify the provision that excluded the evidence. The affidavit summarizing the testimony of Ms. Jones, with the consent of the State, was subsequently admitted as Court's Exhibit 3.

To appreciate the relevance of Ms. Jones testimony, it is helpful to understand how our courts have treated out of court statements as to state of mind in other cases. In murder cases, the courts of our state have long recognized that threats, either made by the defendant against the deceased or by the deceased against the defendant, are relevant to either prove malice or to help establish a cause of fear by the defendant in support of his defense of self defense. *State v. Mason,* 215 S.C. 457, 56 S.E.2d 90 (1949). Even un-communicated threats against a defendant are admissible. *See State v. Griffin,* 277 S.C. 193, 285 S.E.2d 631 (1981). The logic behind the rule is that a threat by either the deceased or the defendant is relevant as it tends to establish who is the aggressor and make more or less probable either the defense or the theory of the prosecution. Past threats of suicide have been admitted to make the fact of murder less probable. *See*, Note, *The Judicial Interpretation of Suicide,* 105 U. PA. L. REV.391, 399-403 (1957). In South Carolina there is no set time as to the remoteness of any threat. As the South Carolina Supreme Court has said:

> Of course, where a great or even a considerable length of time has elapsed between the making of a threat and the perpetration of the deed to which it is supposed to point, such length of time is a circumstance to be considered by the jury in determining whether there is any connection between the threat and the deed; but there is no rule of law, and, in the very nature of things, it would be practically impossible to prescribe any rule, fixing a limit beyond which a threat would not be competent evidence.

State v. Campbell, 35 S.C. 28, ___, 14 S.E. 292, ___ (1892)

In the present case the prior statement by Ms. Asbill was made when she was in high school and approximately 15 years of age. The affidavit establishes Mrs. Jones, an honors English teacher, considered the statement important enough to report it to the principal. The testimony of Mrs. Jones certainly makes the fact that Ms. Asbill attempted to jump from the automobile more probable than not. As such it was relevant testimony and should have been admitted. This Court should order a new trial.

Question VII

Did the trial judge err by denying Michael Beaty's request for the court to *voir dire* jurors to determine whether any of the potential jurors had a bias against defense lawyers who represent someone charged with murder, and when the failure to do so prejudiced Mr. Beaty by the prosecution's repeated attacks on the defense during his jury trial?

The purpose of *voir dire* is to determine whether any potential juror "is sensible to any bias or prejudice." S.C. Code Ann. § 14-7-1020. In his pre-trial brief, Mr. Beaty requested carefully vior dire due to the pre-trial publicity caused by Ms. Asbill's father's employment as a SLED agent and her mother's community activism including public appearances with Attorney General Alan Wilson and Solicitor David Stumbo. Rec. on App. at ___ and Court's Exhibit 1. Mr. Beaty's request for *voir dire* number 9 asked, "Who among you just don't like lawyers, particularly lawyers who represent persons accused of a crime in cases like this?" Rec. on Appeal at *. When the Court did not ask this question, Mr. Beaty renewed his request prior to selecting jurors, and the Court again declined his request. Rec. on Appeal at *. Mr. Beaty moved for a new trial because "he was not able to strike jurors with a bias or prejudice against criminal defense lawyers," asserting prejudice because "[t]hroughout the trial, the prosecutors attacked the defense lawyers." Rec. on App. at *. The trial judge denied this motion. Rec. on Appeal at. *.

When witnesses identified Mr. Beaty—even though his identity was never in dispute—the prosecutors called attention to the fact that Mr. Beaty was sitting "at the Defense table between his attorneys." *E.g.* Rec. on Appeal at 127, ll 10-17 (Rose Stewart) and 170, ll 11-16 (Lauren Simmons).

The prosecution suggested an apology "for the interruption" was necessary after defense counsel requested a sidebar. Rec. on Appeal at 320, ll 8-12.

The prosecution mocked defense counsel for retaining experts from Arizona and Virginia. After pointing out that Dr. Johnson was from Arizona and had never visited our state before, the Solicitor welcomed him to South Carolina "[a]nd Laurens County" and suggested he had to "fly over some seven, eight, nine, 10 states" to testify. Rec. on Appeal at 609, ll 2-23 and 614, l 20 – 615, l 12. The Solicitor welcomed Dr. Arden "back to South Carolina.[16] Rec. on Appeal at 707, ll 3-7.

The prosecution questioned Mr. Beaty's expert witnesses about their fees for services. Dr. Johnson's fee for spending over 100 hours conducting scientific testing, consulting, and testifying was $16,000.00. Rec. on Appeal at 610, ll 2-8 and 646, l 15 – 647, l 18. Dr. Arden's expert rate was $375.00 per hour and he expected his total fee to be "in the seven to $8,000.00 range." The Solicitor mocked Dr. Arden, "So similar to a roadside musician; [defense counsel] pay you and you sing whatever song they want you to sing, correct?" Rec. on Appeal at 734, ll 4-22.

In closing, the Solicitor continued to call attention to the experts' fees:

> Now, our founding fathers set up the jury system because . . . it's ordinary citizens, regular folks that [are] the consciousness of the community, that make the decisions in our criminal justice system on guilt and innocence. Certainly not a perfect justice system. Not by any stretch of the imagination, but it is the best we have. And let me tell you why. Folks, we heard just yesterday in this courtroom, just on Thursday, January the 29th, we heard over $20,000, almost

[16] Dr. Arden previously had testified in South Carolina. *See e.g. Elmore v. Ozmint*, 661 F.3d 783, 808 (4th Cir. 2011), *as amended* (Dec. 12, 2012).

> $25,000 worth of testimony from the Defense. I'm so glad that we have jurors that serve, because it really gets at the heart of what we're doing here this week. That it's ordinary citizens from all walks of life in Laurens County that make these decisions. Not high paid experts from Arizona, from Virginia. They don't make the decisions on these things. Regular folks do, and that's why it's the greatest justice system the world's ever had. Even though, as we said, it's far from perfect. So I want to thank you for being here this week.

Rec. on Appeal at 762, ll 7-25.

During his rebuttal argument, the Solicitor continued:

> What we just heard in the last hour plus [during defense counsel's closing argument], and in the last couple of days, all day yesterday with the $25,000 worth of testimony that we heard from those Defense doctors, reminds me of a story I heard from my grandfather one time, and he told me a story about not letting people take you for a ride or deceive you.

During the opening statements, after discussing circumstantial evidence, the Solicitor introduced a theme that would become the centerpiece of the State's rebuttal argument, "But just because we're in this courtroom – you don't see a sign out there that said check your common sense at the door." Rec. on Appeal at 96, ll 10-12. By telling a story about a coin at the bottom of a puddle, the Solicitor accused defense counsel of

> muddying the water with ridiculous theories to defy commonsense so that just maybe, maybe, their hope is that you do check your common sense at the door and that you listen to the so-called experts that we heard yesterday on this witness stand and that you can't see what really happened to that coin at the bottom of the puddle.

Rec on Appeal at 803, l 13 – 804, l 14. *And see* Rec. on Appeal at 819, l 24 – 820, l. 2 ("[A]nd what they would like you to do is check that commonsense at the door and come back with a not guilty verdict.").

The Solicitor next accused defense counsel of making "a lot of attacks on law enforcement in the last few minutes" during their closing arguments, and the trial judge overruled defense counsel's objection to the improper vouching. Rec. on Appeal at 804, l 25 – 805, l 3.

"To protect both parties' right to an impartial jury, the trial court must conduct *voir dire* of the prospective jurors to determinate whether the jurors are aware of any bias or prejudice against a party, as well as to elicit such facts as will enable [the parties] intelligently to exercise their right of peremptory challenge." *State v. Coaxum*, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014) (internal quotations omitted). The trial judge did not fulfill that duty in this case. Michael Beaty was not able to strike jurors with a bias or prejudice against criminal defense lawyers, and he was prejudiced because, throughout his jury trial, the prosecution attacked his criminal defense lawyers and the expert witnesses hired by his lawyers.

This Court should order a new trial.

Question VIII

Should this Court order a new trial based on the cumulative error doctrine?

Each of the forgoing arguments independently entitles Mr. Beaty to relief. This Court, however, should not overlook the cumulative error doctrine, which "provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). *And see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002) (cumulative error of solicitor's improper argument

and improperly excluded evidence warranted reversal). Some of Mr. Beaty's grounds for relief should be considered together.

Our appellate courts have affirmed convictions by applying a harmless error analysis to erroneous jury instructions. *E.g. Logan* and *Alekesy*, *supra.* The trial judge's erroneous instruction that a jury trial is "a search for the truth in an effort to make sure that justice is done" (Question III), combined with the trial judge not "giving the jurors the "exclusion of every other reasonable hypothesis" instruction (Question V), warrant a new trial.

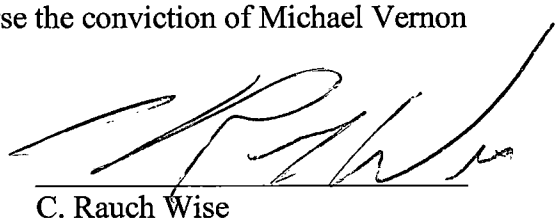
The Solicitor's conduct by capitalizing on the erroneous "truth seeking" instruction (Question III), combined with his "sandbagging" during his "rebuttal" argument (Question IV), and his attacking the defense in front of an inadequately *voir dired* jurors (Question VII), warrant a new trial.

This Court should order a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse the conviction of Michael Vernon Beaty, Jr. for murder.

January 6, 2016



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY
Court of General Sessions

W. Jeffrey Young , Circuit Judge

Appellate Case № 2015-000718

The State, ... Respondent,

vs.

Michael Vernon Beaty, Jr. ..... Appellant.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on January 7, 2016, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Initial Brief, Designation of Matter and Motion to Exceed Page Limit and to File Out of Time in the above case addressed to Donald L. Zelenka, Office of the Attorney General, P.O. Box 11549
Columbia, SC, 29211.

Sworn to and Subscribed

Sandy Traynham

before me this 7 day

of January, 2016

Mary Jane Harter
Notary Public for South Carolina
My Commission Expires: 11/30/22

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January 7, 2016

HAND DELIVERED

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

Re: State vs. Michael Vernon Beaty (2015-000718)

Dear Ms. Kitchings:

Enclosed herewith for filing is the original and six copies of the Petition for Exceed the Page Limit of Initial Brief and File Out of Time concerning the above referenced matter, together with the original Initial Brief of Appellant, Designation of Matter, and Affidavit of Service.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/mjh
cc: Donald L. Zelenka (by U.S. mail)