THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

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SC Court of Appeals

Court of Appeals Case No. 2015-001199

The State, ... Respondent

v.

Preston Shands, Jr., ... Appellant.

Initial Brief of Appellant

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Appellant Preston Shands, Jr.

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STATEMENT OF ISSUES ON APPEAL

Question I

Did the trial court judge err by not applying the third step of *Batson's* comparative juror analysis when the Solicitor struck three men based on their prior criminal convictions but sat a similarly situated female who also had a criminal conviction?

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Did the the trial judge err by charging the jurors they could infer malice from the use of a deadly weapon when that instruction is contrary to *State v. Belcher* and was an impermissible comment on the facts of the case?

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Did the trial judge 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 arguments made by the State in its rebuttal closing argument?

Question VIII

Did the trial judge err by denying Mr. Shands' motion for a directed verdict on the kidnapping charge because the kidnapping statute, as applied to Mr. Shands, is unconstitutionally vague and overbroad because it did not put him on notice of what conduct is prohibited?

STATEMENT OF CASE

On July 21, 2015, the State charged the appellant, Preston Shands, Jr., with first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a knife during the commission of a violent crime. Record on Appeal (hereinafter "R.") *. The Laurens County Grand Jury indicted Mr. Shands for these charges on October 3, 2014. R. *.

On September 4, 2014, the State served notice of intent to seek imprisonment for life without the possibility of parole, pursuant to S.C. Code § 17-25-45(A), if Mr. Shands ultimately was convicted for first-degree burglary, kidnapping, and/or attempted murder. R. *.

The State tried Mr. Shands before the Honorable Edward W. Miller and a jury on May 26-27, 2015. Elizabeth White and Warren Mowry, both of the Eighth Circuit Solicitor's Office, represented the State. Charles Grose represented Mr. Shands. The jurors convicted Mr. Shands as charged. Judge Miller sentenced Mr. Shands to life imprisonment without the possibility of parole for first-degree burglary, kidnapping, and attempted murder. Judge Miller also imposed sentences of ten years for first-degree assault and battery and five years for possession of a knife during the commission of a violent crime. Tr. 267, ll. 6-14.

On May 28, 2015, Mr. Shands filed his notice of appeal. This brief follows.

ARGUMENT

Factual Background

On Sunday, July 20, 2014, Sharron Copeland Shands had been married to Preston Shands, Jr. for ten years. Mr. Shands watched the couple's two minor children, T.C. and J.S.,[1] while his wife went to church. That evening, Mr. and Ms. Shands got into an argument. Ms. Shands left the house through the garage. The garage door was half closed. Mr. Shands pulled Ms. Shands by the hair. She went next door to the home of Clarence ("Bill") and Martha Koon. Mr. Shands broke a sliding glass door, entered the Koons' home, and cut Ms. Shands. Ms. Shands was treated for her injuries at Greenville Memorial Hospital. Tr. 55-67. T.C., J.S., Bill Koon, and Martha Koon also testified about these facts. Tr. 71-78, 81-84, 86-94, 98-100. Bill Koon testified that Mr. Shands' was cut and covered in blood, but did not see how it occurred. Tr. 95, l. 95, l. 19 – 96, l. 11. T.C. also got cut, which was the basis of the first-degree assault and battery charge. Tr. 7, l. 22 – 78, l. 16.

Ms. Shands and T.C. agreed that, while Mr. and Ms. Shands had argued before, this evening was the first time that Mr. Shands had ever violently assaulted Ms. Shands. Tr. 70, ll. 2-9; 79, l. 20 – 80, l. 11. J.S. testified that Mr. Shands' conduct was "out of the ordinary" and he had "never seen [Mr. Shands] in that kind of state of mind before." Tr. 85, ll. 16-25. Bill Koon testified Mr. Shands is a "real nice guy," a "good neighbor," and that their children played together. He too had never seen Mr. Shands act this way before. Tr. 96, l. 15 – 97, l. 7. Martha Koon testified Mr. Shands was a "good neighbor," "very friendly, very polite," and "seemed like a good guy."

[1] T.C. is Ms. Shands son from a prior relationship. Mr. Shands helped Ms. Shands raise T.C. J.S. is Mr. and Ms. Shands son together. Tr. 67, l. 19 – 68, l. 10.

Mr. Shands testified he does not have a memory of the incident but, after reviewing the evidence, realized his conduct was responsible for his wife's injuries. He testified about the events, which he could remember, leading up to the incident. After Mr. Shands cooked breakfast for the family, Ms. Shands went to church. Mr. Shands took care of the two boys. They cleaned house. Mr. Shands helped T.C., who has a learners permit, practice driving. Mr. Shands had one Bud Light. Mr. Shands had bought some "homemade moonshine" at work. He started drinking it. It was too strong to drink straight, so he mixed it with Coca Cola. Normally, Mr. Shands goes to sleep when he drinks alcohol, but this time he had a different reaction. "This had some effect that took me slap clean out of my mind." Tr. 188-96. Travis McBeth testified that Ms. Shands acknowledged to him the possibility that Mr. Shands had been poisoned. Tr. 210, l. 15 – 211, l. 18. Mr. Shands contended at trial that he lacked criminal intent, and he requested a juror instruction on involuntary intoxication.

Question I

Did the trial court judge err by not applying the third step of *Batson's* comparative juror analysis when the Solicitor struck three men based on their prior criminal convictions but sat a similarly situated female who also had a criminal conviction?

The trial court judge conducted *voir dire*. Only two potential jurors—numbers 118 and 122—responded to any of the trial judge's questions. Tr. 13, l. 9 – 14, l. 11. All potential jurors affirmed they could be fair to both the prosecution and Mr. Shands. Tr. 11, l. 13 – 15, l. 18. Jury selection proceeded as follows (Tr. 16-22):

Juror #	Gender	State	Defense	Jurors
85	Female		1	
157	Male		2	
1	Female		3	
17	Female			1

126	Female	1		
162	Male			2
15	Female			3
118	Female		4	
36	Female			4
125	Male	2		
108	Female			5
54	Female			6
182	Female		5	
91	Male		6	
5	Female			7
115	Male	3		
114	Female		7	
156	Male	4		
82	Female			8
53	Male			9
69	Male			10
121	Female		8	
170	Female			11
44	Male		9	
68	Female			12
99	Female		A-1	
127	Female			A

During jury selection, the prosecutor exercised four of her possible five preemptory challenges to remove jurors 126 (a female), 125 (a male), 115 (a male) and 156 (a male). The resulting jury consisted of nine women and three men.[2] Tr. 16, l. 20 – 22, l. 1.

Pursuant to *Batson v. Kentucky,* 476 U.S. 79 (1986), Mr. Shands challenged the prosecutor striking jurors 125, 115, and 156 (all men) based on gender. Tr. 22, l. 2 – 23, l. 4. *See also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (held that intentional discrimination on the basis of gender by state actors in use of peremptory strikes in jury selection violates equal protection clause).

[2] The alternate was also a woman. Tr. 21, l. 22 – 22, l. 1.

The Solicitor explained her strikes. Jurors 125 and 156 had convictions for criminal domestic violence. She pointed out, "[T]his is a case involving domestic violence." Juror 115 had "convictions for lottery law violations." The Solicitor, however, acknowledged seating juror 54, a female, with a fraudulent check conviction. The Solicitor had a strike available to her when she sat juror 54.[3] Tr. 23, ll. 5-23.

Mr. Shands argued, "[T]here is really no way to separate juror number 54 which is the sixth juror [sat] who is a black female who does have a conviction for [a] fraudulent check. . . . If you are going to use criminal record as a reason to strike somebody then you have got to be consistent otherwise." Tr. 23, l. 24 – 24, l. 10.

The trial judge was confused because the initial motion was based on the prosecutor striking men, and Mr. Shands then pointed to juror number 54, a female. Counsel tried to explain that the State seating a similarly situated female juror pertained to the third step of the *Batson* analysis. The trial court denied Mr. Shands' *Batson* motion. Tr. 24, l. 12 – 26, l. 3. Mr. Shands renewed his objection prior to the trial court swearing the jurors. Tr. 32, ll. 9-12.

> In *Batson*, the United States Supreme Court outlined a three-step process for evaluating claims that peremptory challenges have been exercised in a manner violative of the Equal Protection Clause. First, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the

[3] The Solicitor also identified two "other jurors who had contact with law enforcement." Juror 53 (a male) had "a pending simple possession charge," and juror 170 (a female) had arrests for unlawful neglect and simple possession. Tr. 23, ll. 5-23.

> challenge has proved purposeful discrimination. The ultimate burden always rests with the opponent of the challenge to prove purposeful discrimination.

State v. Giles, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted), *cert. denied Giles v. South Carolina,* 134 S. Ct. 2888 (2014).

Here, the trial court did not properly apply the third step of *Batson*. "In the third step, the opponent of the strike must show that the race-neutral explanation given was mere pretext." *Payton v. Kearse*, 329 S.C. 51, 55, 495 S.E.2d 205, 208 (1998). Pretext "generally is established by showing the party did not strike a similarly-situated member of another race or gender." *State v. Stewart*, 413 S.C. 308, 314, 775 S.E.2d 416, 419 (Ct. App. 2015). Mr. Shands pointed to the Solicitor seating juror 54, a female, who had a fraudulent check conviction. The trial judge, however, operated under the mistaken belief that the trial court could not consider a similarly situated female juror because Mr. Shands challenged the Solicitor striking male jurors.

Stewart is instructive for two reasons. First, much like this case, *Stewart* reviewed the trial court's error by not correctly applying the third step of *Batson*. Second, *Stewart* involved a prosecutor attempting to justify preemptory strikes based on jurors' criminal history. In *Stewart,* the State struck African-American jurors with prior involvement with law enforcement while seating Caucasian jurors that also had prior involvement with law enforcement. The Court of Appeals held, "[E]ven though the State offered a racially-neutral explanation for striking the African American jurors, the State negated the reason by seating similarly-situated Caucasian jurors." *Stewart*, 413 S.C. at 317, 775 S.E.2d at 421. *See Miller–El v. Dretke,* 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove

purposeful discrimination to be considered at *Batson* 's third step."); *State v. Oglesby,* 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) (finding the solicitor negated his neutral reason when he seated a white female juror who was similarly situated). Just as it did in *Stewart*, the State in this case negated the gender-neutral reason for striking three men by seating a similarly situated female juror.

Finally, in addition to seating a similarly situated female juror, the totality of the circumstances militates in favor of ordering a new trial. *See State v. Scott*, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013) ("Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record.") (citing *State v. Shuler,* 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)). During jury selection in this case, the Solicitor had twenty-seven decisions on whether to exercise one of her preemptory strikes. She struck three of the nine men (33%) presented to her. She struck just one of the eighteen women (about 5.5%) presented to her. The Solicitor, therefore, was six times more likely to strike men than women. As will be seen in Question V, *infra*, the Solicitor directed her closing argument towards the female jurors, including arguing that Mr. Shands considered his wife property.

This Court should order a new trial.

Question II

Did the trial court judge err by not quashing the indictment because the grand jury presentment process in Laurens County, including in Mr. Shands' case, violates state law and Equal Protection?

Mr. Shands filed a written motion to quash the indictment. R. *. The trial court convened a hearing on this motion, during which the Solicitor's Office confirmed the essential facts. In Laurens County, an Administrative Assistant in the Solicitor's Office

prepares indictments. The Administrative Assistant lists the law enforcement officer that was the affiant on the warrant as the sole witness to be called before the Grand Jury. The indictments are then reviewed and signed by an Assistant Solicitor. When the Grand Jury meets, a police officer from the arresting agency obtains copies of the indictments from the Solicitor's Office and presents them to the grand jurors. The testifying police officer, who is not the same law enforcement officer listed on the indictment, does not have any personal knowledge of the case. The Solicitor's Office ***does not*** keep a record of the identity of the person ***actually*** testifying before the Laurens County Grand Jury. Tr. 26, l. 8 – 29, l. 23.[4] The State followed this procedure in Mr. Shands' case. *See also* warrants, R. *, and indictments, R. *.

A. Constitutional Right to a Challenge a Defective Grand Jury Process.

The right of an accused to have a grand jury review the charges against him is a Constitutional right enumerated in the Fifth Amendment to the United States Constitution as well as in Article I, §11 of the South Carolina Constitution. "It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment." *State v. Rector*, 158 S.C. 212, 236, 155 S.E. 385, 394 (1930) (quoting *Crowley v. United States*, 194 U.S. 461, 473 (1904)).

It has long been recognized that when an indictment is presented, the accused "may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly

[4] Mr. Shands renewed his objection prior to the trial court swearing the jurors. Tr. 32, ll. 9-12.

and properly determined." *State v. Faile*, 43 S.C. 52, 20 S.E. 798 (1895). *See also, State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Our Supreme Court has recognized that questions about the fairness and impartiality of the grand jury are "so closely analogous" to questions regarding the qualification of jurors, that questions of the latter have bearing on considering questions related to the former. *Rector*, 158, S.C. at 240, 155 S.E. at 395 (citing *State v. Richardson,* 149 S.C. 121, 146 S.E. 676 (1928)).

A defendant must challenge the legality and sufficiency of the process of the grand jury ***before*** the jury renders a verdict in order to preserve the error for direct appellate review. *See Evans v. State*, 363 S.C. 495, 509 (2005) (citing *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)).

"Grand jury proceedings are presumed to be regular unless clear evidence indicates otherwise." *State v. Moses*, 390 S.C. 502, 521, 702 S.E.2d 395, 405 (Ct. App. 2010) (citing *State v. Thompson,* 305 S.C. 496, 501, 409 S.E.2d 420, 424 (1991)). Our Supreme Court has recognized the incredible burden this standard places on defendants. "It is usually difficult for a defendant to make such a claim . . . [because] speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment. Fortunately, given the nature of State Grand Jury proceedings, there is a complete record available for analysis." *State v. Thrift,* 312 S.C. 282, 302-303, 440 S.E.2d 341, 352 (1993) (quoting *State v. Thompson*, 305 S.C. at 502, 409 S.E.2d at 424 (emphasis in the original)). Mr. Shands' case, however, was not a State Grand Jury case.

Pursuant to *Gentry*, Mr. Shands challenged the indictments and the grand jury process before his trial jury was sworn. The law also gives him the burden of proving actual irregularity or abuse by clear evidence pursuant to *Thrift* and *Evans*. During the *State v. Carrier* oral argument,[5] our Supreme Court made it clear that failure to present and preserve evidence on the record was fatal to a defendant wishing to make one of the very same arguments Mr. Shands made at trial when he challenge the indictment itself as well as the perfunctory process that produced the indictment. Here, the Solicitor's Office stipulated to the procedures followed in this case and other cases in Laurens County. Tr. 26, l. 8 – 29, l. 23.

B. Correcting Abuse of the Grand Jury Process in South Carolina.

In 1981, the South Carolina Supreme Court began an almost 12-year journey addressing how the State was allowed to go about presenting indictments to grand juries. *State v. Capps* began that journey by finding that "the practice of using a solicitor or ***other officer of the State***, as the sole witness before the grand jury, to provide only a summary of the evidence could be abused and we strongly suggest it be abandoned unless no alternative is available." 276 S.C. 59, 62, 275 S.E.2d 872, 873 (1981) (emphasis added).

Chief Justice Lewis authored a vigorous dissent in *Capps* in which he noted that the Court's previous call for a comprehensive study and ultimate revision in some respects to the current grand jury system had gone unheeded. He, therefore, felt that not only was the Court "compelled in the interests of justice" to reevaluate the

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[5] S.C.S.Ct. Memorandum Opinion No. 2014-MO-043 (filed October 22, 2014). Oral argument found at http://media.sccourts.org/videos/2012-212777.mp4 (last viewed May 24, 2015).

system, but also that it was their duty given the "significance of the right involved" to "give this constitutional provision meaning." *Capps,* 276 S.C. at 63-64, 275 S.E.2d at 847. Chief Justice Lewis saw a "pressing need for change as is evidenced by the further deteriorating nature of the proceedings." *Capps,* 276 S.C. at 64-65, 275 S.E.2d at 874.

Chief Justice Lewis' greatest concern arose over the use of hearsay evidence to obtain indictments. Drawing on the Court's decision in *State v. Williams,* an opinion that he had authored, Chief Justice Lewis argued that the Court had not intended to create "a limitless haven" for the routine use of hearsay in grand jury presentments. He noted that the "deliberate use of hearsay testimony is a questionable practice which seriously erodes the function of the grand jury." *Capps* 276 S.C. at 67-68, 275 S.E.2d at 876, referencing *State v. Williams,* 263 S.C. 290, 210 S.E.2d 298 (1974) and *U.S. v. Gramolini,* 301 F.Supp. 39 (D. R.I. 1969).

Chief Justice Lewis further found that the routine acquisition of indictments based solely on hearsay testimony requires that the indictment be dismissed. He reasoned:

> In order to provide more than lip service to the constitutional provision here in question, I would hold that an indictment cannot, as a matter of course, be acquired solely on oral hearsay testimony. The routine practice of one individual appearing before the proceeding to give his "third hand" capsule version of facts which he has no direct knowledge without some other competent evidence, is insufficient.
>
> The drafters of Article I, §11 as well as those citizens who voted for its implementation clearly intended the right to a grand jury indictment to be meaningful because they incorporated it into such a solemn document, our State constitution. The disposition I propose seeks to rekindle the

spirit with which it was created.

Capps 276 S.C. at 67-68, 275 S.E.2d at 876.

Despite the strong warning the *Capps* court issued, cases continued to come before the appellate courts of South Carolina raising issues about what was acceptable and adequate evidence to present to grand juries. In *State v. Anderson*, prosecutors argued that while our Supreme Court had "frowned upon" an assistant solicitor being the only witness to appear before a grand jury, the Court had not prohibited the practice. In referencing *Capps*, the State's argument was "that case did not say we could not do it, they said they didn't like it." *State v. Anderson*, 312 S.C. 185, 187, 439 S.E.2d 835 (1993). The *Anderson* Court rejected this position and explicitly prohibited the practice of prosecutors appearing as the sole witness before the grand jury. In doing so, the *Anderson* Court specifically cited Chief Justice Lewis' dissent in *Capps*.

Capps dealt with more than *solicitors* testifying to the grand jury. The *Capps* Court also explicitly warned of the potential for abuse of using ***any "other officer of the State,*** as the sole witness before the grand jury...." *Capps,* 276 S.C. at 62, 275 S.E.2d at 873 (emphasis added).

The lone case touching on the "other officer" issue is *State v. Whitted*, 279 S.C. 260, 305 S.E.2d 245 (1983). The defendant in *Whitted* challenged her indictment on the grounds that a sheriff's deputy was the sole witness who testified before her grand jury, arguing that *Capps* prohibited the sheriff's deputy from being the sole witness to testify before the grand jury. The *Whitted* Court said that *Capps* "did not contemplate and should not be construed to prohibit ***the investigative officers***, such as the sheriff's deputy was in this case, from appearing as the sole witness before

the grand jury" and found no error. *Whitted* at 262, 246 (emphasis added).

As our Supreme Court made clear in *Anderson, Capps* was meant to be more than a warning. It was meant to stop "the practice of using a solicitor ***or other officer of the State***, as the sole witness before the grand jury...." *Capps,* 276 S.C. at 62, 275 S.E.2d at 873 (emphasis added). Mr. Shands believes the circumstances of his case show that the State continues to engage in the type of grand jury presentment practices our Supreme Court has been warning of since *Capps*.

As the State stipulated, the witnesses identified in the indictments did not testify before the grand jury. This practice creates three problems. First, if a witness not listed on the indictment testified before the Grand Jury, his appearance before the grand jury violates S.C. Code §14-7-1550, which provides:

> The foreman of the grand jury or acting foreman in the circuit courts of any county of the State may swear the witnesses whose names shall appear on the bill of indictment in the grand jury room. No witnesses shall be sworn except those who have been bound over or subpoenaed in the manner provided by law.

Second, if the witness was not subpoenaed or bound over to appear in front of the grand jury, then the grand jury did not recognize his appearance as "unauthorized" and report it as a "clearly improper" attempt to influence their decision. These actions were compelled by the charge given to the grand jury. The pertinent part of that charge provides:

> On the back of the indictments, the names of the witnesses for the State will be listed. You may call the witnesses before you for questioning ...The Foreperson of the Grand Jury will swear witnesses whose names appear on the bill of indictment. No witness may be sworn except those who have been bound over or subpoenaed

> in the manner provided by law. . . .
>
> The presence of anyone other than Grand Jurors, witnesses under examination, and, at certain times, the Solicitor, during the sessions of the Grand Jury is unauthorized. Thus, any attempt to influence your decision is clearly improper and should be reported to me or the presiding judge.

S.C. Judicial Website, Sample Jury Charges, Chapter II: Grand Jury, pp. 5-6.

Third, if the witness was neither an investigating officer, nor an actual witness, his testimony could have only been "a deliberate use of hearsay" by the State when there were clear alternatives, in violation of *Capps, Anderson,* and *Whitted.* It is easy to envision a scenario in which a witness, having held no personal knowledge as a witness and having had no role in the investigation, merely appeared before the Grand Jury and read from the indictment prepared and signed by the Solicitor. Such a presentment would be exactly what *Capps* and *Anderson* prohibit. In that situation, the testimony would be akin to allowing "a solicitor to merely 'tell his story' by giving a summary of the evidence," a result Chief Justice Lewis warned would lead to grand jury soon being "viewed by a justifiably skeptical public as a mere plaything for prosecutors." *Capps,* 276 S.C. at 67, 275 S.E.2d at 875.

The journey towards completing the process of correcting abuse of the grand jury process in South Carolina is not complete. This Court should declare unconstitutional the grand jury practice followed by the Solicitor's Office in Laurens County and require the State to present witnesses with actual knowledge of the case.

C. Denying Defendants Indicted By A County Grand Jury The Same Due Process Safeguards As Those Indicted By A Statewide Grand Jury Violates The Fifth and Fourteenth Amendments To The United States Constitution, As Well As Article I, Sections 3 and 11 of The Constitution of South Carolina.

Mr. Shands' case illustrates a fundamental inequality within the grand jury process in South Carolina: defendants indicted under the statewide grand jury system are afforded different protections under the law than defendants who are indicted under the county grand jury system. A defendant's rights to an indictment, due process, and equal protection under the law are secured through the Fifth and Fourteenth Amendments to the United States Constitution, as well as through Article I, Sections 3 and 11 of the Constitution of South Carolina. Unfortunately, the current grand jury process in South Carolina denies defendants some of those rights and, therefore, violates equal protection.

In South Carolina, two types of grand juries issue indictments: a county grand jury or a statewide grand jury. Articles 13 and 15 of Chapter 7, Title 14 of the South Carolina Code contain the statutory authority controlling the grand jury systems in South Carolina. Article 13 deals with the county grand jury system. Article 15 addresses the statewide grand jury system.

The best example of the disparity between the two systems can be found in S.C. Code §14-7-1700, which is titled "Record of testimony and other proceedings of grand jury; furnishing of copy to defendant; transcripts, reporter's notes and all other documents to remain in custody and control of attorney general." That statute provides:

> A court reporter shall record, either stenographically or by use of an electronic recording device, all proceedings

> except when a state grand jury is deliberating or voting. Subject to the limitations of Section 14-7-1720(A) and (D) and Rule 5, South Carolina Rules of Criminal procedure, a copy of the transcript of the recorded testimony or proceedings requested by the Attorney General or his designee shall be provided to the defendant by the court reporter, upon request, at the transcript rate established by the Office of Court Administration. An unintentional failure of any recording to reproduce all or any portion of the testimony or proceedings does not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom and all books, papers, records, correspondence, or other documents produced before a state grand jury must remain in the custody and control of the Attorney General or his designee unless otherwise ordered by the court in a particular case.

This language illustrates the inequality that a defendant indicted by a county grand jury faces compared to a defendant indicted by a statewide grand jury: statewide grand jury proceedings must be recorded. There is no corresponding requirement that county grand juries be recorded. Thus, a defendant indicted by a statewide grand jury ***does*** have a record from which to obtain evidence of irregularity, while a defendant indicted by a county grand jury ***does not***. In *State v. Thrift*, our Supreme Court noted the difficulty defendants like Mr. Shands face attacking the grand jury process, specifically finding that Thrift was fortunate his grand jury proceedings were statewide grand jury proceedings, thus providing a complete record for analysis. *Thrift,* 312 S.C. at 302-03, 440 S.E.2d at 352. By commenting on the good fortune Thrift received by virtue of being indicted by a statewide grand jury (and by implication, the ***misfortune*** of those defendants, like Mr. Shands, who are indicted by country grand juries without a record), the *Thrift* Court implicitly acknowledged the inequality of our current grand jury system. Thus, if a defendant, like Mr. Shands,

indicted by a country grand jury, can not force the recording of the grand jury proceedings or access testimony regarding the proceedings, he is effectively prohibited from challenging the propriety of those proceedings unlike the defendant who is fortunate enough to be indicted by the statewide grand jury which provides defendants with the evidence needed to mount such challenges. Such discriminatory treatment of defendants is prohibited by the equal protection clauses of the South Carolina and United States Constitutions.

D. Relief Requested.

This Court should declare unconstitutional the Laurens County Grand Jury process, quash the indictments, and order the State provide Mr. Shands with a meaningful grand jury process where a witness with actual knowledge of the investigation presents the indictment. To ensure compliance with the new procedure, the Court should require that the testimony presented to a grand jury be recorded by a court reporter.

The Court should order a new trial.

Question III

Did the trial judge err by allowing the Solicitor to impeach Mr. Shands by asking him if he had been previously convicted of a violent felony, suggesting to the jurors that Mr. Shands is a violent person, when he was on trial for multiple violent felony charges?

Prior to trial, Mr. Shands filed a written motion, pursuant to Rule 609, SCRE, to exclude his prior conviction in Florida for murder occurring over forty years ago when he was a juvenile. R. *. Mr. Shands called the trial judge's attention to the written motion before he had to decide whether or not to testify. He pointed out that he had been released from confinement on parole in 2003, arguing that this took the conviction

outside the parameters of Rule 609(b), SCRE. Counsel also argued that the Court, under Rule 609(a), SCRE, must weigh the probative value of admitting evidence against the prejudicial effect to Mr. Shands. Counsel contended a conviction "that far in the past would have little if any relevance, no probative value in our opinion and the prejudicial impact would be extraordinarily high if he were to take the stand and be asked about that." Tr. 135, l. 2 – 140, l. 7.

The trial court ultimately ruled that, pursuant to Rule 609(b), "the end of confinement refers to termination of parole or probation." Under Rule 609(a), the trial judge ruled the prosecution could ask Mr. Shands if he had been convicted of any violent felonies. The judge also ruled that Mr. Shands would not have to object when the prosecutor asked the question. Tr. 173, l. 3 – 176, l. 9.

During the State's cross-examination, the Solicitor asked, "Mr. Shands, you have been convicted before of a violent felony, right?" Mr. Shands responded, "Yes, ma'am." Tr. 204, l. 24 – 205, l. 1. In addition to not knowing the nature of the charge, the jurors did not know that it occurred forty (40) years ago when Mr. Shands was a juvenile.

During the charge conference, counsel reminded the trial judge, "[W]hen I did not object during cross-examination of Mr. Shands about the prior record, that was based on discussion that we had earlier." The trial judge agreed counsel "didn't have to" object again. Tr. 217, ll. 15-24.

Rule 609(a)(1), SCRE provides:

> For the purpose of attacking the credibility of a witness, . . . ***evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused."***

(emphasis added).

Mr. Shands' conviction for murder—occurring almost forty (40) years ago—had absolutely no probative value in this case. Admitting evidence of this conviction created "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." *Old Chief v. United States*, 519 U.S. 172, 181 (1997). The conviction occurred when Mr. Shands was a juvenile. Not only did he make parole, Mr. Shands worked for over a decade and supported his family, without incident.

Rule 609(b) additionally provides:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Mr. Shands was released from confinement more than ten years prior to trial. The prosecution, moreover, had not noticed its intent to introduce this conviction as required by Rule 609(b).

More importantly, the similarity of Mr. Shands' prior conviction for murder to the current charge of attempted murder is more reason for this Court to exclude evidence of the prior conviction. Allowing the prosecutor to refer to the conviction as a "violent felony" did nothing to reduce the prejudice to Mr. Shands when he was on trial for allegedly committing several violent felonies. Our Supreme Court has

> decline[d] to hold similar prior convictions inadmissible in all cases. Trial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence. The following factors, along with any other relevant factors, should be considered:
>
> 1. The impeachment value of the prior crime.
>
> 2. The point in time of the conviction and the witness's subsequent history.
>
> 3. The similarity between the past crime and the charged crime.
>
> 4. The importance of the defendant's testimony.
>
> 5. The centrality of the credibility issue.

Green v. State, 338 S.C. 428, 433-34, 527 S.E.2d 98, 101 (2000) (citing *State v. Colf,* 337 S.C. 622, 525 S.E.2d 246 (2000)).

Allowing the prosecution to impeach Mr. Shands with evidence of the prior conviction of a "violent felony"—occurring almost forty (40) years ago—was extremely prejudicial and interfered with the jurors' evaluating Mr. Shands' testimony, the credibility of which was central to his defense. *See also State v. Black*, 400 S.C. 10, 732 S.E.2d 880 (2012) (defense witness's prior convictions for manslaughter that were approximately 20 years old were inadmissible to impeach witness's credibility).[6]

The error is not harmless. Mr. Shands' credibility was essential to his defense. Our appellate courts consistently find error prejudicial when the defendant's credibility is

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[6] The witness in *Black* was "was given concurrent prison sentences of fifteen years on each count of manslaughter and a consecutive seven years on shooting/throwing a deadly missile. He was released from confinement by Florida authorities on March 1, 1993, after serving approximately six years of his twenty-two year sentence." *Black*, 400 S.C. at 15-16, 732 S.E.2d at 883. The *Black* Court did not seem concerned with whether he witness' parole extended beyond his release from confinement.

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.").

This Court should order a new trial.

Question IV

Did the trial judge err by not instructing the jurors about the law of involuntary intoxication when Mr. Shands' testimony supported providing the instruction?

Mr. Shands testified that the "homemade moonshine" "had some effect that took me slap clean out of my mind." All witnesses agree that Mr. Shands had never acted like this before. J.S. testified that Mr. Shands' conduct was "out of the ordinary" and he had "never seen [Mr. Shands] in that kind of state of mind before." This testimony indicted that, unbeknownst to Mr. Shands, the moonshine had been spiked with something other than alcohol. Based on all of this testimony, Mr. Shands' requested the trial court instruct the jurors about involuntary intoxication:

> There are two types of intoxication, voluntary and involuntary. Involuntary intoxication may result from innocently consuming an intoxicant, through being tricked into it by another, or being forced to take it, or perhaps

> through unanticipated side effects of a prescription drug taken on orders of a physician. If you find the defendant was given drugs or alcoholic beverages without his knowledge, and as a result, he lost his ability to exercise independent judgment and volition while committing the crimes alleged against him, then it would be your duty to find the defendant not guilty.

Request to Charge No. 4, R. *, which relied on Ralph King Anderson, Jr., *South Carolina Requests to Charge - Criminal*, 2007, § 6-4 Involuntary Intoxication (citing P.S. Watson & W.S. McAninch, Guide to South Carolina Criminal Law and Procedure165-66 (3d ed. 1990); 21 Am. Jur. 2d Criminal Law §§ 108-09 (1998)).

The trial judge convened a charge conference, during which Mr. Shands' request to charge involuntary intoxication was discussed, and the trial judge denied his request. The Solicitor requested the trial judge "charge voluntary intoxication." Mr. Shands objected to that request "without the charge on involuntary intoxication that goes with it." Tr. 213, l. 19 – 215, l. 20

During the State's argument on the facts, the Solicitor argued, "[V]oluntary intoxication is not a Defense." Tr. 234, l.19 – 235, l. 18.

At the request of the State, the trial judge instructed the jurors

> that voluntary intoxication is not a Defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the acts committed while intoxicated as when a person is not intoxicated.

Tr. 243, ll.10-13.

After the trial judge instructed the jurors, Mr. Shands renewed the "request to charge number four on involuntary intoxication. And also renew[ed the] prior objection to charging voluntary intoxication without [the] corresponding involuntary intoxication charge." Counsel also pointed out that deleting the involuntary intoxication portion of

the charge while including the voluntary intoxication portion "rises to a comment on the facts in the case," which violates Art. V; Section 21 of the South Carolina Constitution. Tr. 253, ll. 18-25.

"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). "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, 207-08, 573 S.E.2d 802, 804 (2002). Here, an instruction on "involuntary intoxication" was necessary to aid the jurors in their deliberations. Instructing on "voluntary intoxication," while omitting an instruction on "involuntary intoxication," had the effect of the judge expressing an opinion on Mr. Shands' testimony and defense in violation of Art. V; Section 21 of the South Carolina Constitution.

This Court should order a new trial.

Question V

Did the trial judge, after sustaining Mr. Shands objection to the Solicitor's improper closing argument, err by not striking that argument from the record and instructing the jurors to disregard it?

During the State's final argument to the jurors, the prosecutor argued:

> But things started going downhill and he said he started drinking. And what happens, his is an almost 60-year-old-man with a 38-year-old wife and she is beautiful and his is a good woman and she was taking care of him but it wasn't good enough for him. He starts getting controlling. Bill Koon told y'all, he could be jealous if you tried to talk to her in the neighborhood. He starts getting jealous and controlling. And it gets worse and he is arguing and he is fussing and he is drinking and Sharon said we were on pins and needles. So this, he may not have put his hands on her

> before that but this is a relationship that is going downhill fast. And what happens on July 20th, 2014, she finally says, you know what, I am leaving, I am leaving, I am going. Come on kids, get in the car. And that is when he snaps. He is not, his wife and his kids that he provides for and he works for that are his property, she is not leaving him, she is not taking the kids, no, no, no, no. Grabs her by the hair, grabs the first thing he can get his hands on and starts going at her. This isn't about he was drinking something that day, this is a jealous, controlling husband who was not going to let his property leave that house.

Mr. Shands objected "to the characterization, outside of the evidence." The trial judge sustained the objection by instructing the Solicitor, "Let's keep it to the facts." Mr. Shands move to strike. The trial judge did not grant this request. Tr. 231, l. 12 – 232, l. 14.

As this Court has observed:

> When an objecting party is sustained, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue. Moreover, as the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review.

State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010).

Here, the trial judge should have granted Mr. Shands' motion to strike and instructed the jurors to disregard the comment. A "trial judge's failure to give a curative instruction" can be reversible error. *State v. Pickens*, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996). As seen in Question III, Mr. Shands' credibility was essential to his defense. *See also Anderson, Gilchrist* and *Bryant, supra.*

This Court should order a new trial.

Question VI

Did the the trial judge err by charging the jurors they could infer malice from the use of a deadly weapon when that instruction is contrary to *State v. Belcher* and was an impermissible comment on the facts of the case?

During the State's opening argument on the law, the Solicitor argued, "implied malice can be inferred from the circumstances surround[ing the event], ***using a deadly weapon, trying to stab someone in the head with it.*** That is implied malice." Tr. 221, ll. 2-5 (emphasis added).

While charging the elements of attempted murder,[7] the trial judge instructed the jurors, "Inferred malice may also arise when the deed is done with a deadly weapon." The judge then defined the term "deadly weapon" and provided the jurors with examples of "deadly weapons," including "a knife." Tr. 244, l. 14 – 245, l. 7.

Mr. Shands objected to this instruction based on *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), which applies anytime the defense argues "the absence of criminal intent." Mr. Shands argued that the error could not "be cured under the facts of this case" and moved for a mistrial. Mr. Shands also objected to the instruction as a comment on the facts of the case, citing to *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). The trial judge, however, seemed to believe that *Belcher* applies only when the defendant claims self-defense. Counsel responded, "[I]t is not just self-

[7] The trial court's instruction on attempted murder was confusing at best. The judge instructed the jurors, "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury." Tr. 245, ll. 8-10. After Mr. Shands objected based on *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), Tr. 254, l. 11 – 255, l. 9 and 256, l. 6 – 257, l. 8, the trial judge corrected the error and instructed the jurors "that a specific intent to kill is an element of attempted murder." Tr. 258, ll. 8-21 and 259, ll. 6-12.

defense. It is any time that criminal intent in an issue." The trial judge disagreed, denied the mistrial motion, and did not cure the error. Tr. 253, l. 25 – 255, l. 11 and 257, l. 8 – 258, l. 6.[8]

Belcher held, "[T]he 'use of a deadly weapon' implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill)." 385 S.C. at 610, 685 S.E.2d at 809.[9] Here, the offense of attempted murder could be reduced, mitigated, or excused for two reasons. First, based on the agreement of counsel, the trial court charged assault and battery of a high and aggravated nature as a lesser-included offense of attempted murder. Second, Mr. Shands entire defense was that the prosecution could not prove criminal intent beyond a reasonable doubt.

The Court in *Belcher* decided that appeal "under the common law" and elected not to address S.C. Const. Art. V, § 21, which provides, "Judges shall not charge juries in respect to matters of fact, but shall declare the law." *Belcher*, 385 S.C. at 602, 685 S.E.2d at 804. As seen, Mr. Shands also objected to this jury instruction as a comment on the facts because the Court provided the jurors with an example of inferred malice. *Hughey, supra* (trial judge properly denied request specific examples of legal provocation for voluntary manslaughter as "instruction on the facts").

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[8] After the trial court judge corrected other errors in the jury instructions, Mr. Shands renewed his "previous objections." Tr. 260, ll. 6-9.

[9] In 2010, our General Assembly abrogated the common law offense of assault and battery with intent to kill and created the offense of attempted murder. 2010 Act 273, Section B; S.C. Code Ann. § 16-3-29.

This improper instruction prejudiced Mr. Shands because it diluted his defense that he lacked criminal intent, eliminated the likelihood that the jurors would consider assault and battery of a high and aggravated nature, and directed them towards a conviction for attempted murder.

This Court should order a new trial.

Question VII

Did the trial judge 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 arguments made by the State in its rebuttal closing argument?

Prior to trial, Mr. Sands filed a written motion requesting an order from the trial court requiring the State to open fully on the law and the facts and then reply only to new matters raised by defense counsel in his closing argument. R. *.

During the directed verdict motion, Mr. Shands noted that the kidnapping indictment did not contain any "factual allegation . . . to tell us what exactly was done in the course of these events for Mr. Shands to have to defend." Tr. 170, l. 17 – 171, l. 10.

Prior to closing arguments, Mr. Shands called the trial judge's attention to the written motion "asking that the State be required to open in full on the law and the facts." Counsel noted, "Due process requires that we have a full opportunity to respond to their entire argument. And then they would have a chance to respond to new matters that were raised in the response." Tr. 217, l. 25 – 218, l. 11.

The trial judge ruled, "[M]aybe the Supreme Court will want to change [the procedure, but] I decline to do so." Counsel verified that the trial judge had reviewed the

arguments in the written motion. Mr. Shands had moved for the State to open on the law, subject to the previous motion to require the State to open fully on the law and facts. Tr. 218, ll. 12-14.

After the trial judge denied Mr. Shands' motion, the State opened on the law, Tr. 220, l. 6 – 233, l. 16. The Solicitor argued, without any additional explanation, "[T]his isn't a traditional kidnapping." Tr. 222, ll. 7-9.

Mr. Shands argued in full. Tr. 223, l. 17 – 230, l. 9. During Mr. Shands' argument, counsel noted:

> As it has kind of already been eluded to this is going to be my last opportunity to address you and I am at a little bit of a handicap because our rules and or procedures don't allow me to hear what they are going to say about the facts before they make their argument. So one point that I would like to make at the onset is, is I have no idea how they are going to explain kidnapping to you under this evidence. And the reason that I have no idea about that is because all they have told you in opening[10] and just a minute ago in closing is that it is not something that you traditionally think of.

And, "I don't get a chance to respond to what their [is] theory under the facts." Tr. 224, l. 8 – 225, l. 2.

The prosecutor next argued the facts. Tr. 230, l. 10 – 238, l. 11. Mr. Shands objected twice about the Solicitor arguing facts outside the record. Tr. 231, l. 12 – 232, l.

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[10] In the State's opening statement, the Solicitor said:

> Again, a lot of time you hear kidnapping. What do you think of, kidnapping for ransom, kidnapping something [sic], holding a child for ransom. Again, that is not what South Carolina requires. But you hold or contain somebody or even move them a short distance against their will and this is kidnapping and you will hear facts in this case that we submit will justify a conviction on that crime.

Tr. 43, l. 21 – 44, l. 3.

14; 235, ll. 2-9. During her final argument, the Solicitor also revealed to the jurors for the first time the State's theory about the kidnapping charge:

> Kidnapping, Mr. Grose brought up that he didn't know what our position was going to be on kidnapping. It is pretty obvious, she wanted to leave, he closed the garage door, she opened it, he closed it again until it was half-way open. She can't get out. He grabs her by the hair and pulls out a great big chunk of it and won't let her leave. Can she leave when he has got her by the hair. Can she leave when he has got this fork stabbing her with it. She can't get away, she has to be rescued by her own teenage son, she couldn't get away on her own. There is the kidnapping, ladies and gentlemen.

Tr. 234, ll. 5-16. As will be discussed in more detail in Question VIII, *infra*, the actual testimony of the witnesses did not support submitting the kidnapping charge to the jurors.

After closing arguments, trial counsel noted for the record what he "would have done if [he] had been able to respond" to the Solicitor's closing argument:

> I would have responded to what I considered to be somewhat of an emotional attack on Mr. Shands both in some of how it was delivered but in particular the language that was used. We would have particularly responded to comments about jealous, controlling, manipulative and viewing his family as property. We would have responded about what they said about kidnapping, we would have responded to what they said about placing the police on trial, that was not our purpose. And we would have responded to the evidence about, the argument made about Sharon leaving that day as well as a number of things that I think that they said that exceeded the bounds of what the evidence really was, Your Honor.

Tr. 255, l. 9 – 256, l. 5.

In South Carolina, no Rule of Criminal Procedure addresses the question of the order of argument to the jury.[11] The practice of the State opening only on the law and

[11] The South Carolina Supreme Court has received comments on proposed Rule

then closing fully on 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."[12] 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 attorney's 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

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21 S.C.RCrim.P, which would require the prosecution to proceed in the manner requested in this motion. Proposed Rule 21 can be found at http://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=1013 (last viewed May 23, 2015).

[12] 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.

(1971). Again the defense counsel requested that the state be required to open fully on the law and the facts. The trial judge denied this request. The Court noted that since the decision in *Atterberry,* Rule 59 of the Circuit Court 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, "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."[13] *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 Delaware. In *Bailey v. State*, 440 A.2d 997 (Del. 1982) the court noted that "Closing argument is 'an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment.'" *Id.* at 1004 (internal citations

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

omitted). The court further held, "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. § 17-8-71; 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.[14]

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

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

in its closing. The inherent logic of this position has been acknowledged by our Court of Appeals 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 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.

This Court should order a new trial.

Question VIII

Did the trial judge err by denying Mr. Shands' motion for a directed verdict on the kidnapping charge because the kidnapping statute, as applied to Mr. Shands, is unconstitutionally vague and overbroad because it did not put him on notice of what conduct is prohibited?

At the end of the State's case, Mr. Shands moved for a directed verdict on the kidnapping charge based on the sufficiency of the evidence and additionally argued:

> [T]he kidnapping statute is unconstitutionally vague and overbroad because we have not really heard any evidence in this case that would put someone on notice that they had committed a kidnapping crime and come to defend the case at trial. And I would note that there is really no factual allegation in this indictment to tell us what exactly was done in the course of these events for Mr. Shands to have to defend. And we think the State's proof has failed on this issue and if this evidence is somehow construed that it has not then the statue is unconstitutionally vague and overbroad and based on the facts of this case Mr. Shands has standing to challenge that statute.

Tr. 170, l. 12 – 171, l. 10.

The Solicitor contended:

> [S]everal people have testified that she was grabbed by the hair as she was attempting to leave, pulled back into the

> doorway of the house. There is testimony that she lifted the garage door and closed it and sort of ended up in kind of a halfway state where she would not have been able to get her car out and leave. That is confining for the purpose of the statute.

Tr. 171, ll. 12-22. The Solicitor did not point to any other facts in the case that supported submitting the charge to the jurors. The trial judge denied Mr. Shands' motions for a directed verdict. Tr. 172, ll. 10-17. Mr. Shands renewed his motions at the close of all evidence. Tr. 213, ll. 1-8.

Ms. Shands and her two children were the only witnesses that could have observed Mr. Shands' conduct related to the garage door and pulling his wife's hair. Ms. Shands actual testified, "[W]e tried to get out of the garage. It was halfway so we couldn't get out." And, "I remember him pulling my by my hair to try to get me back in the backdoor." Tr. 58, l. 14 – 59, l. 12. At this point, she did not testify that Mr. Shands did anything to close an open garage door or actually restrained her by her hair. Later on, Ms. Shands testified, I was trying to open it and he was trying to close it." Tr. 66, l. 23 – 67, l. 5. But, she still never testified that Mr. Shands restrained her. T.C. testified that Mr. Shands "tried to close the garage" door, but never testified that he actually did. Tr. 74, l. 10 – 75, l. 12. T.C. did not offer any testimony about Mr. Shands pulling his wife's hair. J.S. did not offer any testimony about the garage door. J.S. testified that his father "got my mom by the hair," Tr. 83, l. 15, but never said his father actually restrained his mother.

Our Supreme Court has explained the standard for ruling on a directed verdict motion:

> When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of

> evidence, not its weight. A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. When reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.

State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 477-78 (2004) (internal citations omitted). *And see* Rule 19(a), SCRCrimP.

"Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law . . . is guilty of" kidnapping. S.C. Code Ann. § 16-3-910. In this case, the testimony of the State's witnesses did not establish the elements of kidnapping, and the trial judge should have directed the verdict in favor of Mr. Shands. This testimony, additionally, did not establish that Mr. Shands "possessed the requisite intent to commit [a] kidnapping." *State v. East*, 353 S.C. 634, 638, 578 S.E.2d 748, 751 (Ct. App. 2003).

If this testimony is construed to constitute a kidnapping, then § 16-3-910 is not constitutional.

> The void-for-vagueness doctrine rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies. A statute is not unconstitutionally vague if a person of ordinary intelligence seeking to obey the law will know, and is sufficiently warned of, the conduct the statute makes criminal. This concept has been explained as follows, [a] law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. One to whose conduct the law

> clearly applies does not have standing to challenge it for vagueness.

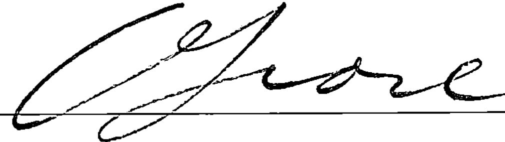
State v. Neuman, 384 S.C. 395, 402-03, 683 S.E.2d 268, 271-72 (2009) (internal quotations and citations omitted.

This Court should reverse the trial court.

CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Shands' convictions and sentences and order a new trial.

Respectfully Submitted,

By 

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Preston Shands, Jr.

January 11, 2016
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LAURENS COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

General Session Case No. 2014-GS-30-1477-82

The State, ... Respondent

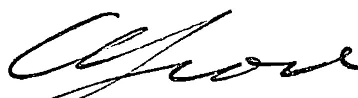
v.

Preston Shands, Jr., ... Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

J. Benjamin Aplin, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211



E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

January 11, 2016
Greenwood, South Carolina

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

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January 11, 2016

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

Re: *State v. Preston Shands, Jr.*
Court of Appeals Case No. 2015-001199

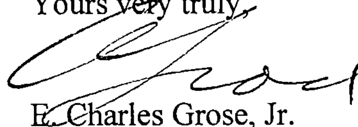
Dear Ms. Kitchens:

Enclosed please find Mr. Shands Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal, along with certificates of service for both. By copy of this letter to Mr. Aplin, I am serving the State of South Carolina.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

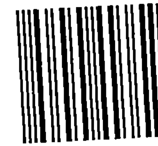
Yours very truly,



E. Charles Grose, Jr.

cc: Mr. Preston Shands, Jr.
J. Benjamin Aplin, Esquire

The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646



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The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. 11629
Columbia, SC 29211