

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM HORRY COUNTY  
COURT OF GENERAL SESSIONS  
Edward B. Cottingham, Circuit Court Judge

NOV 07 2016

SC Court of Appeals

Case No. 2012-GS-26-00859  
Appellate Case No. 2012-213631

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The State, ..... Respondent,

v.

Rickey Mazique, ..... Appellant.

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PETITION FOR REHEARING

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## PETITION

Petitioner respectfully submits that the Court's decision in this case overlooked or misapprehended points that are essential to the determination of the issues. Accordingly, Petitioner moves for a rehearing based on the following arguments:

### I. APPOINTMENT OF COUNSEL.

The Court's decision as to appointment of counsel rests entirely on its application of State v. Graddick, 345 S.C. 383, 548 S.E.2d 210 (2001) to the facts of this case. In its analysis the Court overlooked the operative facts of Graddick which are easily distinguishable from the facts in Mazique's case. In Graddick the request for new counsel was made only four days prior to trial. Also in Graddick the defendant's request was "only the most conclusory arguments." Id. In the present case Mazique made a timely motion, almost two months prior to trial. R. 69-70; Supp. R. 1. Clearly there is no comparison between Graddick and the present case on the issue of timeliness of the motion. Furthermore, Mazique can not be blamed for the clerk's failure, the trial court's failure, and his attorney's failure, to cause a timely hearing on the motion. Under this Court's reasoning, it would not have mattered whether Mazique had made the motion two years prior to the trial as the system, defense attorney included, allowed the issue to lay dormant until just prior to trial. It was not Mazique that caused the undue delay in having a hearing on his motion. It was not Mazique that caused the appearance of a last minute issue, or put the trial court in a position where it felt it necessary to deny relief to keep the docket moving. Unlike in Graddick, Mazique's motion was made timely. Graddick therefore does not support this Court's ruling on the issue of timeliness.

The specificity of Mazique's motion and argument further distinguishes this case from Graddick on the second ground relied on by this Court in its ruling. Unlike the defendant in Graddick, Mazique stated numerous specific reasons for his loss of confidence with his counsel. One of Mazique's grounds was counsel's waiver of his statutory right to a preliminary hearing without his knowledge or consent. Mazique established on the record that counsel waived his right without his consent. R. 86-87. Mazique further identified other specific grounds for his dissatisfaction with counsel including her failure to obtain certain tape recordings necessary to contradict the state's evidence (voice recordings transferred from tape to CD) that Mazique claimed were only select portions of the whole police interview. R. 18-20. Although the trial court cut off Mazique while he was attempting to articulate all of his reasons, he was able to state additional reasons for his dissatisfaction in support of his motion. R. 21-24. This Court has overlooked the number and specificity of the reasons Mazique provided the trial judge. Unlike Graddick, Mazique identified numerous grounds with sufficient specificity to justify the removal of counsel. This case is distinguishable from Graddick on both grounds cited by this Court as a basis for its ruling. The Court's reliance on Graddick is therefore error.

## **II. Right to Self-Representation.**

This Court's opinion overlooks the fact that the trial court ultimately conducted a Farretta hearing and allowed Mazique to represent himself. By virtue of the ruling the court found all of the factors necessary to allow Mazique to represent himself, including that the request was not merely to manipulate or delay the trial. In light of the trial court's ultimate decision once it conducted a Farretta hearing, this Court's reliance on State v. Jones, 270 S.C. 587, 243 S.E.2d

461 (1978), and other cited cases is misplaced. The Court fails to consider the prejudice in the improper delay in granting the Faretta hearing.

Mazique made a clear and unambiguous request to proceed pro se prior to trial. There was absolutely no question prior to the Jackson v. Denno hearing that Mazique intended to proceed pro se if he was not appointed a different counsel. In its opinion this Court overlooks the essential point that the trial court refused to conduct a timely Faretta hearing when this happened. Instead the trial court forced counsel to proceed and repeatedly denied Mazique the right to participate in the Jackson v. Denno hearing. The trial court failure to conduct a Farretta hearing prior to the Jackson v. Denno hearing resulted in the Mazique's failure to represent himself at a critical stage of the proceedings. The end result was that Mazique's trial was conducted under a prohibited hybrid form of representation.

This Court misperceives the timing and clarity of Mazique's request to proceed pro se. During the Jackson v. Denno hearing Mr. Mazique stated: "I want to represent myself." R. 57-58. "I want to represent myself at this hearing right now." R. 57-58. "This is a crucial part of my trial. This pretrial..." R. 57-58. "... and I want to represent myself right now. I don't want her representing me." 57-58. This Court's finding that Mazique was "equivocal about whether he wanted to represent himself" overlooks all of the relevant facts in this case. This Court's reliance on Fuller is therefore in error.

The Court further misperceives the facts relating to the Batson hearing. This Court finds no error in the trial court's denial of Mazique's attempt to raise a Batson issue after the striking of the jury. The Court appears to do so finding that Mazique failed to timely raise the motion. This overlooks the fact that the trail court repeatedly told Mazique that he was not going to be

heard because he had counsel. Counsel, acting contrary to Mazique's desire to proceed pro se, waived the Batson issue. This Court overlooks the fact that any attempt of Mazique to act on his own behalf up to that point had been summarily ignored by the trial court. This Court now implies that Mazique had a right to participate but waived his right to make a Batson challenge because he didn't object to defense counsel's waiver of any objection fast enough.

Although Mazique attempted to raise the Batson issue after counsel expressly waived any objection, he did so prior to any further proceedings. It is therefore difficult to understand whether it was counsel's waiver or the intervening lunch break that was fatal to Mazique's motion. If it was lunch, and not counsel's waiver that was fatal to Mazique's attempt, then the Court is implicitly holding that Mazique had the right to make and be heard in a hybrid form of representation. If it counsel's waiver that was fatal because Mazique was not entitled to hybrid representation, then Mazique's waiting until after lunch to raise his objection is irrelevant. Mazique was wrongfully denied the right to raise a Batson objection by the trial court's refusal to timely conduct a Faretta hearing and allow him to proceed pro se prior to this critical stage of the proceedings.

The Court's opinion overlooks the importance of the right to self representation. In State v. Barnes our Supreme Court said: "As the Supreme Court explained "[s]ince the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." McKaskle, 465 U.S. at 177, fn. 8, 104 S.Ct. 944. To the extent the State's argument can be characterized as "no harm, no foul," it conflicts with the United States Supreme Court's pronouncements on the sanctity of an

individual's sixth amendment right to counsel/right to self-representation. State v. Barnes, 413 S.C. 1, 774 S.E.2d 454 (S.C., 2015). This Court's decision as to Mazique's right to a timely Faretta hearing and self-representation is in error.

### **III. Comments to the Jury.**

This Court held that "the solicitor's comments referring to his belief that Mazique was guilty were in response to Mazique's closing argument to the jury that the solicitor had an obligation to investigate before charging and that the solicitor mislead the jury." This Court's reliance on Vaughn v. State, 363 S.C. 163, 607 S.E.2d 72 (2004) in coming to that conclusion is in error. The invited reply doctrine is inapplicable as the solicitor's comments clearly were not in response to anything. The comment by the solicitor was made in the solicitor's opening statement. Less than thirty seconds into the trial, in the sixth sentence of the State's opening statement to the jury the solicitor said: "I believe that Mr. Mazique, this defendant, did commit the crime of armed robbery." R. 143, l. 14-15. The solicitor went on to say: "I submit to you that at the end of the evidence presented today that you will be as firmly convinced beyond a reasonable doubt as I am that Rickey Mazique did go into a Kangaroo on September 29th, 2011, a little after 2 a.m., and he did with a weapon, he had a handgun, present it to this victim, Ms. Tonia Branton, and rob her at gunpoint." R. 143, l. 20-R. 144, l. 1. All of this was in opening argument, not in response to anything, not invited. The Court's reliance on the "invited response" doctrine to the solicitor's opening comments is clearly in error.

The Court's reliance on the "invited response" doctrine to the solicitor's even more egregious comments in closing is also in error. While the Court hold's that Mazique invited a

reply, a review of the record shows that Mazique's comments in closing were a fair response to the solicitor's improper opening. To the extent that the "invited reply" doctrine is applicable in this case, it would be applicable to Mazique's statements in closing, not the solicitor's. As the solicitor's opening statements opened the door for Mazique's closing, the solicitor's closing remains improper. The solicitor can not make improper closing argument based on his having made improper opening comments.

The Court also misperceives the nature of the state's argument in closing. The solicitor placed his personal belief and righteousness of his cause into the issue of guilt or innocence: "It is my duty to prosecute the person I believe who committed the crime. If I though Rickey Mazique did not commit this crime I would not be standing in front of you today." R. 419, l. 7-11. "After you've listened to all the law, after you've seen all the evidence, after you've heard all the witnesses I'm confident that you will find beyond a reasonable doubt that you're as firmly convinced as I am that this defendant Rickey Mazique on or about September 29th, 2011, in the early hours of the morning walked into that Kangaroo store in Horry, South Carolina, presented a handgun and robbed Ms. Branton at gunpoint." R. 418, l. 12-19. Even more egregious the solicitor concluded with a personal request for the jury to find the Defendant guilty: "Ladies and gentlemen, I ask you to find the only verdict that you could in this case, that you find this defendant guilty of armed robbery, thank you." R. 418, l. 20-23. The solicitor's comments were numerous and flagrant. The solicitor, having opened the door for Mazique's comments in the defense closing, should not then have carte blanche to make even more egregious comments to the jury. But even if the state was entitled to some response, the solicitor's argument was clearly unreasonable under the facts of the case. In light of this being a criminal case, the flagrant and

repeated nature of the solicitor's comments should be sufficient to allow this Court to address the issue on appeal despite Mazique's contemporaneous objection. See Toyota of Florence v. Lynch, 314 S.C. 257; 442 S.E.2d 611 (1994).

As to the question of the preservation issue being novel, the Court's reliance on State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (S.C. 2014) is misplaced. The Court's quote from Barnes is simply a fact stated in the analysis of that case. It is not the holding of the case, nor does it state a rule of law. The holding of Barnes relates to the proper competency standard in applying Farretta and has no application to the novel issue of whether an obvious attempt by the solicitor to take advantage of a self-represented defendant should allow the Court to address the improper argument despite the lack of a contemporaneous objection.

Mazique maintains that the repeated and flagrant nature of the violations indicate either an intent to take advantage of the self-represented Appellant or, a complete disregard for the duty of a prosecutor in making opening statements and closing arguments to the jury. This should, in a criminal case, be considered a flagrant case under Toyota of Florence v. Lynch, 314 S.C. 257; 442 S.E.2d 611 (1994). As a result, the State should not be allowed to argue Mazique's failure to object to its repeated and flagrantly improper statements as a bar to the issue being raised on appeal. "Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training. While the right does not exempt a party from compliance with relevant rules of procedural and substantive law, it should not be impaired by harsh application of technical rules." See Haines v. Kerner, 404 U.S. at 520; Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981); Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983); Forshev v.

Principi, 284 F.3d 1335, 1357-58 (Fed. Cir. 2002). The Court's opinion as to the solicitor's comments to the jury is therefore in error.

#### **IV. Audio of Police Interview.**

This Court's interpretation of Rule 106 SCRE is erroneous. Rule 106 provides: "When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction *at that time* of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. Rule 106, SCRE *emphasis added*; see also State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004), In Cabrera-Pena, the Court held that the "rule of completeness" was applicable to allow the defendant to develop the full substance of a conversation *when the prosecution witness testified* to only portions of the conversation. Mazique was entitled to have the whole interview played for the jury in the state's case when the state attempted to enter only excerpts of the interview.

The Court's reliance on the failure of Mazique to object to the redaction of the audio tapes during the Jackson v. Denno hearing as having any impact on the issue is erroneous. First, Mazique was not allowed to make any objections at the Jackson v. Denno hearing. The fact that the counsel that was forced upon him failed to make an appropriate objection is only further evidence of the prejudice in the trial court not making the Farretta inquiry timely. A pre-trial ruling is not a final ruling. The proper time to object to the introduction of the partial recording was during the trial contemporaneous with its offer into evidence, which Mazique did.

The Court further erred in holding that Mazique would have lost last argument anyway since he called two witnesses in his case-in-chief. This Court can not say that had Mazique not

been forced to put up the audio that he would have put up the two witnesses. The fact that Mazique elected to call witnesses has to be taken in light of the fact that he had already lost last argument due to the trial court's erroneous ruling under Rule 106, SCRE, and the doctrine of completeness. The purpose for recalling Chatfield was to allow the Appellant to cross examine him on the portion of the audio that the State did not play for the jury. The same was true as to Stanton, who the Appellant attempted to question about portions of the store surveillance and in-car video. R. 335-336. Having to compensate for the erroneous ruling, Mazique was forced to put up witnesses. Putting up witnesses can not therefore take away the prejudice of the erroneous ruling. Mazique's reluctance in having to introduce evidence in his case in chief shows that he was trying to overcome the prejudice from the court's ruling. R. 336, l. 2-8.

It is clear that the court's earlier ruling denying the Appellant's request to have the whole audio played when offered by the State limited the Appellant's ability to fully cross-examine the State's witnesses. This forced the Appellant to put up the remaining portion of the audio and put up the two officers to complete what should have been allowed cross-examination during the State's case. Of course this resulted in the Appellant's loss of last argument. The Court's decision as to the Rule 106 issue is therefore in error.

**V. Officer's Notes.**

The Court's opinion misinterprets the requirements necessary to preserve an issue for appeal. During the Appellant's cross-examination of detective Chatfield it was revealed that Chatfield had written notes about the case that he did not turn over in discovery. R. 275. These contemporaneous investigative notes were used by Chatfield to prepare his report which, were

sometimes not produced until a month or two later. R. 367, l. 2-13. Upon learning of the notes, the Appellant stated: "Your Honor, in the discovery I haven't received any written notes of his."

R. 275. The State argued that it is not their policy to turn over notes, and the Court ruled that Mazique was not entitled to the notes. 275.

To be preserved for appeal, "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004). Here, Mazique timely raised the issue of the notes and the court clearly ruled that he was not entitled to them. Mazique was not required to take exception to the ruling to preserve it and further argument would have been improper. See Rule 18, SCRCrimP.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is "axiomatic that an issue cannot be raised for the first time on appeal." *Id.* Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

A party is not required to use the exact name of a legal doctrine in order to preserve the issue. See State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001) Nonetheless, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can

be reasonably understood by the judge. Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733; *see also* S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007)

(finding that although SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial court to rule on the issue). In the present case it is clear that Mazique sought the officer's notes. The judge's ruling that he was not entitled to them makes it evident that the judge considered Mazique's statements as a request to have the notes produced and ruled on the issue. The issue is therefore adequately preserved for appeal.

#### **VI. Examination of Officers**

Appellant's argument is sufficient to inform the Court that the basis for the argument is the Appellant's right to cross-examine the witnesses against him as provided by the Confrontation Clause of the Sixth Amendment. The argument is sufficient for the issue to be addressed by this Court.

#### **VII. Cross-Examination of Witnesses.**

Mazique attempted to impeach the robbery victim (Branton) by cross-examination regarding the existence of prior arrests. Mazique's question was immediately cut off by the judge. R. 316. This Court held that the issue is not preserved because Mazique did not ask whether the witness had any pending charges. However, the record makes it abundantly clear that the trial court was not going to let him go any further. "No sir, got nothing to do with this case, not going to do that." R. 316. When Mazique asked: "Sir?" the trial judge responded: "No, sir, not going, that has nothing to do with her in this case, proceed to something else." R. 316. The

trial court ordered Mazique to proceed to something else, thus foreclosing further argument on the topic. "(a) Argument After Ruling. Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced; (b) Argument on Objection. No argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the court." Rule 18, SCRCrimP. The issue is therefore properly preserved for appeal.

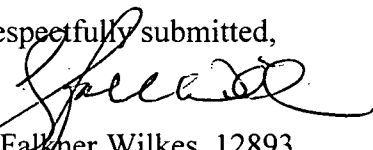
#### **VIII. Prejudicial Effect.**

To the extent that the Court's opinion changes and finds error, then the cumulative effect argument is not barred by Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999).

#### **CONCLUSION**

Based on the foregoing, the Appellant moves this Court to reconsider its decision and grant a rehearing.

Respectfully submitted,

  
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November 3, 2016.

THE STATE OF SOUTH CAROLINA  
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CERTIFICATE OF SERVICE

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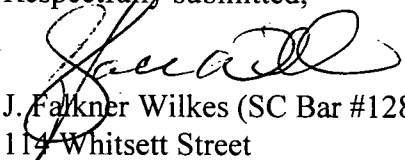
I certify that I have served a copy of the Petition for Rehearing and Certificate on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 3<sup>rd</sup> day of November, 2016, to counsel of record and others as follows, and by facsimile, email or other means as indicated:

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Respectfully submitted,



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