STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GERALD AKEEM GADSDEN,

APPELLANT

APPELLATE CASE NO. 2016-001286

FINAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial judge erred in refusing to allow appellant to cross-examine a vital State's witness about a lie he told during the co-defendant's cross-examination where the witness's bias and credibility were central to the State's case?

2.

Whether appellant's sentence should be vacated and this case remanded for sentencing where the trial judge erred in refusing to consider appellant's motion to strike mandatory life without parole as a possible sentence based on an erroneous belief that he lacked the power to grant appellant's motion because the solicitor has unfettered discretion to seek such a sentence?

STATEMENT OF THE CASE

On November 25, 2014, a Greenville County grand jury indicted appellant for armed robbery, two counts of kidnapping, second degree burglary, conspiracy, and a weapons charge. R. 723 – 725. On April 11, 2016, the State called the case for trial, but appellant was not present. R. 712 – 714, l. 12. The Honorable James R. Barber, III, continued the case. R. 712 – 714, l. 12. On April 26, 2015, the solicitor issued a Notice of Intent to Seek Sentence of Imprisonment for Life without the Possibility of Parole. R. 722.

On June 6, 2016, the case was again called for trial before Judge Barber. R. 1. Allen Fretwell and Nicole Simpson represented the State. R. 1. Susannah Ross represented appellant. R. 1. William Yarborough represented co-defendant James White. R. 1. The Court first held a hearing pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) and found appellant competent to stand trial. R. 12, l. 6 – 30, l. 21. The State did not proceed on the burglary charge and the jury convicted appellant and his co-defendant on all counts. R. 700, l. 11 – 701, l. 3. **The co-defendant received an aggregate sentence of twelve years' imprisonment.** R. 706, ll. 6 – 21. **Appellant received three concurrent LWOP sentences** and five years' imprisonment on the weapons charge. R. 708, l. 21 – 709, l. 23. This appeal follows.

ARGUMENT

1.

The trial judge erred in refusing to allow appellant to cross-examine a vital State's witness about a lie he told during the co-defendant's cross-examination where the witness's bias and credibility were central to the State's case.

Relevant Facts

At approximately 11:28 PM on January 20, 2014, someone robbed the Olive Garden in Greenville. R. 435, ll. 4 – 15. The restaurant was closed and three employees were present when it was robbed: (1) the manager, Aaron Kretzschmar ("Kretzschmar"); (2) dishwasher Grady Pugh ("Pugh"), and (3) dishwasher and co-defendant James White ("White"). R. 74, ll. 4 – 11.

Another employee, Damion Riley ("Riley"), left minutes before the robbery. R. 73, l. 14 – 74, l. 3. Three years before the robbery, Riley was convicted for second degree burglary and possession of burglary tools. R. 154, ll. 9 – 14. Riley was on probation at the time of the robbery. R. 168, ll. 4 – 18. During White's cross-examination, Riley lied and said he had not violated his probation. R. 161, ll. 9 – 20. The trial judge prevented appellant from cross-examining Riley about this lie. R. 168, l. 4 – 170, l. 18. R. 193, l. 22 – 194, l. 2. R. 717.

The Robbery

After the restaurant closed, Pugh and White were cleaning the kitchen and washing dishes. R. 184, l. 12 – 185, l. 5. A man with a gun came into the kitchen and ordered Pugh and White to get on the floor. R. 185, ll. 6 – 14. Pugh stayed on the floor, praying, until the police arrived. R. 187, ll. 3 – 24. Pugh told the police the robber had a gun, was heavyset, about his height, and was wearing a camouflage hood. R. 188, l. 13 – 189, l. 15. White also described the

robber as a "black male wearing a brown or camouflage hoodie" with a black handgun. R. 224, l. 8 – 225, l. 3. Pugh had never seen appellant Gadsden before the trial. R. 191, ll. 4 – 5.

The manager, Kretzschmar, was in the office waiting on the dishwashers to finish their work. R. 74, l. 23 – 75, l. 6. He walked back to the kitchen to check their progress. R. 75, ll. 10 – 13. The robber hit Kretzschmar in the side of the head as Kretzschmar rounded a corner. R. 75, l. 22 – 76, l. 4. The robber pointed a gun at Kretzschmar's face and told him to go to the restaurant's safe. R. 76, ll. 2 – 4.

At the safe, the robber gave Kretzschmar a flimsy plastic grocery bag and instructed him to fill it with the money from the safe. R. 76, l. 5 – 77, l. 15. While Kretzschmar filled the bag with money, the robber hit him several times and told him to hurry. R. 76, l. 5 – 77, l. 15. Approximately $3,500.00 was in the safe. R. 77, l. 23 – 79, l. 3. Kretzschmar was unsure of the denominations of the bills in the safe. R. 113, ll. 2 – 24. The robber demanded the rolled coins and their weight caused the bag to rip. R. 79, ll. 4 – 23. The robber fled, leaving a trail of money strewn behind him. R. 79, l. 24 – 80, l. 10. Kretzschmar called 911. R. 80, ll. 21 – 24.

Kretzschmar described the robber as a stocky black male with a black gun wearing a camouflage hooded sweatshirt. R. 98, l. 13 – 99, l. 13. The police gave Kretzschmar a photo lineup, but he was unable to identify appellant. R. 106, ll. 18 – 20. Later, the police showed Kretzschmar a photograph of a camouflage coat worn by appellant and he was unable to identify it as the same coat. R. 106, l. 21 – 107, l. 18.

After the police arrived, they found that one of the windows by the front doors was broken. R. 84, ll. 6 – 8. An "out of place" brick was outside of the door. R. 84, l. 24 – 85, l. 1. Only one pane of the double-pane glass was broken and no one could reach through the broken portion of the window. R. 215, ll. 10 – 18. The police found a white rag propping open the front

door. R. 215, ll. 10 – 18. Kretzschmar identified the rag as belonging to the Olive Garden by, among other characteristics, a marinara sauce stain. R. 85, l. 25 – 86, l. 16.

The first officer on the scene and Kretzschmar described White as unusually calm in the aftermath of the robbery. R. 225, ll. 7 – 10. R. 101, ll. 8 – 13. Two days after the robbery, the police summoned White to the station. R. 312, l. 23 – 313, l. 9. White reaffirmed his initial description of the robbery. R. 317, ll. 7 – 18.

The police then asked White for permission to search his cell phone, which he granted. R. 318, ll. 13 – 18. The police asked White if he had any other items and he replied that he had another "old phone" that he had not used in months. R. 318, ll. 19 – 25. White also gave the police consent to search the "old phone." R. 318, ll. 19 – 25.

The police retrieved the data from the phones and immediately began looking at the images. R. 336, ll. 6 – 9. Appellant's photograph was on the phone. R. 341, ll. 19 – 20. A photograph taken the day after the robbery showed appellant wearing a camouflage jacket "holding a large stack of cash." R. 496, ll. 3 – 15. Another photograph showed appellant wearing teal pants. R. 349, ll. 10 – 14. When the police searched White's apartment, they found a pair of teal pants with appellant's credit card. R. 347, l. 17 – 348, l. 9.

Through the contacts on the phone, the police were eventually able to speak to Gadsden. R. 349, l. 23 – 350, l. 5. Gadsden called the police after his mother informed him they wanted to speak to him. R. 349, l. 23 – 350, l. 5. R. 344, l. 14 – 345, l. 15. When the police asked Gadsden about the phone they had taken from White, Gadsden told them he had lost his phone on January 15 at a nightclub in Charleston. R. 350, ll. 12 – 22.

White told the police that he made several thousand dollars before the robbery at a rap concert. R. 443, l. 23 – 444, l. 2. White denied knowing Gadsden. R. 503, ll. 1 – 9. The data

recovered from the phones showed communications between Gadsden and White in the months prior to the robbery. R. 490, l. 11 – 496, l. 2.

Damion Riley's Testimony

Damion Riley, a line cook at the Olive Garden, was the last employee to leave before the robbery. R. 144, l. 21 – 145, l. 22. Riley clocked out at 11:18 PM and the robbery occurred less than ten minutes later. R. 438, ll. 20 – 24. R. 435, ll. 9 – 12. Riley's testimony was critical for the State for three reasons. First, he testified that when he left, the front doors were locked and no rag was propping the doors open. R. 150, l. 12 – 152, l. 7. Second, Riley told the police about a conversation he had with White just before Riley left the restaurant. R. 146, l. 21 – 148, l. 12. Riley claimed White told him he made two thousand dollars working at a rap concert. R. 146, l. 21 – 148, l. 12. Riley claimed this conversation was unusual because he had never had a similar conversation with White. R. 146, l. 21 – 148, l. 12. Finally, the State needed the jury to believe Riley had nothing to do with the robbery. R. 154, ll. 15 – 17.

Before ending his direct-examination, the solicitor asked Riley about his prior convictions. R. 154, ll. 9 – 17. In 2011—three years before the Olive Garden robbery—Riley was convicted of second degree burglary and possession of burglary tools. R. 154, ll. 9 – 17. Riley then denied any involvement in the Olive Garden robbery. R. 154, ll. 15 – 17.

During White's cross-examination, Riley vigorously denied that anyone ever propped open the door to, for example, smoke cigarettes after the restaurant closed. R. 157, l. 8 – 158, l. 14. Riley said, "It's the procedure that we cannot come out—during business hours we can go out, but after 10:00 it is shut down. It's against the law." R. 157, ll. 14 – 18. White's attorney then asked about Riley's burglary conviction:

> Q. Now, Mr. Fretwell asked you about you had a previous charge of burglary, second.

A. Yes.

Q. And that took place back in 2011.

A. Yes.

Q. And you had a recent probation violation.

A. No.

Q. Have you—you haven't had a probation violation between 2011 and now?

A. No. I fulfilled all my probation and everything.

Q. And it's complete?

A. Yes, sir.

R. 161, ll. 9 – 20 (emphasis added).

When it was her turn to conduct cross-examination, appellant's attorney questioned Riley about his probation violation:

Q. Okay. Now, did he—did you tell [the police] that you were on probation for burglary at that time?

A. Yes.

Q. You did mention that to him?

A. I can't really recall. I think he asked me just basic questions about the job, I want to say. I can't recall. It's been—

Q. So you—

A. –a while.

Q. –can't recall whether you told him or not?

A. I can't say.

Q. Do you recall whether he asked you about that or not?

A. He asked me had I been in trouble.

Q. Okay. And you don't recall what you said?

A. I said yes.

Q. Okay. And I think what Mr. Yarborough might have been getting at, while you didn't have a probation violation hearing in February—

MR. FRETWELL: Objection, Your Honor. Let me see this document.

MS. ROSS: I think it's relevant. It goes to bias and motive, Your Honor.

R. 168, ll. 4 – 25. Ms. Ross showed the solicitor the document and told the trial judge that she thought she could use it for impeachment and the trial judge then excused the jury. R. 169, ll. 1 – 9.

Trial counsel introduced as a court's exhibit the document she intended to use to impeach Riley. R. 193, l. 22 – 194, l. 2. R. 717. Appellant wanted to impeach Riley with a "Consent Order Imposing Additional Conditions of Probation." R. 717. In the document, Riley admitted violating his probation. R. 717. The hearing on the violation was held on February 19, 2014, before the Honorable Edward W. Miller. R. 717. Riley signed the consent order admitting he violated his probation. R. 717.

After excusing the jury, the trial judge asked, "What does probation have to do with this? Doesn't the rule deal with convictions?" R. 169, ll. 10 – 11. Trial counsel responded that "under 608(c) I think—I think I can put evidence of character and bias and I can also impeach. This witness told Mr. Yarborough that he did not have a probation violation. At that point I—" R. 169, ll. 16 – 19. The trial judge interrupted, "No, he asked him if he violated his probation." R. 169, ll. 20 – 21. Trial counsel responded that Riley did violate his probation. R. 169, ll. 22 – 23. The court asked whether a court found that "there was a probation violation?" R. 169, ll. 24 – 25. Trial counsel pointed out that Riley admitted he was in violation in the order and she told the

court the substance of the violation. R. 170, ll. 1 – 6. The trial judge then ruled, "We ain't going into it." R. 170, l. 7.

Discussion

The trial court erred in not allowing appellant to cross-examine the State's crucial witness Riley on a lie he told from the witness stand. It has long been the rule in this state that, "[c]onsiderable latitude is allowed in the cross-examination of an adverse witness to show bias." State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983). Riley lied about not violating his probation and the trial court prevented appellant from exposing his lie to the jury. Had the jury believed Riley was a liar and had a reason to curry favor with the police, the State's theory about an inside job and that White placed the rag in the door would have been considerably weakened, especially given White's prior burglary offense.

Appellant's attempted impeachment of Riley was proper under the rules of evidence. Rule 608(c) provides, "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE. "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." State v. McEachern, 399 S.C. 125, 140-41, 731 S.E.2d 604, 612 (Ct. App. 2012). "Since it is the function of the jury to determine the credibility of witnesses and the weight to be given their testimony, as a general rule, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony, and on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the

witness." State v. Brewington, 267 S.C. 97, 100-01, 226 S.E.2d 249, 250 (1976) (internal quotations and citations omitted).

In McEachern, a witness in a drug conspiracy case told the solicitors before trial that the defendant provided him with financial assistance to hire his lawyer. McEachern at 138, 731 S.E.2d at 610. When the witness took the stand, the defendant objected when the solicitor asked the witness whether the defendant helped him hire an attorney. Id. The trial judge sustained a series of objections on relevance grounds during the witness's testimony. Id. However, on redirect, the defense failed to object when the witness testified that the defendant offered to provide financial help and denied this offer influenced his testimony. Id.

When the defendant testified, the solicitor cross-examined her about providing financial assistance to the witness to hire an attorney. Id. at 138-39, 731 S.E.2d at 610-11. The defense objected to the questioning. Id. The trial judge overruled the objection and the solicitor was able to cross-examine the defendant about giving money to the witness through his family. Id.

The defendant appealed the trial judge's ruling allowing the examination. Id. at 140-41, 731 S.E.2d at 611-12. The Court of Appeals affirmed because the evidence tended to show bias, citing Rule 608(c). Id. The evidence that the witness received monetary help from the defendant tended to show his bias in her favor. Id.

The present case is very similar to McEachern. When White's attorney first asked about Riley's probation violation, the solicitor failed to object. R. 161, ll. 9 – 20. The State's witness then lied and said he had not violated his probation. R. 161, ll. 9 – 20. Even if the rules regarding impeachment with criminal convictions barred any questioning about probation, the State's failure to object at this point left their witness telling a lie to the jury. Not only was

appellant allowed to cross-examine Riley for bias, but appellant would have also been able to expose Riley as a liar in front of the jury. If the jury had found Riley's credibility lacking, it would have weakened several key points in the State's case, including the timing of the rag's placement and White's "unusual" conversation about making money at a rap concert.

Cross-examining witnesses on inconsistencies between trial testimony and prior statements is routine practice in criminal trials to portray witnesses as liars. See Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016). See also Driscoll v. Delo, 71 F.3d 701, 709-11 (8th Cir. 1995) (holding trial counsel's failure to impeach a witness with a prior inconsistent statement prejudiced a defendant); Wilson v. State, 340 P.3d 1213, 1227-30 (Kan. Ct. App. 2014) (holding that if trial counsel had impeached a key witness with prior inconsistent statements, it "would have seriously undermined [the witness's] credibility."). In Rutland, the Court reversed a murder conviction in PCR because trial counsel failed to impeach a key witness with prior inconsistent statements. Id. at 577-79, 785 S.E.2d at 353-54. The witness was "the only disinterested, objective witness." Id. The Court focused on the damage to the witness's credibility that would have resulted from proper impeachment. Id. The Court found that "had trial counsel discredited [the witness's] testimony by raising the prior inconsistent statements on cross-examination, [the witness's] credibility at trial would have suffered. Id.

In appellant's case, Riley's prior inconsistent statement was not made to the police, a reporter, or a bystander, but after being placed under oath and from the witness stand. Few moments can be more damaging to a witness's credibility than being caught lying on the witness stand—a lie that Riley could not have refuted because of his judicial admission to violating his probation. Just as in Rutland, appellant suffered prejudice from the trial court's limitation on his ability to attack Riley's credibility.

Had appellant been allowed to cross-examine Riley on his probation violation, it also would have exposed his bias in favor of the police. See State v. Sims, 348 S.C. 16, 25-26, 558 S.E.2d 518, 523 (2002). In Sims, the trial court erred in limiting the defendant's cross-examination of a State's witness about his pending charges for bias. Id. See also State v. Mizzell, 349 S.C. 326, 330-32, 563 S.E.2d 315, 317-18 (2002) (holding trial court erred in refusing to allow defendant to cross-examine a witness about possible sentencing exposure); State v. Jones, 343 S.C. 562, 568-71, 541 S.E.2d 813, 816-18 (2001) (holding the trial court erred in refusing to allow the defendant to cross-examine a State's witness about prior deals with the solicitor to show bias); State v. Pradubsri, 403 S.C. 270, 278-80, 743 S.E.2d 98, 103-04 (Ct. App. 2013) (holding trial judge erred in refusing to allow cross-examination of State's witness's possible sentencing exposure to show bias).

Here, Riley was on probation at the time of the robbery and had every incentive to deflect suspicion. He also had an incentive not to risk the wrath of the police because of the ease of which he could have been sent back to prison on a probation violation. The incentive to avoid any prison time is enough to lie. See State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012). In Gracely, the trial judge refused to allow the defendant to cross-examine the State's witnesses about the mandatory minimum sentences they avoided by making a plea deal. Id. at 372-75, 731 S.E.2d at 885-86. The Court held that the trial judge "improperly prevented questioning which would have examined the extent of that bias and the witnesses' possible motivations for testifying against appellant." Id.

"The limitation of cross-examination is reversible error if the defendant establishes he was unfairly prejudiced." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). The evidence proffered by appellant that Riley escaped further prison time even though he admitted

violating his probation showed his bias and the trial judge erred in preventing the impeachment. Riley was the only witness who could testify whether the rag was in the door when he left the Olive Garden and his testimony could not be cumulative to other witnesses. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (listing factors to consider when analyzing erroneous limitation of cross-examination) *cited by* State v. Fossick, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998). No other evidence corroborated Riley's claims about the "unusual" conversation with White. The State's case against Gadsden was wholly circumstantial and relied primarily on a photograph on a cell phone that copied numerous rapper poses in other photographs on the phones. R. 585, ll. 15 – 23. The inability to demonstrate Riley's bias and lack of credibility prejudiced appellant. This Court should reverse.

2.

Appellant's sentence should be vacated and this case remanded for sentencing where the trial judge erred in refusing to consider appellant's motion to strike mandatory life without parole as a possible sentence based on an erroneous belief that he lacked the power to grant appellant's motion because the solicitor has unfettered discretion to seek such a sentence.

The trial judge refused to consider appellant's motion to strike LWOP because he mistakenly believed he lacked the authority to do so. A trial judge errs when he refuses to exercise his discretion. State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981). If this Court declines to reverse appellant's conviction on Issue 1, appellant's remedy is vacation of his sentence a remand to allow the trial judge to consider appellant's motion and pronounce a new sentence. Id.

Appellant's Competency to Stand Trial

Gadsden did not appear when his case was originally called for trial on April 11, 2016, **because he was in a mental hospital.** R. 712 – 714, l. 12. R. 36, ll. 19 – 21. It seems clear from the record that appellant's attorney did not know Gadsden was at MUSC during the April hearing. Judge Barber continued the case. R. 712 – 714, l. 12. On April 26, 2015, the solicitor issued an LWOP notice. R. 722.

Dr. Donna Schwartz-Maddox testified in the State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), hearing about Gadsden's severe mental illness. R. 37, ll. 22 – 23. Gadsden's trial began June 6, 2016, but **just two weeks earlier, Dr. Schwartz-Maddox found him incompetent to stand trial.** R. 12, ll. 18 – 21.

Gadsden has schizophrenia. R. 14, ll. 3 – 7. He has a history of "prior inpatient psychiatric hospitalizations." R. 13, ll. 21 – 22. Dr. Schwartz-Maddox evaluated Gadsden on

May 21, 2016, and described him as "very psychotic" and "very delusional." R. 14, ll. 19 – 25. The doctor described Gadsden's delusions:

> His delusional system included—there is a woman named Jigger. **And Jigger is the queen of the devil.** And he believed that he converted her into her religious—into Christianity. He reported beliefs that **he's the other forgotten son of God**, those sorts of things, very religious preoccupations.
>
> Wasn't concerned with them as much, but then he also had some delusions that involved the court, which is why it was my opinion then that he did not have a rational understanding of the proceedings. His delusion was **that he could mentally and telepathically communicate with the judge during his proceedings and influence a verdict.** So I had some concerns about that.

R. 14, l. 20 – 15, l. 7 (emphasis added).

Dr. Schwartz-Maddox opined that Gadsden was competent to stand trial because of the positive effect of his medications. R. 15, ll. 8 – 21. This finding was despite Gadsden's lingering belief in his ability to communicate with the judge telepathically. R. 15, ll. 22 – 25. Dr. Schwartz-Maddox told Judge Barber "that if he communicated with you and you had some daughters that would like him to father your grandchildren, he would do that." R. 16, ll. 1 – 5. She ultimately described Gadsden's competency as "tenuous" and asked Judge Barber to order the jail to ensure Gadsden did not miss any doses of his medication because he "would decompensate in a matter of a day most likely." R. 16, l. 11 – 17, l. 15.

The Solicitor's Position on LWOP

After the Blair hearing, the solicitor told Judge Barber that he anticipated appellant would "be making some sort of motion on the record with respect to the notice of life without parole." R. 31, ll. 2 – 5. The solicitor told the court the procedural history and the plea offers in the case. R. 31, l. 9 – 35, l. 22. The solicitor initially offered the co-defendant, White, a

sentence of twelve years. R. 31, ll. 19 – 23. Gadsden was also given a plea offer, but the solicitor did not disclose the length of the sentence. R. 33, ll. 10 – 19.

The case had two previous trial dates and was not reached. R. 33, l. 20 – 34, l. 6. After the second trial date passed, the solicitor emailed appellant's attorney "confirming the prior offer making sure there wasn't anything we could do in this particular case." R. 34, ll. 1 – 3. Gadsden rejected the plea offer and said he was not guilty. R. 34, ll. 4 – 6.

The solicitor then claimed that as the case reached **its third trial date**, he realized that Gadsden "was LWOP eligible." R. 34, ll. 7 – 13. The solicitor said, "There wasn't anything at that point I could do." R. 34, ll. 12 – 13. He stated his office has an LWOP committee and there was no time to submit paperwork for LWOP in time for the third trial, but when Gadsden did not appear (because he was in a mental hospital), the solicitor gave the committee the paperwork. R. 34, ll. 18 – 23. The LWOP committee "gave permission" to the solicitor to extend an additional plea offer "to plead guilty to the charges that are on the docket for today with no LWOP requirement." R. 34, l. 24 – 35, l. l. 6. The solicitor again said he wanted to "reemphasize" this point for the record:

> [T]he State is prepared to allow the Defendant, Mr. Gadsden, to plead guilty today without enforcing the life without parole letter. But certainly, after the jury is sworn, that's the will of our office, that if this case proceeds to trial, that the State should seek life without parole based on his prior conviction and this qualified conviction.

R. 35, ll. 16 – 22.

Appellant's Motion to Strike LWOP and the Trial Judge's Refusal to Consider the Motion

Appellant argued that the State was engaging in vindictive prosecution and "punishing Mr. Gadsden for asserting his right to a trial." R. 36, l. 1 – 37, l. 1. She questioned the timing of the decision to notice appellant for LWOP, finding it hard to believe that it took

over two years for the solicitor to determine that Gadsden was eligible for LWOP. R. 36, ll. 4 – 10. Appellant argued his prior record was significantly less than other individuals who the solicitor did not notice for LWOP. R. 36, ll. 11 – 18.

Appellant further argued that the State was essentially punishing Gadsden for failing to appear for trial when he was severely mentally ill and for asserting his constitutional right to a jury trial. R. 36, ll. 11 – 21. Trial counsel stated that allowing the State to seek LWOP for these reasons and at this late date violated Gadsden's Eighth Amendment right to be free from cruel and unusual punishment. R. 36, l. 11 – 37, l. 1.

The trial judge did not believe he had the authority to consider appellant's arguments. R. 38, l. 10 – 39, l. 2. Judge Barber said, "I don't know of anything that the Court can do to prevent—that's clearly within the prosecutor's province. And they've elected to proceed in that manner." R. 38, ll. 10 – 14. Judge Barber expressed sympathy for Gadsden's mental illness, but ultimately stated, **"I don't know of anything I can do to assist you in your request here, Ms. Ross. So your motion to prevent them from going forward is denied because I don't think I can do that."** R. 38, l. 24 – 39, l. 2 (emphasis added).

Sentencing

After the jury convicted White and Gadsden, the solicitor told Judge Barber their criminal records. R. 704, l. 4 – 707, l. 18. White had the following record:

1. Habitual traffic offender, 2007

2. Assault with a high and aggravated nature, 2007

3. Criminal conspiracy, 2007

4. Assault with a high and aggravated nature, 2009

5. Criminal conspiracy, 2009

6. ABHAN "with misdemeanor, unclassified"

7. Robbery from Georgia, 2010

8. Possession of a firearm by a convicted felon from Georgia, 2010

R. 704, ll. 7 – 17. The solicitor then gave Judge Barber appellant's criminal record:

1. ABWIK, 2008 (the qualifying offense for LWOP)

2. Unlawful possession of a pistol, 2008

3. Offering bribes to an officer, 2014

4. Receiving stolen goods, 2014

R. 706, l. 25 – 707, l. 18. R. 718. **White received a twelve-year aggregate sentence.** R. 706, ll. 6 – 21. **Appellant received three LWOP sentences.** R. 709, ll. 5 – 23. Judge Barber said, "If the State hadn't sought it, I would not have on my own sentenced you to a sentence such as this based on what I heard in this case." R. 708, l. 25 – 709, l. 4.

Discussion

The trial judge erred in failing to exercise his discretion and consider appellant's motion. Appellant did not seek some broad new pronouncement of law, but application of existing law to his individual circumstances. While prosecutors have broad discretion in matters of plea bargaining, "there are undoubtedly constitutional limits upon its discretion." Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978). Even Hayes, a case that stands for the breadth of a prosecutor's discretion, recognized such discretion was not unlimited. Id. Here, appellant raised two substantial constitutional issues on which the trial judge needed to make

factual and legal findings: (1) prosecutorial vindictiveness, which is a due process violation, and (2) an Eighth Amendment violation based on Gadsden's severe mental illness. See State v. Fletcher, 322 S.C. 256, 259-63, 471 S.E.2d 702, 704-06 (Ct. App. 1996) (analyzing a claim of prosecutorial vindictiveness under the due process clause); Atkins v. Virginia, 536 U.S. 304 (2002) (applying an Eighth Amendment to the sentencing of mentally impaired persons). The trial judge was required to exercise his discretion and decide appellant's motion.

The Due Process Clause and the Eighth Amendment Limit a Solicitor's Powers and Give Discretion to the Trial Judge

"It is a due process violation to punish a person for exercising a protected statutory or constitutional right." Fletcher at 259, 471 S.E.2d at 704 citing United States v. Goodwin, 457 U.W. 368 (1982). The Fletcher Court analyzed relevant United States Supreme Court precedent on prosecutorial vindictiveness and the due process clause. Id. at 259-63, 471 S.E.2d at 704-06 citing Goodwin; Hayes; Blackledge v. Perry, 417 U.S. 21 (1974); Alabama v. Smith, 490 U.S. 794 (1989).

In Fletcher, the Court held that no presumption of prosecutorial vindictiveness attached. Fletcher at 259-63, 471 S.E.2d at 704-06. As part of its reasoning, the Court cited the timing of the allegedly vindictive charge. Id. The supposedly vindictive charge (pointing a firearm) was initiated at the same time as lesser municipal level charges. Id. The circuit court considered, and denied, the defendant's motions regarding prosecutorial vindictiveness. Id. at 259, 471 S.E.2d at 704.

Here, even under the timeline proffered by the solicitor, the decision to seek LWOP against appellant did not arise until after he rejected a plea offer and exercised his right to a jury trial. R. 31, l. 2 – 35, l. 22. Even on the day of trial, the solicitor boldly stated that appellant

could plead guilty without LWOP before the jury was sworn, but after the jury was sworn, the State would seek LWOP. R. 35, ll. 16 – 22. The solicitor claimed he did not discover appellant was eligible for LWOP until after the case had been called a third time—a claim trial counsel questioned. R. 36, ll. 4 – 10.

The timing of the solicitor's decision to seek LWOP also coincided with appellant's absence when the case was called during April 2016. R. 36, l. 11 – 37, l. 1. Gadsden was in a mental hospital and it was undisputed during the Blair hearing that Gadsden was severely mentally ill. R. 36, l. 1 – 37, l. 1. Gadsden has schizophrenia and even on the day of trial believed he could communicate telepathically with the trial judge. R. 14, ll. 3 – 7. R. 15, ll. 22 – 25. Despite these uncontested findings by the psychiatrist, the solicitor speculated that Gadsden "admitted himself" to the mental hospital to avoid trial. R. 37, l. 19 – 38, l. 3.

Intertwined with appellant's due process argument was appellant's argument that, in this very limited factual circumstance, the Eighth Amendment barred any decision by the solicitor to seek LWOP because Gadsden did not show up for trial while he was in a mental institution. The Eighth Amendment protects defendants with mental impairments and its proscription against cruel and unusual punishment may have required individualized sentencing instead of LWOP as a knee-jerk, mandatory sentence to Gadsden's mental illness and absence from trial in April.[1] See Miller v. Alabama, 567 U.S. 460 (2012) (forbidding mandatory LWOP sentences for juveniles because their lack of mental development reduced their culpability); Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) (interpreting and applying Miller).

Appellant anticipates the State will exaggerate the question before the trial judge in an attempt to show the question was purely legal and extraordinary. Appellant does not seek some

---

[1] Perversely, had Gadsden been tried in his absence in April, he would have avoided an LWOP sentence.

broad, sweeping change in the law. Appellant does not contend that the Eighth Amendment currently forbids mandatory LWOP sentences for mentally ill defendants. Appellant only contends that the factual circumstances of his individual case may prevent the use of mandatory LWOP. The timing of the solicitor's decision combined with appellant's hospitalization raises the constitutional question of whether due process and the Eighth Amendment combine to bar LWOP in his specific case. Far from asking this Court to create new law or any new remedies, appellant asks for consideration of his individual circumstances by the trial court.

The Trial Judge Erred in Not Exercising His Discretion

Appellant was entitled to have his motions considered by the trial judge. In State v. Smith, the trial judge ruled he did not have the authority to change the defendant's sentence. Smith at 497-98, 280 S.E.2d at 201-02. The trial judge stated, "The solicitor does not want the sentence changed. The attorney general does not want the sentence changed and under those circumstances, I cannot change the sentence so the motion for resentence is denied." Id. The trial judge also believed he lacked jurisdiction to change the sentence. Id.

The trial judge in Smith was mistaken about the law and the Court held that "the authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion." Id. The Court further held that it was "an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." Id. The Court remanded the case to the trial judge to consider the defendant's motion to change his sentence. Id.

In State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001), the Court reversed a trial judge for failing to realize he had the discretion to act on a request from the defendant. The State's expert testified that she had used her notes to refresh her memory and the defendant asked

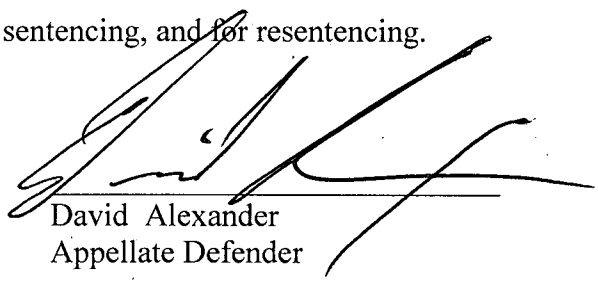
to inspect the expert's notes. Hughes at 341, 552 S.E.2d at 36. The trial took place in Orangeburg, but the witness left her notes in Columbia. Id. The trial judge stated he was without the power to compel the witness to produce the notes because the notes were not in Orangeburg. Id.

This Court reversed, stating, "The trial court apparently believed it was powerless to order [the expert witness] to produce anything that was not in the courtroom. This was an error of law because the rule's language is not limited to materials located inside the courtroom." Id. at 343, 552 S.E.2d at 37. "Therefore, the trial court erred in failing to exercise its discretion." Id. The Hughes Court cited Smith as authority that failing to exercise discretion is an error. Id. See also State v. Hawes, 411 S.C. 188, 767 S.E.2d 707 (2015) (holding trial judge erred in failing to exercise his discretion).

Here, the trial judge mistakenly believed he was powerless to decide appellant's motion to strike LWOP. The court believed the solicitor had unlimited discretion in this matter, which was an error of law. While a prosecutor does have broad discretion in what charges to bring or what sentence to seek, that discretion is subject to constitutional limitations. Appellant was entitled to have the trial court consider his constitutional arguments, make factual findings, and rule. This Court should vacate appellant's sentence remand to the trial judge for consideration of appellant's motion and resentencing.

CONCLUSION

For the foregoing reasons, appellant's case should be reversed and remanded for a new trial. Alternatively, this Court should vacate appellant's sentence, remand to the trial court for consideration of appellant's motions regarding sentencing, and for resentencing.



David Alexander
Appellate Defender

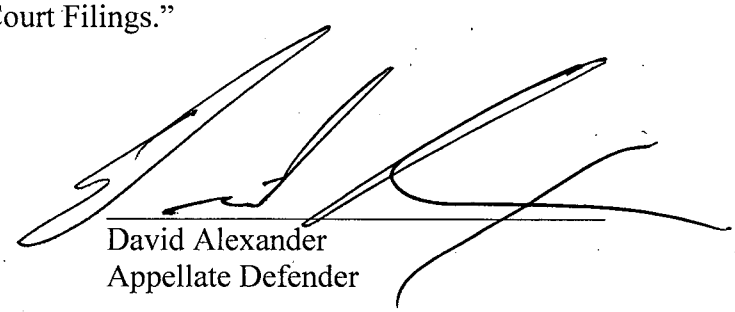
ATTORNEY FOR APPELLANT

This 24th day of August, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 24, 2017



David Alexander
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589