STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Laurens County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENNIE RAY BROWN, JR.,

APPELLANT

APPELLATE CASE NO 2016-001597

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Does South Carolina's recidivist statute violate the Eighth Amendment to the United States Constitution because the statute mandates imposition of a sentence of life imprisonment without the possibility of parole on a person suffering from intellectual disability without providing for an individualized sentencing hearing or permitting a sentencing option that would allow the person to have a meaningful opportunity for release?

II. Did the solicitor's improper closing argument where he injected improper victim impact evidence into the closing argument by referring to the ground on which the deceased police officer had died and where the jury had walked with the solicitor the day before the argument as "hallowed ground" because the officer gave his "full measure and devotion" in service of their community and asking the jury to consider the impact of the loss of the deceased individuals on their family and friends violate Appellant's state and federal constitutional rights to due process of law and an impartial jury?

III. Did the trial judge violate Appellant's right to due process of law under the South Carolina Constitution and the United States Constitution by permitting the state to deliver a limited opening argument, reserving its main argument for its second argument, which prevented Appellant from responding to the state's principal theories and permitted the state to "sandbag"?

IV. Did the trial judge err? by refusing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that (1) words accompanied by hostile acts may, depending on the circumstances, establish self-defense, and (2) if the aggressor withdraws in good faith from the conflict he is restored to his right of self-defense, where these additional elements were crucial to the jury's understanding of the law on self-defense and without these elements the instruction was incomplete?

STATEMENT OF THE CASE

A Laurens County Grand Jury indicted Appellant on October 7, 2011, for two counts of murder, five counts of attempted murder, and possession of a weapon during the commission of a violent crime. R. * (Indictments). On November 10, 2011, the state served Appellant and his counsel with notice of its intent to seek the death penalty. R. * (Death Notice).

On November 17-19, 2014, an evidentiary hearing was held pursuant to Atkins v. Virginia, 536 U.S. 304 (2002) to determine if Appellant was intellectually disabled before the Honorable Frank R. Addy, Jr. Tr. 1 (November 17-19, 2014). Solicitor David Stumbo and Assistant Solicitors Dale Scott and Demetri Andrews represented the state, and Charles Grose, Diana Holt, and Bill McGuire represented Appellant. Tr. 1 (November 17-19, 2014). The Atkins hearing resumed on March 4-5, 2015, and ultimately concluded on March 13, 2015. Tr. 1 (March 4-5, 2015); Tr. 1 (March 13, 2015). By order filed April 15, 2016, Judge Addy found Appellant is intellectually disabled and therefore ineligible for the death penalty. R. * (Atkins Order).

On June 1, 2016, the state served Appellant and his counsel with notice of its intent to seek a sentence of life without parole (LWOP) pursuant to S.C. Code Ann. § 17-25-45. R. * (LWOP Notice). Service was performed on the record before the Honorable Donald B. Hocker. Tr. 1 (June 1, 2016).

On June 16-17, 2016, and June 22, 2016, hearings were held before Judge Addy to resolve various pretrial motions filed by the parties. Tr. 1 (June 16-17, 2016); Tr. 1 (June 22, 2016). Solicitor David Stumbo and Assistant Solicitors Dale Scott and Demetri Andrews represented the state, and Charles Grose and Bill McGuire represented Appellant. Tr. 1 (June 16-17, 2016); Tr. 1 (June 22, 2016).

Appellant's case was ultimately called to trial on June 27, 2016, before Judge Addy, and a jury. Tr. 1. Solicitor David Stumbo and Assistant Solicitors Dale Scott and Demetri Andrews represented the state, and Charles Grose, Bill McGuire, and Shane Goranson represented Appellant. Tr. 1. After a five day trial, the jury acquitted Appellant of all five counts of attempted murder, but found him guilty of both counts of murder and the weapons offense. Tr. 933, l. 2 – Tr. 934, l. 12. After denying Appellant's request for an individualized sentencing hearing, Judge Addy sentenced Appellant to two consecutive life sentences. Tr. 956, l. 21 – Tr. 957, l. 9; R. * (Sentence Sheets). Pursuant to S.C. Code Ann. § 16-23-490(A), the judge did not impose a sentence for the weapons offense because Appellant was sentenced to life without parole for murder. R. * (Sentence Sheet).

On July 11, 2016, Appellant filed a motion for a new trial. R. * (Motion for New Trial). By order dated July 27, 2016, Judge Addy denied the motion. R. * (Order Denying Motion for New Trial).

On July 29, 2016, Appellant served his notice of appeal. In the notice, Appellant explained why he was filing his appeal in this Court:

> Pursuant to Rule 203(d)(1)(A)(ii), SCACR, this appeal is filed in the Supreme Court because [Appellant] contends S.C. Code Ann. § 17-25-45 violates the Eighth Amendment of the United States Constitution by imposing a mandatory sentence of life imprisonment without the possibility of parole on an individual suffering from Intellectual Disabilities without providing for an individualized sentencing hearing.

This appeal follows.

ARGUMENT

I. South Carolina's recidivist statute violates the Eighth Amendment to the United States Constitution because the statute mandates imposition of a sentence of life imprisonment without the possibility of parole on a person suffering from intellectual disability without providing for an individualized sentencing hearing or permitting a sentencing option that would allow the person to have a meaningful opportunity for release.

Relevant facts

Finding of intellectual disability

On April 14, 2016, Judge Addy determined Appellant suffered from intellectual disability, and the death penalty was not a potential sentence in the case. R. *(Atkins Order). Judge Addy relied heavily upon the opinions offered by the expert witnesses. R. *(Atkins Order). "Of the eight (8) doctors to render a report and/or testify, six (6) actually met with [Appellant] and affirmatively diagnosed him to be mentally disabled." R. *(Atkins Order). Dr. Tora Brawley tested Appellant and determined he had an IQ score of 68. R. *(Atkins Order). After review of his history, she diagnosed him with mild intellectual disability. R. *(Atkins Order). Dr. Alicia Hall, "the state's designated examiner," tested Appellant, evaluated his history, and determined he was "mentally disabled." R. *(Atkins Order). Dr. Daniel Reschly diagnosed Appellant "with IQ range of 65-75" and "mild intellectual disability." R. *(Atkins Order). According to Dr. Reschly, "ninety-five percent (95%) of the human population performs at an intellectual level higher than [Appellant]." R. *(Atkins Order). Dr. Reschly concluded Appellant's "overall achievement level [was] equal with that of an average fourth (4^{th}) grader." R. *(Atkins Order). Dr. Caroline Everington also concluded Appellant met the "criteria for a diagnosis of mild intellectual disability." R. *(Atkins Order). Her testing indicated Appellant's

"overall achievement score [was] below the 1st percentile." R. *(Atkins Order). Dr. Geoffrey McKee also diagnosed Appellant "with mild intellectual disability" based upon his interactions with Appellant, Appellant's history, and his test scores. R. *(Atkins Order). Finally, Dr. George Woods diagnosed Appellant "as having mild intellectual disability" due to his "low IQ score and low adaptive functioning." R. *(Atkins Order).

Judge Addy also relied upon the testimony of the lay witnesses in reaching his conclusion. R. *(Atkins Order). The judge explained that the state called several lay witnesses, particularly, Appellant's former co-workers and managers, who "undermine[d] the state's position." R. *(Atkins Order). Judge Addy concluded the testimony supported the findings of the doctors presented by the defense. R. *(Atkins Order). After explaining the burden of proof was "by the preponderance of the evidence," Judge Addy found Appellant "not only met this burden, but would meet practically any burden of proof required of him." R. *(Atkins Order). The judge found Appellant's evidence of mental disability to be "overwhelming" and found an "absence of significant contradictory evidence." R. *(Atkins Order). "Through the testimony of the defense experts and the state's designated expert, in conjunction with the testimony of lay witnesses, [Appellant] has surpassed his burden." R. *(Atkins Order).

After Judge Addy found Appellant suffered from intellectual disability and was not eligible for the death penalty, the state served Appellant with its notice of intent to seek life imprisonment without the possibility of parole (LWOP) based upon a prior most serious conviction. Tr. 3, l. 4 –Tr. 4, l. 8 (June 1, 2016); R. * (LWOP Notice). The predicate offense was a burglary first conviction from August 3, 1990. Tr. 3, ll. 8-10 (June 1, 2016); R. * (LWOP Notice).

Sentencing

After the jury returned its verdicts, Appellant moved to quash the LWOP notice as unconstitutional as applied to Appellant. Tr. 941, l. 15 – Tr. 944, l. 9. Defense counsel noted the prior judicial finding that Appellant suffered from intellectual disability. Tr. 942, ll. 6-11. Further, defense counsel argued there was "an inherent link" between the United States Supreme Court's Eighth Amendment jurisprudence barring the death penalty for the intellectual disabiled and juvenile sentencing procedures as both involve "issues in the developmental period." Tr. 942, ll. 12-17. Defense counsel elaborated that the juvenile cases prohibited certain punishments because the offenders were "still in the developmental stage." Tr. 942, ll. 18-20. Likewise, the intellectual disability cases concerned a disability that arose during "the developmental stage." Tr. 942, ll. 21-23. Defense counsel argued a mandatory life sentence without the possibility for parole for someone suffering from intellectual disability was barred by the Eighth Amendment, and that an individualized sentencing hearing was required. Tr. 942, l. 24 – Tr. 944, l. 9.

In explaining what the individualized sentencing hearing would entail, defense counsel provided:

> Your Honor would not only hear what was presented at the Atkins hearing, we would have the opportunity to examine the facts and circumstances surrounding that prior conviction to determine what role his intellectual disabilities played in that.
>
> You would have an opportunity to hear from medical testimony about [Appellant], not only at the time of this incident, but throughout his life.
>
> You would have an opportunity to hear from family members and hear a whole host of mitigation information to determine whether or not that sentence - - determine whether or not the appropriate sentence would be. And our position is, is you could not make a ruling on the sentencing without having heard all of that additional evidence.

Tr. 943, ll. 9-24.

Judge Addy denied the motion, stating that although he understood "additional evidence might be presented during the course of that sentencing hearing," he had an "opportunity to get an extremely detailed background of [Appellant] during the course of the Atkins hearing." Tr. 944, ll. 13-19. Despite recognizing he was not equipped with other information that a hearing would reveal, Judge Addy stated he had "an extremely, extremely good understanding of what [Appellant] has been through throughout his life, his capabilities, his many abilities, his limited disability, family history, family background." Tr. 945, ll. 5-10.

Thereafter, Judge Addy heard from family members and co-workers of the deceased individuals, Roger Rice and Nichole Kingsborough. A letter from Nichole's mother was read wherein she described the impact of the loss on her and Nichole's children. Tr. 948, l. 11 – Tr. 950, l. 8. Rice's wife and two children also addressed the judge. Tr. 950, l. 16 – Tr. 953, l. 23. Rice's wife called Appellant "a selfish, worthless, waste of space." Tr. 952, ll. 13-14. She hoped Appellant was "plagued day-by-day" for what he had done. Tr. 953, ll. 2-3. Finally, a police officer explained that he did not have "any prepared speech" because he wanted "to show [his] anger toward" Appellant. Tr. 953, ll. 15-17. Losing his law enforcement brother "really anger[ed]" him. Tr. 953, ll. 19-21. He opined that "the day [Appellant] dies in prison" would be "when the families will get their - - their - - their satisfaction." Tr. 953, ll. 21-23. He closed by saying, "Rest in peace, 1043. We love you." Tr. 953, l. 24.

Prior to pronouncing his sentence, Judge Addy told Rice's children that their "father would be very, very proud" of them. Tr. 955, ll. 2-4. He also said he "had some understanding" of what they were experiencing because he "lost [his] father" when he was "relatively young" as well. Tr. 955, ll. 4-8. Judge Addy stated that if he could give them peace, he would, and he offered his condolences. Tr. 955, ll. 9-10. He wanted the children to understand that their

conduct "reflect[ed] bits and pieces" of Rice and for them "to continue to make him proud as he look[ed] down on [them]." Tr. 955, ll. 12-16. The judge also expressed his "deepest condolences" to the family of Nichole Kingsborough. Tr. 956, ll. 8-12. Finally, the judge explained:

> The sentence that the Court imposes today is nothing more than a measure of justice. It's not perfect justice. We have to wait for divine justice or perfect justice. And perhaps when [Appellant] is called to answer for these offenses at some later point in time, perhaps at that point in time a greater expression of regret would be demonstrated perhaps.
>
> [Appellant], it is the great pleasure of this Court, sir, on Indictments 11-1524 and 11-1692, commit you to the Department of Corrections for the rest of your natural life. This would be the sentence of the Court, [Appellant], for the heinousness of these offenses.
>
> Even if you had not committed that earlier burglary, so even if this was not an LWOP case, this Court would be - - would be quite comfortable and quite happy to impose these sentences. So you are committed to the Department of Corrections for the rest of your natural life, sir.
>
> These sentences will run consecutively with each other. Goodbye.

Tr. 956, l. 13 – Tr. 957, l. 9.

Post-trial motion and order

In his post-trial motion, Appellant moved the court to reconsider its order denying an individualized sentencing hearing in this matter. R. * (Motion for new trial). Appellant argued, "The Atkins line of cases naturally converges with" the cases prohibiting certain sentences for juvenile offenders, including death and mandatory life imprisonment, and requiring individualized sentencing proceedings prior to imposition of a life sentence. R. * (Motion for new trial). Appellant explained that "[b]oth lines of cases provide constitutional guidance based on an offender status during the developmental period." R. * (Motion for new trial). Based upon the natural convergence of the strands of Eighth Amendment jurisprudence, Appellant argued he

was entitled to an individualized sentencing hearing prior to imposition of sentence. R. *(Motion for new trial).

In ruling upon the motion, Judge Addy stated he had "reviewed ad nauseam the reports and testimony of the psychologists who met with [Appellant] and opined as to his mental capacity." R. *(Order denying new trial). He claimed he was "very familiar" with Appellant's "psychological history, limitations, and capabilities" and the "horrific and inexcusable nature of the crimes" for which Appellant was convicted. R. *(Order denying new trial). Judge Addy concluded that "[g]iven [his] uniquely exhaustive familiarity with [Appellant] and these events, an individualized sentencing hearing was wholly unnecessary, and the court would have imposed the exact same sentence" even if the recidivist statute were inapplicable. R. *(Order denying new trial).

Discussion

"The Eighth Amendment succinctly prohibits '[e]xcessive' sanctions. It provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'" Atkins v. Virginia, 536 U.S. 304, 311 (2002). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Trop v. Dulles, 356 U.S. 86, 100 (1958). "The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." Hall v. Florida, 134 S.Ct. 1986, 1992 (2014).

"To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" Graham v. Florida, 560 U.S. 48, 58 (2010)(quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)). "Embodied in the Constitution's ban on cruel and unusual punishment is the 'precept of

justice that punishment for the crime should be graduated and proportioned to [the] offense.'" Id. at 59 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

Over the years, the cases addressing the proportionality of sentences have developed along two general lines. The first is concerned with the particular circumstances of the case and whether the defendant's sentence for a term of years is grossly disproportionate given the particular offense. Graham, 560 U.S. at 59; Harmelin v. Michigan, 501 U.S. 957, 1005 (1991). The second classification of cases is concerned with categorical rules as applied to groups of offenses or groups of offenders. Graham, 560 U.S. at 60-61. For example, the Supreme Court categorically ruled the Eighth Amendment prohibits the imposition of the death penalty for non-homicide crimes against individuals, Kennedy v. Louisiana, 554 U.S. 407 (2008), and prohibited the death penalty for defendants who committed their crimes before the age of eighteen, Roper v. Simmons, 543 U.S. 551 (2005). In Atkins, the Court explained it had held "that death [was] an impermissibly excessive punishment for the rape of an adult woman," "or for a defendant who neither took life, attempted to take life, nor intended to take life." Atkins, 536 U.S. at 312 (internal citations omitted).

When adopting categorical proportionality rules, the Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Graham, at 61 (quoting Roper, 543 U.S. at 572). Generally, the Court has relied on social science data and statistics to discern "society's evolving standards of decency." Roper, 543 U.S. at 560-77. "[G]uided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,'" the Court, in the exercise of its own independent judgment, then determines whether the punishment

in question violates the Eighth Amendment to the Constitution. Graham, 560 U.S. at 61 (quoting Kennedy, 554 U.S. at 421).

No death penalty for intellectually disabled

In Atkins, the Court surveyed the state legislative considerations of executing of intellectually disabled individuals. Atkins, 536 U.S. at 313. After reviewing the legislatures that had banned the practice or had contemplated such a ban, the Court concluded that it was "not so much the number of these states that is significant, but the consistency of the direction of change." Id. at 315. The Court found the "number of states prohibiting the execution of mentally retarded persons" though small was "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." Id. at 315-316. Examining the number of individuals with intellectual disability executed in states where the practice was permissible, the Court concluded "the practice" of executing intellectually disabled people had "become truly unusual" and that it was "fair to say that a national consensus ha[d] developed against it." Id. at 316.

Individuals with intellectual disability "by definition" "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Id. at 318. "Abundant evidence" shows the intellectually disabled "often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." Id. "Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." Id.

After identifying retribution and deterrence as the "social purposes served by the death penalty," the Court examined whether executing intellectually disabled people served those

purposes. Id. at 318-319. Concerning retribution, the Court concluded that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the state, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." Id. at 319.

Turning to deterrence, the Court explained "[e]xempting the mentally retarded from the punishment will not affect the cold calculus that precedes the decision of other potential murderers" because "that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders." Id. at 319-320 (internal quotation omitted). Thus, a categorical bar on executing the intellectually disabled was appropriate. Id. at 319.

"The reduced capacity of mentally retarded offenders provide[d] a second justification for a categorical rule making such offenders ineligible for the death penalty." Id. at 320. With the intellectually disabled there was an enhanced risk of false confessions, a lesser ability to a persuasive showing of mitigation, a lesser ability to give meaningful assistance to counsel, a decreased ability to be a good witness, and a risk "their demeanor may create an unwarranted impression of lack of remorse for their crimes." Id. at 320-321. Ultimately, the Court concluded that executing the intellectually disabled was "excessive" and in violation of the Eighth Amendment. Id. at 321.

No death penalty for children

Beginning in 2005 with its decision in Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court began a steady evolution of juvenile justice jurisprudence applicable to the states and federal government. In Roper, the Court held death sentences for juveniles were cruel and unusual punishment. In Roper, the Supreme Court established a categorical ban on the death penalty for juveniles relying in large part on social science research indicating that youths have a

lessened culpability and are less deserving of the most severe punishments. 543 U.S. at 569-75. Juvenile offenders are fundamentally different from adults for purposes of sentencing for three reasons: (1) they are immature and have "an underdeveloped sense of responsibility;" (2) they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and (3) their characters are "not as well formed" as adults. Id. at 569-70 (internal citations omitted). "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 573. Therefore, "juvenile offenders cannot with reliability be classified among the worst offenders." Id.

No LWOP for children convicted of non-homicide offenses

A few years after Roper, the Court held that a LWOP sentence imposed upon a juvenile for a non-homicide offense violated the Eighth Amendment's ban on cruel and unusual punishment. Graham v. Florida, 560 U.S. 48 (2010).

Sixteen-year old Terrance Graham was charged with armed burglary and attempted armed robbery of a barbeque restaurant. Id. at 53. After Graham entered guilty pleas to both charges pursuant to a plea agreement, the trial court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent three-year terms of probation with jail time. Id. at 54. Shortly thereafter, when Graham was seventeen-years old, he was arrested again and charged with home invasion robbery. Graham's probation officer charged Graham with violating the terms of his probation by "possessing a firearm, committing crimes, and associating with persons engaging in criminal activity." When Graham appeared before the trial court where he maintained he had no involvement in the home invasion robbery, he admitted to violating his probation by fleeing arrest,

even though the trial court emphasized that the admission could expose him to a life sentence based on his previous charges. Id. at 55.

After finding Graham had violated his probation, the trial judge, in his discretion, sentenced Graham to the maximum sentence of life. During the sentencing proceeding, the judge provided his reasoning for the sentence: "We can't do anything to deter you. This is the way you are going to lead your life.... [T]hat is where we are today is I don't see where I can do anything to help you any further." Id. at 56-57. Florida had abolished its parole system; accordingly, the life sentence gave Graham no possibility of release unless he was granted executive clemency. Id. at 57.

The Supreme Court held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." Id. at 74. Just as the Court did in Roper, the Graham Court, relied upon developments in social science demonstrating the fundamental differences between juveniles and adults:

> [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults. It remains true that from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Id. at 68 (internal citations omitted). Based upon the differences between adults and children, the Court concluded that while "[a] juvenile is not absolved of responsibility for his actions," his transgressions are "not as morally reprehensible as that of an adult." Id. at 68 (internal citations omitted).

The Court explained the decision was "necessary to prevent the possibility that life without parole sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment." Id. at 74. Although "[a] state is not required to guarantee the

eventual freedom to a juvenile offender convicted of a non-homicide crime," the state must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. "[W]hile the Eighth Amendment forbids a state from imposing a life without parole sentence on a juvenile non-homicide offender, it does not require the state to release that offender during his natural life." Id. at 75. "The Eighth Amendment does not foreclose the possibility that persons convicted of non-homicide crimes committed before adulthood will remain behind bars for life. It does forbid states from making the judgment at the outset that those offenders never will be fit to reenter society." Id.

While explaining its rationale, the Graham Court noted that a LWOP sentence is the "second most severe penalty permitted by law." Id. at 69 (internal citations omitted). Additionally, "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." Such a sentence "alters the offender's life by a forfeiture that is irrevocable." Id. For a juvenile offender, a LWOP sentence "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit [of the convict], he will remain in prison for the rest of his days.'" Id. at 70 (quoting Naovarath v. State, 779 P.2d 944 (Nev. 1989)). Additionally, the Graham Court observed that a juvenile offender sentenced to LWOP will on average serve more years and a greater percentage of his life in prison than an adult offender. "A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." Id.

Finally, the Graham Court concluded that its new categorical rule "gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform." Id. at 79. "Life in prison without the possibility of parole gives no chance for reconciliation with society, no hope." Id. However, "[m]aturity can lead to that considered reflection which is the foundation for remorse,

renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual." Id. By imposing a "categorical rule against life without parole for juvenile non-homicide offenders," the Court avoided "the perverse consequences in which the lack of maturity that led to an offender's crime is reinforced by the prison term." Id.

No mandatory LWOP sentences for children

Not surprisingly, when presented with the question of whether mandatory LWOP sentences for juveniles in homicide cases violated the Eighth Amendment, the Supreme Court held they did. Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 2464 (2012). Quite simply, "children are constitutionally different from adults for purposes of sentencing." Id.

In Miller, the Court continued the evolution of Eighth Amendment jurisprudence. The Court extended the reasoning of Roper and Graham by holding that mandatory sentences of LWOP for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. Miller, 132 S.Ct. at 2460. This was a categorical ban. However, the Court further explained that while the decision did not foreclose imposition of a sentence without the possibility of a parole on a juvenile convicted of a homicide offense, the Court required the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 2469.

The Miller Court reserved ruling on whether juveniles could ever be sentenced to LWOP. Id. at 2469. The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." Id. at 2464. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. The Court eloquently explained that due to the innate characteristics of

children at large, there is a "great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." In fact, the Court stated "incorrigibility is inconsistent with youth." Id. at 2469. The Court emphasized the potential for reform present in all juveniles. The Court emphasized the mitigating qualities of youth and noted "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 2467(quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

Although the Miller Court did not hold LWOP to be an unconstitutional sentence in non-mandatory sentencing schemes, the Court held Eighth Amendment jurisprudence governing imposition of death sentences applied equally to cases involving juveniles facing the possibility of LWOP. Id. at 2470. The Court's decision created a presumption against LWOP sentences for juveniles, and most importantly, the Court imported the principles of capital sentencing into cases where juveniles face the possibility of LWOP. Specifically, the court explained that "death is different" and "children are different too." Id. at 2470.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" Id. at 2463 (quoting Roper, 543 U.S. at 560). The Miller Court emphasized that "proportionality is central to the Eighth Amendment." Id. Focusing on the concept of individualized sentencing, the Court recognized "that children are constitutionally different from adults for purposes of sentencing." Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. at 2464 (quoting Graham, 560 U.S. at 68). "[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 2465. As a result, "[a]n

offender's age is relevant to the Eighth Amendment." Graham, 560 U.S. at 76. In light of the relevance to the ban on cruel and unusual punishment, "imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children." Miller, 132 S.Ct. at 2466.

Mandatory sentencing prevents the sentencer from considering the juvenile offender's "chronological age and its hallmark features, among them, immaturity, impetuosity, and failure to appreciate risks and consequences," the offender's family and home environment, the extent of the offender's conduct in the offense and the way familial and peer pressures may have affected him. Id. at 2468. The Court required sentencers "to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 2469.

No non-mandatory LWOP sentences for juveniles

In Aiken v. Byars, 410 S.C. 534, 540-541, 765 S.E.2d 572, 575-576 (2014), this Court held that Miller "unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole." Id. at 542, 765 S.E.2d at 576. Thus, this Court determined "an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender" was required. Id. Recognizing that Miller "did not expressly extend its ruling to states such as South Carolina whose sentencing scheme *permits* a life without parole sentence to be imposed on a juvenile offender but does not *mandate* it," this Court held it "must give effect to the proportionality rationale integral to Miller's holding – youth has constitutional significance." Id. at 542-543, 765 S.E.2d at 576. Therefore, youth "must be afforded adequate weight in sentencing." Id. at 543, 765 S.E.2d at 576.

This Court found the Miller decision "clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." Id. at

543, 765 S.E.2d at 576-577. Quite simply, this Court concluded "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." Id. at 543, 765 S.E.2d at 577. Accordingly, this Court held the requirement that sentencing judge must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" "deserves universal application." Id. (internal quotations omitted). This Court held the class of petitioners in the case "and those similarly situated" were "entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." Id. at 544, 765 S.E.2d at 577.

The sentencing court must consider the following factors in crafting a sentence proportional to the offense and the juvenile offender:

> (1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence; (2) the family and home environment that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth—for example, the offender's inability to deal with police officers or prosecutors (including on a plea agreement) or the offender's incapacity to assist his own attorneys; and (5) the possibility of rehabilitation.

Id. at 544, 765 S.E.2d at 577 (internal quotations omitted). While not requiring the sentencing proceedings to "mirror the penalty phase of a capital case," this Court determined "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings," in addition to the Miller factors. Id. at 544-45, 765 S.E.2d at 577.

Two years after the South Carolina Supreme Court's decision in Aiken, the Supreme Court of the United States addressed the retroactivity question of Miller. Montgomery v. Louisiana, 136 S.Ct. 718 (2016). In line with our Court's Aiken opinion, the High Court held that Miller announced a new substantive constitutional rule that was retroactive on state collateral review. Montgomery, 136 S.Ct. at 732-36. However, the Court's opinion answered more than the retroactivity question.

In 1963, Henry Montgomery was seventeen-years old. Id. at 725. He shot and killed a deputy sheriff. Id. He was sentenced to death for the crime, but his conviction was reversed by the state supreme court. Id. Upon re-trial, the jury returned a verdict of guilty without capital punishment. Id. According to state law, the judge was required to impose LWOP. Id. at 726. "The sentence was automatic upon the jury's verdict, so Montgomery had no opportunity to present mitigation evidence to justify a less severe sentence." Id. At the time of his appeal to the United States Supreme Court, Montgomery was sixty-nine years old, having "spent almost his entire life in prison." Id.

When Montgomery challenged his sentence based upon the Miller decision, the state court held he was not entitled to relief because Miller was not retroactive on collateral review. Montgomery, 136 S.Ct. at 727. In deciding that Miller's prohibition on mandatory life without parole for juvenile offenders announced a new substantive rule that must be retroactive, the Court revealed much about its prior opinion in Miller. Montgomery, 136 S.Ct. at 732. "The 'foundation stone' for Miller's analysis" was the "Court's line of precedent holding certain punishments disproportionate when applied to juveniles." Montogmery, 136 S.Ct. at 732. The "starting premise" is the "principle" "that children are constitutionally different from adults for

purposes of sentencing" that "result from children's diminished culpability and greater prospects for reform." Id. (internal quotation omitted).

The Court further noted Miller recognized "that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." Montgomery, 136 S.Ct. at 733. However, "in light of children's diminished culpability and heightened capacity for change, Miller made clear that appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. at 733-34 (internal quotations omitted). Therefore, Miller "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth." Id. at 734 (internal quotations omitted).

"Because Miller determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status – that is, juvenile offenders whose crimes reflect the transient immaturity of youth." Id. (internal citations and quotations omitted). Miller barred "life without parole" "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Id. "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." Id. (internal quotations omitted).

"A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." Id. at 735. It is the hearing that "gives effect to Miller's substantive

holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." Id. The Court concluded that Montgomery and others like him "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." Id. at 736-37.

Individualized sentencing hearings for intellectually disabled

The separate, but intertwined strands of Eighth Amendment jurisprudence regarding the categorical bans on the death penalty for the intellectually disabled and juveniles along with the cases banning imposition of a mandatory life sentence for juveniles without an individualized sentencing proceeding demonstrate the next step in America's evolving standards of decency – categorical ban on mandatory life sentences on intellectually disabled individuals and the requirement of individualized sentencing hearings for such individuals prior to imposition of sentence. South Carolina's recidivist statute, which requires imposition of a life sentence for certain convictions, violates the Eighth Amendment as it provides for no exceptions for those with intellectual disabilities and fails to ensure those with such disabilities receive individualized sentencing hearings prior to imposition of sentence. See S.C. Code Ann. § 17-25-45.

When examining its own excessive punishment ban embodied in the Oregon Constitution, the Oregon Supreme Court looked to the United States Supreme Court's opinions on intellectual disabilities to determine whether a trial judge was required to consider a defendant's intellectual disability prior to sentencing. State v. Ryan, 396 P.3d 867, 875-877 (Ore. 2017). Ryan received a mandatory minimum prison sentence of seventy-five months for multiple sex offenses. Id. at 868. He argued the mandatory sentence was disproportionate as applied to him because it prohibited the court from considering his intellectual disability. Id. After examining the Supreme Court's Eighth Amendment jurisprudence, the Oregon Supreme

Court concluded "[e]vidence of an offender's intellectual disability" "is relevant to a proportionality determination where sentencing laws require the imposition of a term of imprisonment without consideration of such evidence." Id. at 877. According to the Court, "where the issue is presented, a sentencing court must consider an offender's intellectual disability in comparing the gravity of the offense and the severity of a mandatory prison sentence on such an offender in a proportionality analysis." Id.

The Kansas Legislature prohibits the imposition of a sentence of death, life without the possibility of parole, or a mandatory term of imprisonment if a person convicted of capital murder has intellectual disability. Kan. Stat. Ann. § 21-6622(f); see also State v. Corbin, 386 P.3d 513, 516 (Kan. 2016). Thus, at least one state legislature has determined that mandatory life imprisonment for intellectually disabled individuals does not comply with the country's evolving standards of decency.

"Mandatory life without the possibility of parole sentences, such as those under recidivist sentencing statutes, imposed on intellectually disabled persons is inconsistent with the Eighth Amendment ban on cruel and unusual punishment because a sentence with such finality ignores the reduced culpability of the defendant and the defendant's ability to be treated." Nick Bonham, *Mandatory Life Without Parole Sentences for the Intellectually Disabled: A Violation of the Eighth Amendment*, 12 Cardozo Pub. L. Pol'y & Ethics J. 737, 738-739 (Summer 2014). "Precluding the possibility of parole from a life sentence increases its severity, the justifications for which are incompatible with the mental status of the intellectually disabled." Id. at 738.

"The intellectually disabled are deficient in intellectual functioning – such as reasoning – and adaptive ability, so are even less likely to be aware of the extreme consequences for their actions, thereby undermining both moral retribution and deterrence theory." Id. at 753.

"Cognitive impairments would make the processing of the information that one must spend the rest of their life in jail, removed from society, as a penalty for their conduct extremely difficult." Id. at 753-754. "Where a class of defendants has been shown to have lower levels of culpability, there is a recognized need for individualized sentencing and rejection of severe, mandatory sentences." Id. at 767. "Because the intellectually disabled, like juveniles, have been recognized as such a class with reduced levels of culpability, and a LWOP sentence is such a severe punishment that requires a proportional crime, the intellectually disabled deserve individualized, not mandatory, sentencing." Id.

"Mandatory LWOP sentences for those defendants found to be intellectually disabled" "is cruel because it subjects a class of defendants that by definition has lower levels of culpability to an incredibly severe and final punishment without consideration of mitigating factors." Id. at 773. Applying mandatory LWOP sentences to the intellectually disabled "violates our society's modern notions of decency and proportionality in sentencing." Id. "Where there are legitimate proportionality concerns as applied to a group of offenders proven to have deficient levels of logical reasoning and moral culpability, the Supreme Court has shown a recent and repeated proclivity for ruling harsh sentences unconstitutional for that class of offenders." Id.

South Carolina's recidivist statute violates the Eighth Amendment to the United States Constitution because it mandates imposition of a sentence of life imprisonment without the possibility of parole on a person suffering from intellectual disability without providing for an individualized sentencing hearing or permitting a sentencing option that would allow the person to have a meaningful opportunity for release. In South Carolina, intellectually disabled "means significantly subaverage general intellectual functioning existing concurrently with deficits in

adaptive behavior and manifested during the developmental period." S.C. Code Ann. § 16-3-20(C)(b)(10); see also S.C. Code Ann. § 44-20-30(12). Imposing mandatory LWOP sentences on intellectually disabled individuals, such as Appellant, is cruel, unusual, and excessive. By the nature of his intellectual disability, Appellant is less culpable than others convicted of the same offense. The mandatory nature of the recidivist statute imposes the harshest penalty and prohibits the sentencing judge from considering the reduced culpability of the defendant, which the Eighth Amendment requires. The justifications for the severe sentence of mandatory LWOP are not satisfied when such a sentence is imposed on the intellectually disabled. People who suffer from intellectual disability, such as Appellant, have cognitive and social functioning deficits, which undermine the retribution and deterrence purposes of the harsh punishment of LWOP, particularly under a theory of reducing recidivism.

Consistently, when the United States Supreme Court has confronted a class of criminal defendants who have lower levels of culpability, such as Appellant, the Court has recognized the requirement of individualized sentencing and the bar to mandatory sentencing. The Eighth Amendment requires the sentence imposed be proportional to the crime including consideration of the offender, particularly the offender's culpability. Sentencing Appellant to mandatory LWOP violates our society's notions of decency and proportionality in sentencing. Therefore, his sentence must be vacated.

Despite Judge Addy's insistence, the Atkins hearing was wholly inadequate to substitute for a proper individualized sentencing proceeding. The purpose of the Atkins hearing was to determine whether Appellant met the statutory definition of intellectually disabled. The hearing was not designed, and did not provide, evidence of the factors a judge would need to consider to ensure the sentence complied with the requirements of the Eighth Amendment. As previously

mentioned, when crafting a sentencing proportion to the offense and a juvenile offender, a judge *must* consider certain evidence. While those factors do not align perfectly with intellectual disability, the factors certainly provide a guide. For example, when sentencing a juvenile offender, the judge must consider "the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence." Similarly, when sentencing an intellectually disabled offender, the judge must consider the mental age of the offender and the hallmark features of intellectual disability.

Additionally, as trial counsel explained, an individualized sentencing proceeding would equip the judge with information about Appellant's social history, including education, medical, mental health, environmental, socio-economic, and criminal. In light of the recidivist statute, Judge Addy could consider only that Appellant had a prior conviction. He was unable to examine the circumstances of that prior conviction to determine if Appellant were truly at risk of re-offending and what impact Appellant's intellectual disability had on Appellant's prior conviction. In short, the Atkins hearing simply could not serve as a substitute for an individualized sentencing proceeding, particularly in light of the mandatory nature of the recidivist statute.

II. Violating Appellant's state and federal constitutional rights to due process of law and an impartial jury, the trial judge erred in permitting the solicitor to inject improper victim impact evidence into the closing argument by referring to the ground on which the deceased police officer had died and where the jury had walked with the solicitor the day before the argument as "hallowed ground" because the officer gave his "full measure and devotion" in service of their community and asking the jury to consider the impact of the loss of the deceased individuals on their family and friends.

Relevant facts

Motion to prevent improper closing argument & ruling

Prior to closing argument, defense counsel moved to preclude the state from making an improper closing argument, particularly one designed to appeal to the passions and prejudices of the jurors by relying upon the impact of the loss of the deceased's individuals, commonly considered "victim impact evidence." Tr. 823, l. 21 – Tr. 824, l. 9; R. *(Motion to exclude VIE). Judge Addy explained that if evidence had been presented on a particular subject, then the evidence could be discussed during closing argument. Tr. 824, ll. 10-19. When the solicitor stated that Nichole and Appellant's children would grow up without a mother was "just a fact," the judge explained he was "probably getting into the gray if not venturing over into the black." Tr. 825, l. 22 – Tr. 826, l. 2. The solicitor assured the judge that he was "certainly not going to do anything to enflame the prejudices or passions of the jury," but that the case law supported him "talk[ing] about the victim[s] and who they were." Tr. 826, ll. 3-11. The judge agreed, but limited it "[t]o the extent that there is evidence in the record related to the victims." Tr. 826, ll. 12-14. The judge explained that it was his recollection that there was evidence that "Rice had been on the job for just a few months, that the officer found him to be a good cop, he did well at

the academy, that he did have a family, and that he did have kids." Tr. 826, ll. 14-19. The judge explained the solicitor could "argue that" as it was in the record. Tr. 826, ll. 19-20.

Solicitor's closing argument

The solicitor began his closing, which was supposed to be only on the law, by informing the jurors that as everyone viewed the crime scene, a thought occurred to him:

> That yard that we were walking in is hallowed ground. And it's hallowed ground because of this:
>
> Because a man, an officer of the peace, a good man, a man with a family, a man with friends, a man with a wife and children, a man that served this community in Laurens County, that the property we were walking yesterday is the place where he gave the last full measure of devotion to this county, the last full measure of devotion, and it left a massive hole. It left a massive hole in the life of Stacy Rice, his wife. It left a massive hole in the lives of his two children.

Tr. 832, ll. 2-5. Defense counsel objected and referred to his prior motion to prohibit such argument. Tr. 832, ll. 16-17. The solicitor was undeterred, particularly when the judge overruled the objection. Tr. 832, l. 18 – Tr. 833, l. 4. The solicitor told the jurors that Rice's death "left a hole in the lives of a lot of the officers y'all heard testify from this witness stand this week." Tr. 833, ll. 5-7. He continued:

> But it wasn't just that. He also left a hole in the lives of his own family, brutally taking the life of Peaches Kingsborough, the mother of his children.
>
> Two lives. Two bullets. These two bullets right here will go back to the jury room with you, shot from one gun from his hand, this .357. In less than an hour, completely wrecked and destroyed two families.

Tr. 833, ll. 8-16.

Post-trial motion & order

In the motion for new trial, defense counsel argued the judge erred in permitting the solicitor to present an improper closing argument as it was designed to appeal to the jurors' emotions through victim impact evidence. R. *(Motion for new trial). Defense counsel pointed

to the solicitor's characterization of "the incident at issue as something that 'wrecked' the families and left 'massive holes' in their lives." R. *(Motion for new trial). As defense counsel explained and the transcript confirmed, "Solicitor Stumbo's theme, even for his closing on the law, was that 'in less than an hour, [the Defendant] completely wrecked and destroyed two families." R. *(Motion for new trial). With no elaboration on this issue, the judge denied the motion for new trial. R. *(Order denying new trial).

Discussion

Although a solicitor should prosecute vigorously, he is a minister of justice. Thus, his job is not to convict a defendant, but to see justice done. A prosecutor's argument must be based upon that basic principle of the criminal justice system. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). The prosecutor's closing argument "must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence." State v. Vaughn, 362 S.C. 163, 607 S.E.2d 72 (2004)(citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)); see also, Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007)(explaining "[a] solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury"). It is axiomatic that although a prosecutor should "prosecute with earnestness and vigor," he may not "use improper methods calculated to produce a wrongful conviction." See Berger v. United States, 295 U.S. 78, 88 (1935). The requirement that a prosecutor confine his closing argument to the evidence adduced at trial and reasonable inferences therefrom is incontrovertible. It is a "fundamental rule, known to every lawyer, that argument is limited to the facts in evidence." United States ex rel. Shaw v. DeRobertis, 755 F.2d 1279, 1281 (7th Cir. 1985).

Where a prosecutor makes an improper argument, the question is whether "the remark ... so infected the trial with unfairness as to make the resulting conviction a denial of due process."

Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). This Court explained an appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In Donnelly, 416 U.S. at 643-644, the United States Supreme Court held the prosecutor's improper comments were not so egregious such that they infected the trial with unfairness making the resulting conviction a denial of due process in light of the trial judge's "special pains" to cure the error and the ambiguous nature of the argument. Although the Donnelly Court afforded no relief to the defendant, the Court reaffirmed the long-standing legal principle that the "'Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.'" Id., at 646 (citing Miller v. Pate, 386 U.S. 1, 7 (1967)).

In Darden v. Wainwright, 477 U.S. 168, 179-182 (1986), the Court held the prosecutor's argument deserved the condemnation it had received; however, the Supreme Court ultimately determined the argument had not so infected the trial with unfairness as to make the resulting conviction a denial of due process. Although the comments were improper, they did not deprive the defendant of a fair trial because the argument did not manipulate or misstate the evidence and did not implicate other specific rights of the defendant, such as the right to counsel or the right to remain silent. Id., at 181-182. Importantly, the Court explained first, "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense." Id., at 182. Second, the Court noted the trial court instructed the jury numerous times that their decision must be based on the evidence and the arguments of counsel were not evidence. Third, the Court explained the evidence against the defendant was "heavy." Id.

In a federal habeas corpus case, the Fourth Circuit Court of Appeals held a "prosecutor's argument" "exceeded all permissible bounds" where the "prosecutor's comments were poorly disguised appeals to racial prejudice." Bennett v. Stirling, 842 F.3d 319, 324 (4th Cir. 2016).[1] The Fourth Circuit recognized that "closing arguments can be florid" and that "[v]ivid expression and exaggeration for effect are many an attorney's stock-in-trade." Id. However, the Court determined "the remarks challenged here were unmistakably calculated to inflame racial fears and apprehensions on the party of the jury." Id. Specifically, during the closing argument of the capital sentencing proceeding, the solicitor "alternated between characterizing Bennett as a primitive, subhuman species and a wild, vicious animal." Id. The solicitor "labeled Bennett an 'old caveman,' a 'mountain man' (twice), a 'monster,' and a 'big old tiger.'" Id. He also called him "[t]he beast of burden." Id. "The coup de grâce in this sad story arrived when [the solicitor] warned the jury what would result if it did not impose the death penalty: 'You give him life, the real [Bennett] will come back. You give him life and he'll come back out. Meeting him again will be like meeting King Kong on a bad day. Vile [Bennett]. Mean [Bennett]. Manipulating [Bennett]. Murderous [Bennett].'" Id.

After reviewing the solicitor's presentation of evidence and argument, the Fourth Circuit concluded "[t]here was therefore nothing isolated about the prosecutor's racially-charged references to Bennett during closing argument." Id. at 326. "Race was a recurrent theme throughout the capital sentencing proceeding, a theme designed to implant both racial fears and prejudices in the mind of the jury by playing upon ancient staples of racial disparagement and discrimination." Id. at 327. See also Vasquez v. State, 388 S.C. 447, 460, 698 S.E.2d 561, 567 (2010)(finding a singular

[1] The Fourth Circuit concluded "[t]he state courts unreasonably determined that the prosecutor's references to Bennett during closing argument were not appeals to racial prejudice. Drawing on this flawed factual finding, the courts unreasonably concluded that Bennett's right to due process was not violated." Bennett v. Stirling, 842 F.3d 319, 324 (4th Cir. 2016).

inflammatory characterization of the defendant as a terrorist "clearly exceeded the bounds" established by this Court and was "intentionally used in conjunction with the solicitor's extensive reference to the events of September 11, 2001," to "improperly evoke[] religious prejudice" and "served only to inflame the passions and prejudice of the jury").

Recently, this Court granted post-conviction relief to an individual whose lawyer failed to object to the state's improper closing argument. Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016). In "her final statement to the jury, the solicitor asserted that in making their decision, the jurors should consider 'would you let [Tappenier] babysit your kids? Your grand kids [sic]? Nieces and nephews? I think the answer to that is why you should find her guilty.'" Id. at 247, 785 S.E.2d at 475 (alterations in original). This Court held the solicitor's remarks "improperly appealed to the jurors' emotions, rather than the evidence in the record." Id. at 252, 785 S.E.2d at 478. This Court further held "the solicitor's emotional plea that Tappeiner was a bad actor and could not be trusted to watch the jurors' own family members is reasonably likely to have had a substantially stronger impact than would be the case in a trial where there was additional, independent evidence of the defendant's guilt." Id. at 253-254, 785 S.E.2d at 478.

Where a solicitor implored the jurors to "speak for" the victim in a sexual assault case, the remarks "undeniably asked the jurors to set aside their impartiality and, instead, consider the evidence from the subjective position of the child victim." Brown v. State, 383 S.C. 506, 516-517, 680 S.E.2d 909, 915 (2009). This Court held it was error for trial counsel not to object to the solicitor's improper argument. Id. at 517, 680 S.E.2d at 915. Nevertheless, this Court held Brown had not shown there was a reasonable probability that but for counsel's deficient performance the result of the trial would have been different. Id. This Court was persuaded to reach this result because "the solicitor's comments came at the very end of his closing argument and were limited in

duration." Id. Additionally, this Court concluded "there was overwhelming evidence of Brown's guilt." Id. at 518, 680 S.E.2d at 916.

This Court also addressed this issue in Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994). In Elijah Mincey's drug distribution trial, two witnesses testified that Mincey had not participated in the drug transaction. Those witnesses were present for the drug transaction and had entered guilty pleas to distribution for their involvement. Id., at 357, 444 S.E.2d at 511. In his closing argument, the prosecutor called Mincey "*a pretty intimidating man.*" He further argued Mincey "*must be pretty intimidating for these guys to come before Judge Connor, tell her, yes, we're guilty of this.*" Id. (emphasis in original). Concerning the confidential informant in the case, the prosecutor stated "*Maybe she's intimidated by Elijah.* She's got children. She lives down there too." Id., at 358, 444 S.E.2d at 511. The Court held the prosecutor's argument was improper and trial counsel was ineffective for failing to object. "References to threats or dangers to witnesses are improper unless evidence is offered connecting the defendant with the threats." Id. (citing State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985)). As explained by this Court, Mincey's defense was that he was not involved in the drug transaction. The prosecutor's implication that the two witnesses gave false testimony due to intimidation or threats contradicted this defense. The prosecutor's argument was improper because "[t]here was, in fact, *no* evidence that Mincey intimidated any of the witnesses." Id., at 358, 444 S.E.2d at 511.

This Court granted a defendant a new trial where a prosecutor's closing argument, which "misstated the law by improperly injecting parole considerations into the jury's sentencing decision and equating a finding of guilty with a recommendation of mercy with a much lighter sentence of an acquittal." Simmons, 331 S.C. at 338-339, 503 S.E.2d at 167. Although the trial judge informed the jury that the responsibility of sentencing the defendant was for the judge alone, the judge did not

explain the sentencing consequences of the verdicts available to the jury. Id. at 339, 503 S.E.2d at 167. Therefore, the instructions did not cure the improper argument. Additionally, the Court was not persuaded by the overwhelming evidence of the defendant's guilt because the prosecutor's argument prevented the jury from fairly considering a verdict of guilty with a recommendation of mercy. Id. at 340, 503 S.E.2d at 167.

In Vaughn, 362 S.C. at 171, 607 S.E.2d at 76, this Court held a defendant was entitled to a new trial based upon the solicitor's improper closing argument. The defendant's attorney asked the jury to remember that only one officer testified on behalf of the prosecution concerning observing drugs despite the fact that another officer and civilians were present. Id. at 167, 607 S.E.2d at 74. The solicitor then informed the jury she did not present additional witnesses because she did not want to waste the jurors' time. She also stated that the rules of evidence did not permit the presentation of duplicative testimony. She told the jury that if any of the potential witnesses listed by the defendant's attorney would have testified differently than the testifying witness, then the defendant had the ability to subpoena those witnesses to testify. She also stated she did not call the other witnesses because they would have said "the very same thing" that the officer presented said. Id. at 168, 607 S.E.2d at 74.

This Court recognized that improper argument includes vouching for a witnesses and initiating argument about the testimony of absent witnesses. Id. at 169, 607 S.E.2d at 75. Additionally, this Court recognized that the defendant "'opened the door' to some response from the solicitor" based on is closing argument concerning the absence of witnesses. Id. at 170, 607 S.E.2d at 75. This Court held that the solicitor's response was unfair and prejudicial in light of the lack of evidence of the defendant's guilt. Id. at 170, 607 S.E.2d at 75-76.

In a capital case, this Court found a solicitor's closing argument to require reversal where the solicitor informed the jury that if the death penalty were not returned, then it would be the equivalent of "declaring an "'open season on babies in Lexington County.'" The only purpose of such a statement was to inflame the jury. Additionally, the prosecutor told the jury repeatedly that he "expected" the jury to return a death verdict, which was in direct contradiction of case law. Finally, the prosecutor ended his argument by producing a large black shroud and draping it over the baby's crib, which he wheeled into the courtroom in a staged funeral procession. State v. Northcutt, 372 S.C. 207, 222-223, 641 S.E.2d 873, 881-882 (2007).

Victim impact evidence includes "evidence of the character of the victims or the impact [of the loss] on their families" or community. State v. Bennett, 369 S.C. 219, 228, 632 S.E.2d 281, 286 (2006).[2] Importantly, South Carolina generally prohibits evidence of a person's character to be admitted during a trial. Rule 404(a), SCRE. Only "[e]vidence of a pertinent trait of character of the victim of a crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor" may be admitted. Id.

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[2] South Carolina statutory law provides for a court to consider a victim impact statement prior to sentencing. S.C. Code Ann. § 16-3-1550(F). However, the statute prohibits the introduction of the victim impact statement and its contents as evidence in any trial. Id. According to the United States Supreme Court, there is no *per se* bar to victim impact evidence in capital proceedings. Payne v. Tennessee, 501 U.S. 808 (1991). The Court noted "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of offense and in determining the appropriate punishment." Id. at 819. "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." Id. at 825. In State v. Stewart, 283 S.C. 104, 107-108, 320 S.E.2d 447, 450 (1984), this Court held that evidence of the defendant's prior crimes was admissible during the penalty phase of a capital trial. However, the jury must be instructed that these prior crimes may not be used as proof of a statutory aggravating circumstance, but may only be considered as they reflected upon the defendant's character. Id.; see also Woodson v. North Carolina, 428 U.S, 280, 304 (1976); State v. Plath, 313 S.E.2d 619, 623 (1984).

The solicitor's "hallowed ground" argument was entirely improper as it appealed to the passions and prejudices of the jury. The solicitor unjustly evoked religion into his closing argument by referring to the earth where Rice was killed as "hallowed ground." The term refers to ground that is sanctified, consecrated, holy, and worthy of religious veneration. According to the solicitor, the ground was worthy of religious veneration because Rice gave his life in service to his community, of whom the jurors were members. In short, Rice died for the jurors. Thus, the solicitor improperly injected religion and religious considerations into the analysis. See State v. Patterson, 324 S.C. 5, 18-19, 482 S.E.2d 760, 766 (1997)(finding no error in the judge's prohibition on the defendant telling a Biblical story during closing arguments).

Further, the solicitor improperly placed victim impact evidence before the jury when he sought a guilty verdict because of the "massive hole" left in the lives of Rice's wife, children, and fellow police officers. His injection of an improper influence continued when he told the jurors that Appellant "left a hole in the lives of his own family." The state's closing argument combined the two by stating that Appellant had "completely wrecked and destroyed two families." The argument went directly to victim impact evidence as he asked the jury to consider the impact of the loss of lives on the deceased individuals' family members and the police force. The only purpose of such an argument would have been to inflame the passions and prejudices of the jurors and to encourage the jury to render its verdict, not on the evidence presented, but on emotion, principally sympathy and vengefulness.

The solicitor's improper remarks were not singular in nature. Instead, the remarks were lengthy and permeated the theme of the solicitor's closing, even in the parts that were not improper. The "hallowed ground" argument was the first thing the jurors heard, giving it primacy in their minds during deliberations. The argument was not slipped into the middle of a

long monologue or a "one-off" at the end of an otherwise proper argument. Rather, the solicitor, at the very beginning of his closing argument, evoked religious sentiments by telling the jurors that he along with them had walked on hallowed ground the day prior. He continued his improper argument by encouraging the jurors to consider the impact of the deaths of Rice and Nichole upon their families and the community at large. This argument was particularly poignant when used in reference to Rice, a rookie police officer, who died in the line of duty – defending and protecting the community, defending and protecting the people of the community, defendant and protecting the jurors. Such an argument appealed to the jurors' emotions – specifically, sympathy and vengeance – and sought a verdict on that improper basis. Due to the solicitor's improper closing argument, Appellant is entitled to a new trial.

III. The trial judge violated Appellant's right to due process of law under the South Carolina Constitution and the United States Constitution by permitting the state to deliver a limited opening argument, reserving its main argument for its second argument, which prevented Appellant from responding to the state's principal theories and permitted the state to "sandbag."

Relevant facts

Motion to require the state to open fully on the law and facts

Defense counsel requested the state open fully on the law and the facts, permit defense counsel to argue, and then require the state to reply only to the defense argument. Tr. 802, l. 23 - Tr. 803, l. 2; Tr. 806, ll. 4-7; R. *(Order denying new trial). Defense counsel explained he could not "respond to facts and arguments" the state had "not made in advance" because the defense could not foresee the state's arguments. Tr. 804, ll. 3-7. Additionally, defense counsel explained that if the state "advance[d] a theory different than what they advanced in their opening," the defense would request an opportunity to reply. Tr. 804, ll. 8-10. Finally, defense counsel explained that "even under the common law," the judge had the discretion to define the order and content of closing arguments, and permitting the state to "sandbag" as the state had "done in other cases," would result in an appellate issue. Tr. 804, ll. 14-18.

Judge Addy indicated he was "going to follow the current common law procedure for closing arguments." Tr. 803, ll. 3-8. However, the judge agreed to require the state to open on the law. Tr. 803, ll. 5-8. Immediately prior to closing arguments, defense counsel renewed his request, but Judge Addy denied it yet again. Tr. 828, ll. 16-25.

Solicitor's closing argument

In his "closing on the facts," the solicitor argued that Hanna Price was "the tiebreaker" for the jurors regarding whether to believe Chris Brown and Rico Kingsborough fired shots prior

to the police arriving at Appellant's home. Tr. 865, ll. 7-8. She was "a third party," "impartial," and "minding her own business," and therefore, trustworthy as a "tiebreaker." Tr. 865, ll. 22-24. According to the solicitor, Price heard "the first cluster of shots," and said they were "about the same amount." Tr. 865, ll. 10-14. She then heard another cluster of shots. Tr. 865, ll. 17-21. The solicitor told the jurors Price described Appellant "coming out of that door and firing the first shots," and "then the police officers have a short break in time, long enough to try to draw their weapons and take cover and fire back." Tr. 866, ll. 1-8.

Rhetorically, the solicitor asked, "How in the world can they go with the theory that [Appellant] is acting as a hero?" He answered, "It's preposterous, folks." Tr. 867, ll. 14-16. He told the jurors that Appellant was not the hero in the case. Tr. 867, l. 18; see also, Tr. 868, ll. 10-13. Instead, the solicitor repeatedly told the jurors, the hero was Rice. Tr. 867, ll. 18-24.

When trying to convince the jurors that the defense theory was not plausible, the solicitor relied upon his version of what Appellant said to Goggins when Appellant was in the ambulance. Tr. 868, ll. 22-24. According to the solicitor, Appellant told Goggins that he did not mean to shoot the officer, but he was trying to shoot someone else – probably Laura Brown who was standing in the crowd on Appellant's lawn. Tr. 868, l. 24 – Tr. 869, l. 13.

Finally, the solicitor asked the jurors to "return a verdict, the only verdict in this case that speaks the truth, the only verdict that speaks justice, the only verdict [that] will give these families finally closure." Tr. 870, ll. 10-14. Defense counsel objected, and the judge sustained the objection. Tr. 870, ll. 15-17. Nevertheless, the solicitor told the jurors, "The only verdict you can find in this case, ladies and gentlemen, that speaks the truth and speaks justice is verdicts of guilty." Tr. 870, ll. 20-22.

Request for reply argument

Following the solicitor's closing argument, defense counsel requested an additional five minutes of argument to respond to four specific points made by the solicitor during closing. Tr. 898, l. 20 – Tr. 901, l. 6. Those four matters were discussed in great detail on the record and in the motion for new trial. Tr. 898, l. 20 – Tr. 901, l. 6; R. *(Motion for new trial). Succinctly, defense counsel wanted to respond to (1) the solicitor's mischaracterization of Price's testimony, (2) the solicitor's mocking of Appellant's defense by stating it was one that cast Appellant as a hero, (3) the solicitor taking Appellant's statements to Goggins out of context, and (4) the solicitor instructing the jury to return a verdict that spoke "the truth." Tr. 898, l. 20 – Tr. 901, l. 6.

While Judge Addy agreed that he had removed the "speak the truth" language from his jury instructions and that most judges had done so as they had "been cautioned to do," he opined this Court's cautions did "not prevent" "any lawyer arguing what the - - the fact - - what the truth is." Tr. 901, l. 22 – Tr. 902, l. 1. Regarding his permitting the state to have last argument with no opportunity for rebuttal, the judge stated:

> Maybe one day the rule will be changed. Somebody has to go last. It's the way we've done it for hundreds of years or at least a big chunk of time. It's the - - it's the way we've done it here today.
>
> When the rule is changed, that's when the Court will do it differently. And I understand you need to demonstrate prejudice, which you have done or you claimed to do by explaining the issues that you would've responded to had you been given another five minutes.

Tr. 903, ll. 4-14.

Post-trial motion and order

In his post-trial motion, Appellant requested a new trial because the trial court's failure to require the state to open fully on the law and facts and not limiting the state to rebuttal in their

final closing argument violated Appellant's right to due process of law. R. *(Motion for new trial). Defense counsel argued that after the state's closing argument "it was evident" Appellant's due process rights were violated by the state's misstatement of the law and facts and defense counsel's inability to respond to new arguments presented. R. *(Motion for new trial). Defense counsel explained the practice of not allowing a defendant to respond to the state's "best argument" if the defendant presents evidence was "unique to South Carolina" and was "fundamentally unfair." R. *(Motion for new trial). Counsel explained that "no Rule of Criminal Procedure addresses the question of the order of argument to the jury." R. *(Motion for new trial). According to defense counsel, "[t]he practice of the state opening only on the law and 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." R. *(Motion for new trial).

After going through South Carolina's legal history regarding closing argument and offering persuasive authority, defense counsel explained just how Appellant was prejudiced by the trial judge's refusal to permit him "an opportunity to respond to errors posited and new arguments made by the state in their closing." R. *(Motion for new trial). "Specifically, [Appellant] was not allowed to respond to four crucial aspects of the Solicitor's final argument." R. *(Motion for new trial). First, the state's argument was misleading concerning the testimony of Hanna Price about "two clusters of gunshots." R. *(Motion for new trial). The state said Price indicated the first cluster of shots was fired by Appellant and the second cluster was fired by the police. R. *(Motion for new trial). Had the defense been able to respond, the defense could have argued the first cluster was the shots fired by Rico and Chris and that the state's argument was inconsistent with Shane Prather's testimony that he returned fire after Appellant

fired the second shot, indicating there was no break between Appellant's shooting and the police returning fire. R. *(Motion for new trial).

Second, the state repeatedly told the jurors that the defense "was trying to portray [Appellant] as a hero." R. *(Motion for new trial). "[T]he defense should have been afforded the opportunity to remind the jury that the defense never suggested [Appellant] was a hero, but quite the opposite as the defense acknowledged [Appellant] was guilty of the shooting of Ms. Kingsborough" R. *(Motion for new trial).

"Third, Solicitor Stumbo mischaracterized the video Investigator Goggins recorded of [Appellant]'s statements in the ambulance. The defense should have been allowed to put the video and [Appellant]'s statement in context." R. *(Motion for new trial).

Fourth, the state instructed the jury "to reach a verdict that speaks the truth and achieves justice for the decedents' families." R. *(Motion for new trial). The defense should have been permitted to respond regarding the proper role of a jury – to determine whether the state had met its burden of proof and to not base its decision on sympathy or emotion. R. *(Motion for new trial).

Without elaboration on this ground, the judge denied the motion for new trial. R. *(Order denying new trial).

Discussion

Closing argument is "an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the states are bound." Donnelly v. DeChristoforo, 416 U.S. 637, 649 (1974)(Douglas, J., dissenting). "The right to be fully heard has always been regarded as one of greatest value, not only to the accused, but to the due administration of justice, and any limitation of this right which has seemed to deprive the accused of a full and fair hearing has

generally been held error, entitling the defendant to a new trial." State v. McIntire, 221 S.C. 504, 521, 71 S.E.2d 410, 418 (1952).

In a 1911 case, this Court explained that a defendant in a criminal case who has the right to reply in argument by reason of not introducing evidence may decline to open in argument and still retain the right to make the closing argument to the jury either upon the case in general or by way of reply to the state's argument. State v. Garlington, 90 S.C. 138, 72 S.E. 564, 566 (1911). South Carolina required the prosecution to close in full prior to the defense's closing argument pursuant to court rule – Rule 59 of the Circuit Court. See State v. Atterberry, 129 S.C. 464, 124 S.E. 648, 651 (1924). To explain "[t]he wisdom" of the rule requiring the state to open fully on the law and facts and limit final closing to rebuttal, this Court provided an analogy: "It may be that the circumstances are to all appearances disconnected, and yet an able prosecuting attorney, but for this rule, would be able to present a connection, little suspected by the defendant or his counsel. If the prosecuting attorney is allowed to reserve his argument for the closing speech, the defendant will not be allowed to show any defect in the chain of evidence." Atterberry, 129 S.C. at 464, 124 S.E. at 651. "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." Atterberry, 129 S.C. at 464, 124 S.E. at 651 (Aycock, A.A.J., concurring and dissenting).

Subsequently, the rule changed to require the partying having the opening in the argument to disclose fully the law.[3] Thus, this Court held in State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971), that the solicitor was "no longer required to make an opening argument to the jury on issues of fact." Id.

[3] Rule 58 of the Circuit Court Rules provided for the order of closing at the time.

When the South Carolina Rules of Criminal Procedure were adopted, they were silent on the order of closing arguments. However, the Rules of Civil Procedure provided that

> [t]he moving party upon a motion shall have the right to open and close argument, and the plaintiff shall have the right to open and close upon the trial; except that a party admitting the adverse party's claim in his pleading, and taking upon himself the burden of proof, shall have the like privilege. The party having the right to open shall be required to open in full, and in reply my respond in full but may not introduce any new matter.

Rule 43(j), SCRCP. In light of the Criminal Procedure Rules' silence regarding closing arguments, trial courts continued to enforce Rule 58 of the Circuit Court Rules, despite its demise, and this Court's interpretation of that rule in Lee, permitting the state to save its best argument for its second closing and encouraging "sandbagging." Thus, began the "tradition" for the order and content of closing arguments where no rule controlled in criminal cases.

In State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016)(Shearouse Adv. Sh. No. 1 at 13-21) this Court addressed the order and content of closing arguments and "restore[d] what had been, largely by court rule, the practice in this state for many years until 1971." Beaty contended his due process rights were violated when "the trial court erred in failing to require the state to open fully on the law and facts in its closing argument, and to limit the state's reply to matters raised by [defense] counsel in his 'middle' closing argument." Id. This Court held "that in a criminal trial where the party with the 'middle' argument requests, the party with the right to the first and last closing argument must open in full on the law and the facts, and in reply may respond in full to the other party's argument but may not raise new matter." Id. In January 2017, both sides requested rehearing in Beaty. This Court granted the petitions for rehearing on March 28, 2017. On June 15, 2017, this Court heard oral arguments on the matter. As of this writing, no opinion has been issued following rehearing.

In arriving at its opinion in Beaty, this Court relied upon Bailey v. State, 440 A.2d 997 (Del. 1982). The Delaware Supreme Court explained the prosecutor in that case delivered a "very brief" opening summation, "constituting a mere 3 ½ pages of the transcript and lasting only 5 minutes." Id. at 1000. "With the exception of a passing reference to one of the witnesses, the state prosecutor did not comment on the testimony of any of the witnesses or on the circumstances surrounding defendant's arrest." Id. Bailey's counsel then delivered his closing argument, focusing on the testimony and conduct of a witness who was present at the shooting for which Bailey was charged. Id. at 1001. Ultimately, Bailey's counsel argued it was this person who was responsible for the murder." Id. "The state's rebuttal lasted over an hour and contained the bulk of the state's final argument to the jury." Id. During rebuttal, the prosecutor "discuss[ed] the testimony of numerous witnesses whose testimony was not mentioned by the defense in its summation or by the state itself in its opening summation." Id. In fact, the prosecutor "dwelled at length on the question of how the victim's body was removed from the murder scene" and "devoted" "considerable time" to Bailey's statements and the conduct of police officers at the time of Bailey's arrest. Id.

The Delaware Supreme Court explained the general rule governing the argument of a case to a jury is the party with the burden of proof must develop in his opening the points and matters he wishes to present, the defendant may then answer and develop all points he considers important, and finally the party with the burden may reply to counter the arguments made by the defendant. Id. at 1002 (internal quotation omitted). The court explained the rule protects due process and fundamental fairness because "it is unfair and often highly prejudicial for plaintiff's or state's counsel to avoid treatment of certain issues in opinion summation so as to deprive defense counsel of the opportunity to reply." Id. According to the court, the general rule had evolved "to give trial courts a modicum of discretion to allow a more substantial rebuttal which is not so narrowly tailored

to the scope of defense counsel's summation." Id. at 1003. Ultimately, the court concluded that while a trial court has "a measure of discretion as to the application of the rule governing the scope of a rebuttal, that discretion is not so broad as to permit a trial judge to oversee a blow to a defendant's right to a fair trial via the state's sandbagging." Id. at 1003.

South Carolina sits in the minority in permitting the prosecutor to open solely on the law, require the defense to present its entire closing argument, and then allow the prosecutor to close fully on the facts and law. See John B. Mitchell, *Why Should The Prosecutor Get the Last Word?* 27 Am. J. Crim. L. 139, 140 (Spring 2000)("It is generally accepted without much question or thought that the prosecution gets the last argument in closing."). Recently, the United States Attorney for the Southern District of California moved to summarily reverse a conviction and vacate a sentence where the Assistant United States Attorney who prosecuted the case argued "for the first time in rebuttal closing argument" that the defendant "must have lied about the details of his trip because he had no luggage with him when he was apprehended, a fact from which the jury could infer knowledge" in the drug case. United States v. Maloney, 755 F.3d 1044, 1045-1046 (9th Cir. 2014). There was no evidence regarding whether the defendant had luggage with him on the trip, and the defendant's counsel moved for surrebuttal to counter this new argument, but the trial court denied the request. Id. Commending the United States Attorney for moving to summarily reverse the conviction, the Ninth Circuit reminded prosecutors of their duties to seek justice, not to win a case. Id. at 1046.

The trial judge's refusal to require the state to open fully denied Appellant's right to a fair trial and due process of law because it prevented him from responding to specific points made the prosecutor.

The state relied heavily upon the testimony of Hannah Price, a witness the solicitor described as the "tie breaker" because she was an "impartial" "third party" who was "minding her own business" during the shooting. The solicitor characterized Price's testimony as supporting the state's case that the only shots fired were by Appellant and the police. Had defense counsel been permitted to respond, defense counsel could have shown how Price's testimony permitted a reasonable inference that the two clusters of shots she heard were from Rico and Chris initially, followed by the volley of shots from Appellant and police, which were virtually simultaneous.

Price "heard like a group of cluster shots, between two or three, and it was close enough" to scare her. Tr. 515, ll. 18-21. When the shots stopped, she woke her husband to inform him of the gunfire. Tr. 515, ll. 22-25. After he awoke, there were "more shots," which were "about the same amount as the first couple." Tr. 516, ll. 1-2. She described there being "some separation between these two clusters" of shots. Tr. 522, ll. 12-14. Price estimated the clusters were within thirty seconds of each other. Tr. 524, ll. 1-11.

Defense counsel could have used the testimony of the police officers to show that when Appellant started firing, the police responded in kind instantaneously. See Tr. 396, ll. 1-8 (Jones testifying that two officers returned fire and "[t]he shooting probably only lasted just several seconds. It was a barrage of gunfire."); Tr. 409, ll. 19-22 (Plaxico testifying that when he saw Appellant start shooting, he drew his revolver and shot back); Tr. 432, ll. 7-19 (Prather testifying that when he heard shots being fired, he "engaged" Appellant). Relying upon this evidence, defense counsel would have been able to use Price, the witness characterized by the state as "impartial," to support its theory that Rico and Chris fired at Appellant prior to Appellant firing at them.

Not once during its closing argument did the defense portray Appellant as a "hero." However, the solicitor repeatedly denigrated Appellant's defense of self-defense and defense of others and suggested that any findings of self-defense or defense of others would cast Appellant in the role of a hero. Tr. 867, ll. 1-17 (calling "self-defense" a "fiction" and "preposterous," and asking how defense counsel could "go with the theory that [Appellant] is acting as a hero"). The solicitor juxtaposed Appellant's conduct with Rice's conduct to conclude that Appellant was not the "hero in this case" because the "hero in this case" "was Roger Rice." Tr. 867, ll. 18-24. The solicitor argued there was no evidence "to support this theory that [Appellant] was acting heroically." Tr. 868, ll. 10-13. Not only was this argument an unfair and improper denigration of defense counsel and the defense theory, but the argument mischaracterized the defense as one that cast Appellant as the "hero." See State v. Parker, 391 S.C. 606, 614, 707 S.E.2d 799, 803 (2011)(noting that "[i]t is generally improper for the prosecutor to accuse defense counsel of fabricating a defense or to otherwise denigrate defense counsel"). The jury was left with the impression that a verdict of not guilty on the murder charge pertaining to Rice would equate to finding Appellant was a "hero." Nothing could be further from the truth.

Defense counsel should have been afforded an opportunity to dispel the solicitor's notions that self-defense and defense of others were the equivalent of casting Appellant as a hero. Self-defense and defense of others are legal principles, having nothing to do with whether Appellant was acting heroically or whether the jury condoned his conduct. This was particularly important where the evidence demonstrated that Rice was not the intended target of Appellant's bullet. Rather, Appellant was shooting at individuals who were in his front yard, armed, threatening his life and the lives of his family members, and admittedly present in order to exact

revenge on Appellant for killing Nichole. In fact, Appellant shot one of those individuals, Rico, and the jury acquitted him of attempted murder of Rico.

During his closing argument, Solicitor Stumbo played the video Investigator Goggins recorded of Appellant while Appellant was in the ambulance receiving medical attention for his gunshot wound. Tr. 869, l. 11; State's Exhibit #102. Solicitor Stumbo told the jurors that when Appellant said, "'I was trying to eff her up,'" he was "talking about a female family member, probably Ms. Laura Brown who was standing out there in that crowd." Tr. 868, l. 22 – Tr. 869, l. 5. The solicitor claimed Appellant "intended to kill a female in-law that had been messing around in the family and everything." Tr. 869, ll.15-17. He then argued it was the intent to kill "Ms. Laura" that "transferred to Roger Rice." Tr. 869, ll. 23-25. Thereafter, he argued that intent "transferred to Rico Kingsborough" and "to the four officers in the yard" for whom Appellant had been charged with attempted murder. Tr. 870, ll. 2-7.

Defense counsel deserved an opportunity to counter this argument. Defense counsel deserved a chance to remind the jury that Laura Brown was in the yard with her son, Chris Brown, and her nephew, Rico Kingsborough, who admitted to being armed and desirous of killing Appellant. Laura Brown was present when Benquane Brown, Appellant's nephew, and Chris and Rico were arguing in the yard. Tr. 281, ll. 12-25; Tr. 286, ll. 1-13. During this heated argument between Appellant's family and the Kingsborough family in his front lawn, with the Kingsborough family threatening revenge against Appellant and his family, Appellant shot. Tr. 286, ll. 11-13. Defense counsel could have used these facts, which were in the record, to show how any alleged malice Appellant had toward Laura Brown was not transferred to others with his shooting, but was negated by self-defense and defense of others as Laura Brown was part of

the lynch mob on his lawn seeking vigilante justice. The order and content of closing denied Appellant this opportunity.

At the conclusion of his closing argument, the solicitor instructed the jury to return a verdict "that speaks the truth" and "that speaks justice." He told the jurors that the "only verdict" "that speaks the truth and speaks justice is [sic] verdicts of guilty." Due to the judge's ruling on the content and order of closing, Appellant was unable to respond to the solicitor's improper argument that ran, what this Court has called, "the risk of unconstitutionally shifting the burden of proof to a defendant." State v. Needs, 333 S.C. 134, 155-156, 508 S.E.2d 857, 867-868 (1998). Starting in 1998, this Court "strongly urge[d] the trial courts to avoid using any 'seek' language." Id. Just a couple of years later, in State v. Aleksey, 343 S.C. 20, 26-29, 538 S.E.2d 248, 251-253 (2000), this Court repeated its warning that trial courts should avoid using any "seek the truth" language.

Then, in State v. Daniels, 401 S.C. 251, 255-256, 737 S.E. 473, 475 (2012), this Court considered a similar jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Although the issue was not preserved, this Court instructed trial judges "[to] remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties. Id. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt." Id. In Beaty, supra, this Court held the trial judge's remarks that a trial is "a search for the truth in an effort to make sure that justice is done" and that the jury's role is to "search for the truth, or to find the true facts or to render a just verdict" were error. Id. This Court explained yet again, "These phrases may be understood to place an obligation on the jury, independent of the burden of

proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." Id. Moreover, this Court repeated its caution to trial judges that they should "avoid . . . any [terms] that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the state has proven the defendant's guilt beyond a reasonable doubt." Id.

The solicitor's request that the jury return verdicts that "speak the truth and justice" was improper as it had an unreasonable risk of shifting the burden to Appellant. The judge's refusal to permit Appellant to reply to the argument and his acquiescence in the state's request that it be permitted to use its second closing to present its theory of the case allowed the solicitor's improper argument to go unchecked and uncorrected. By instructing the jurors to return verdicts that "speak the truth and justice," the solicitor counseled the jurors to do something other than what the Constitution requires, which is to determine if the state met its burden beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979).

As this Court explained many years ago, the wisdom of requiring the state to open fully on the law and facts and limit final closing to rebuttal is to safeguard fundamental fairness in the jury trial process. Here, Appellant's right to due process of law was violated by the solicitor saving the critical aspects of his closing argument until after the defense had already closed.

IV. The trial judge erred by refusing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that (1) words accompanied by hostile acts may, depending on the circumstances, establish self-defense, and (2) if the aggressor withdraws in good faith from the conflict he is restored to his right of self-defense, where these additional elements were crucial to the jury's understanding of the law on self-defense and without these elements the instruction was incomplete.

Relevant Facts

Testimony at Trial

As to the killing to Deputy Roger Rice, Appellant asserted that he was acting in self-defense and the defense of others after numerous angered Kingsborough family members, at least one of which was armed and brandishing a gun, closed in on his home and made threats against his life and the life of his cousin Benquane McGee. Tr. 118, l. 9 – Tr. 121, l. 18. After the Kingsborough family learned Appellant had shot and killed Nicole, they had a family gathering and all converged on Appellant's house, like a lynch mob. Tr. 179, l. 19 – Tr. 181, l. 10; Tr. 219, ll. 11-25; Tr. 280, ll. 2-15; Tr. 322, l. 19 – Tr. 323, l. 11;

Rico Kingsborough and Chris Brown, who were both first cousins with Nicole, were the first to arrive at Appellant's house. Tr. 303, ll. 19-22; Tr. 326, ll. 7-14. The men were armed with .32 caliber firearm. Tr. 217, l. 14 – Tr. 219, l. 3; Tr. 302, l. 2-5. Rico admitted he and Chris went to Appellant's house to "get revenge" and that their intent was to harm Appellant. Tr. 302, l. 18 – 303, l. 12; Tr. 324, l. 15 – Tr. 325, l. 20. Chris also admitted they intended to harm Appellant. Tr. 239, l. 22 – Tr. 240, l. 9. When the men arrived, Chris gave Rico the gun because Rico was supposed to "be the trigger man." Tr. 220, ll. 14-18; Tr. 302, l. 18 – Tr. 303, l. 12. The men approached a side window on the outside of Appellant's house. Tr. 220, ll. 19-22. Rico

testified, "When we got down beside the window, like I hear him [Appellant] crying . . . I heard him inside the house, and I had the gun and I was trying to engage it." However, Rico claimed the gun was "jammed" and would not fire. Tr. 306, l. 22 – Tr. 307, l. 5. Chris also claimed that despite firing the weapon at his house before the men left, "when [they] got there the gun didn't work" and that neither he nor Rico ever shot into the window. Tr. 222, ll. 6-21.

However, other witnesses, who had arrived at the house shortly after Chris and Rico, testified that they heard gunshots come from the side of the house where Rico and Chris were hiding under the window. Dorothy Brown, Appellant's grandmother, and Benquane McGee, Appellant's cousin, arrived at the house together. Tr. 255, ll. 8-20; Tr. 339, ll. 20-24. As Benquane was knocking on the door under the carport, he heard two gunshots. Tr. 341, ll. 11-19; Tr. 345, ll. 21-23. Dorothy also testified that she heard two or three gunshots. Tr. 256, ll. 1-9. After hearing the shots, Dorothy and Benquane walked around the front of the house towards the other side where they encountered Rico and Chris near the corner. Tr. 256, ll. 1-23; Tr. 341, ll. 19-22.

Benquane told Rico, "Bro, it ain't called for," referring to the gunfire. Tr. 341, l. 22. Rico immediately began threatening Appellant and Benquane. Rico yelled, "Eff that. He [Appellant] killed Peaches [Nicole]. I'm going to kill him or one of y'all."[4] Tr. 347, l. 25 – Tr. 348, l. 3; Tr. 358, ll. 13-19. Rico and Benquane then started arguing back and forth. Tr. 257, ll. 1-19; Tr. 341, l. 25. Chris Brown also admitted that he told Benquane, "We'll whoop your ass too." Tr. 242, ll. 5-24; Tr. 311, ll. 14-17. As Rico and Chris were threatening Benquane, Rico still had the gun in his hand. Tr. 311, ll. 20-24. He was "waving it back and forth." Tr. 351, ll.

[4] There was also testimony that Rico threatened, "Eff that. He [Appellant] shot Peaches [Nicole], so I'm gonna shoot one of y'all." Tr. 341, ll. 23-24; Tr. 347, ll. 11-14 .

4-10. He eventually gave the gun to Chris. Tr. 309, l. 25 – Tr. 310, l. 6; Tr. 311, ll. 20-24; Tr. 312, ll. 6-10.

The confrontation slowly moved to the front of the house as Benquane continued to retreat from the armed men. A small group of Kingsborough and Brown family members were gathered near the front porch. Everyone was arguing. Tr. 181, l. 20 – Tr. 183, l. 14; Tr. 281, l. 12 – Tr. 282, l. 1; Tr. 286, ll. 1-13; Tr. 309, ll. 21-24; Tr. 312, l. 19 – Tr. 313, l. 22. It was then that Appellant came out the front door and began firing. Tr. 281, l. 18 – Tr. 282, l. 9; Tr. 314, l. 5 – Tr. 315, l. 9. He shot Rico in the right leg above the thigh. Tr. 315, l. 23 – Tr. 316, l. 5. Unfortunately, he also fatally struck Deputy Rice who had arrived only moments before and was attempting to disperse the crowd. Tr. 226, l. 16 – Tr. 228, l. 2; Tr. 318, ll. 7-11. It was undisputed that these events all occurred very quickly. Tr. 244, l. 22 – Tr. 245, l. 13; Tr. 348, l. 21 – Tr. 349, l. 17.

Motion

It was undisputed that Appellant was entitled to a jury instruction on self-defense based on the evidence presented. During the charge conference, the trial judge stated, "And as I've previously stated, the defendant does have the right to self-defense from the mob. He does not have the right to self-defense from the police under these facts, but he does have the right to self-defense from the mob." Tr. 816, l. 24 – Tr. 817, l. 4. The solicitor also conceded Appellant was entitled to a self-defense instruction. Tr. 768, ll. 12-25.

Appellant requested the trial judge tailor the self-defense instruction to reflect the evidence as presented and his theory of the case. In his request to charge, Appellant requested the judge charge the jury with the following language from State v. Harvey, 220 S.C. 506, 518, 68 S.E.2d 409, 414 (1951): "Words accompanied by hostile acts may, depending on the

circumstances, establish self-defense." R. * (Request to Charge). He further requested the judge charge the jury with language from State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999): "If, after commencing the assault, the aggressor withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire, he is restored to his right of self-defense. One's right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act. R. * (Request to Charge).

During the charge conference, defense counsel argued, "We are anticipating, based on prior comments in the case, that the Solicitor's going to argue that . . . Bennie [Appellant] was at fault for what happened when he was in Fountain Inn." Tr. 814, ll. 6-9. Based on the evidence presented and the anticipated arguments by the solicitor, defense counsel argued the judge should instruct the jury with the language from Bryant that if the aggressor withdraws in good faith from the conflict he is restored to his right of self-defense. Tr. 818, ll. 2-10; R. * (Request to Charge). Counsel asserted the request to charge was consistent with South Carolina case law that states the self-defense instruction must fit the facts and circumstances of the case. Tr. 814, ll. 16-20.

The solicitor made clear he was going to argue Appellant brought on the difficulty. Tr. 817, ll. 20-24; Tr. 820, ll. 6-9. He also asserted, "I think the jury can infer from the way the evidence is presented that . . . the difficulty was brought on by the prior event at Fountain Inn [the killing of Nicole Kingsborough] which happened less than an hour before, or they may find that he didn't - - he didn't bring on the difficulty. I think that's a question for the jury to decide." Tr. 818, ll. 13-19.

The trial judge agreed that the "evidence indicates that this is susceptible to more than one interpretation" and that it is "an issue of fact for the jury" to decide. The judge stated the

parties were "free to argue what you choose to argue" and the "jury can make whatever conclusions or inferences they feel are appropriate based on the language or the argument or the evidence." However, the judge found the instruction from Bryant that if the aggressor withdraws in good faith from the conflict he is restored to his right of self-defense would be "an instruction on the facts" and therefore refused it charge it. Tr. 820, l. 10 – Tr. 821, l. 4.

The judge later asserted:

> Mr. Grose [defense counsel], I'm going to decline to instruct them on that. There is evidence in the record which would indicate that there was a break in the cause of the chain. The break in the cause of chain [between the killing of Nicole Kingsborough and the shooting of Deputy Rice] is what entitles you to the defense of self-defense in the first place. So to a large extent, that's a question of law for the Court.
>
> There has to be some evidence of break in the cause of chain in order for you to even be entitled to a self-defense instruction. Whether the break was sufficient to reestablish self-defense is a jury issue entirely. So the Court will decline to instruct the jury on that.

Tr. 821, ll. 13-25.

There was little to no discussion on the record about Appellant's request to charge the language from Harvey that "words accompanied by hostile acts may, depending on the circumstances, establish self-defense." See R. * (Request to Charge). This charge was likely discussed in more detail during the in chambers charge conference. Tr. 775, ll. 10-19; Tr. 778, ll. 7-10. However, the trial judge ultimately refused to charge this specific element of self-defense.

Closing Arguments

The solicitor argued in closing:

> You're also going to hear about self-defense in this case, folks, and I want to spend a little bit of time on this. If a person acts in self-defense under - - under our law, obviously that would be a justifiable homicide, correct? And I'm sure you're going to hear about some of this from defense.

But the first elements of self-defense under our law, and I want y'all to pay attention to his. I'm reading this. "A defendant must be without fault in bringing on the difficulty." And so you're going to hear from the defense attorneys in a little bit that, well, Bennie's not guilty of killing Roger Rice because he was just acting in self-defense or he was acting in defense of his cousin Benquane out in the yard. He had - - he somehow magically broke away from his homicidal and suicidal thoughts and all of a sudden he's going to be acting in self-defense or the defense of others.

But here's the one element that must be shown to establish self-defense, that the defendant must be without fault. Folks, why was - - why was everybody in the yard that night? Law enforcement were there, family members were there, because he had just killed his wife in cold blood right up the road in Fountain Inn.

He had called his family members and said, "I did it. Now I'm going to kill myself." That's why everyone was there. And so Bennie Brown was at fault that night, folks, and that's a nonstarter for a self-defense. So I want you to remember that as you listen to the rest of the argument.

Tr. 839, l. 5 – Tr. 840, l. 10 (emphasis added).

On the other hand, defense counsel argued:

And he did make his way back to his home, which I will refer to as a temporary place of safety. And why that's important is, is that there is a break in the chain of events from the tragedy that happened in Fountain Inn to what happened in Bennie's front yard.

Bennie had withdrawn from the situation. He knew the character of his family. You saw them come in and testify. He knew that they would call the police and report what he had done. He had gone to his house. And when this chain of events was broken, when he got to the temporary place of safety where he was ultimately going to be arrested, when he got to that place, it was this whole other chain of events that had stated.

Tr. 846, l. 13 – Tr. 847, l. 2.

Jury Charge

The trial judge gave the following instruction on self-defense:

Ladies and gentlemen, the defendant has raised the defense of self-defense. I instruct you that self-defense is a complete defense. If it is established, you must find the defendant not guilty. The State has the burden of disproving self-defense by proof beyond a reasonable doubt. If you have reasonable doubt of

the defendant's guilt after considering all the evidence and including the evidence of self-defense, then you must find the defendant not guilty.

On the other hand, [if] you have no reasonable doubt of the defendant's guilt after considering all the evidence, including the evidence of self-defense, you should find the defendant guilty.

The following elements must be disproven by the State beyond a reasonable doubt in order for you to find the defendant did not act in self-defense:

The first, the defendant must be without fault in bringing on the difficulty. The defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense.

The second element of self-defense is that the defendant was actually in imminent danger of death or serious bodily injury, or that the defendant actually . . . believed he was in imminent danger or death or serious bodily injury.

If the defendant was actually in imminent danger, it must be shown that the circumstances would have warranted a person of ordinary firmness and courage to strike the fatal blow to prevent death or serious bodily injury.

The defendant believed he was in imminent danger or death or serious bodily injury, it must be shown that a reasonably prudent person of ordinary firmness and courage would have the same belief. I instruct you that a person who is attacked in his own home or on his own premises has no duty to retreat.

Deciding whether the defendant actually was or believed he was in imminent danger of death or serious bodily injury, you should consider all the facts and circumstances surrounding the crime, including the physical condition and the characteristics of the defendant and the crime.

Tr. 888, l. 4 – Tr. 889, l. 25.

As seen, the trial judge failed to give the requested charges and tailor the self-defense instruction to reflect the evidence presented and theory or arguments raised by Appellant.

Motion for New Trial

Appellant renewed his request to charge in his motion for a new trial arguing the trial judge committed reversible error by failing to charge the specific instructions raised in this argument. R. * (Motion for New Trial). As to the Harvey charge, Appellant asserted, "Defense

counsel added the instruction because there was inconsistent testimony about whether Rico Kingsborough and Chris Brown fired their weapons at or around Mr. Brown's house. The instruction makes clear that even if they had not fired their weapons, the verbal threats Rico Kingsborough made against Mr. Brown's life, when combined with the hostile act of brandishing a gun, established Mr. Brown's right to act in self-defense." R. * (Motion for New Trial).

As to the Bryant charge, Appellant commented that the solicitor argued Appellant was not entitled to self-defense because he had just killed his wife in Fountain Inn. R. * (Motion for New Trial). Counsel then argued, "However, at no point was the jury ever instructed that one's right to self-defense can be restored. Bennie [Appellant] had withdrawn from the scene of the first crime, and had announced his intention to go home and kill himself to his family on the phone. From that phone call, a reasonable jury could find that even if Mr. Brown was guilty of the murder of Nicole Kingsborough, he restored his right to self-defense by retreating to his home. Once withdrawn to his home, Bennie was not at fault for any new difficulty, and thus could not be guilty of the murder of Deputy Rice. Because the jury only had an incomplete definition of "fault," the exclusion of the jury instruction concerning restoring the right to self-defense constituted independent reversible error." R. * (Motion for New Trial).

Discussion

The trial judge erred by refusing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that (1) words accompanied by hostile acts may, depending on the circumstances, establish self-defense, and (2) if the aggressor withdraws in good faith from the conflict he is restored to his right of self-defense. These additional elements were crucial to the jury's understanding of the law on self-defense as applied in Appellant's case. Without these elements the instruction was incomplete.

"At one time, self-defense was an affirmative defense in this State, and a defendant bore the burden of establishing it by a preponderance or greater weight of the evidence." State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492 (1998) (citing State v. McDowell, 272 S.C. 203, 249 S.E.2d 916 (1978)); See State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984) (where this Court removed the burden of proving self-defense from the defendant and placed it instead on the state).

"If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000) (quoting State v. Muller, 282 S.C. 10, 316 S.E.2d 409 (1984)).

In Davis, this Court suggested a standard self-defense instruction. 282 S.C. at 46, 317 S.E.2d at 453. However, in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), this Court made clear that it did not intend Davis to be the exclusive self-defense charge. State v. Burkhart, 350 S.C. 252, 262, 565 S.E.2d 298, 303 (2002). Instead, "a trial judge should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant." State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing Fuller, 297 S.C. 440, 377 S.E.2d 328). "A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Id. (citing Fuller, 297 S.C. 440, 377 S.E.2d 328).

In State v. Day, this Court held the trial judge's failure to charge the specific elements of self-defense that were applicable to Day's theory constituted reversible error. 341 S.C. at 418, 535 S.E.2d at 435. The Court found the trial judge's instruction was incomplete because it failed to include a charge indicting: (1) Day had a right to judge the conduct of the decedent more

harshly than otherwise because of the decedent's drug consumption, and (2) the jury could consider prior instances of violence or unprovoked aggression by the decedent in determining whether Day had a reasonable belief of imminent danger. Id. Part of Day's defense was his argument that the decedent had previously pulled a gun on him and that the decedent was in a "drug induced paranoia" the day of the incident. Id. Consequently, this Court held the jury charge, which only included the standard self-defense instruction as outlined by this Court in Davis along with the charge on the right to act on appearances, was incomplete because the trial judge failed to charge on the decedent's substance abuse or his prior acts of violence. Id. Ultimately, the Court reversed Day's convictions and sentence and remanded for a new trial.

Words Accompanied by Hostile Acts

This Court has held that "words accompanied by hostile acts may, according to circumstances, not only reduce a killing from murder to manslaughter, but may establish the plea of self-defense." State v. Harvey, 220 S.C. 506, 518, 68 S.E.2d 409, 414 (1951) (quoting State v. Mason, 115 S.C. 214, 105 S.E. 286 (1920)).

In State v. Fuller, this Court held the trial judge's failure to charge the jury that "words accompanied by hostile acts may, depending on the circumstances, establish a plea of self-defense" as stated in Harvey, constituted reversible error. 297 S.C. at 444, 377 S.E.2d 331. The evidence presented at trial revealed that the decedent stated "he was going to take care" of Fuller; that the decedent grabbed Fuller by the throat; and that the decedent called Fuller a racial slur. Id. The evidence also showed the decedent rammed Fuller's car with his truck. Based on this evidence, the Court found the trial judge should have charged the jury that words alone accompanied by hostile acts may establish self-defense. Id.

Appellant's request to charge included the jury instruction exactly as stated in Fuller. See R. * (Request to Charge). However, the trial judge refused to charge the despite the fact that it was highly relevant to Appellant's theory of the case.

The evidence as presented was inconsistent as to whether Rico Kingsborough and Chris Brown fired their weapons at or around Appellant's house. The instruction clarifies that even if the men had not fired their weapons, the verbal threats Rico Kingsborough made against Appellant, when combined with the hostile act of brandishing a firearm, established Appellant's right to act in self-defense. This additional instruction was crucial to the jury's understanding of what "without fault" and "imminent danger" meant. Without the instruction, the self-defense charge was incomplete and likely confused the jury. With a more complete understanding of the law of self-defense, a reasonable jury would have found Appellant not guilty of the murder of Deputy Rice.

Restore Right to Self-Defense

One who provokes or initiates an assault is barred from asserting self-defense. Bryant, 336 S.C. at 345, 520 S.E.2d 322. However, as this Court announced in Bryant: "If, after commencing the assault, the aggressor withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire, he is restored to his right of self-defense." Bryant, 336 S.C. at 345, 520 S.E.2d 322 (quoting Ferdinand S. Tino, *Comment Note: Withdrawal, After Provocation of Conflict, As Reviving Right of Self-Defense*, 55 A.L.R.3d 1000, 1003 (1974)). "One's right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act." Id. (citing State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973)).

Appellant requested the trial judge charge the above language based on the facts as presented and his theory of the case. R. * (Request to Charge). As stated above, the solicitor argued in closing that Appellant was not entitled to an acquittal based on self-defense for the killing of Deputy Rice because he was at fault in bringing on the difficulty since he had killed Nicole Kingsborough an hour before in Fountain Inn. Tr. 839, l. 5 – Tr. 840, l. 10 (June 30, 2016). Specifically, the solicitor argued:

> But here's the one element that must be shown to establish self-defense, that **the defendant must be without fault. Folks, why was - - why was everybody in the yard that night? Law enforcement were there, family members were there, because he had just killed his wife in cold blood right up the road in Fountain Inn.**
>
> He had called his family members and said, "I did it. Now I'm going to kill myself." **That's why everyone was there. And so Bennie Brown was at fault that night, folks, and that's a nonstarter for a self-defense.** So I want you to remember that as you listen to the rest of the argument.

Tr. 839, l. 5 – Tr. 840, l. 10 (June 30, 2016) (emphasis added).

This argument was presumably persuasive as the jury found Appellant guilty of the murder of Deputy Rice. However, the jury was never instructed that one's right to self-defense is restored after a withdrawal from the initial conflict. Appellant had withdrawn from the scene at the first crime and had announced to his family his intention to go home and kill himself. From that telephone call, a reasonable jury could find that even if Appellant was guilty of the murder of Nicole Kingsborough, he restored his right to self-defense by retreating to his home. Once withdrawn to his home, Appellant was not at fault for any new difficulty and thus could not be guilty of the murder of Deputy Rice. Because the jury only had an incomplete definition of "at fault," the exclusion of the jury instruction concerning restoration of the right to self-defense constituted independent reversible error. The trial judge erred by failing to tailor the self-defense instruction to reflect the evidence and Appellant's theory of the case.

Respectfully, this Court should reverse the ruling of the trial judge and remand for a new trial.

CONCLUSION

As to Issue I, Appellant respectfully this Court declare S.C. Code Ann. § 17-25-45 unconstitutionally as applied to individuals with intellectual disability, vacate his sentence, and remand his case to the Circuit Court for an individualized sentencing proceeding. As to Issues II, III, and IV, Appellant respectfully requests this Court reverse the trial court and remand for a new trial.

Susan B. Hackett
Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR APPELLANT

This 22nd day of September, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

SEP 22 2017

S.C. SUPREME COURT

Appeal from Laurens County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENNIE RAY BROWN, JR.,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Bennie Ray Brown, #169625, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 22nd day of September, 2017.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of September, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.