THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

Frank R. Addy, Jr., Circuit Court Judge

Case Nos. 2005-GS-24-1003, & -1004

State of South Carolina, ...Respondent,

v.

Freddie Edwards, ...Appellant

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the lower court err in failing to grant a directed verdict where the State's case against Mr. Edwards was entirely circumstantial and the State failed to present substantial evidence of guilt?

Did the lower court err when it allowed the State to "open on the law" during closing argument thereby denying the defense any opportunity to respond to the State's closing argument on the facts?

STATEMENT OF THE CASE

At the August 2005 term, the Greenwood County Grand Jury indicted Appellant Freddie Edwards for murder and possession of a firearm during a violent crime, indictment numbers 2005-GS-24-1003, 1004. On August 28, 2005, Mr. Edwards proceeded to a jury trial before the Honorable J. Cordell Maddox. The jury returned a verdict of guilty on both counts. On August 31, 2005, pursuant to S.C. Code §17-25-45, Mr. Edwards was sentenced to thirty years' incarceration. Mr. Edwards did not appeal his conviction. Upon post-conviction review, the South Carolina Supreme Court granted Mr. Edwards the right to file a belated appeal, on which the Court reversed Mr. Edwards' conviction and remanded for a new trial. Mr. Edwards was tried for the second time before the Honorable Frank Addy, Jr., beginning on June 20, 2011. The jury returned a verdict of guilty on both counts. Judge Addy again sentenced Mr. Edwards to thirty years' incarceration. A timely notice of intent to appeal was filed on July 1, 2011. This appeal follows.

ARGUMENT

I. The Lower Court Erred When It Refused to Grant a Direct Verdict for Mr. Edwards

A. Relevant Facts

On July 16, 2005, Freddie Edwards invited some friends to play poker in a small outbuilding behind his house. R. 1, Lines 16-19. The friends included Clyde Marshall, Derek Saxon, and Ben Smith. These men had been playing poker regularly for many years. Id., Lines 16-19; R. 25, Lines 2-7; R. 30, Lines 13-14. Also present that night, and the last to arrive, were Gregory Harrison and his brother, George Freeman. R. 5, Lines 19-22; R. 40, Lines 15-20. These two brothers had only played with the group on a few occasions, and were considerably younger than the other men. R. 28, Lines 15-18. Harrison was dropped off by a friend, R. 3, Lines 21-23, and Freeman arrived later in his van. R. 10, Lines 20-23.

Prior the start of that night's game, Mr. Edwards had announced a new rule whereby a person who folded out of turn had to put two dollars into the pot. R. 4, Line 23-25; R. 26 Line 117, Lines 4-12. When he asked that Mr. Freeman abide by this new rule, Freeman, who had been drinking prior to arriving at Mr. Edwards' home, refused.[1] R. 30, Lines 3-4; R. 38, Lines 6-11, R. 41, Lines 4-10. A verbal altercation ensued between the two men, at which point, Mr. Edwards ordered everyone to leave. R. 6, Line 16 - R. 9, Line 14; R. 30, Line 7 - R. 31, Line 8. Mr. Smith tried to leave, but his car was blocked in by Freeman's van. R. 27, Line 3-7; R. 43, Lines 20-25. Freeman and Harrison did not leave, although they had ambled over to Freeman's van. R. 12, Line 16 - R. 13, Line 11. Mr. Freeman was counting his money, apparently in no

[1]Mr. Freeman's blood alcohol content at the time of autopsy was .186, almost two and one half times the legal limit. R. 102, Lines 12-17.

particular hurry to depart. R. 12, Line 16 - R. 13, Line 4; R. 34, Line 24 - R. 35, Line 1.

Meanwhile, Mr. Edwards went into his house, where it later appeared he had hurriedly pulled clothes out of his dresser drawers. R. 63A, Lines 21-24. He reemerged from his house with a gun. R. 114, Lines 4-9. Witness accounts of the amounts of time that elapsed between Edwards' entry into his home and his eventual return with the gun varied between five minutes, R. 31, Line 25, to "about a minute." R. 51, Lines 21-22. However long it was, Ben Smith testified it would have been plenty of time for Harrison and Freeman - whose van was *not* blocked in - to leave Edward's property. R. 53, Lines 4-20. When Mr. Edwards reemerged from his house, he proceeded to the end of his driveway, following Harrison and Freeman. R. 17, Lines 5-6. Harrison turned left into Cokesbury Road, away from Mr. Edwards' house, and Freeman crossed in front of Mr. Edwards' house into the side yard. R. 14, Lines 4-9; R. 33, Line 9; R. 36, Lines 1-6.

As evidence of what occurred next, in the side yard, the State offered the tearful recorded statement of Mr. Edwards and the testimony of Gregory Harrison. Prior to giving his statement, a highly distraught Mr. Edwards, had instructed his stepson to call 911 just after the shooting, then waited for police to arrive. He waived his constitutional rights to remain silent and to counsel and gave police a full statement regarding what happened. State's Ex. 14 (transcription at R. 179-198). Mr. Edwards described the conflict over the poker game. Edwards said Harrison "asked me what I want to do and I told him, 'I don't want to do nothing... just get out and go." "And he kept bouncing around. 'Course I should have hit him but I couldn't 'cause his brother was there." "So I went in the house to scare him." Edwards went into the house and got his gun. When he came back out of the house, Harrison was trying to get Freeman to leave, but

Freeman ran around into Edwards' side yard where the gate was locked. "He couldn't go over the fence so he came back my way and I put my arm out and I clotheslined him and he fell down. But I had my gun – he pulled the gun and said, "don't shoot me." And the gun went off when he pulled it. I wasn't gonna shoot him. The gun went off. He pulled the gun down." "It happened so fast. He grabbed the gun and it went off. I ain't shot nobody 'bout no poker game."

Q. Okay. About how long after you clotheslined him until the gun – the gun went off? Do you know?

A. I clotheslined him – it happened so fast. He pulled the gun down on him – pulled me and the gun down.

Q. Was he already laying on the ground when he grabbed it?

A. Soon as I clotheslined him.

Q. Um Hum.

A. Next thing I know he pulled the gun and me.

Q. As he was falling?

A. I don't know, it happened so fast.

Q. Okay.

A. But, as he was falling - it had to be as he was falling 'cause it happened too fast.

Mr. Edwards gave substantially similar testimony in his own defense. He gave slightly more detail and said that after he clotheslined Freeman, Freeman had fallen to his buttocks. Mr. Edwards had started to get up from one knee, and Harrison reached for the gun with both hands. R. 126, Lines 18-24. Edwards pulled back and the gun went off. R. 127, Line 19 - R. 128, Line 5. Edwards reiterated that everything happened very fast, that he did not remember putting his finger on the trigger but concluded he must have because it went off. R. 128, Lines 2-24.

Mr. Harrison told a very different story. He testified that after the men left the poker house, Edwards and Freeman ran across the front of the house, and Harrison lost sight of them briefly as he ran after them. R. 16, Lines 16-19; R. 17, Lines 1014. When he arrived in the side yard, he heard Edwards threatening to kill Freeman. R. 17, Lines 17-20. Edwards was "straddled" on top of Freeman, who was on the ground on his back.[2] R. 18, Lines 13-14. By "straddling," Harrison meant "on top of him with his knees on him." R. 20, Lines 1-3. "Knees was on his arms and chest and stuff like that." R. 22, Lines 17-19. According to Harrison, Freeman was waving his left hand, which was grasping a wad of bills. R. 96, Lines 10-11; R. 24, Lines 22-25. Freeman's free right arm remained outstretched. R. 23, Lines 4-8; R. 24, Lines 16-18. Harrison claimed Edwards had the gun in Freeman's mouth and pulled the trigger. R. 20, Lines 7-15.

The State also offered two expert witnesses[3] in an attempt to prove beyond a reasonable doubt that the shooting took place as Harrison had described and not as Edwards had said (although Edwards had repeatedly stated that the incident happened so fast he could not be entirely sure exactly at what point the shot went off.) State's Ex. 14 (transcription at R. 179-198).

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[2]The State's other witnesses testified that Harrison was in Cokesbury Road, on the other side of Edwards' house at the time of the shooting. R. 36, Line 22 - R. 38, Line 1; R. 50, Line 24 - R. 51, Line 4.

[3]In addition to a gunshot residue expert and a pathologist, the State offered an expert who opined on the amount of force required to pull a trigger on the gun in the case and an expert who evaluated DNA evidence which demonstrated that there was a tiny piece of the victim's tissue on the gun and that a spot of the Freeman's blood was on Edwards' shirt. These facts prove only that Edwards shot Freeman, which is not disputed.

The State offered Joseph Powell as an expert in the analysis of gunshot residue. Mr. Powell began by explaining that there are varying degrees of conclusions he was able to make based on the quantities of gunshot residue found on swabs taken from a person's skin.

> Q. So when you are analyzing a sample what will you be able to tell from a sample?
>
> A. Sometimes a little, sometimes a lot. If I am looking at a sample, the swabs, and the levels on the swabs are not, vary outside the norm there is very little I can tell from that. It just says that they have been in the presence of gunshot residue.

R. 67, Lines 19-15. Powell went on to explain that he could tell if a subject was standing in front of a weapon because the levels are "10, 15, 20 times higher than you can ever get just from firing a weapon." He went on to say that only if levels are "excessively high" can any conclusion be drawn regarding where a person or object was in relation to the gun when it was fired. "If they are not, we can't make any conclusion about it." R. 58, Lines 19-23. Mr. Powell then explained that samples are done on the front and back of a subjects hand because "we can use the materials to give us some indication of where or what someone is doing with their hands as far as a weapon is concerned." But, he admitted,

> *It is not an exact science* because unfortunately we are dealing with a process where after you fire a weapon you can lose this material because you can wash your hands or you can wipe your hand on your clothing and of course that can remove a lot of materials. So we can actually have an area that will come up negative that had residue on them to begin with but because of something that someone did it removed the materials.

R. 69, Lines 5-15.

Mr. Powell testified that Mr. Edwards had one particle of gunshot residue on his right palm and one particle on the back of his right hand. He said that Mr. Edwards had "many particles" on the palm and back of his left hand." *Id.*, Lines 19-24. Based on this distribution of

particles, Mr. Powell told the jury that this distribution indicated that "the left hand had received more exposure to the cloud coming out of the weapon on [sic] the right hand." R. 70, Lines 3-7. He then told the jury that either Mr. Edwards' left hand was "closer" to the gun at the time it was fired, or that the right hand was holding the gun, and was completely covered by the left hand at the time it was fired. *Id.*, Lines 8-19. He similarly concluded that Mr. Edwards could not have held the gun with his right hand and kept his left arm at his side. R. 71, Line 23 - R. 72, Line 18.

Powell conceded that gunshot residue is like "flour" and easily rubs off as well as transfers from one surface to another. R. 77, Line 23 - R. 77A, Line11. When confronted with the fact that Mr. Edwards had been handcuffed behind his back while riding in the police car following the shooting, he admitted the gunshot residue readings could have been "distorted." R. 77A, Lines 12-17.

Mr. Powell also made conclusions about the gunshot residue on Mr. Freeman's hands. He testified that Mr. Freeman's hands had no gunshot residue on either palm. On the back of his left hand - which was holding a wad of money - there was a "moderate" amount of gunshot residue. On the back of the right hand, there was a "very, very high level of residue." R. 73, Lines 15-19. Based on this information, Mr. Powell told the jury that Freeman's right hand was "very close" to the gun when it was fired, and the left hand was "someone [sic] in the neighborhood." R. 80, Lines 8-11. He added that at the time the gun went off, both of Mr. Freeman's palms would have had to be closed into fists, or closed around objects. *Id.*, Line 7-12. Mr. Powell said based on this residue distribution, Freeman's hand was not on Edwards' wrist at

the time he was shot. R. 74, Lines 19 - R. 75, Line 5.[4] He also told the jury that Mr. Freeman's hands were not actually on the gun at moment it was fired, because his hand would have been burned. R. 75, Lines 6 - R. 76, Line 12.

Mr. Powell also told the jury that if the gun was in Mr. Freeman's mouth when it was fired, the "very very high" levels of residue on the back of Freeman's right hand "could" have come from the "cylinder gab [sic]" of the gun, as the majority of the residue from the muzzle would have entered Mr. Freeman's mouth. R. 76, Lines 16-24.

Finally, Mr. Powell conceded that the residue distribution pattern on Freeman's hands was consistent with Mr. Edwards' explanation that Freeman's hand pulled on the gun and his fist closed just prior to actual shot. R. 79, Line 238, Line 17 - R. 79A, Line 9.

Q. If a person had a hold of the barrel and pulled on it they would normally, when they pull on it keep their hand closed, correct?

A. Right.

Q. And as soon as it cleared the barrel, if it went off, then you would get a high reading on the back of the hand?

A. Yes, sir.

Q. But none on the palms?

A. If the hands, once it came off it has to be closed and it has to be nothing on the weapon. That is correct.

Id.

The State also offered Dr. Joel Sexton, who was qualified as an expert in forensic

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[4]The probity of this question is unclear. Mr. Edwards stated repeatedly that Mr. Freeman "pulled the gun," not his arm.

pathology. R. 89, Line 25 - R. 90, Line 3.[5] Dr. Sexton concluded that in order to create the wounds he observed on Freeman's body, the gun would have to have been fired while just against or inside of Freeman's mouth, or from a minimum of eighteen inches away. R. 95, Lines 2-7; R. 103, Lines 10-14. Dr. Sexton also testified that the bullet entered the lower left side of Freeman's mouth and exited just above and behind his right ear. R. 97, Lines 6-24. He then opined on three hypothetical scenarios as demonstrated by members of the prosecution team. First, Dr. Sexton concluded that it would be "nearly impossible" for Freeman to have reached for the gun with his right hand *as* he was falling from being clotheslined by Mr. Edwards. R. 98, Lines 6-8. Second, Dr. Sexton, in his capacity as a pathologist, testified that Mr. Freeman would not have grabbed the gun and pulled it toward him after he fell, in an attempt to wrest the gun away from Edwards, because that is contrary to "human nature."[6] R. 98, Line 24 - R. 99, Line 14. Dr. Sexton then said that Mr. Edwards' being on top of the victim with both hands on the gun and the gun in the victim's mouth would be consistent with the bullet trajectory. R. 99, Line

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[5]Dr. Sexton also testified that he has an "interest" in firearms and engages in recreational shooting. He also took a course in 1969 in wound ballistics as part of his residency. R. 91, Line 3-5. Although he was not qualified as an expert in ballistics or gunshot residue analysis, he did offer several opinions on these topics. For example:

> Q. And the fact that the shooter has both hands on the firearm is that consistent with the gunshot residue as it is placed on Mr. Edwards' hands?
>
> A. It would be consistent with getting it on both hand because it is coming out the front of the gun, it is coming out of the cylinder and it is making a cloud and that cloud with a Magnum like that could be a couple of feet in diameter. And so it certainly could get on the shooter's hands.

R. 101, Lines 11-19.

[6]Dr. Sexton also testified that Mr. Freeman's high blood alcohol content would impair his ability to defend himself, because he "may not recognize something as dangerous as quickly," R.. 107, Lines 22-24, but he did not say how it would impede his ability to act in accordance with his expert understanding of human nature. Dr. Sexton also failed to opine on whether batting at a gun with two balled-up fists comported with "human nature."

24 - R. 100, Line 11. Ultimately, however, Dr. Sexton admitted that he could not say "beyond a reasonable doubt" where Freeman and Edwards were when the shot was fired. "There are multiple positions they could be in." R. 107, Lines 3 -6.

At the close of the State's case, the defense moved for a directed verdict on the grounds that the State had not provided sufficient evidence of malice to send the murder charge to the jury. The defense noted in particular Mr. Edwards' distraught demeanor during his statement to police following the shooting. R. 109, Lines 5-12. The State argued that they had presented evidence of malice in the form of Edwards' "going and getting a firearm, chasing this man down, clotheslining him, you take the testimony of the pathologist there are scenarios where this is an intentional act." *Id.*, Lines 15-24. The lower court denied the motion. R. 109, Line 25 - R. 110, Line 4. The defense renewed its motion for a directed verdict, and asserted that the State had failed to present substantial evidence of guilt as required by the Fourteenth Amendment and *Jackson v. Virginia*, 433 U.S. 307 (1979). R. 132, Line 25 - R. 133, Line 8. The lower court again denied the motion. *Id.* at Line 9. The jury returned a verdict finding Mr. Edwards guilty of murder.[7]

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[7]The record suggests the possibility of some irregularity in the manner in which the jury reached this conclusion. During deliberations, the jury requested to be reinstructed on involuntary manslaughter. R. 172, Line 18 - R. 173, Line 7. The jury had, however, been instructed that "*if* you find that the State has failed to meet is burden of proving the defendant guilty of murder... *then* you would have the option of considering the third possible scenario and that is the charge of involuntary manslaughter. R. 173, Lines 18-25 (emphasis added). The jury was reinstructed to this effect when they returned with their question. R. 173, Line 21 - R. 174 Line 1. Therefore, if the jury had been following instructions, as they are presumed to do, *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1995), they must have already found that the State failed in its burden to prove malice in order to be considering involuntary manslaughter at all.

B. Relevant Legal Principles and Argument

The lower court erred in denying Mr. Edwards' motion for a direct verdict, and as a result he was convicted based on insufficient evidence in violation of due process of law. *Jackson*, 433 U.S. 307. When the State's case is circumstantial, a charge must be submitted to the jury only "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). The charge may not be submitted to the jury if the evidence gives rise only to a suspicion of the defendant's guilt. *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475 (2004).

In a case in which a person's intent is the only issue before the jury, the evidence is almost by definition circumstantial. As the South Carolina Supreme Court has indicated, "intent is seldom susceptible to proof by direct evidence and must ordinarily be proved by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred. *State v. Tuckness*, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971); *see also,* 29A Am.Jur.2d Evidence § 1469 at 849-50 (1994) ("Circumstantial evidence alone is often sufficient to show criminal intent because the element of intent, being a state of mind or mental purpose, is usually incapable of direct proof."). In this case, even taking the evidence in the light most favorable to the State, there is simply no substantial evidence from which malice can be proved. *See State v. McHoney*, 344 S.C. 85, 544 S.E.2d 30 (2001) (when reviewing the denial of a directed verdict, the court must consider the facts in the light most favorable to the State).

The only question in this case was Mr. Edwards' state of mind at the moment that Mr.

Freeman was shot. The State contended he acted with malice. Mr. Edwards said the shot was an accident. The State argued that the following factors were evidence of malice:

that Mr. Edwards was angry as a result of the dispute with Mr. Freeman;

that he hurriedly pulled clothes from his drawers while looking for the gun;

that he armed himself;

that he chased Mr. Freeman; and

that the circumstances of the shot (as described by Mr. Harrison) indicated malice.

With regard to all of these factors except for the last, Mr. Edwards was acting with legal intent. Once Freeman failed to leave Edwards' property despite being asked to do so, and having had the opportunity to do so, Edwards was entitled to use reasonable means to eject him. *See State v. Bradley*, 126 S.C. at 533, 120 S.E. at 242 ("for the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances.").[8] Thus, the State's sole remaining evidence of malice was the testimony of Harrison. Harrison's testimony, however, is entirely contradicted by the State's documentary and scientific evidence. What is left is little more than a smoke screen of suspicion – far removed from substantial evidence that Mr. Edwards acted with malice.

The State's theory was that Mr. Edwards kneeled on top of Mr. Freeman, put the gun in

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[8]The jury was instructed, "[a]n invitee cannot be lawfully ejected by the use of violence until the occupant has requested that he leave. Once the invitee refuses the occupant must use only such force as necessary to accomplish the ejectment. No one has the right to kill an invitee guest without any notice to leave. If a trespass has occurred the property owners chosen means of ejectment must be reasonable under the circumstances. R. 166, Line 24 - R. 167, Line 7. The jury was not expressly instructed that if they found that Mr. Edwards had used reasonable force to eject Mr. Freeman, that they could not find him guilty of any crime, or that they could not consider any reasonable and therefore lawful actions as evidence of malice.

his mouth and shot him, as described by Mr. Harrison, but according to their own evidence, taken in its most favorable light, this theory cannot be true.

First, Harrison said that Edwards was on top of Freeman with his knees on Freeman's "arms and chest and stuff like that." R. 22, Lines 17-19, and that Freeman was waving his left arm at Mr. Edwards' gun. R. 20, Lines 10-11; R. 24, Lines 22-25. Photos taken at the crime scene, however, depict Mr. Freeman's left arm lying across his left hip. Exhibit 41, (reproduced at R. 199). Had Edwards been on top of the victim at the time he was shot, Freeman's arm could not possibly have gotten into that position. There was no testimony that Freeman's body was moved by anyone after he was shot. Moreover, if Freeman's arm had been in that position at the time he was shot, and Edwards was indeed on top of him, Freeman's hand would not have had gunshot residue on it, because it would have been covered by Edwards' body.

Second, the gunshot residue expert and the forensic pathologist testified that there was a "very, very large amount of gunshot residue on the back of Freeman's right hand, and that therefore this hand must have been in front of the gun or near the cylinder gap at the time the gun was shot. This is simply not what Harrison described. He said Freeman's right hand was "off to the side." In addition, the experts testified that Freeman's right had would have been in a fist or closed around an object at the time he was shot, because there was no gunshot residue on the palm of his hand. Harrison did not mention any object in Harrison's right hand,[9] nor did he mention that Freeman was trying to fend off the gun with a closed fist.

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[9]The State attempted to raise the suspicion that the water bottle on the ground near Mr. Harrison's body may have been in his hand. R. 74, Lines 9-14. Not only is the position of the bottle inconsistent with such a scenario, there was no evidence of gunshot residue on the bottle presented, and Harrison did not mention that Freeman was holding a water bottle.

Third, Harrison said that Freeman was pinned to the ground with the gun in his mouth when he was shot. There was, however, no imprint in the ground of a bullet hole or any bullet found. R. 65, Line 20- R. 66, Line 16. The State's expert witness theorized that bullet must have ricocheted off a rock, R. 104, Lines 10-18, but there was no evidence presented that there was a rock underneath or anywhere near Freeman's head.

Fourth, although Harrison claimed the gun was in Freeman's mouth at the time that it was fired, the State's expert on DNA evidence found that a swab of the muzzle of the gun did not have any blood on it. R. 88, Lines 11-13.

Fifth, Mr. Powell expressly testified that unless the volumes of gunshot residue were "very, very high," he could not make conclusions about where exactly a person's hands were in relation to a gun, yet he went on to make precisely those sort of conclusions about where Mr. Edwards' hands must have been as he was firing.

The State contended that Mr. Edwards "lost his cool, he went charging into his house, got his revolver and with a reckless disregard and hostility in his heart he ran George Freeman down, he clotheslined him, got down on top of him and stuck that .44 Magnum in his mouth and pulled the trigger." R. 165, Lines 19-23. The State's own evidence, however, fails to prove its own theory – Harrison's utterly contradictory testimony does not constitute substantial evidence that Mr. Edwards acted with malice. See *State v James*, 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004).

Mr. Edwards' conviction violates the Fourteenth Amendment of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution and should be reversed.

II. The Lower Court Erred When it Deprived Mr. Edwards of Any Opportunity to Rebut the State's Closing Argument on the Facts

A. Introduction and Relevant Facts

Prior to the delivery of closing arguments, the defense moved that the State be required to open fully on the facts and the law. The defense argued that to do otherwise violated the Due Process Clause of the Fourteenth Amendment, because

> the State will hear my entire theory of the case before they ever have to utter the first word about their theory of the case. They will have ample opportunity to refute any theory I put out there. I will never have an opportunity to refute their theory. If they are to require to open fully on the law and the facts then I can refute their theory and then they come in and refute my theory and I think it is a much fairer process for the jury to hear arguing in that order.

R. 134, Lines 7-15. The State countered simply that it was "appropriate" for the state to open on the law, because Mr. Edwards had presented evidence in his defense. *Id.* at Line 25. The lower court denied the defense motion, holding that it was bound by "tradition" and "the rules" as he understood them to be. R. 135, Lines 3-11; R. 171, Lines 16-24. Depriving Mr. Edwards of any opportunity to respond to the State's arguments deprived him of the effective assistance of counsel and due process of law. U.S. Const. amends VI, XIV; S.C. Const. art. I, §§ 3,14.

B. Background of the Rule Depriving Certain Defendants of the Right to Rebut the State's Closing Argument on the Facts

South Carolina's rules governing whether the party with the first and last closing argument must open on the law and the facts have a dynamic history. In *Atterberry v. State*, 129 S.C. 464, 124 S.E. 648 (1924), the defendant in a criminal case moved to have the prosecuting attorney make his closing argument first. The trial court denied the motion. The South Carolina Supreme Court held that the issue was clearly resolved in defendant's favor by reference to Rule 59 of the then extant Code of Civil Procedure. *Id.* at ___, 651. That rule stated that "the party

having the opening argument shall disclose his entire case and on his closing shall be confined strictly to a reply to the points made, and authorities cited by the opposite party." *Id.* Based on the lower court's clear violation of the rule, the South Carolina Supreme court reversed. In addition to reiterating the rule, however, the court also opined on its wisdom:

> The wisdom of this rule is seen most clearly in a case in which the state relies upon circumstantial evidence. 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.

Id.

It is not clear why the straightforward logic of *Atterbury* and the old Rule 59 was abandoned, but it appears it may have occurred as a result of the Supreme Court's interpretation of a new Rule 58 of the Circuit Court in *State v. Lee*, 255 S.C.309, 178 S.E.2d 652 (1971). In *Lee*, the defendant again moved that the prosecution be required to open both on the law on the facts. The court cited the new rule, which stated, "the party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposing party." *Id.* at 317, 656. The court then concluded, without explanation, that because the rule stated that the opening party was *required* to open on the law upon the defendant's request, that he was *not* required to open on the facts under any circumstances. *Id.* The court did not explain why it was so suddenly retracting the criminal defendant's critical ability to respond to the prosecution's case - a right that had been so logically supported by the *Atterbury* court. The South Carolina Supreme Court reiterated its interpretation of Rule 58 in *State v. Rogers*, 269 S.C. 22, 235 S.E.2d 808 (1977)(per curiam). In *Rogers*, the defendant requested (for some reason) that the Solicitor

not be permitted to open on the facts. The court then concluded, interestingly, that "there is nothing in the Circuit Court Rule 58 which *limits* the initial closing argument to the law of the case, it simply requires a discussion of the law to be included in that argument if demanded by the defendant." *Id.* at 24, 809 (emphasis added). But in the next breath, the court said, "[t]he solicitor is not required to make an opening argument to the jury on issues of fact, but may do so in his discretion." *Id.* at 25, 809. Therefore, after *Rogers*, the State was not required to open on the law, unless the defendant so requested, and was not required to open on the facts at all.[10] Perhaps the most compelling language in *Rogers*, however, is this: "The right to open and close the argument to the jury is a substantial right, the denial of which is reversible error." *Id.* at 24, 809.

Despite the eventual repeal of the Rule on which *Lee* and *Rogers* were based, the practice of giving the opening party the advantage of an unrebuttable argument remains, although only in criminal cases. The civil rule states, "The party having the right to open shall be required to open in full, and in reply may not introduce any new matter." S.C. Rule. Civ. Pro. 43(j). It is not clear why, unlike in *Atterbury* and *Lee*, the rule is not extended to criminal cases.

C. Relevant Legal Principles and Argument

The lower court's adherence to an unexplained interpretation of a rule that no longer exists conflicts with constitutional requirements that must attend a criminal trial. The United States Supreme Court has held that closing argument is a critical aspect of the Sixth Amendment right to counsel. *Herring v. New York*, 422 U.S. 853, 858 (1975). The Court stated, "[t]here can

[10]It is not clear from this interpretation what the State would be left to argue should the defendant not make any requests.

be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial."

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for parties are in a position to present their retrospective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and *point out the weaknesses of their adversaries' positions*. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.

Id. at 863 (emphasis added).

1. Requiring a criminal defendant to choose between fundamental rights is constitutionally intolerable

The only way in which a criminal defendant in South Carolina can obtain the right to point out the weakness of his adversary's position, however, is to waive his right to present a defense, including his right to testify. *See, e.g., State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972) ("In a criminal prosecution, where a defendant is separately tried and introduces no testimony, he is entitled to the closing argument to the jury."). The United States Supreme Court has held this kind of Hobson's Choice to be constitutionally "intolerable." *Simmons v. United States*, 390 U.S. 377 (1968). *Simmons* addressed a situation in which a defendant needed admit his possession of incriminating evidence (and therefore guilt) in order to demonstrate standing to challenge the evidence under the Fourth Amendment. Simmons argued that this requirement amounted to compelled incriminating testimony in violation of the Fifth Amendment. The lower court had held that the Fifth Amendment was not implicated, because the defendant could simply "choose" not to offer the testimony that conferred standing. The Court found, however,

> the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.

Id.[11]

2. The right to rebut the State's argument is a fundamental right

The South Carolina Supreme Court has acknowledged that the improper denial of a defendant's right to rebut the state's argument can constitute reversible error. Thus, the Court has implicitly acknowledged that closing argument is the type of right that should not be the subject of a *Simmons* dilemma. In *State v. Mouzon*, 326 S.C. 199, 485 S.E.2d 918 (1997), the defendant was denied the right to present the last argument, despite the fact he had presented no evidence. The court found the harm lay in defendant's inability to respond to the State's argument.[12]

> Mouzon focused on the murder charge and was acquitted for murder; he did not focus on the conspiracy charge and was convicted. In its closing argument, the State devoted a significant amount of attention to the issues of drug dealing and conspiracy. If Mouzon had been allowed to argue last, then he could have more adequately addressed the issue of conspiracy to distribute crack cocaine.

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[11]In fact, only South Carolina and North Carolina obligate criminal defendants to make this choice. See N.C. Gen. Prac. R. 10.

[12]The fact that the ability to respond to the State's argument is a critical aspect of presenting a defense is implicitly acknowledged by the existence of S.C. Code Ann 16-3-28 (1995 & Supp. 2001) which expressly affords the right to defendants in capital sentencing proceedings. Notably, a federal court has also found the right to rebut the State's argument is so critical that forgoing the presentation of evidence in order to achieve the right is an acceptable trial strategy. *Whelchel v. Battle*, 489 F.Supp.2d 523, 533 (D.S.C. 2000).

Id. at 205, 923. Certainly, however, the damage done by the defendant's inability to respond to the State's argument is the same, regardless of whether the defendant presented evidence. The prejudice should not be ignored simply because the defendant exercised one of his other constitutional rights. Mr. Edwards was prejudiced in the same way as Mr. Mouzon was – by his counsel's inability to respond to the State's argument. Denying the defendant the right to respond or forcing him to abandon other constitutional rights in order the assert the right is fundamentally unfair, and a deprivation of due process and the right to counsel.

In Mr. Edward's trial, the State gave a three-page opening on the law during which it explained to the jury that the State would need to prove malice in order for them to find Mr. Edwards guilty of murder. It then noted that the following facts were "the sorts of things" that tended to prove malice: that Mr. Edwards was angry; that he hurriedly pulled clothes from his drawers while looking for a gun; that he armed himself; that he chased Mr. Freeman; that he "clotheslined" Mr. Freeman; and that he shot Mr. Freeman in the mouth. R. 136, Line 14 - R. 137, Line 3. The State also told the jury that the defendant "was engaged in a violent felony" of "pointing or presenting a firearm" when he shot Mr. Freeman, which "cuts against manslaughter." R. 137, Lines 9-13.

The defense then argued that the crime was not murder. A dispute arose between Mr. Edwards and Mr. Freeman as a result of which Edwards ordered Freeman to leave his property. Edwards ran inside of his house, during which time Freeman had ample time to leave the premesis, but he did not. Edwards encountered Freeman attempting to climb over the fence in his side yard. Edwards did not shoot Freeman at that point. Instead, Freeman charged at Edwards and said, "don't shoot me." He grabbed the gun, the two went down, and the gun went

off. The defense noted that the expert witnesses could not say with any certainty whether the shot was at close range or from a distance. The defense also pointed out there was no bullet found in the ground beneath Freeman's head, calling into question the story of the State's main witness who had said Edwards was kneeling on top of the victim when he shot, and the defense questioned Freeman's ability to see what he said he saw. The defense argued that the facts did not support a finding of voluntary manslaughter, because Edwards never pointed the firearm at Freeman, and therefore his possession of his own firearm in his own home was not unlawful. R. 137, Line 15 - R. 155, Line 11 .

The State then presented its argument on the facts. It contended that after the verbal dispute, Edwards was angry and hostile when he went to get the gun, which he later said there had been no need to do. When he came back out with the gun, sixty seconds later, Mr. Freeman was "clear down" by his van, "getting ready to leave." The Solicitor stated that Edwards' tearful admission was not, in fact, remorseful. He also told the jury that clotheslining the victim while he had a gun in the other hand is "reckless disregard." The State pointed out several instances in which it believed Mr. Edwards' version of the events to be inconsistent with the forensic evidence, and argued that it was not a natural defensive reaction to pull a gun toward onesself, but also argued – seemingly to the contrary – that Freeman's natural instincts were impaired by alcohol. R. 155, Line 13 - R. 165, Line 25.

Defense counsel then put on the record the arguments he would have made in a responsive argument, had he been provided one:

> When Mr. Hodges argued that he was mad when he stood up and called him Freddie. I would argue that was a concern by Mr. Edwards because he normallly didn't call him Freddie and that showed he was acting unnormally [sic]. When Mr. Hodges argued no reason to go get a gun I would have argued going to get a

gun was not illegal. When he said that Freddie being mad when he left the house I would have pointed that Mr. Edwards never said anything as he came out of the house with the gun. Never made any threats against Mr. Freeman and never pointed the firearm at Mr. Freeman. When he said the carrying of the pistol is reckless disregard I would have pointed out that that would mean that anyone who walked upon their premises with a firearm could be guilty of murder for they would be in reckless disregard. When he was talking about, thinking about I am going to tell the police I would have argued that due to the emotion on the tape that wasn't true and if someone is so coldhearted as be able to murder somebody and then sit down and act like he did then they probably are really coldhearted. The defendant said a couple of different versions, I would have pointed out that in the statement he gave the police that night the really only version he gave them was the Mr. Freeman was on the ground first before the gun was grabbed. When he argued about the angle of the bullet I would have pointed out that if the head was tilted back a little bit the bullet would have been at the same angle as shown on the diagram and was testified to by Dr. Sexton. I would have argued that when the gun, when he pointed out that the gun was pulled away from Mr. Freeman I would have argued that when the gun was pulled back that a reflex action easily could have pointed the gun directly at Mr. Freeman. He said grabbing the hand with money was not possible. I would have pointed out that we demonstrated through Mr. Edwards grabbing the paper that it was possible to grab the gun with the money in your hand. And when he argued that GSR was inconsistent with grabbing we would argue that GSR was consistent with the gun being fired immediately upon Mr. Freeman's hand slipping off of it. And when he says, talking about the blood on the t-shirt, I would have pointed out that Dr. Sexton testified the blood on the t-shirt could have been splattered on him and that had the gun occurred at contact range there should have been more blood on the t-shirt. And when he said the different versions of the defendant are not consistent with the forensic evidence. I would have testified that Dr. Sexton clearly said that there were a myriad of versions that could have created the same bullet path and everything.

R. 169, Line 15 - R. 171, Line 15. Each of these arguments rebuts a critical part of the State's closing. For example, the State said that Edwards' anger at Mr. Freeman was clear evidence of malice. The defense was precluded from responding that perhaps Mr. Edwards was not so angry as the State says - he did not threaten Freeman or point the gun at him as he was attempting to get Freeman to leave the property. The State argued that Edwards was acting in reckless disregard for the safety of others simply by getting the gun, but the defense was precluded from responding

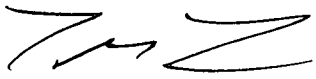
that he was legally entitled to do so. The defense was also precluded from responding to the very specific conclusions drawn by the State on the basis of its forensic evidence, where the testimony was actually quite broad and allowed for a number of scenarios, and occasionally actually contradicted the State's theory.

The State offered a highly circumstantial case in support of its quest to turn a tragic accident into a malice murder. The State's only eyewitness to the shooting told a story that was contradicted in numerous respects by the State's other lay witnesses and its forensic evidence. Therefore, it was critical that the State be able to cobble together an argument that could effectively distract the jury from the profound weaknesses in its case and enable the jury to convict Mr. Edwards beyond a reasonable doubt. The defense's ability to parry the State's thrust in this case through a rebuttal argument was critical. Depriving Mr. Edwards of this right violated his rights to the effective assistance of counsel and due process of law under the Sixth and Fourteenth Amendments to the Untied States Constitution and Articles 1, Sections 3 and 14 of the South Carolina Constitution.

CONCLUSION

For the foregoing reasons, Mr. Edwards' convictions should be reversed.

Respectfully submitted,



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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Case Nos. 2005-GS-24-1003
2005-GS-24-1004

The State,.....Respondent,

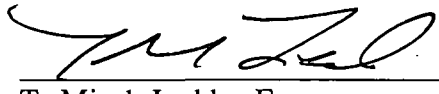
vs.

Freddie Edwards,.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

January 8, 2013



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PROOF OF SERVICE

I, T. Micah Leddy, attorney for appellant, certify that I have served the *Final Brief of Appllant, Record on Appeal* and the accompanying *Index* on Respondent by depositing one copy of the same in the United States mail, postage prepaid, to the following address:

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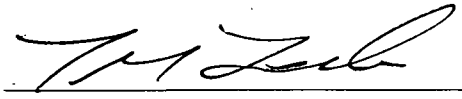

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