THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC Court of Appeals

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

Court of Appeals Case No. 2015-001199
State v. Shands, ___ S.C. ___ 817 S.E.2d 524 (Ct. App. 2018)

The State, ... Respondent-Petitioner,

v.

Preston Shands, Jr., ... Petitioner-Respondent.

PETITION FOR WRIT OF *CERTIORARI*

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CERTIFICATION

Pursuant to Rule 242(C)(1), SCACR, counsel for Preston Shands, Jr., certifies a petition for rehearing was made and finally ruled on by the Court of Appeals. A. 465-72, 482.[1]

QUESTIONS PRESENTED

I. Did the Court of Appeals err when it applied the third step of *Batson's* comparative juror analysis and concluded a female juror with a criminal conviction seated by the Solicitor was not similarly situated to three male jurors with criminal convictions struck by the Solicitor, when the Solicitor's sole basis for striking these jurors was criminal convictions?

II. Did the Court of Appeals err by affirming the trial court judge not quashing the indictments because the grand jury presentment process in Laurens County, including in Preston Shands, Jr's case, violates state law and Equal Protection?

III. Did the Court of Appeals err when it held Preston Shands, Jr. opened to the door to the Solicitor questioning him about his forty-year-old felony convictions that were inadmissible under Rule 609, SCRE, when he was on trial for multiple violent felony charges?

IV. Did the Court of Appeals err when it affirmed the trial judge not instructing the jurors about the law of involuntary intoxication when Preston Shands, Jr.'s testimony supported providing the instruction?

V. Did the Court of Appeals err when it held the Solicitor's improper closing argument was supported by the evidence, even though the trial judge had sustained Preston Shands, Jr.'s objection, instructed the Solicitor to "keep it to the facts," but refused to strike the argument form the record?

VI. Does Due Process confer a right for an accused to have a full and fair opportunity to respond to the prosecution's best closing argument, meaning the State must open in full on the facts and the law and restrict its reply argument to matters raised by the defense in closing?

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[1] "R." refers to the Record on Appeal. "A." refers to the Appendix. The Record on Appeal is included in the Appendix. The page numbers for the Record on Appeal contained in the Appendix correspond to the page numbers in the original Record on Appeal. For example, R. 1 is also numbered A. 1.

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

STATEMENT OF THE CASE

On July 21, 2015, the State charged Preston Shands, Jr., with first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a knife during the commission of a violent crime. Record on Appeal (hereinafter "R.") 294-98. The Laurens County Grand Jury indicted Mr. Shands for these charges on October 3, 2014. R. 299-310. On September 4, 2014, the State served notice of intent to seek imprisonment for life without the possibility of parole, pursuant to S.C. Code § 17-25-45(A) regarding the charges of first-degree burglary, kidnapping, and attempted murder. R. 311.

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

Mr. Shands appealed to the Court of Appeals. Charles Grose represented Mr. Shands. David A. Spencer, of the Attorney General's Office, represented the State. Mr. Shands raised eight questions on appeal. Question VIII of his brief in the Court of Appeals asked:

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

On January 12, 2016, the day after he served his Initial Brief of Appellant, pursuant to Rule 204(a), SCACR, Mr. Shands petitioned the court below to "issue an order transferring this appeal from the Court of Appeals to the Supreme Court" because Question VIII in his brief in the court below "involve[d] a challenge to the constitutionality of a state statute" that must be heard by this Court pursuant to Rule 203(d)(1)(A)(ii), SCACR. A. 318-20. The State opposed this motion. A. 321-23. The Court of Appeals denied the motion. A. 324.

On November 8, 2017, the Court of Appeals convened an oral argument. On June 13, 2018, the Court of Appeals reversed Ms. Shands conviction for attempted murder because the trial judge instructed the jurors they could infer malice from the use of a deadly weapon, which is contrary to this Court's holding in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). The Court of Appeals affirmed Mr. Shands other convictions and sentences. *State v. Shands*, ___ U.S. ___, 817 S.E.2d 524 (S.C. Ct. App. 2018). A. 447-64. Both parties petitioned for rehearing., and the Court of Appeals denied those petitions on August 16, 2018. A. 456-82. This petition for a writ of *certiorari* follows.

STATEMENT OF FACTS

On Sunday, July 20, 2014, Sharron Copeland Shands had been married to Preston Shands, Jr. for ten years. Mr. Shands watched the couple's two minor children, T.C. and J.S.,[2] while his wife went to church. That evening, Mr. and Ms. Shands got into an

[2] T.C. is Ms. Shands son from a prior relationship. Mr. Shands helped Ms. Shands raise T.C. J.S. is Mr. and Ms. Shands son together. R. 67-68.

argument. Ms. Shands left the house through the garage. The garage door was half closed. Mr. Shands pulled Ms. Shands by the hair. She went next door to the home of Clarence ("Bill") and Martha Koon. Mr. Shands broke a sliding glass door, entered the Koons' home, and cut Ms. Shands. Ms. Shands was treated for her injuries at Greenville Memorial Hospital. R. 55-67; *see also* R. 71-78, 81-84, 86-94, 98-100 (testimony of T.C., J.S., Bill Koon, and Martha Koon). Bill Koon testified that Mr. Shands' was cut and covered in blood, but did not see how it occurred. R. 95-96. T.C. also got cut, which was the basis of the first-degree assault and battery charge. R. 77-78.

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

Mr. Shands testified he does not have a memory of the incident but, after reviewing the evidence, realized his conduct was responsible for his wife's injuries. He testified about the events, which he could remember, leading up to the incident. After Mr. Shands cooked breakfast for the family, Ms. Shands went to church. Mr. Shands took care of the two boys. They cleaned house. Mr. Shands helped T.C., who has a learners permit, practice driving. Mr. Shands had one Bud Light. Mr. Shands had bought some "homemade moonshine" at work. He started drinking it. It was too strong to drink

straight, so he mixed it with Coca Cola. Normally, Mr. Shands goes to sleep when he drinks alcohol, but this time he had a different reaction. "This had some effect that took me slap clean out of my mind." R. 188-96. Travis McBeth testified that Ms. Shands acknowledged to him the possibility that Mr. Shands had been poisoned. R. 210-11. Mr. Shands contended at trial that he lacked criminal intent, and he requested a juror instruction on involuntary intoxication. R. 213-15, 293.

ARGUMENTS

I. Did the Court of Appeals err when it applied the third step of *Batson's* comparative juror analysis and concluded a female juror with a criminal conviction seated by the Solicitor was not similarly situated to three male jurors with criminal convictions struck by the Solicitor, when the Solicitor's sole basis for striking these jurors was criminal convictions?

The trial court judge conducted *voir dire*. Only two potential jurors—numbers 118 and 122—responded to any of the trial judge's questions. R. 13-14. All potential jurors affirmed they could be fair to both the prosecution and Mr. Shands. R. 11-15. During jury selection, the prosecutor exercised four of the State's possible five preemptory challenges to remove jurors 126 (a female), 125 (a male), 115 (a male) and 156 (a male). The resulting jury consisted of nine women and three men.[3] R. 16-22.

Pursuant to *Batson v. Kentucky,* 476 U.S. 79 (1986), Mr. Shands challenged the prosecutor striking jurors 125, 115, and 156 (all men) based on gender. R. 22, l. 2 – 23, l. 4. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (held that intentional discrimination on the basis of gender by state actors in use of peremptory strikes in jury selection violates equal protection clause). The Solicitor explained the State's strikes. Jurors 125 and 156 had convictions for criminal domestic violence. The State argued,

[3] The alternate was also a woman. R. 21-22.

"[T]his is a case involving domestic violence." Juror 115 had "convictions for lottery law violations." The Solicitor, however, acknowledged seating juror 54 (a female), who has a fraudulent check conviction. The Solicitor had a strike available to her when she sat juror 54. R. 23. Mr. Shands argued, "[T]here is really no way to separate juror number 54 which is the sixth juror [sat] who is a black female who does have a conviction for [a] fraudulent check. . . . If you are going to use criminal record as a reason to strike somebody then you have got to be consistent otherwise." R. 23-24. The trial judge was confused because the initial motion was based on the prosecutor striking men, and Mr. Shands then pointed to juror number 54, a female. The trial judge operated under the mistaken belief that the trial court could not consider a similarly situated female juror because Mr. Shands challenged the Solicitor striking male jurors. Counsel tried to explain that the State seating a similarly situated female juror pertained to the third step of the *Batson* analysis. The trial court denied Mr. Shands' *Batson* motion. R. 24-26. Mr. Shands renewed his objection prior to the trial court swearing the jurors. R. 32.

On appeal, Mr. Shands argued the trial judge did not properly apply the third step of *Batson's* "three-step process for evaluating claims that peremptory challenges have been exercised in a manner violative of the Equal Protection Clause." *State v. Giles*, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted). "In the third step, the opponent of the strike must show that the race-neutral explanation given was mere pretext." *Payton v. Kearse*, 329 S.C. 51, 55, 495 S.E.2d 205, 208 (1998). Pretext "generally is established by showing the party did not strike a similarly-situated member of another race or gender." *State v. Stewart*, 413 S.C. 308, 314, 775 S.E.2d 416, 419 (Ct. App. 2015). The Court of Appeals agreed "the trial court misapplied the third step of

the *Batson* analysis by not properly considering whether the female juror was similarly situated to the potential male jurors." *Shands*, ___, S.C. at ___, 817 S.E.2d at 530. The court below, however, held:

> The female juror was not similarly situated to the two potential male jurors who had convictions for CDV. It is understandable that the State would want to strike potential jurors who had convictions for CDV because Shands was being tried for attempting to kill his wife. Further, the female juror was not similarly situated to the third potential male juror who had convictions for violating the lottery law. We agree with the State that having multiple convictions is different than having only one conviction that is over a decade old. Considering the totality of facts in the record, we find Shands did not meet his burden of showing the State's use of its peremptory strikes was impermissible.

Id. ___ S.C. at ___, at 530–31 (S.C. Ct. App. 2018).

During the oral argument at the Court of Appeals and during his Petition for Rehearing, A. 466, Mr. Shands contended the State's argument would have been more persuasive if the prosecution had limited its strikes, based on criminal history, to the two male jurors with domestic violence convictions. The State, however, "negated" the use of criminal history when it struck the male juror with lottery law convictions and sat the female juror with a fraudulent check conviction. The totality of the circumstances supports ordering a new trial. *See State v. Scott*, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013) ("Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record.") (citing *State v. Shuler,* 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)). During jury selection in this case, the Solicitor had twenty-seven decisions on whether to exercise one of the State's preemptory strikes. The State struck three of the nine men (33%) presented. The State struck just one of the eighteen women (about 5.5%) presented. The Solicitor, therefore, was six times more likely to strike men than women. As will be seen in Question V,

infra, the Solicitor directed the State's closing argument towards the female jurors, including arguing that Mr. Shands considered his wife to be his property.

This Court should grant to writ, consider the issue, and provide guidance for when the State selectively uses criminal history to strike similarly situated jurors, particularly in situations where our state's limited *voir dire* procedure yields limited information for parties to consider when exercising preemptory strikes. As Mr. Shands argued in the court below:

> *Stewart* involved a prosecutor attempting to justify preemptory strikes based on jurors' criminal history. In *Stewart,* the State struck African-American jurors with prior involvement with law enforcement while seating Caucasian jurors that also had prior involvement with law enforcement. The Court of Appeals held, "[E]ven though the State offered a racially-neutral explanation for striking the African American jurors, the State negated the reason by seating similarly-situated Caucasian jurors." *Stewart*, 413 S.C. at 317, 775 S.E.2d at 421. *See Miller–El v. Dretke,* 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson* 's third step."); *State v. Oglesby,* 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) (finding the solicitor negated his neutral reason when he seated a white female juror who was similarly situated). Just as it did in *Stewart*, the State in this case negated the gender-neutral reason for striking three men by seating a similarly situated female juror.

Brief of Appellant, A. 333-34, 466.

II. Did the Court of Appeals err by affirming the trial court judge not quashing the indictments because the grand jury presentment process in Laurens County, including in Preston Shands Jr.'s case, violates state law and Equal Protection?

The trial court convened a hearing on Mr. Shands written motion to quash the indictment, during which the Solicitor's Office confirmed the essential facts. In Laurens County, an Administrative Assistant in the Solicitor's Office prepares indictments. The Administrative Assistant lists the law enforcement officer that was the affiant on the

warrant as the sole witness to be called before the Grand Jury. The indictments are then reviewed and signed by an Assistant Solicitor. When the Grand Jury meets, a police officer from the arresting agency obtains copies of the indictments from the Solicitor's Office and presents them to the grand jurors. The testifying police officer, who is not the same law enforcement officer listed on the indictment, does not have any personal knowledge of the case. The Solicitor's Office ***does not*** keep a record of the identity of the person ***actually*** testifying before the Laurens County Grand Jury.[4] The State followed this procedure in Mr. Shands' case.[5] R. 26-29, 269-85; *see also* warrants and indictments, R. 294-310.

In the trial court and his Brief of Appellant, Mr. Shands argued the procedure used to obtain indictments violates state law, including S.C. Code §14-7-1550, the pattern instruction trial judges provide new grand jurors, and Equal Protection. A. 269-85, 334-44. The Court of Appeals acknowledged the prosecution "'could not tell' whether either of the two officers listed on Shands's indictments testified in front of the grand jury because it did not have a record of who testified." *Shands*, ___ S.C. at ___, 817 S.E.2d at 531. The court below was unable "to say there was a violation in Shands's case from the record presented," reasoning "[w]ithout any clear

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

[5] The grand jury process followed in Mr. Shands case is the norm in the Eighth Judicial Circuit. *See* Brief of Appellant Respondent-Appellant Edward Dean, at 10-19, *State v. Dean*, Court of Appeals Appellate Case No. 2015-001436; *State v. Carrier*, S.C.S.Ct. Memorandum Opinion No. 2014-MO-043 (filed October 22, 2014) (Oral argument found at http://media.sccourts.org/videos/2012-212777.mp4 (last viewed September 22, 2018)).

evidence, Shands's argument that there was a grand jury abuse in his case is pure speculation." *Id.*

Because of the Solicitor's custom and practice of not keeping records of witnesses testifying before the grand jury, no one accused of a crime in the Eighth Judicial Circuit will ever be able to meet the unreasonable burden required by the court below. This Court, however, long ago warned grand juries are not "a prosecutor's plaything and the awesome power of the State should not be abused but should be used deliberately, not in haste." *State v. Capps*, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981) (Lewis, C.J., Dissenting); *see also State v. Davis*, 420 S.C. 50, 61, 800 S.E.2d 138, 143 (Ct. App. 2017) (same). This Court should grant the writ, consider the issue, and provide guidance to the bench and bar about the proper procedures for a grand jury presentment.[6]

III. Did the Court of Appeals err when it held Preston Shands, Jr. opened to the door to the Solicitor questioning him about his forty-year-old felony convictions that were inadmissible under Rule 609, SCRE, when he was on trial for multiple violent felony charges?

Pursuant to Rule 609, SCRE,[7] Mr. Shands moved to exclude his prior conviction in Florida for murder, occurring over forty years ago, when he was a juvenile. R. 286-88. Mr. Shands pointed out he had been released from confinement on parole in 2003,

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[6] Abusive grand jury practices occur in other judicial circuits. The Honorable Daniel D. Hall quashed 904 indictments, involving 400 people, when lawyers showed the grand jurors spent an average of 39 seconds considering each indictment. "York County judge throws out 'unreasonable' 904 indictments from June grand jury," *The Herald*, Aug. 17, 2018 (found at https://www.heraldonline.com/news/local/article216878215.html (last viewed Sept. 15, 2018)).

[7] Rule 609(a)(1), SCRE provides, "For the purpose of attacking the credibility of a witness, . . . evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Rule 609(b) sets a ten-year time limit on the admissibility of the conviction from "the date of the conviction or of the release of the witness from the confinement imposed for that conviction."

arguing that this took the conviction outside the parameters of Rule 609(b), SCRE. Counsel argued Rule 609(a), SCRE, requires weighing the probative value of admitting evidence against the prejudicial effect to Mr. Shands. Counsel contended a conviction "that far in the past would have little if any relevance, no probative value in our opinion and the prejudicial impact would be extraordinarily high if he were to take the stand and be asked about that." R. 135-40. The trial court ruled, under Rule 609(b), "the end of confinement refers to termination of parole or probation." The trial judge ruled the prosecution could ask Mr. Shands if he had been convicted of any violent felonies. The judge also ruled Mr. Shands would not have to object when the prosecutor asked the question. R. 173-76. During the State's cross-examination, the Solicitor asked, "Mr. Shands, you have been convicted before of a violent felony, right?" Mr. Shands responded, "Yes, ma'am." R. 204, l. 24 – 205, l. 1. In addition to not knowing the nature of the charge, the jurors did not know that it occurred forty (40) years ago when Mr. Shands was a juvenile.[8]

The Court of Appeals observed, "This case presents the novel issue in South Carolina of whether parole following a prison term constitutes "confinement" for the purposes of the ten-year time limit under Rule 609(b). *Shands*, ___ S.C. at ___, 817 S.E.2d at 532. The court below decided to "follow the majority of jurisdictions in holding that probation and parole do not constitute 'confinement' for the purposes of Rule 609(b); confinement ends when a defendant is released from actual imprisonment." *Id.* ___ S.C. at ___, 817 S.E.2d at 533. The Court observed "the State did not present

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

sufficient evidence to show the probative value of Shands's conviction *substantially* outweighed its prejudicial effect" and held, "Because Shands was convicted over forty years ago and was released from prison over ten years ago, we believe his conviction had little probative value." *Id.*

The Court of Appeals, however, ultimately held, "[T]he trial court did not err in admitting Shands's prior conviction because Shands opened the door to such evidence" because Mr. Shands "elicited testimony during the cross-examination of numerous witnesses to show that he had never reacted violently before." *Id.* Mr. Shands merely asked his wife, children, and neighbors whether they had ever seen him act in this manner to support his involuntary intoxication defense. None had. The court below thus adopted a rule allowing the prosecution to introduce an otherwise inadmissible prior conviction to impeach an accused's cross-examination of witnesses that gave truthful answers about issues relevant in the case. In future trials, an accused will have to choose between cross-examining witnesses or testifying.

Additionally, as pointed out in the petition for rehearing, the court below never identified the court rule under which the evidence was admissible. A. 467-68. It appears the Court of Appeals conflated the analysis under Rule 609, SCRE with the analysis under Rule 404(a) or (b), SCRE. The prosecution tacitly acknowledged Mr. Shand's conviction was not admissible under Rule 404, as its only theory at trial for admitting the conviction was under Rule 609. Like Rule 609, Rule 404 generally does not support the admission of remote convictions. *See, e.g., State v. King*, 334 S.C. 504, 513, 514 S.E.2d 578, 583 (1999) ("The temporal connection between these petty thefts and the charged

crimes is too attenuated for admissibility under the *res gestae* theory or under" Rule 404(b)).

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

The error is not harmless. Mr. Shands' credibility was essential to his defense. Our appellate courts consistently find error prejudicial when the defendant's credibility is at issue. *E.g. State v. Anderson*, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) (error in qualifying witness as an expert not harmless when the "case turned solely on the credibility of the minor and of Appellant"); *Gilchrist v. State*, 350 S.C. 221, 228, 565 S.E.2d 281, 285 (2002) (Solicitor's improper vouching for State's witness was prejudicial); *State v. Bryant,* 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) (Bryant was unfairly prejudiced by the improper cross-examination" that pitted the officer's testimony against Bryant.).

This Court should grant the writ, consider the issue, and provide guidance to the bench and bar regarding the admissibility of remote convictions.

IV. Did the Court of Appeals err when it affirmed the trial judge not instructing the jurors about the law of involuntary intoxication when Preston Shands Jr.'s testimony supported providing the instruction?

Mr. Shands testified that the "homemade moonshine" "had some effect that took me slap clean out of my mind." All witnesses agree they had never seen Mr. Shands act

in this manner before. J.S. testified that Mr. Shands' conduct was "out of the ordinary" and he had "never seen [Mr. Shands] in that kind of state of mind before." This testimony indicated that, unbeknownst to Mr. Shands, the moonshine had been spiked with something other than alcohol. Based on all of this testimony, Mr. Shands' requested the trial court instruct the jurors about involuntary intoxication:

> There are two types of intoxication, voluntary and involuntary. Involuntary intoxication may result from innocently consuming an intoxicant, through being tricked into it by another, or being forced to take it, or perhaps through unanticipated side effects of a prescription drug taken on orders of a physician. If you find the defendant was given drugs or alcoholic beverages without his knowledge, and as a result, he lost his ability to exercise independent judgment and volition while committing the crimes alleged against him, then it would be your duty to find the defendant not guilty.

Request to Charge No. 4, R. 293 (citing Ralph King Anderson, Jr., *South Carolina Requests to Charge - Criminal*, 2007, § 6-4 Involuntary Intoxication. The Solicitor objected and requested the trial judge "charge voluntary intoxication." Mr. Shands objected to that request "without the charge on involuntary intoxication that goes with it." The trial judge declined to charge involuntary intoxication. R. 213-15. During closing, the State, "[V]oluntary intoxication is not a Defense." R. 234-35. The trial judge ultimately instructed, "[V]oluntary intoxication is not a Defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the acts committed while intoxicated as when a person is not intoxicated. R. 243.

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

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

"The law to be charged to the jury is determined by the evidence presented at trial. . . . , [and] a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Blurton*, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002). Here, an instruction on "involuntary intoxication" was necessary to aid the jurors in their deliberations. Instructing on "voluntary intoxication," while omitting an instruction on "involuntary intoxication," had the effect of the judge expressing an opinion on Mr. Shands' testimony and defense in violation of Art. V; Section 21 of the South Carolina Constitution.

This Court should grant the writ, consider the issue, and provide guidance for when the defense of involuntary intoxication is raised by the evidence.

V. Did the Court of Appeals err when it held the Solicitor's improper closing argument was supported by the evidence, even though the trial judge had sustained Preston Shands, Jr.'s objection, instructed the Solicitor to "keep it to the facts," but refused to strike the argument form the record?

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

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

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

Mr. Shands objected "to the characterization, outside of the evidence." The trial judge sustained the objection by instructing the Solicitor, "Let's keep it to the facts." Mr. Shands moved to strike. The trial judge denied this motion, R. 231-32, even though ordinarily:

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

State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010). The trial judge, accordingly, should have granted Mr. Shands' motion to strike and instructed the jurors to disregard the comment. A "trial judge's failure to give a curative instruction" can be reversible error. *State v. Pickens*, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996). As seen, Mr. Shands' credibility was essential to his defense. *See Anderson, Gilchrist* and *Bryant, supra.*

The court below, however, held, "[T]he trial court did not abuse its discretion in denying Shand's motions to strike because the State's comments were not outside the evidence." *Shands*, ___ S.C. ___, 817 S.E.2d at 535. The Court of Appeals overlooked the procedural posture of this issue. The trial judge very clearly sustained the objection and admonished the prosecutor to confine her arguments to the evidence. The court

below, accordingly, was reviewing whether it was error not to provide a curative instruction and not whether the prosecutor's comments were improper. As pointed out in Mr. Shand's reply brief and Petition for Rearing, the prosecutor's statement, "'[T]his is a jealous, controlling husband who was not going to let *his property* leave that house,' is highly inflammatory and not based on evidence." A. 441-42, 469.

This Court should grant the writ, consider the issue, and provide the bench and bar guidance about limiting the closing argument to the evidence in the case and not seeking a conviction based on considerations other than evidence in the case.

VI. Does Due Process confer a right for an accused to have a full and fair opportunity to respond to the prosecution's best closing argument, meaning the State must open in full on the facts and the law and restrict its reply argument to matters raised by the defense in closing?

In its opening statement, the prosecution told the jurors:

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

R. 43-44. During the directed verdict motion, Mr. Shands noted that the kidnapping indictment did not contain any "factual allegation . . . to tell us what exactly was done in the course of these events for Mr. Shands to have to defend." R. 170-7. Prior to closing arguments, Mr. Shands called the trial judge's attention to his written motion "asking that the State be required to open in full on the law and the facts" and then reply only to new matters raised by the Mr. Shands in his closing argument. Counsel noted, "Due process requires that we have a full opportunity to respond to their entire argument. And then they would have a chance to respond to new matters that were raised in the response."

The trial judge ruled, "[M]aybe the Supreme Court will want to change [the procedure, but] I decline to do so." Counsel verified that the trial judge had reviewed the arguments in the written motion. R. 217-18, 289.

After the trial judge denied Mr. Shands' motion, the State opened on the law. The prosecution argued—as it had telegraphed in its opening statement—without any additional explanation, "[T]his isn't a traditional kidnapping." R. 220-23. Mr. Shands argued in full. R. 223-30. During Mr. Shands' argument, counsel noted:

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

And, "I don't get a chance to respond to [] their theory under the facts." R. 224-25.

The prosecution made its reply argument. R. 230-38. During its final argument, the prosecution revealed to the jurors for the first time the State's theory about the kidnapping charge:

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

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

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

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

R. 255.

While Mr. Shands case was pending in the Court of Appeals, this Court decided *State v. Beaty* and acknowledged "there is no rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence, except for the 'constitutional rule' that a defendant's right to due process cannot be violated at any stage of a trial." 423 S.C. 26, 46, 813 S.E.2d 502, 512-13 (2018). This Court further recognized, under precedent existing at the time of Mr. Shands trial, "In cases in which a defendant introduces evidence, trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State's reply argument to matters raised by the defense in closing." *Id.*

The opinion below illustrates five deficiencies in our state's closing argument procedure, even after *Beaty*. First, as pointed out in Mr. Shands' petition for rehearing, A. 469-70, neither the Court of Appeal's opinion in this case nor this Court's opinion in *Beaty* answers the question of whether due process requires the accused to have an

opportunity to respond to the prosecution's best closing argument.[9] Mr. Shands believes it is fundamentally unfair to allow the State to withhold its theory of the case until after it hears the accused's closing argument.

Second, the Court of Appeals looked to *Beaty* and observed, our state's "case law focuses upon allegedly inflammatory or unsupported content of the State's closing argument, not upon whether the State must open in full on the facts and not upon reply arguments which have a basis in the record but to which a defendant is not allowed to respond." *Shands*, ___ S.C. at ___, 817 S.E.2d at 539 (quoting *Beaty*, 423 S.C. at 43, 813 S.E.2d at 511). Our state lacks such law because, until the *Beaty* opinion, many in the bench and bar—like Mr. Shands' trial judge—did not understand trial courts have discretion, under existing precedent, to grant the relief requested by Mr. Shands.[10] This Court's guidance is needed for consistency in our state.

Third, the court below followed this Court's lead in *Beaty* when it stated, "[T]he State's comments during its reply closing argument were arguably in response to Shands's closing argument." *Shands*, ___ S.C. at ___, 817 S.E.2d at 539 (mirroring *Beaty*, 423 S.C. at 44, 813 S.E.2d at 512 (2018) ("We first note that the State's presentation of this theory during its reply was arguably a proper response to the theory Appellant advanced in his closing argument.")). The court below actually reasoned, "[T]he State's comments in its closing argument regarding kidnapping were arguably in reply to Shands's closing argument comment that he 'had no idea how [the State] would

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[9] Mr. Beaty raised this issue in his Petition for Rehearing in this Court.

[10] "A failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *Samples v. Mitchell,* 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997)).

explain kidnapping to [the jury] under this evidence.'" *Id.* An appellate court always will be able to make these types of observations when the trail court allows the prosecution to hear the accused's closing argument before requiring it to commit to its theory of the case. Neither the court below in this case nor this Court in *Beaty* explained how this scenario complies with due process.

Fourth, the procedure sanctioned by the Court of Appeals in this case requires defense counsel to anticipate the prosecutor's factual argument. The Court below acknowledged "the jury had not yet heard the State's full theory for kidnapping" when Mr. Shands made his closing argument, but reasoned Mr. "Shands was aware of the State's theory of the kidnapping charge because the State explained what facts it believed supported the charge in response to Shands's directed verdict motion." *Id.* As discussed in Section VII below, the State argued at the directed verdict stage that Mr. Shands' unsuccessful attempt to keep his wife from leaving their garage constituted the kidnapping. Even after the prosecution made this statement, how could Mr. Shands be assured the State wouldn't switch theories during its reply argument and argue the kidnapping occurred when Mr. Shands was on top of his wife inside the Koons' home?[11] *See, e.g.*, R. 92. Neither the court below in this case nor this Court in *Beaty* explained why requiring defense counsel to anticipate the Solicitor's real theory of the case complies with due process.

Finally, the court below conflated the due process violation with the harmless error rule when it stated, "[W]hile the State did not restrict its reply argument to matters

[11] As seen in Question VII below, Mr. Shands contends neither theory supports a kidnapping conviction as neither theory alleges conduct beyond the allegations of the assaults.

raised by Shands and the trial court did not allow him to respond to the foregoing points, we hold Shands did not suffer prejudice as a result because he was not denied the fundamental fairness essential to the concept of justice." *Shands*, ___ S.C. at ___, 817 S.E.2d at 539 (internal quotations omitted). This Statement seemingly finds a due process violation but then requires Mr. Shands to show prejudice contrary to *Chapman v. California,* 286 U.S. 18, 24 (1967) ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

This Court should grant the writ, consider the issue, and answer the question left unanswered in the *Beaty* opinion, to wit: Does Due Process confer a right for an accused to have a full and fair opportunity to respond to the prosecution's best closing argument, meaning the State must open in full on the facts and the law and restrict its reply argument to matters raised by the defense in closing?

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

As seen above, Mr. Shands moved the court below to transfer this constitutional issue to this Court. The State opposed, and the Court of Appeals denied the motion. A. 318-24. The Court of Appeals ultimately rejected Mr. Shands constitutional argument—as it was required to under our state's procedures—stating, "We find Shands's argument regarding the constitutionality of the kidnapping statute is without merit because our supreme court has already held the kidnapping statute is not unconstitutionally vague and overbroad." *Shands*, ___S.C. ___, 817 S.E.2d at 540 (citing *State v. Smith*, 275 S.C. 164, 268 S.E.2d 276 (1980) and *Lozada v. S.C. Law Enforcement Div.*, 395 S.C. 509, 719

S.E.2d 258 (2011)). Mr. Shands now requests this Court consider the constitutional argument.

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

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

R. 170. The Solicitor contended:

> [S]everal people have testified that she was grabbed by the hair as she was attempting to leave, pulled back into the doorway of the house. There is testimony that she lifted the garage door and closed it and sort of ended up in kind of a halfway state where she would not have been able to get her car out and leave. That is confining for the purpose of the statute.

R. 171. The Solicitor did not point to any other facts in the case that supported submitting the charge to the jurors, even thought there was evidence Mr. Shands was on top of his wife inside the Koons' home. The trial judge denied Mr. Shands' motions for a directed verdict. R. 172. Mr. Shands renewed his motions at the close of all evidence. R. 213.

Ms. Shands and her two children were the only witnesses that could have observed Mr. Shands' conduct related to the garage door and pulling his wife's hair. Ms. Shands actual testified, "[W]e tried to get out of the garage. It was halfway so we couldn't get out." And, "I remember him pulling me by my hair to try to get me back in the backdoor." R. 58. At this point, she did not testify that Mr. Shands did anything to close an open garage door or actually restrain her by her hair. Later on, Ms. Shands

testified, I was trying to open it and he was trying to close it." R. 66-67. But, she still never testified that Mr. Shands restrained her. T.C. testified that Mr. Shands "tried to close the garage" door, but never testified that he actually did. R. 74-75. T.C. did not offer any testimony about Mr. Shands pulling his wife's hair. J.S. did not offer any testimony about the garage door. J.S. testified that his father "got my mom by the hair," R. 83, but never said his father actually restrained his mother.

This Court has explained:

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

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

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

If the testimony in this case is construed to constitute a kidnapping, then § 16-3-910 is not constitutional. As this Court has observed:

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

State v. Neuman, 384 S.C. 395, 402-03, 683 S.E.2d 268, 271-72 (2009) (internal quotations and citations omitted. This Court should grant the writ and consider the constitutional issue. The State did not present evidence of kidnapping beyond what was alleged in the assaults. If this Court allows Mr. Shands' kidnapping conviction to stand, then every assault offenses involving attempt to grab or hold the other person would also support a kidnapping conviction.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and consider the issues.

Respectfully Submitted,

By _____

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Attorney for Preston Shands, Jr.

September 24, 2018.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 26 2018
SC Court of Appeals

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

Court of Appeals Case No. 2015-001199
State v. Shands, ___ S.C. ___ 817 S.E.2d 524 (Ct. App. 2018)

The State, ... Respondent-Petitioner,

v.

Preston Shands, Jr., ... Petitioner-Respondent.

PROOF OF SERVICE

I certify that I have served Mr. Shands' Petition for Writ of *Certiorari* on the State of South Carolina, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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September 24, 2018
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September 24, 2018

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
1231 Gervais Street
Columbia, SC 29201

RECEIVED
SEP 26 2018
SC Court of Appeals

Re: *State of South Carolina v. Preston Shands, Jr.*
Appeals Case No. 2018-001673

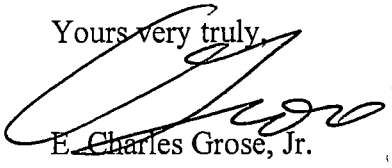
Dear Mr. Shearouse:

Enclosed for filing, please find the original and six copies of Mr. Shands Petition for Writ of *Certiorari*, along with a certificate of service.

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

With kindest regards, I am

Yours very truly,



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cc: Mr. Preston Shands, Jr.
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