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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

Appellate Case No. 2014-001497

THE STATE,RESPONDENT

v.

JOE ROSS WORLEY,APPELLANT.

RETURN TO 2nd PETITION FOR REHEARING

On July 18, 2018, this Court issued an unpublished opinion that affirmed Appellant Joe Ross Worley’s convictions for assault and battery with intent to kill (ABIK) and possession of a weapon during the commission of a violent crime. *State v. Worley*, Op. No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018). On August 1, 2018, Appellant submitted a “Petition for Rehearing and Request for Holding on Final Issue” pursuant to Rule 221(a), SCACR. On August 24, 2018, Respondent (the State) filed a “Return to Petition for Rehearing and Request for Holding on Final Issue.” On September 26, 2018, this Court withdrew, substituted, and refiled an unpublished opinion that again affirmed Appellant’s convictions. *State v. Worley*, Op. No. 2018-UP-327 (S.C. Ct. App. filed September 26, 2018). On October 12, 2018, Appellant filed a “2nd Petition for Rehearing” pursuant to Rule 221(a), SCACR. By letter dated October 16, 2018, this

Court asked the State to file a return to the motion. This “Return to 2nd Petition for Rehearing” now follows. The State respectfully asks this Court to deny the petition for rehearing pursuant to Rule 221(a), SCACR, because it did not overlook or misapprehend any points that would warrant further consideration of this matter. The procedural history, the statement of facts, and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

The Protection of Persons and Property Act

In regard to the lower court’s denial of immunity under the “Protection of Persons and Property Act” (the Act), S.C. Code Ann. §§ 16-11-410 to -450 (2007), this Court affirmed and adopted the lower court’s December 8, 2011 order, which itself employed a thorough and proper analysis of each of the arguments raised by Appellant at the immunity hearing before concluding Appellant did not carry his burden of proving he was entitled to immunity under the Act. The lower court followed the appropriate procedure—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence—and ultimately found Appellant did not carry his burden of proof. Appellant’s arguments simply could not prevail under this Court’s standard of review. As in *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013), Appellant’s claims of self-defense and defense of habitation presented quintessential jury questions, which is not a situation warranting immunity from prosecution. The trial court’s findings that Appellant failed to carry his burden of proving there was an entry or attempted entry, and that Appellant failed to carry his burden of proving he was not without fault in bringing on the difficulty, had evidentiary support and were not controlled by errors of law.

Similarly, the lower court’s December 8, 2011 order analyzed and rejected Appellant’s myriad grounds for claiming Deputy Rushton was not a “law enforcement officer” within the

meaning of the Act. The lower court's findings in this regard served merely as an additional sustaining ground to the overall denial of immunity, and as noted above, that denial was solidly grounded in credibility findings and Appellant's abject failure to carry his burden of proving the required elements of self-defense by a preponderance of the evidence. Indeed, the lower court held: "Even if there is some problem in considering Deputy Rushton as a law enforcement officer because of a technical condition he had not fulfilled, the Act does not preclude prosecution. The defendant has not established that he had a reasonable belief that he was not firing upon law enforcement officers." (R.p.1767). In other words, the lower court concluded Appellant failed to establish he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief. *See Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. (listing the four elements required by law to establish a case of self-defense). Similarly, the lower court found "that the preponderance of the evidence is that the 'difficulty' was brought on by [Appellant's] conduct." (R.p.1774). These individual findings supported the lower court's ultimate conclusion that "Appellant has not met his burden of proof" in establishing the elements of self-defense needed for a grant of pretrial immunity. (R.p.1773-p.1774). For all of these reasons, the lower court's denial of immunity and Appellant's convictions were properly affirmed by this Court. Rehearing should be denied.

Mistrial – Solicitor's Closing Argument

In regard to the lower court's refusal to grant a mistrial based on the solicitor's comments in closing arguments, this Court affirmed, noting the trial court: (1) found "the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by Worley and was not burden-shifting or inferring that Worley was

guilty because he failed to testify,” and (2) “[t]herefore the court found the comment was harmless beyond a reasonable doubt.” These findings were supported by evidence in the record and therefore were properly affirmed by this Court.

In his petition for rehearing, Appellant contends this Court should have reversed the convictions because the State’s closing argument “constituted a direct comment” on Appellant’s right to not testify. He argues that, with respect to the showing that must be made under the harmless error analysis set forth by this Court in *Pickens*, “there is no doubt that the showing was satisfied and appellant was denied a fair trial by the state’s impermissible comments and, thus, prejudiced.” Appellant claims the State “directly referenced appellant’s failure to testify multiple times” and that the solicitor “tied appellant’s failure to testify directly and inexorably to appellant’s self-defense, mistake, and accident theories. (Petition for Rehearing, p.19). The State disagrees and maintains its position that Appellant’s argument is entirely without merit. The State’s closing argument was in direct response to comments made during Appellant’s opening statement, Appellant’s attempts to substantiate those comments through the examination of other witnesses, the resulting lack of evidence to support the comments in the opening statement, and Appellant’s closing argument. The State’s argument did not shift the burden onto Appellant, but instead merely made note of the lack of evidence as a whole in the record, despite Appellant’s opening statement suggesting such evidence would be forthcoming at trial.

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); *State v. Meggett*, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme

measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. *Inman*, 395 S.C. at 565, 720 S.E.2d at 45. A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *Meggett*, 398 S.C. at 524, 728 S.E.2d at 496.

The trial court has wide discretion in ruling on the appropriateness of a closing argument. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003).

Relevant Facts

During pretrial arguments about a defense request for a jury charge on modified ammunition, counsel for Appellant stated:

. . . [There is] no evidence whatsoever that [Appellant] was in any way mean-spirited towards anybody except trying to get rid of a fox earlier that evening.

He fired two shots at a fox. And he really wasn't trying to kill the fox; he was trying to motivate him out of there. The fox had bothered his cat. The cat called Sweet Pea. And they had been having trouble with this fox. And that evening, earlier before this thing happened, he fired that thing from the same gun at a fox. And a fox sure isn't the police and certainly isn't a person.

And so - - on the same evening, he also fired it at two fox. But, again, it's an environmental bullet.

(R.p.824-p.825). Later, during preliminary remarks, the trial judge told the jury the parties would be making opening statements and instructed that whatever was said in those statements was not evidence. (R.p.839). In his opening statement, Appellant's counsel said in part:

Y'all may not understand this, but as you hear this case, it's horribly tragic, because it starts off with a cat by the name of Sweet Pea, and this cat was found, and it was a scraggly cat and it

had a collar on it. And Mr. Worley's father took on the cat and protected this cat, and it became a cat here in McCormick.

And they'd been over on that property for over 40 years. The Worley family comes down here every weekend and has for 40 years. They've been broken into before.

This family is there with his mother, who is 84 years old at the time. Mr. Joe Worley and his mother, 84 years old, in their little garage apartment, and their cat, Sweet Pea. And when you go out there, if His Honor will let you go out there, there's and elaborate cathouse and catwalk that they built. They love their little cat.

Well, in September, when the Sheffields complained the first time, *there's a fox* - - actually, it was the Sheffields that told the Worleys that there was a fox out there - - *and that fox had injured this cat*, had injured it to the point they had to take it to the vet.

Now, Mr. Worley that evening, the 15th, November the 15th of 2009, goes out on his balcony, and he hears a noise. *He flips on his light, and he sees movement out there, and he said, The dadgum fox again. So he's out there hollering at it and trying to get rid of it.* He goes into his house and gets his father's - - his deceased father by now - - gets his gun, and he loads it with ammo that his father had. *And he goes outside and he shoots towards the lake to motivate the fox that was bothering their cat to get out there. He shot twice. He went on back to bed. And he might have hollered, but he shot twice and then went back to bed.*

(R.p.833-p.834) (emphasis added).

Subsequently, during Appellant's cross-examination of Deputy Moore, counsel asked: "Well, you heard Joe testify that he shot it up into the air; right?" (R.p.978, lines 11-12). The State objected to the question and the jury was sent out. The parties then engaged in a discussion with the trial judge in regard to whether Appellant would be allowed to cross-examine other witnesses in regard to Appellant's testimony from the pretrial immunity hearing. The trial judge said it would be inherently unfair to allow Appellant to bring up the prior testimony and then to claim his privilege under the Fifth Amendment to not take the stand during trial. The trial court

ruled it would not allow the defense to use Appellant's pretrial testimony during the examination of other witnesses, but that if Appellant chose to testify, the prior testimony might be admissible in cross-examination. Appellant said he understood the ruling but contended he may still be able to use the prior testimony in some fashion as it relates to his expert witness. The judge said he would address the issue of the expert witnesses using the prior testimony if it became an issue later during the trial. (R.p.978-p.983).

Later during trial, Appellant's neighbor, Alan Sheffield, took the stand. On cross-examination, he testified he knew the Worleys' cat Sweet Pea had been injured but he had no knowledge of how or why. Sheffield said he did not know anything about the cat having problems with a varmint and that while he had seen foxes in the area before, he does not remember ever having a conversation with Ms. Worley about a fox. (R.p.1114-p.1115). After the State rested, during arguments on Appellant's motion for a directed verdict, the trial judge said: "Well, there is - - the testimony was that Mr. Worley was shooting a gun at a fox. In other words, he was hunting a fox at night. Regardless of whether it's to protect some Sweet Pea cat or whatever, he was hunting at night with a .30-06." (R.p.1204, lines 7-12).

Appellant then was sworn and advised of his right to testify and his right not to testify. He proceeded to call witnesses in his defense. First, he called his brother, Robert Worley, to the stand. Robert testified he was familiar with Sweet Pea and remembered that Sweet Pea had been injured two or three times over the years; however, he offered no testimony about how those injuries occurred and never mentioned a fox. (R.p.1253-p.1257). Appellant later called Dr. Kirkham to the stand. He was admitted as an expert criminologist without objection. (R.p.1305-p.1320). While discussing Deputy Rushton's initial thoughts about the 9-1-1 call, Kirkham commented that because it was a rural area, the gunshots could have been someone poaching

deer, “or somebody shooting at foxes or whatever.” (R.p.1325, lines 16-24). Later, during cross-examination, after having opined that it was reasonable for someone in Appellant’s situation to have a fear of imminent peril or death, Kirkham was asked whether it also would then be reasonable for Appellant to have been home and afraid earlier that night when he was instead outside shooting his rifle. Kirkham responded: “No. He was doing what he was doing. He says he was trying to motivate a fox to leave his cat, Sweet Pea, alone.” Kirkham clarified he was offering an opinion about a hypothetical and that he was only assuming Appellant was shooting at a fox. (R.p.1383, line 16-p.1384, line 1).

Appellant also called Officer Bo Willis of the McCormick Police Department to the stand. He helped investigate the shooting, drew a diagram of the property, and took photographs of the scene. (R.p.1433-p.1446). On cross-examination, while testifying about the rifle and ammunition used by Appellant, Willis said the bullet used by Appellant was “not a round you would shoot foxes with.” (R.p.1457, lines 3-7). Before the defense rested, Appellant advised the court he wished to exercise his rights under the Fifth Amendment and was not going to testify. (R.p.1472).

At the conclusion of the testimony and pursuant to a prior ruling, the jury was driven to see the Worley residence. The attorneys and the trial judge also went to the house. Upon returning, the trial judge held a charge conference to address the parties’ requests to charge. (R.p.1477-p.1484). In regard to a particular request from Appellant in regard to night hunting, the trial judge commented: “I’m not going to charge number 7, because the law in this case under the statute that I found is the evidence presented was it was shooting at a fox. Even if it’s night hunting, even if he was shooting at a fox, he can’t use a .30-06; he’s got to use a .22 or less.” Ultimately the court changed its ruling and agreed to give the charge at the end of its charge on

habitation, because the night hunting appeared to be permissible under a different subsection of section 50-11-710. (R.p.1506-p.1508).

After concluding the charge conference, the parties gave closing arguments. The solicitor closed on the law, followed by a closing argument from Appellant. (R.p.1513-p.1516). During Appellant's close, counsel said: "Unfortunately, for the Worley family, they had problems with a fox bothering their cat." (R.p.1518, lines 4-6). He later said: "Worleys [sic] having a problem with a fox trying to kill or injure their cat, Sweet Pea. Joe shoots at the fox and yells." (R.p.1520, lines 2-4). The solicitor objected, complaining that Appellant was not allowed to quote his prior statement. The jury was sent out and the solicitor explained he was objecting to Appellant making a statement from facts that were not in the record. He pointed out that Appellant did not testify and there was no trial testimony a fox was out there on the night of the incident or that Appellant shot at a fox. The trial court agreed, sustained the objection, and directed counsel to make his argument based only on facts in evidence. (R.p.1520-p.1521). Appellant completed his closing argument without further mention of a fox. (R.p.1521-p.1554).

The solicitor then presented a closing argument on behalf of the State. Shortly after starting his argument, the solicitor said:

Now, let's get all these, you know, like the traveling medicine man from Florida. All these hypotheticals and all these what ifs, and, of course, he's going to give everybody the benefit of the doubt. He's going to give these law enforcement officers the benefit of the doubt, the standards and procedures man.

And what did he tell you? Well, what about this? Well, what about that?

Well, let's look at what's not here. First of all, didn't that medicine man - - that traveling medicine man talk about a fox? There's a fox out there. There's an old country and western song, A fox on the run. Who saw a fox? Who got on that stand and said,

on November the 15th of 2009, between two o'clock in the morning and four o'clock there was a fox out there?

Well, the brother testified, and he's in Florida. The traveling medicine man is in Palm Beach in that big ol' house down there. Bo Willis testified. That's their three witnesses. Who said there was a fox out there?

If y'all heard it, disregard what I say and hold it against me. I'm bad, too; I'm the Solicitor. But who said there was a fox out there? I'm half deaf, but I swear I didn't hear it.

Oh, but the fox been out there before, the fox on the run. I just didn't hear anybody say there was a fox out there that night.

.....

You know, you'd think after two months, he'd shot that fox. He's such a good shot, isn't he? Seems like the fox on the run would be dead if the fox was out there. That's for you to decide, but I ain't heard it. I tried to listen. I tried to listen.

.....

So they call the sheriff's department. The light's still on. When the officers get out there - - now, how can a man, in 20, 25 minutes, calm down from cussing and yelling and shooting, come in and get undressed and go fast asleep? I don't know because there ain't no testimony to that.

(R.p.1556-p.1559).

Discussion / Analysis

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. *See* U.S. Const. amend. V (prohibiting a criminal defendant from being "compelled in any criminal case to be a witness against himself."); S.C. Const. art. I, § 12 ("[N]or shall any person be compelled in any criminal case to be a witness against himself."). Accordingly, this right forbids both comments by the prosecution on a defendant's silence and instructions by the trial judge indicating a defendant's silence constitutes evidence of guilt. *Griffin v. California*, 380 U.S. 609, 615 (1965).

“As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant’s failure to testify at trial is constitutionally impermissible.” *State v. Weaver*, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004).

“Specifically, the solicitor must not comment, either directly or indirectly, on a defendant’s silence, failure to testify, or failure to present a defense.” *McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000). In determining whether a solicitor’s remarks constitute a comment on a defendant’s failure to testify, courts generally ask: “Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?” *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973). In considering this issue, the solicitor’s remarks must be evaluated in the context in which they were made. *See Weaver*, 361 S.C. at 89, 602 S.E.2d at 794 (“In making this determination, we must examine the alleged impropriety in the context of the entire record.”). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

Initially, the solicitor’s statements that there was no testimony or evidence about a fox or Appellant going back to bed were simply comments on the evidence presented during trial in response to Appellant’s counsel’s argument. It was not a comment on Appellant’s constitutional right to remain silent and not present a defense. Indeed, contrary to the repeated assertion that the solicitor made a “direct comment” on his right to not testify, no such comment appears. (See Brief of Appellant, p.39-p.41; Petition for Rehearing, p.19). Unquestionably, the solicitor was permitted to comment on the evidence adduced during trial and the inferences to be drawn from it. *See State v. Pitts*, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) (“The solicitor had a perfect

right to state his version of the testimony and to comment on the weight that should be given to such.”). Looking to the context in which the remarks were made, the solicitor did not state Appellant failed to present any evidence, did not claim Appellant did not present a defense, did not shift the burden of proof onto Appellant, and did not suggest to the jury an adverse inference should be drawn against Appellant based on his failure to present evidence or failure to testify. *See Johnson v. State*, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) (“In context, the comment was simply a statement of the evidence which was before the jury, rather than a comment on Johnson’s failure to testify.”).

Viewed in the proper context, the solicitor’s remarks were designed to comment on Appellant’s counsel’s false promises from his opening statement, the evidence presented at trial, and the absence of evidence regarding a fox, and did not improperly shift the burden of proof or suggest Appellant’s guilt could be inferred from his failure to testify or present a defense. *See State v. Shuler*, 353 S.C. 176, 187, 577 S.E.2d 438, 443-44 (2003) (“In any event, the solicitor’s statement did not refer to appellant’s decision to remain silent. Instead, the statement was a comment on the evidence which had been presented[.]”). The remarks merely clarified for the jury what they should and should not properly consider during their deliberations. Therefore, viewing the remarks in the appropriate context consistent with the natural inferences to be drawn from them, the solicitor’s closing argument did not infringe upon Appellant’s constitutional rights or render his trial fundamentally unfair.

In addition, Appellant’s opening statement and closing argument injected the extraneous considerations of whether Appellant was shooting at a fox and whether he had actually gone back to bed between the time of the shooting and the arrival of the police. As a result, the solicitor was fully permitted to comment on the lack of evidence regarding these issues. *See*

State v. Ellenberg, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) (“Once the defendant opens the door, the solicitor’s invited response is appropriate so long as it does not unfairly prejudice the defendant.”); *see also Patterson*, 324 S.C. at 17, 482 S.E.2d at 766 (finding solicitor’s closing argument comments were an invited response and did not render the trial fundamentally unfair); *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012) (finding solicitor’s statement that there was no evidence the victim was a prostitute was a comment on the evidence, or lack thereof, presented during trial, and did not improperly shift the burden of proof or suggest that the defendant’s guilt could be inferred from his failure to testify or present a defense).

Finally, even if the solicitor’s remarks during his closing argument were somehow improper, Appellant did not suffer any prejudice and his trial was not rendered fundamentally unfair by the comments. *See Weaver*, 361 S.C. at 89, 602 S.E.2d at 794 (“[A]lthough it is improper for the solicitor to indirectly comment on a defendant’s failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one.”). Appellant’s counsel first claimed there would be evidence about Appellant shooting at a fox and going back to bed in his opening statement. He then repeatedly implied the existence of such evidence during examination of other witnesses. The solicitor merely responded to the argument. The comments, especially in light of the substantially consistent testimony from multiple witnesses, were entirely harmless and did not render the trial fundamentally unfair. Finally, the trial court thoroughly charged the jury on the burden of proof and Appellant’s presumption of innocence. It also specifically charged that Appellant’s failure to testify could not be considered. (R.p.1612-p.1613). Accordingly, the trial court did not abuse its discretion in denying Appellant’s motion for a mistrial. The comments

did not unfairly shift the burden and Appellant was not prejudiced by the comments so as to receive an unfair trial.

This Court appropriately affirmed and adopted the lower court's conclusions as to Appellant's failure to carry his burden of proving his claim of immunity by the preponderance of the evidence, and it appropriately affirmed the trial court's denial of Appellant's motion for a mistrial in regard to the solicitor's closing argument. There is no basis for granting rehearing.

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court deny Appellant's second petition for rehearing and let stand the substituted and refiled unpublished opinion affirming Appellant's convictions and sentence.


Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

S.R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit

BY:


J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
October 25, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
William P. Keesley, Circuit Court Judge (Immunity Hearing)
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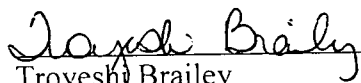
JOE ROSS WORLEY,APPELLANT.

PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Return To 2nd Petition For Rehearing*, dated October 25, 2018, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

Wanda H. Carter, Esquire
Deputy Chief Appellate Defender
Office of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 25th day of October, 2018.


Troyeshi Brailey
Legal Coordinator

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

October 25, 2018

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SC Court of Appeals

Wanda H. Carter, Esquire
Deputy Chief Appellate Defender
Office of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

State v. Joe Ross Worley
Appellate Case No. 2014-001497

Dear Ms. Carter:

I am enclosing one (1) copy of the Return to 2nd Petition for Rehearing in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

JBA/tb
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Services