STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH LAMONT ROBINSON, JR.

APPELLANT

APPELLATE CASE NO. 2018-001269

INITIAL REPLY BRIEF OF APPELLANT

JOHN H. BLUME
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14850
(607) 255-1030

MEGAN S. EHRLICH
Charleston County Public Defender Office
101 Meeting Street, 5th Floor
Charleston, S.C. 29401
(843) 958-1850

SUSAN B. HACKETT
Appellate Defender
SCCID - Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEYS FOR APPELLANT

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ARGUMENT IN REPLY

I. The trial court erred by refusing to remand jurisdiction over Appellant to the Family Court in light of substantial new evidence meriting reconstruction of the transfer order.

The State repeatedly asserts that the Family Court did not rely on Simmons' false statement to law enforcement that Kenneth was the actual shooter in its decision to transfer jurisdiction to the Court of General Sessions. *See, e.g.,* Resp. Br. at 12, 15, 16, 19. This is demonstrably false. The Family Court Judge repeatedly relied upon the fact that Kenneth and Simmons were blaming each other, or in the State's words, "pointing the fingers at each other," (Resp. Br. at 15), as the basis for transferring jurisdiction. The block quote in the State's brief from the Family Court's order clearly states: a) the "juvenile" (Kenneth) denies he did the shooting; b) an adult co-defendant (Simmons) implicates the "juvenile as the shooter;" and, c) "[u]nder these circumstances, it would be desirable for the trial of all the Defendants to take place in one court." Resp. Br. at 15. In sum, it was the perceived and materially inaccurate ambiguity as to who fired the fatal shots that was the crux of the Family Court's transfer order.

Thus, when that ambiguity was resolved, by Simmons' own admission that he was the actual shooter, Kenneth's attorneys moved to remand the matter back to the Family Court. Trial Tr. 142-144. The trial judge refused to do so. As is set forth in detail in Appellant's Opening Brief, this was an abuse of discretion. Once evidence came to light establishing beyond all doubt that Kenneth (the lone juvenile charged in the case) did not fire the fatal shots, a critical fact that was hotly contested at the waiver hearing, the appropriate course of action was to remand the matter back to the Family Court to reconsider the appropriateness of retaining jurisdiction there.[1]

[1] As set forth in Appellant's Opening Brief at p. 21, the *Kent v. United States*, 383 U.S. 541, 566-67 (1966) factor relied upon in the main by the Family Court in Kenneth's case – the desirability of trying all defendants in one venue – in many cases, including this one, penalizes juveniles

It was especially appropriate in this matter given the overall strength of the case establishing Kenneth's amenability to rehabilitation, maturity and growth while at DJJ. *See* App. Br. at 13-15.

For these reasons, as well as for those set forth in Appellant's Opening Brief, this Court should vacate and remand for a new transfer hearing.

II. The trial court erred in permitting the State to introduce inadmissible gang-related evidence throughout the entire trial, including the improper opinion testimony of a lay witness.

A. ERROR PRESERVATION

On appeal, the State correctly notes Appellant "argued that the State relied on inadmissible hearsay in order to introduce evidence of the gang war." Resp. Br. at 22. Further, the State correctly notes that Appellant pointed to "the fact that most of the testimony made regarding murders and other shootings was not firsthand knowledge, but was brought in from witnesses informed of this information by a third party." Resp. Br. at 22. Thereafter, the State claims that "[a]lthough this might be considered hearsay evidence, during the trial the Appellant's counsel never objected during this testimony." Resp. Br. at 22. "Therefore," the State argues, "the argument was waived, and thereby is not preserved for appellate review." Resp. Br. at 22. Although it is unclear from the brief, the State appears to assert that any issue on appeal that the state presented a parade of witnesses to testify to gang activity was not preserved for appellate review because trial counsel did not object either on the basis of hearsay or contemporaneously with the testimony. The State's attempt to have this Court declare the issue procedurally barred must fail.

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with adult co-defendants and is inconsistent with the reality acknowledged by the Supreme Court of the United States that juveniles are "vulnerable to negative influences and pressures." *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

Prior to trial, defense counsel moved to exclude testimony about gang activity on multiple bases, including hearsay. R. *(motion to exclude gang testimony). During the pre-trial hearing, defense counsel noted that the state wanted to introduce "gossip" regarding the activities of alleged gang members. Trial Tr. 186, ll. 5-7. Further, defense counsel explained that the witnesses who would talk about the other shootings and the suspects in those shootings would be engaging in "speculation" based on "gossip." Trial Tr. 186, ll. 10-11. The solicitor flatly admitted he intended to rely upon hearsay when he claimed he did not "have to prove these other events by clear and convincing evidence," and would simply have to show that the witnesses believed the other events occurred. Trial Tr. 187, ll. 9-13; Trial Tr. 187, ll. 22-25. Defense counsel re-iterated her objection that the majority of the state's evidence regarding a so-called "gang war" was "inadmissible hearsay." Trial Tr. 250, ll. 22-24. Defense counsel explained the witnesses to the prior shootings could only testify as to hearsay because those witnesses were not present during those shootings. Trial Tr. 251, ll. 2-8. The trial judge even sought the assurance of the state that its evidence would not be inadmissible hearsay. Trial Tr. 252, ll. 1-5. Therefore, any contention by the State that defense counsel failed to object on the basis of hearsay is unfounded.

Admittedly, defense counsel did not object to each and every instance of the state's introduction of inadmissible evidence related to alleged gang activity. To do so would have been futile in light of the judge's ruling on the pre-trial motion and the judge's initial rulings on defense counsel's objections to this evidence. While, "[i]t is well-settled that an issue cannot be raised for the first time on appeal," because "[e]rror preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments,'" appellate courts do "not require parties to engage in futile actions in order to

preserve issues for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412-415, 529 S.E.2d 543, 546-547 (2000) (quoting *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). "Once the court rules on an objection to a line of questioning, it is not necessary that counsel repeat his objection after each question. *State v. Ross*, 272 S.C. 56, 61, 249 S.E.2d 159, 162 (1978). *See also State v. Simmons*, 423 S.C. 552, 562, 816 S.E.2d 566, 571-572 (2018) (explaining that a party is not expected "to be a jack-in-the-box" in order to preserve an objection); *State v. Higgenbottom*, 344 S.C. 11, 14 n.4, 542 S.E.2d 718, 719 n.4 (2011) (holding it would have been futile for the defendant to object when the judge had just increased his sentence); *State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (holding an issue was preserved on appeal where "the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile); *Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 45-46, 426 S.E.2d 756, 758 (1993) (holding an error preserved where "[t]he judge had a fair opportunity to rule upon the issue and did so" and explaining that "[i]t was not incumbent upon defense counsel to harass the judge by parading the issue before him again"); *State v. Banton*, 387 S.C. 412, 420, 692 S.E.2d 201, 205 (Ct. App. 2010) (holding an issue preserved despite defense counsel's failure to object to the sufficiency of a curative instruction in front of the jury where defense counsel had moved for a mistrial, which the trial judge denied, based upon the doctrine of futility); *State v. Covert*, 368 S.C. 188, 201, 628 S.E.2d 482, 489 (Ct. App. 2007) (Anderson, J., concurring) (noting that "our courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused"); *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005) (explaining "the doctrine of futility …

recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused").

The purpose of error preservation rules is not to "play a 'gotcha' game with attorneys by showcasing their alleged mistakes, at the expense of their clients." *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, J., concurring). Playing such games "ignores the fact that behind every name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests." *Id.* "[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Id.*

First, the solicitor understood the judge's pre-trial ruling on the admissibility of gang evidence to be a *final* ruling. Typically, "[a] ruling *in limine* is not a final ruling on the admissibility of evidence." *State v. Simpson*, 325 S.C. 37, 43, 479 S.E.2d 57, 60 (1997). Here, had the ruling been of a preliminary nature only and subject to change, then the solicitor would not have mentioned the evidence that may have been excluded later during his opening statement. But he did. At the outset of the solicitor's opening statement, he informed the jurors that the death of Kadena Brown was the result of collateral damage from a gang war and that the jurors would hear evidence about this supposed gang war. Specifically, in the opening line of his opening statement, the solicitor informed the jurors of his intent to present evidence of a "gang war." Trial Tr. 266, ll. 4-8. The solicitor claimed the jury would hear about "an ongoing gang war in North Charleston between two gangs, the Young Gunnas and the Loud Pack." Trial Tr. 266, ll. 5-8. According to the solicitor, there was "collateral damage" from the gang war, including "cars, homes riddled with bullets," "good people who are afraid to walk outside their homes," a neighborhood "permeated with fear," and "a civilian casualty." Trial Tr. 266, ll. 8-12.

The solicitor told the jury that the car in which Kenneth was a passenger was "full of three Young Gunnas." Trial Tr. 266, l. 25 – 267, l. 3. It was from this car that the fatal shot was fired.

Further, when the solicitor first asked a witness, Jawan Nicks, if he had "heard" of the Young Gunnas, defense counsel objected, renewing her previous grounds for the objection. Trial Tr. 440, ll. 1-3. The judge overruled the objection. Trial Tr. 440, l. 4. Shortly thereafter, the solicitor asked Nicks if he were aware of turmoil in the neighborhood, and defense counsel objected. Trial Tr. 442, l. 24 – 443, l. 1. Again, the judge overruled the objection. Trial Tr. 443, l. 2. Later, when the solicitor questioned Donald Jackson about the Young Gunnas, defense counsel objected "[f]or the remainder of the questioning." Trial Tr. 507, ll. 19-23. Yet again, the judge overruled the objection and allowed the state to delve into purported gangs and their activities. Trial Tr. 507, l. 24. Even when the solicitor questioned Richard Simmons about the alleged gang activity, defense counsel objected, and the judge overruled the objection and permitted the jury to hear the testimony. Trial Tr. 688, ll. 5-11.

Defense counsel sufficiently preserved this error for appellate review. The issue was raised to the trial judge in a pre-trial motion and ruled upon by the trial judge after hearing lengthy argument from the parties. Not only did the solicitor immediately tell the jurors in his opening statement about the alleged "gang war," but defense counsel repeatedly objected to the evidence when the solicitor elicited so-called "gang activity" in front of the jury. Counsel's failure to do so for each and every instance was rendered unnecessary by the doctrine of futility.

B. INADMISSIBLE OPINION TESTIMONY

The State argues the testimony given by Investigator Desheers "was factual" and admissible pursuant to Rule 701, SCRE. Resp. Br. at 24. According to the State, "[h]is testimony revealed the reports of shootings currently being investigated by the North Charleston

Police Department." Resp. Br. at 24. In light of Desheers membership in a gang task force, the State alleges Desheers "had direct knowledge of these crimes." Resp. Br. at 24. Citing to Rule 701, SCRE, the State appears to argue that Desheers' testimony was rationally based on his perception, was helpful to a clear understanding of his testimony or the determination of a fact in issue, and did not require special skill, knowledge, experience, or training. Resp. Br. at 24. Despite the State's best efforts on appeal, Desheer's testimony was not admissible under Rule 701, SCRE.

"Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445-446, 699 S.E.2d 169, 175 (2010). "On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." *Id.* at 446, 699 S.E.2d at 175. Recently, this Court held a coroner's testimony regarding the cause of death of an alleged victim was improper opinion testimony under Rule 701(a), SCRE. *State v. Westmoreland*, 421 S.C. 410, 420, 807 S.E.2d 701, 406 (Ct. App. 2017). The coroner's opinion regarding the cause of death "was not based on his perceptions or observations but instead was based on his review of the perceptions of others." *Id.* Thus, this Court concluded, the coroner's testimony was inadmissible. *Id.*

Desheers had no personal knowledge of the alleged gang activity about which he testified as borne out by the record. During the proffer, Desheers testified that he is required to "stay current on gang trends, including rivalries, alliances, customs, habits, that sort of thing." Trial Tr. 1424, ll. 19-22. In order to do so, he relied on what others told him. Trial Tr. 1424, l. 23 – 1425, l. 19. Desheers learns about gangs through interviews with known gang members, through

confidential informants who infiltrate a gang through drug activity, through police reports of shootings, and through social media. Trial Tr. 1424, l. 23 – 1425, l. 19. He claimed his knowledge about the Young Gunnas and Loud Pack was derived through interviews of known gang members in adversarial and cooperative settings. Trial Tr. 1426, ll. 16-25; Trial Tr. 1427, ll. 10-15. Accordingly, the State requested to qualify Desheers as an expert because the state wanted Desheers to testify as follows:

> I want to talk about his familiarity with the Young Gunnas. I want to talk about his familiarity with Loud Pack. I want to talk about his familiarity of the origin of their feud and specific incidents that brought that about. I want to talk about the dissolution of the Young Gunnas and when and why, and you know, the spinoff groups that came from it. I believe he has a specialized knowledge in that area based on his job, his training, and his experience that would be - - that would assist the trier of fact, that would assist the jurors in being educated.

Trial Tr. 1438, l. 19 - 1439, l. 3. The solicitor explained this testimony was "an expert issue." Trial Tr. 1439, l. 6. As to "the larger sort of macro picture of the gang situation in The Waylyn and the Dorchester/Terrace area," the solicitor argued Desheers had "specialized knowledge … through his - - not just his training, but through his job." Trial Tr. 1439, ll. 18-23.

Despite the trial judge's determination that Desheers was not qualified as an expert, the State persisted in revealing testimony through Desheers that only an expert could provide. For example, Desheers claimed that due to a large number of shootings, "with the detectives and the officers we kind of identified a trend as who some of the - - some of the people participating in these crimes, whether victims or suspects, and linked them back to some of the Loud Pack members, as well as some of the – some of the Gunnas." Trial Tr. 1449, l. 24 - 1450, l. 4. Most revealing, when the solicitor asked Desheers about a shooting on May 9, 2015, Desheers responded that he was familiar with it because he had "reviewed this report and the information in it." Trial Tr. 1451, ll. 10-12.

Desheers lacked any personal knowledge of the matters to which he testified. None of Desheers' testimony was based upon his own perceptions or observations. Rather, the entirety of his testimony involving alleged gang activity was based upon what others told him or what he read in police reports drafted by others. At trial, the State recognized that this type of testimony would require expert qualification because it was allegedly based upon "specialized knowledge" that Desheers acquired through his training and experience. Yet, despite the judge's refusal to qualify Desheers as an expert, the State presented the improper testimony anyway. On appeal, the State tries to defend the presentation of inadmissible evidence by citing to Rule 701, SCRE. However, the Rule offers no protection for the State because Desheers testified to matters outside of his personal knowledge that were based upon hearsay and the observations of others.

C. NOT HARMLESS BEYOND A REASONABLE DOUBT

In its brief, the State argued that "[e]ven if the inclusion of the evidence regarding gang activity was done in error it must be considered harmless." Resp. Br. at 25. Essentially, the State argued that the gang-related evidence did not contribute to the verdict due to other evidence in the record. Resp. Br. at 25-27.

When determining whether an evidentiary error was harmless beyond a reasonable doubt, courts examine not only the significance of the evidentiary error, but also how the improperly admitted evidence affected other aspects of the trial with particular emphasis on how the evidence was used by the prosecution in its closing argument. *See Hyman v. Aiken*, 824 F.2d 1405, 140 (4th Cir. 1987) (concluding that a judge's erroneous jury instruction involving a presumption of proof was not harmless and explaining that "[t]he importance of the malice presumptions is emphasized by the solicitor's reliance on them in his closing argument"); *State v. Ellis*, 345 S.C. 178, 547 S.E.2d 490, 491 (2001) (holding the trial court's erroneous

qualification of a police officer as an expert "was compounded by the solicitor's closing argument," in which he referred to the "'scientific testimony of [the officer], 'an expert qualified by the judge'"); *State v. Huckabee*, 419 S.C. 414, 431, 798 S.E.2d 584, 593 (Ct. App. 2017) (concluding "the prosecutor compounded the prejudice" of the erroneous admitted profiling testimony in his closing argument); *State v. Jackson*, 410 S.C. 584, 608, 765 S.E.2d 841, 854 (Ct. App. 2014) (finding the admission of a non-testifying co-defendant's statement was not harmless where "the State emphasized the statements throughout trial, especially during its closing argument").

Given the emphasis the State placed on depicting Kenneth as a gang member and this crime as the alleged product of an ongoing war, the admission of the incompetent, often rank, hearsay, this argument must be rejected. As will be detailed below, the solicitor's argument for the introduction of the evidence, the solicitor's reliance on the evidence in his opening statement and closing argument, and the State's brief on appeal prevent the State from meeting its burden of proving beyond a reasonable doubt that the error did not contribute to the verdict.

When arguing for introduction of the gang evidence, the solicitor argued the evidence was "extremely relevant." Trial Tr. 182 ll. 1-2. According to the solicitor, it was not "possible to explain to the jury why all this took place without understanding the background and the relationship to gang involvement." Trial Tr. 183, ll. 7-10. The solicitor argued that this evidence was necessary to "combat" the evidence that Kenneth was merely present at the shooting. Trial Tr. 184, ll. 3-12. According to the solicitor, "when the jury understands that he's a gang member and that this is part of an ongoing battle, then it's no longer mere presence." Trial Tr. 184, ll. 6-8. According to the solicitor, the criminal offenses against Kenneth were the result of "gang mentality." Trial Tr. 200, l. 15. He asserted that the jury had to know "what's going on" and

that keeping out the gang evidence would "deny the jury the ability to know what's going on and it's their community and to hold the people responsible." Trial Tr. 201, ll. 2-8. The solicitor explained that without the gang evidence, then Kenneth looked like "an innocent fifteen year old who [got] swept into a car with older men" and one of the older men shot someone. Trial Tr. 201, ll. 9-21. However, the "gang information" would prove, in the solicitor's view, that Kenneth was more involved. Trial. Tr. 201, ll. 9-21.

As discussed *supra*, the solicitor's opening statement centered on the "gang war" evidence that he intended to present. Trial Tr. 266, ll. 4-12; Trial Tr. 266, l. 25 – 267, l. 3. Not surprisingly, the solicitor's closing argument used the "gang war" as a central theme as well. The solicitor noted there had "been a lot of talk about gangs in this case." Trial Tr. 1567, ll. 4-5. According to the solicitor, its weak gang evidence showed the jury that Kenneth knew what was going on – "He knows who, what, when, where. This isn't happenstance. This is not random." Trial Tr. 1567, ll. 8-13. After arguing the gang evidence showed "motive and intent," the solicitor claimed the gang evidence showed "a mentality." Trial Tr. 1567, ll. 14-17. He compared the "gang mentality" to a feeding frenzy of three or four sharks. Trial Tr. 1567, ll. 17-22. Quoting Mickey Mantle, the solicitor told the jurors that a gang was where a coward went to hide and that the gang in this case took justice into their hand owns, which was something "we cannot tolerate as a society." Trial Tr. 1568, ll. 7-13. The solicitor claimed the shooting of Brown by Simmons was about Kenneth, "his motive, his house, his gang, his family." Trial Tr. 1571, ll. 10-11.

Regarding two other shootings, evidence of which was introduced by the State as part of the "gang war," the solicitor admitted that he had no proof that Kenneth was involved in those shootings, but he claimed Kenneth knew about them. Trial Tr. 1573, ll. 10-17. Thereafter, the

solicitor painstakingly detailed every piece of evidence presented about the prior shootings and alleged prior acts committed by the gang. Trial Tr. 1573, l. 18 – 1575, l. 20. According to the solicitor, "[t]his is all about a conflict with Gunnas and Loud Pack." Trial Tr. 1582, l. 9. The case was all about "this conflict, this ongoing feud." Trial Tr. 1583, ll. 4-12.

On appeal, the State continued to rely heavily upon the gang evidence to convince this Court to affirm Kenneth's convictions and sentences. In fact, the State's opening line of its "statement of the case" explained that "[i]n order for the court to get a complete understanding of the motives and reasons for the actual incident, a history of the gang war within this North Charleston community must be explained." Resp. Br. at 1. Thereafter, the State meticulously described the evidence presented of an alleged gang war. Resp. Br. at 1-2.

The State's claim on appeal that the gang evidence had no effect on the verdict is refuted by the State's own heavy reliance on the gang evidence during the pre-trial hearing, the trial, and on appeal. As the solicitor noted during the pre-trial hearing, without the gang evidence, Kenneth, was a fifteen-year old child, who was swept up in the vengeance of older men and was merely present at the scene of a shooting. The gang evidence allowed the solicitor to argue that Kenneth acted in conformity with the character of a gang member on the day Brown was shot. It was undisputed that Kenneth was not the shooter, but he was present at the time of the shooting. Evidence was presented that Kenneth informed Simmons that he was not shooting at the person who had shot at them earlier. The State, at trial and on appeal, used the improperly admitted gang evidence to paint a picture of Kenneth as a gang member out for "street justice." Had the evidence not been so critical to the State obtaining guilty verdicts, then the solicitor would not have argued the evidence was necessary for its case and the State would not have relied upon it

so heavily in its brief on appeal. The erroneously admitted evidence of gang activity was not harmless beyond a reasonable doubt as it had an effect on the jury's verdict.

III. The trial court erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter where evidence in the record required the instruction.

A. THE STATE'S INCONSISTENT POSITIONS

At Kenneth's trial and on appeal, the State asserted that the facts underlying Kenneth's conviction for murder did not support the elements of voluntary manslaughter. At trial, the prosecutor claimed, "there was absolutely zero evidence on the record that [Simmons] was overcome by emotion or anger or any other thing - - anything else that caused him to lose his cool." Tr. 1510, ll. 7-13. The State asserted "[t]here [was] a total lack of evidence on the record that would support a voluntary charge as to Mr. Simmons. … And, therefore, any intent of his transfer to [Kenneth] would not satisfy a voluntary manslaughter." Tr. 1510, ll. 14-18. On appeal, the State argued the offense "did not include all of the elements of voluntary manslaughter." Resp. Br. at 28. Specifically, the State asserted on appeal that "Mr. Simmons had plenty of time to 'cool off' prior to the shooting of Ms. Brown." Resp. Br. at 28. According to the State, the evidence did not show "something that is sudden." Resp. Br. at 28.

Despite the State's contention at Kenneth's trial and currently during Kenneth's appeal, the State offered to allow Kenneth to plead guilty to the lesser-included offense of voluntary manslaughter prior to trial. Furthermore, the State represented to the circuit court that the facts underlying the offense supported a voluntary manslaughter conviction when Kenneth's co-defendant, Keon Anderson, entered his guilty plea. On November 8, 2018, E. Culver Kidd, IV, the same prosecutor who represented the State during Kenneth's trial, presented Anderson to the Honorable Roger M. Young for a guilty plea to voluntary manslaughter. Anderson Sentencing Tr. 1. The prosecutor presented Judge Young with a factual basis for the guilty plea, which the

prosecutor assured the judge supported the offense of voluntary manslaughter. Anderson Sentencing Tr. 10, l. 4 – 11, l. 21. Specifically, the prosecutor informed the judge that the voluntary manslaughter charge was the result of a car chase in which Kenneth, Anderson, and Simmons were chasing a particular car, but found the wrong car and Simmons shot the wrong car, killing the deceased. Tr. 11, ll. 1-6.

According to the State, a conviction for voluntary manslaughter and a "15-year negotiated sentence account[ed] for Mr. Anderson's culpability and his degree of acceptance of responsibility." Anderson Sentencing Tr. 11, ll. 18-20. After hearing the State's presentation, Judge Young found there was "a substantial factual basis for the plea." Anderson Sentencing Tr. 12, ll. 8-9.

B. ETHICAL RESPONSIBILITIES OF PROSECUTORS

In the circuit court and on appeal, the State ignored the inconsistent positions put forward by the State on the issue of voluntary manslaughter. Not only did the State offer to allow Kenneth to plead guilty to voluntary manslaughter before the trial, it then permitted his co-defendant to plead guilty to that charge after Kenneth's trial was completed. The State's position during Anderson's guilty plea must not be ignored. The prosecutor assured the trial judge that the factual basis supported a conviction for voluntary manslaughter. Presumably, the prosecutor would not knowingly make a false statement of fact or law to the judge. *See* Rule 3.3, RPC, Rule 407, SCACR. Additionally, the prosecutor would refrain, as he must, "from prosecuting a charge that the prosecutor knows is not supported by probable cause." *See* Rule 3.8(a), RPC, Rule 407, SCACR.

The Iowa Supreme Court addressed a complaint that a city prosecutor violated his ethical violations by allowing defendants to plead guilty to charges for which no probable cause existed.

Iowa Supreme Court Attorney Disciplinary Bd v. Howe, 706 N.W. 360 (Iowa 2005). For years, the city prosecutor successfully moved to amend 174 citations that originally charged violations of a city ordinance to allege violations of the cowl-lamp statute. *Id.* at 367. The cowl-lamp statute provided that a car could not be equipped with more than two side cowl or fender lamps. *Id.* Cars had not been equipped with such lamps for many years prior to the plea bargains at issue in the case. *Id.* "The amendments were made as part of plea bargains with the defendants" to avoid an adverse impact on the defendants' license or auto insurance. *Id.*

The city prosecutor "admitted he knew there was no probable cause to believe this offense had been committed by the 174 persons charged with violating this law." *Id.* There was no dispute that the cowl-lamp charges were not supported by probable cause. *Id.* at 368. The Iowa Supreme Court explained that "[t]he fact that the *original* traffic citations may have been supported by probable cause is beside the point because [the city prosecutor] is not being disciplined for instituting the *original* charges." *Id.* (emphasis in original). "His ethical violation arises from the *amended* charges alleging cowl-lamp violations, which clearly lacked probable-cause support." *Id.* (emphasis in original). The Court explained that it was also irrelevant that the rules of criminal procedure permitted plea bargains to lesser or related charges because the ethical violation was filing an amended charge that was not supported by probable cause. *Id.* Authorizing guilty pleas to lesser-included offenses did not nullify the probable cause requirement of the ethics rules. *Id.*

Additionally, the Iowa Supreme Court noted an ethics decision issued by its Board of Professional Ethics and Conduct that concluded it was improper for a prosecuting lawyer and for a defendant's lawyer to enter into a plea agreement under which a prosecutor files charges that are not supported by underlying facts. *Id.* at 369. The Court rejected the prosecutor's argument

that the ethical requirement was intended to ensure a prosecutor does not use improper or overreaching methods to obtain a conviction. *Id.* at 370. The Court accepted the prosecutor's proposition that there was no overreaching in the 174 cases because the defendants agreed to the filing of the charges; however, the Court explained "the improper use of prosecutorial discretion is just as possible in plea bargaining as it is in the initial charging decision." *Id.* "Filing charges that are blatantly bogus – even when defendants are willing to plead guilty to them – does not promote confidence in the integrity of the judicial process." *Id.* at 371. Thus, the ethical rules provided no exception to the probable-cause requirement for charges resulting from plea bargains. *Id.* The Court made clear that "prosecutors have the authority to negotiate plea bargains, and may ethically reduce a charge in exchange for a defendant's guilty plea to the reduced charge. The only restriction placed on this process by [the ethical rules] is the requirement that any charge – original or reduced – be supported by probable cause." *Id. See also Iowa Supreme Court Attorney Disciplinary Bd. v. Zenor*, 707 N.W.2d 176 (Iowa 2005); *Iowa Supreme Court Attorney Disciplinary Bd. v. Borth*, 728 N.W. 2d 205 (Iowa 2007).

Prosecutors are ministers of justice and not merely advocates. *State v. Quattlebaum*, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000) (citing Rule 3.8, cmt. RPC, Rule 407, SCACR). "A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics." *Id.* The prosecutor's duty is to see that justice is done. *In re Richland County Magistrate*, 389 S.C. 408, 411, 699 S.E.2d 161, 163 (2010) (internal quotation omitted). "He must see that no conviction takes place except in strict conformity with the law, and that the accused is not deprived of any constitutional rights or privileges." *Id.* (internal quotation omitted). "The South Carolina Constitution, South Carolina statutes and case law place the unfettered discretion to prosecute solely in the prosecutor's hands." *Id.* Thus, "[t]he importance

to the public as well as to individuals suspected or accused of crimes, that these discretionary functions be exercised with the highest degree of integrity and impartiality, and with the appearance thereof, cannot be easily overstated." *Id.* at 411-412, 699 S.E.2d at 163 (internal quotations omitted).

Here, the prosecutor offered to allow Kenneth to enter a guilty plea to voluntary manslaughter prior to trial. Thus, the prosecutor believed the facts supported the lesser-included offense of voluntary manslaughter in order to offer such a plea agreement – ethically. Additionally, the prosecutor represented to Judge Young that the facts supported a conviction for voluntary manslaughter for Keon Anderson. Without question, Anderson's criminal liability was the same as Kenneth's. All agreed that Simmons was the actual shooter. If Anderson and Kenneth were guilty at all, it was only through the doctrine of accomplice liability. The prosecutor's representation was made to the judge accompanied by the prosecutor's duty of candor to the tribunal and his special responsibilities as a prosecutor. In light of the prosecutor's assurances to the judge that the factual basis for Anderson's guilty plea supported a conviction for voluntary manslaughter, the State's position on appeal to the contrary is untenable.

V. Appellant's sentence of fifty years in prison, given that equally or more culpable adult co-defendants received significantly lesser sentences, constituted a tax on the exercise of his constitutional rights to trial and direct appeal, was disproportionate and based on treating a hallmark feature of youth as an aggravating circumstance.

The State argues on several occasions that the trial and appellate tax component of this issue is not preserved for appeal because the conditions of the plea bargaining was never placed on the record. *See, e.g.*, Resp. Br. at 36. This argument is refuted by the record. Trial counsel filed a motion for reconsideration immediately after the judge imposed the sentence raising the trial and appellate tax issue (R. * Motion to Reconsider), which was denied by the judge. R. * (Order denying reconsideration). Furthermore, after Simmons and Anderson were sentenced to

thirty and fifteen years respectively, Kenneth was authorized by this Court to file a motion for new sentencing hearing based on after-discovered evidence. R. * (Motion for new sentencing). After a hearing, at which the negotiations and sentences were made part of the record, the motion was denied. R. * (Order denying new sentencing). Thus, the issue is fully preserved and properly before the Court.

As detailed in Kenneth's Opening Brief, at the hearing the State effectively admitted that the sentence was based on Kenneth's exercise of his constitutional rights repeatedly arguing that he had failed to accept responsibility for his criminal conduct (which in context can only mean he refused to plead guilty) and conversely arguing that the disparity was justified because Simmons and Anderson "both cooperated." App. Br. at 62-63. The State's argument on appeal is even more explicit in this regard maintaining that the sentence was justified because "Appellant was the only individual who decided to exercise his right to a jury trial." Resp. Br. at 40.

The State also asserts that the sentence was warranted because Kenneth had a prior juvenile adjudication for ABHAN and attempted armed robbery. Resp. Br. at 40. That is true, but it does not change several facts which support Kenneth's arguments that he was penalized for going to trial and pursing this appeal. First, the State knew of the prior adjudications at the time it made the offer of twenty-three years if he pled guilty to voluntary manslaughter and thirty years if he abandoned the right to bring an appeal. No new negative information came to light after the offers were made and rejected. Second, the adult co-defendant and trigger-man (who Kenneth implored not to shoot), who was sentenced on the State's recommendation to the mandatory-minimum sentence of thirty years, also had a prior record, having been convicted of Assault and Battery 3rd and unlawful carrying of a pistol, and adult co-defendant Anderson,

whose role in this offense was similar to Kenneth's also had a prior conviction for unlawful carrying of a pistol. Thus, the only fair reading of the record as a whole is that fifteen-year-old Kenneth Robinson was sentenced to effectively die in prison because he decided to do what the Constitution authorizes him to do, go to trial and file an appeal.

CONCLUSION

Regarding Issue I, Appellant respectfully requests this Court vacate the order transferring jurisdiction and remand for a new transfer hearing in order to decide whether to retain or waive Kenneth to the Court of General Sessions based on a materially accurate record. Regarding Issues II, III, and IV, Appellant respectfully requests this Court reverse his convictions and remand for a new trial. Finally, regarding Issue V, Appellant respectfully requests this Court vacate his fifty-year sentence and remand for a new sentencing hearing.

s/John H. Blume
John H. Blume
Cornell Law School

s/Megan S. Ehrlich
Megan S. Ehrlich
Charleston County Public Defender Office

s/Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEYS FOR APPELLANT

This 8th day of January, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH LAMONT ROBINSON, JR.

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon: Tommy Evans, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is tommyevansjr@scag.gov; Meredith D. McPhail, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is meredith@adamsbischoff.com; Chris Adams, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is chris@adamsbischoff.com; and a copy of the Initial Reply Brief of Appellant have been served on Kenneth Lamont Robinson, #376714, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 8th day of January, 2021.

s/Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT