No. 18-

IN THE

Supreme Court of the United States

MICHAEL VERNON BEATY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Does the South Carolina Supreme Court's standard for determining harmless constitutional error depart from this Court's mandates in *Chapman v. California*, 386 U.S. 18 (1967)?

II.

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?

LIST OF PARTIES AND CORPORATE DISCLOSURE

Michael Beaty is a natural person. The respondent is the State of South Carolina. No corporations are involved in this petition.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Page

Page

Page

Statutes and Other Authorities

Page

Michael Beaty respectfully petitions this Court for a writ of *certiorari* to review the judgment of the South Carolina Supreme Court.

OPINION BELOW

The South Carolina Supreme Court opinion affirming Michael Beaty's conviction and sentence is published, *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018), and reprinted in the Appendix (hereinafter "App.") at 36a-61a. The South Carolina Supreme Court's order denying the petition for rehearing is unreported and reprinted at App. 84a-85a.[1]

JURISDICTION

The South Carolina Supreme Court affirmed Michael Beaty's conviction and sentence on April 25, 2018, App. 36a-61a, and denied the timely petition for rehearing on May 25, 2018, App. 84a-85a. The final order and Remittitur were filed in the trial court on May 31, 2018. App. 36a-61a; 86a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, applicable to the State through the Fourteenth Amendment, provides, "No person shall be . . . deprived of life, liberty, or property, without due process of law."

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1. The complete South Carolina Supreme Court record in this case can be found at https://ctrack.sccourts.org/public/caseView.do?csIID=59167 (last viewed August 26, 2018).

The Fourteenth Amendment to the United States Constitution provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The South Carolina Supreme Court summarized the facts and hotly contested issues presented by the parties to the jurors who sat in judgment of Michael Beaty:

> [Michael Beaty] and [Emily Anna ("EA") Asbill] attended an evening party in their hometown of Clinton. They decided to leave the party between 9:00 pm and 10:00 pm and agreed to give their friend Will Alexander a ride home. [Beaty] drove the vehicle, [Asbill] sat in the front passenger seat, and Alexander sat in the backseat. At approximately 11:00 pm, [Beaty] rang the doorbell at his parents' home and asked his stepfather for help. When Appellant's stepfather approached the car, he found [Asbill] unconscious on the front passenger side floorboard and called 911. EMS arrived shortly thereafter and found [Asbill] sitting on the floorboard with her head laid back on the passenger seat. She was not breathing and did not have a pulse. [Beaty's] shirt was wrapped around [Asbill's] right arm. [Asbill] was found to have severe "road rash" on her right and left arms and bruising to her neck. EMS transported [Asbill] to the hospital, where she was pronounced dead. An autopsy revealed the cause of [Asbill's] death was asphyxia due to strangulation.

At trial, the State introduced several of [Beaty's] statements to law enforcement into evidence. These statements varied materially. [Beaty] initially suggested [Asbill] died of a self-inflicted cutting injury. Following law enforcement's receipt of the autopsy results, [Beaty] voluntarily returned to the police station and repeated his earlier version of events. However, in this statement, [Beaty] stated he had to undo [Asbill's] seatbelt when he realized she was unconscious after arriving at his parents' home. When [Beaty] was informed of the autopsy results, which showed [Asbill] had been strangled and had "road rash," [Beaty] gave a written statement explaining he and [Asbill] had argued during the car ride, [Asbill] had opened the car door to jump out, and he had grabbed her shirt to pull her back into the car.

At trial, the State and [Beaty] presented expert witnesses to support their theories as to the events leading up to [Asbill's] death. The State's theory was that [Beaty] strangled [Asbill] with a USB cord after a fight during which she tried to jump out of the moving car. [Beaty's] theory was that when [Asbill] tried to jump out of the moving car, he held her in by her tank top, which caused the ligature marks on her neck and rendered her unconscious, and that once he pulled her back into the car, she succumbed to positional asphyxiation due to the awkward position she assumed on the floorboard.

> The pathologist who conducted the autopsy was called by the State and testified the ligature marks on [Asbill's] neck were visible on the front and sides of her neck but not on the back of her neck. The pathologist identified a USB cord found in the car as consistent with the ligature marks and the abrasion on [Asbill's] neck. DNA analysis of the USB cord showed [Asbill] DNA on the middle of the cord. The cord's ends had a mixture of at least two individuals' DNA, with [Asbill] being the major contributor and [Beaty] being the minor contributor.
>
> A forensic pathologist also testified for [Beaty] and stated the USB cord did not cause the injuries to [Asbill's] neck and opined positional asphyxiation played a role in [Asbill's] death. A mechanical engineer testified for [Beaty] and stated the ligature marks on [Asbill's] neck could have been caused by someone holding her up by her tank top as she hung out of the car and that both [Asbill's] abrasions and her blood found on the outside of the car were consistent with this scenario.
>
> [Beaty] was convicted of murder and received a life sentence.

Beaty, 423 S.C. at 29-31, 813 S.E.2d at 504.

WHY THE PETITION SHOULD BE GRANTED

I.

The South Carolina Supreme Court's standard for determining harmless constitutional error departs from this Court's mandates in *Chapman v. California*, 386 U.S. 18 (1967).

After swearing the jurors, the trial judge instructed:

> This is a real trial, which is a fundamental part of our democracy, and it is a search for the truth in an effort to make sure that justice is done. In searching for the truth and ensuring that justice is done is often slow, deliberative, repetitive.

Record on Appeal (hereinafter "R.") at 57. The trial judge also instructed that the attorneys for the parties "are officers of this court who are sworn to uphold the integrity of the fairness of our judicial system and to help you as jurors in your search for the truth." R. at 58. The trial judge further instructed, "[Y]our purpose is to determine the facts of this case" and explained the components of a jury trial. R. at 59. The trial judge then instructed, "[I]n determining what the true facts are in this case, you must decide what testimony of a witness is believable." R. at 63. The opening charge did not explain circumstantial evidence or reasonable doubt. At the conclusion of the opening instruction, the trial judge offered the parties an opportunity to object, and Mr. Beaty requested a sidebar and objected, citing *State v. Aleksey*, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000)

("Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'"). R. at 64, 84-86. *See Cage v. Louisiana*, 498 U.S. 39 (1990) (held that the jury instruction in that case was contrary to the "beyond a reasonable doubt" requirement articulated in *In Re Winship*, 397 U.S. 358 (1970) (holding that the accused is protected against conviction under the Fourteenth Amendment except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged)). Mr. Beaty further explained, "[T]he objection that we made at the bench had to do with Your Honor discussing search for the truth" and telling the juror to find the "true facts" and reach a "just verdict." The trial judge acknowledged the instruction as "search for the truth and ensure justice." Counsel argued, "[A] reasonable juror would take [those remarks] as a jury instruction" explaining the jury's mission as "seeking the truth." Counsel pointed out *Aleksey* disfavors such an instruction and argued prejudice occurred when the Solicitor, during the State's opening statement, informed the jurors there would be "two competing theories and the jurors had to decide which one to believe. Basically that they had to pick which one was the most probable, the most believable, or in other words, which was the truth in the case." R. 77-78. Counsel noted, "[W]e feel at this point the jurors are under the impression that they have a duty to seek the truth, to find what the true facts are, . . ." R. at 86. But that is not the law in South Carolina.

Counsel noted, the trial judge's "very strong instruction that [the jurors] have to accept the law as" the trial judge instructs it, meaning the jurors "will be sitting

there through all this [trial] testimony believing they have to seek the truth." R. at 86. Although acknowledging the instruction is "disfavored," the Solicitor argued, "[I]t's not particularly characterized as reversible error either." The State contended the "disfavored" instruction "does comport with what our justice system is about, which is finding – finding a verdict which speaks the truth." R. at 86. The trial judge overruled the objection and denied Mr. Beaty's request for a curative instruction. R. at 87.

After four days of trial where the jurors heard competing theories, the Solicitor began his closing argument by placing a photograph of Ms. Asbill on the large screen and reminding the jurors, "This is the girl that was born in this county, grew up here, lived her life here over in Clinton here in Laurens County." R. at 761. The prosecution continued to define the trial just as it had done during opening statements–that the jurors had to choose between two competing hypotheses. After attacking the defense as "ridiculous theories," R. at 798, the Solicitor argued:

> The defense of accidental strangulation, the defense of positional asphyxiation, defies commonsense, and what they ask you to do is check you commonsense at the door and come back with a not guilty verdict. But there is a reasonable explanation for [what] happened. There is a very reasonable explanation for why this smiling girl, EA Asbill, became this, lying in a bed, not breathing, gone from this world.

R. at 799-800. The Solicitor then argued, "One of these theories is reasonable and it passes the common sense

test. One of these reasons – theories is not." R. at 803. The Solicitor also embraced the "disfavored" instruction when he argued:

> And when you're able to do that and really filter everything through that filter of commonsense there's going to be one verdict that speaks the truth.
>
> Now, that's what verdict means, folks. It's two Latin words, verus dictum [sic], that literally the word means. To speak the truth – or to speak truth. And we're confident that you're [sic] verdict will speak the truth at the end of this case, that Michael Beaty is guilty of murder.

R. at 752. The Solicitor called for the jurors "to go back in that jury room, reason together as a group, and come out and speak the consciousness – you're the consciousness of the community as the jury, and speak the truth. R. at 783. The Solicitor implored the jurors to seek the truth that would bring justice for Ms. Asbill's family by finding Michael Beaty guilty of murder:

> This family was going to be celebrating her 21st birthday this coming Tuesday, February 3rd. But instead of now celebrating with her we go into a cemetery to remember her. Never again to go and have – Amanda, her sister, to be setting up a get-together for her 21st birthday with the girls. Her dad, Ashley, should be able to give her a hug on that day. Her momma should be able to take her to lunch and have a good time. Take her shopping. Instead of

> those things on Tuesday they'll be going to the graveyard with a tombstone. Malice, hatred, ill-will. You'll have an opportunity when you go back to that jury room to deliberate, speak as one mind because of the evidence you have using your good common sense and speak with one voice to Michael Beaty. Time's up on him.

R. at 804.

After closing arguments, Mr. Beaty reminded the trial judge about his "objection to the opening charge" and pointed out the prosecution "actually incorporated that language and used it in their argument." Counsel argued the Solicitor incorporating that language into the closing arguments "adds to the prejudice that resulted from that opening instruction." R. at 828. Mr. Beaty moved for a new trial because "[t]he Court erred by instructing the jurors to search for the truth and find the 'true facts.'" His written motion reminded the trial judge, "In his closing argument, the Solicitor parroted this language and asked the jurors to render a verdict that speaks the truth." New Trial Motion, R. 973-80.

The South Carolina Supreme Court issued its first opinion in this case on December 29, 2016. App. at 1a-12a. On January 9, 2017, Mr. Beaty petitioned for rehearing. App. 13a-31a. By order dated March 24, 2017, amended on March 28, 2017, the lower court granted Mr. Beaty's petition and convened an oral argument on June 15, 2017. App. at 31a-35a. On April 25, 2018, the South Carolina Supreme Court reissued its opinion. Although making stylistic changes to the section captioned "Trial Judge's Opening Remarks," the substance of the opinion remained the same. App. at 41a-44a.

In both opinions, the South Carolina Supreme Court agreed that the trial judge, by "use of terms 'search for the truth,' 'true facts,' and 'just verdict,'" ignored its own precedent in *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (instructing discontinuance of charge that jury's duty is to return a verdict that is just and fair to all parties), *Alekesy*, *State v. Needs*, 333 S.C. 134, 151-52, 508 S.E.2d 857, 866 (1998), *State v. Raffaldt*, 318 S.C. 110, 115-16, 456 S.E.2d 390, 393 (1995), and *State v. Manning*, 305 S.C. 413, 415-17, 409 S.E.2d 372, 374-75 (1991) (prohibited trial judges from telling jurors "to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant" because "[r]ather than conveying to the jury the principle that the State must affirmatively establish appellant's guilt by probative evidence beyond a reasonable doubt, this charge could mislead a reasonable juror to focus exclusively on appellant's explanation of the evidence to determine the existence of reasonable doubt."). The court below found a constitutional violation and reaffirmed its prior precedent holding, "These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice." *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506. After admonishing trial courts to avoid using these terms, the South Carolina Supreme Court concluded:

> Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that *Appellant has not shown prejudice from this error sufficient to warrant reversal. Compare State v. Coggins*, 210 S.C. 242, 245, 42 S.E.2d

> 240, 241 (1947) (providing trial judge's choice of words and comments, while not "happy," did not require reversal).

Id. (emphasis added). The court below, therefore, found Mr. Beaty was prejudiced by the trial judge's unconstitutional comments but never explain why that prejudice was not sufficient to warrant a new trial, even after Mr. Beaty's initial petition for rehearing pointed out this error. App. 16a.

The South Carolina Supreme Court overlooked the Solicitor exploiting the trial judge's remarks in his closing argument, R. at 752, even after Mr. Beaty's petition for rehearing pointed out this error. App. 16a. The court below continued to acknowledge the "State had informed the jury that it would have to pick between two competing theories." *Id.*, 423 S.C. at 33, 813 S.E.2d at 506. Indeed, the parties did present the jurors with two competing theories, neither of which absolved Mr. Beaty of Emily Anna Asbill's death. Relying entirely on circumstantial evidence, the prosecution argued that Mr. Beaty intentionally strangled his girlfriend with a USB cord. Relying on his statement to investigators, expert testimony, and circumstantial evidence, Mr. Beaty established his girlfriend tried to jump out of a moving car and he failed to safely secure her inside the car, resulting in her death by positional asphyxiation.[2] The jurors' role never was to determine which competing theory best explained the circumstances of the crime or to render a verdict they believed best served their perception of justice. Rather, the jurors' role

2. The trial judge declined to charge the jurors involuntary manslaughter.

was to determine whether the State met its burden of proving Mr. Beaty guilty of murder beyond a reasonable doubt. *See Winship, supra.*

This South Carolina Supreme Court did not apply the proper standard of review for a harmless constitutional violation when it held Mr. Beaty "*has not shown prejudice from this error sufficient to warrant reversal*." *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506 (emphasis added). The lower court, therefore, required Mr. Beaty to not only show prejudice but also placed the burden on him to show prejudice sufficient to warrant reversal, even after Mr. Beaty's initial petition for rehearing pointed out this error. App. 16a. As set forth in Mr. Beaty's initial petition for rehearing, under the proper standard of review, "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." *Chapman v. California,* 386 U.S. 18, 24 (1967). The burden, therefore, was on the court below to explain why the error is harmless beyond a reasonable doubt and not on Mr. Beaty to explain why a prejudicial, constitutional error is sufficient to warrant reversal.

The South Carolina Supreme Court's reliance on *Coggins* was misplaced for two reasons. First, it was decided two decades before this Court decided *Chapman* and, therefore, does not represent the appropriate standard of review for determining a harmless constitutional violation. Second, the trial court's "[un]happy choice of words" in *Coggins* "did not constitute [an] objectionable expression of the opinion of the judge," *id.* 210 S.C. at 245, 42 S.E.2d at 241, in violation of the state constitutional requirement that trial "[j]udges shall not charge juries in respect to matters of fact." S.C. Const. Art. V, § 21.

The South Carolina Supreme Court's failure to follow *Chapman* is inconsistent with the Circuit Courts of Appeals. *See, e.g., Bauberger v. Haynes*, 632 F.3d 100, 104 (4th Cir. 2011) ("On direct review, the government has the burden of proving that a constitutional error was 'harmless beyond a reasonable doubt.'" (citing *Chapman*, at 24)); *United States v. Vazquez-Rivera*, 407 F.3d 476, 489 (1st Cir. 2005) ("Because the defendant was 'denied a federal constitutional right,' *Chapman* 386 U.S. at 20, 87 S.Ct. 824, the government has the burden of proving beyond a reasonable doubt that the error did not affect the defendant's substantial rights."); *United States v. Mendoza-Mesa*, 421 F.3d 671, 672 (8th Cir. 2005) ("If the error is of constitutional magnitude, then the government is required to prove the error was harmless beyond a reasonable doubt.'); *United States v. Haidley*, 400 F.3d 642, 645 (8th Cir. 2005) ("If the error is of constitutional magnitude, then the government is required to prove the error was harmless beyond a reasonable doubt."); *Bentley v. Scully*, 41 F.3d 818, 824 (2d Cir. 1994) ("In conducting a direct review, *Chapman* dictates that the State bears the burden of proving harmless error beyond a reasonable doubt.'"); *Bustamante v. Eyman*, 456 F.2d 269, 271 (9th Cir. 1972) ("However, the burden of proving harmless error is a heavy one. The state must 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (citing *Chapman*, at 24)); *United States v. Serawop*, 410 F.3d 656, 669 (10th Cir. 2005) ("The harmless error test is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 15, 119 S.Ct. 1827 (quoting *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)); *Bonner v. Holt*, 26 F.3d 1081, 1082 (11th Cir. 1994) (finding error in Magistrate Court Judge's application of *Chapman* harmless error

standard); and *United States v. Shue*, 766 F.2d 1122, 1132 (7th Cir. 1985) ("The burden of proving a constitutional error harmless rests upon the government."), *holding modified by United States v. Coleman*, 22 F.3d 126 (7th Cir. 1994); and *Eberhardt v. Bordenkircher*, 605 F.2d 275, 280 (6th Cir. 1979) ("We are unable to conclude that the State has carried its heavy burden of proving that the error in this case was harmless.").

The South Carolina Supreme Court's failure to follow *Chapman* is inconsistent with every state in the union and the District of Columbia. *See, e.g. Carrell v. United States*, 165 A.3d 314, 328 (D.C. 2017) ("Under *Chapman*, an error is considered harmless if the government can 'show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)*; State v. Santos*, 318 Conn. 412, 425, 121 A.3d 697, 704 (2015) ("If the claim is of constitutional magnitude, the state has the burden of proving the constitutional error was harmless beyond a reasonable doubt."); *St. Clair v. Com.*, 451 S.W.3d 597, 633 (Ky. 2014) (Finding harmless error "requires 'prov[ing] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,'" (citing *Chapman,* at 24) "[a]nd '[t]he State bears the burden of proving that an error passes muster under this standard.'" (citing *Brecht v. Abrahamson,* 507 U.S. 619, 630 (1993)); *State v. Morris*, 141 Ohio St. 3d 399, 406, 24 N.E.3d 1153, 1160 (2014) (following *Chapman*, "an appellate court must declare a belief that the error was not harmless beyond a reasonable doubt"); *State v. Patterson*, 112 So. 3d 806, 810 (La. 2103) ("under *Chapman,* it is clear that the burden of proving harmless error rests squarely on the shoulders of the party

benefitting from the error."); *Hagos v. People*, 2012 CO 63, ¶ 11, 288 P.3d 116, 119 (2012) ("These errors require reversal unless the reviewing court is 'able to declare a belief that [the error] was harmless beyond a reasonable doubt.'" (citing *Chapman* at 24). "In other words, we reverse if 'there is a reasonable *possibility* that the [error] might have contributed to the conviction.' *Id.*"); *Bryant v. State*, 288 Ga. 876, 898, 708 S.E.2d 362, 383 (2011) ("[B]efore 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." (citing *Chapman, at* 24)); *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801, 820 (2011) (Following *Chapman*, "the error may be declared harmless where the party benefitting from the error proves beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.,* proves there is no reasonable possibility that the error affected the verdict."); *Koenig v. State*, 933 N.E.2d 1271, 1273 (Ind. 2010) ("Since *Chapman,* we have reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."); *Commonwealth v. Morales*, 76 Mass. App. Ct. 663, 667, 925 N.E.2d 551, 555 (2010) ("[I]n determining whether a constitutional error was harmless, we ask whether the record establishes beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (citing *Chapman* at 24) (internal quotations omitted)); *State v. Charlie*, 357 Mont. 355, 367, 239 P.3d 934, 945 (2010) ("The United States Supreme Court has held that a harmless error analysis turns on the notion that "'the burden [is] on the beneficiary of the error either to prove that there was no injury or to suffer

a reversal of his erroneously obtained judgment.'" (citing *Chapman* at 24)); *State v. Mundon*, 121 Haw. 339, 368, 219 P.3d 1126, 1155 (2009) ("[A] constitutional error may be held harmless if 'the court ... [is] able to declare a belief that it was harmless beyond a reasonable doubt.'" (citing *Chapman* at 24)); *State v. Scutchings*, 2009 ND 8, ¶ 14, 759 N.W.2d 729, 733 (2009) ("The beneficiary of a constitutional error has the heavy burden of proving beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."); *People v. Lewis*, 139 Cal. App. 4th 874, 884, 44 Cal. Rptr. 3d 403, 408-09 (2006) ("When such error consists of a failure to instruct on an element of a charge or amounts to an instruction of a legally incorrect theory, the judgment must be reversed unless the People prove beyond a reasonable doubt that the error did not contribute to the verdict in the case at hand."); *Luginbyhl v. Commonwealth*, 48 Va. App. 58, 74–75, 628 S.E.2d 74, 83 (2006) ("Constitutional error is harmless . . . only if 'the beneficiary of the constitutional error ... proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"); *Sparkman v. State*, 91 Ark. App. 138, 142, 208 S.W.3d 822, 825 (2005) ("To conclude that a constitutional error is harmless and does not mandate a reversal, this court must conclude beyond a reasonable doubt that the error did not contribute to the verdict."); *State v. Hale*, 277 Wis. 2d 593, 612-13, 691 N.W.2d 637, 647 (2005) ("The test for this harmless error was set forth by the Supreme Court in *Chapman.* There, the Court explained that, '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.' An error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error

complained of did not contribute to the verdict obtained.'" (internal citations omitted)); *Vigil v. State*, 2004 WY 110, ¶ 19, 98 P.3d 172, 179 (Wyo. 2004) ("On direct appeal, the State has the burden of proving that the constitutional errors below were harmless beyond a reasonable doubt."); *State v. Peterson*, 663 N.W.2d 417, 431 (Iowa 2003) ("To establish harmless error, the State must 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (citing *Chapman,* at 24); *Whitehead v. State*, 777 So. 2d 781, 847 (Ala. Crim. App. 1999) ("In order for a constitutional error to be deemed harmless under *Chapman,* the state must prove beyond a reasonable doubt that the error did not contribute to the verdict and/or sentence....") *affirmed sub nom. Ex parte Whitehead*, 777 So. 2d 854 (Ala. 2000); *People v. Stanaway*, 446 Mich. 643, 694, fn. 53, 521 N.W.2d 557, 582, fn. 53 (1994) ("A state may develop a standard of harmless error at variance with the harmless error analysis set forth for constitutional error by the Supreme Court in *Chapman*, to be applied to incorrect rulings regarding its rules of evidence not amounting to a constitutional violation." (internal citation omitted)); *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) ("The State has the burden of convincing us that error is harmless." (citing *Chapman at* 24-26)); *People v. Rodgers*, 756 P.2d 980, 984 (Colo. 1988), ("[I]f the asserted error is of constitutional dimension, reversal is required unless the [reviewing] court is convinced that the error was *harmless beyond a reasonable doubt.*" (citing *Chapman* at 24) *overruled on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005); *People v. Simms*, 121 Ill. 2d 259, 276, 520 N.E.2d 308, 315 (1988) ("Because the defendant's interests are heightened where constitutional error is at issue, the *Chapman* harmless-error standard shifts to the State the

burden of proving "beyond a reasonable doubt" that the error did not affect a given decision."); *State v. Ingalls*, 544 A.2d 1272, 1275 (Me. 1988) ("In developing the standard that we felt was 'constitutionally required and made obligatory upon us under the Fifth Amendment through the medium of the Fourteenth Amendment,' we looked to the Supreme Court's definition of harmless error set forth in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), as further refined by *Anderson v. Nelson,* 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81 (1968), and *Fontaine v. California,* 390 U.S. 593, 88 S.Ct. 1229, 20 L.Ed.2d 154 (1968)." (citing *State v. Tibbetts*, 299 A.2d 883, 888 (Me. 1973)); *Van Arsdall v. State*, 524 A.2d 3, 11 (Del. 1987) "In view of the fundamental nature of the rights guaranteed under the State constitution, we adopt as State law a standard such as that used by the *Chapman* court, whereby reversal is required whenever the reviewing court 'cannot say that the error was harmless beyond a reasonable doubt.'" (citing *Chapman,* at 24)); *People v. Mehmedi*, 118 A.D.2d 806, 809-10, 500 N.Y.S.2d 304, 307 (1986), aff'd, 69 N.Y.2d 759, 505 N.E.2d 610 (1987) ("The burden of proving constitutional error harmless is, of course, a heavy one, requiring that the State establish beyond a reasonable doubt that the error complained of did not contribute to the verdict."); *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986) ("The harmless error test, as set forth in *Chapman* and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." (citing *Chapman* at 24)); *State v. LePage*, 102 Idaho 387, 393, 630 P.2d 674, 680 (1981) ("The standard for determining whether error of

constitutional dimension is 'harmless,' as set forth in is 'that 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.'" (internal citation omitted)); *State v. Caldwell*, 94 Wash. 2d 614, 618, 618 P.2d 508, 510 (1980) ("Since the error infringed upon the petitioner's constitutional rights, the error is presumed prejudicial, and the State has the burden of proving that the error was harmless." (citing *Chapman* at 23-24)); *Dorsey v. State*, 276 Md. 638, 658–59, 350 A.2d 665, 678 (1976) ("Embracing the requirement laid down in *Chapman*, that the beneficiary of error be required to demonstrate, beyond a reasonable doubt, that such error did not contribute to the conviction, and engrafting that precept upon the principles and mechanics which have antecedently and traditionally been applied in resolving whether the rights of a defendant in a criminal case were prejudiced by the error, we adopt the criteria enunciated in *Chapman* and applied by the Supreme Court in its progeny."); *Com. v. Harkins*, 459 Pa. 196, 200, 328 A.2d 156, 157 (1974) (Applying *Chapman,* "The prosecution has failed to establish that the error was harmless beyond a reasonable doubt. Error cannot be harmless beyond a reasonable doubt if there is a reasonable possibility that the information received by the jury contributed to the conviction."); and *Love v. State*, 457 P.2d 622, 631 (Alaska 1969) ("[I]n cases where constitutional rights are affected by evidentiary determinations in state courts…. we are bound by the rule of *Chapman v. California*, *supra*, that 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.'" (citing *Chapman at* 24)).

This Court should grant the writ, consider the issue, reverse the decisions below, and remand for the South Carolina Supreme Court to conduct a proper constitutional harmless error analysis pursuant to *Chapman*.

II.

Due Process confers 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.

Currently, there is no rule [of criminal procedure in South Carolina] governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence." *Beaty*, 423 S.C. at 46, 813 S.E.2d at 512. Individual trial judges must address this situation in individual cases. Michael Beaty's trial judge followed a procedure allowing the State to open only on the law and then close fully on the facts *after* the defendant makes his final argument. Prior to closing arguments, Mr. Beaty moved for the trial judge to require the prosecution to open fully on the law and facts. R. at 815-816; 828-830. Trial counsel was under the impression the trial judge granted this motion. The opening argument in "full" by the Solicitor consisted of only twelve pages. R. at 741-752. Of those twelve pages, only three pages were used to discuss the facts. R. at 749-52. In the "rebuttal" argument, the prosecutor used a PowerPoint presentation, which was not sued in the opening argument. The "rebuttal" argument consisted of thirty-four pages, almost three times longer than his opening argument in "full" and ten times longer than his discussion of the facts in his opening

argument at closing. R. at 782-815. After the State's "rebuttal" argument, Mr. Beaty moved for a mistrial or, in the alternative, for an opportunity to give a brief reply to the new matters the prosecution brought up in its rebuttal argument, placing on the record the new matters raised by the State in its rebuttal. R. at 816, 822-28. The trial judge declined to do either.

This closing argument procedure followed by Mr. Beaty's trial judge—also followed by other South Carolina trial judges—is long on tradition but short on law to support that tradition. The early practice in South Carolina was for the State to open fully on the law and the facts. In *State v. Atterberry*, 129 S.C. 464, 124 S.C. 648 (1924), the South Carolina Supreme Court held that the failure to require the State to open fully on the law and facts was reversible error. At that time Circuit Court Rule 59 provided, "The party having the opening in argument shall disclose his entire case and on his closing shall be confined strictly to a reply to the points made, and authorities cited by the opposite party." In reversing the conviction of the defendant the Court said, "The defendant moved the court to require the solicitor to make the opening speech to the jury before the defendant's attorneys were required to make their arguments. This was refused. This was error." *Atterberry*, 129 S.C. at ___, 124 S.E. at 651. In his concurring opinion Acting Associate Justice Aycock stated the principle best when he said "It is but fair that the party who has the advantage of the last address to a jury should be required to open and apprise the opposing party of his views as to his entire case." *Id.* at ___, 124 S.E. at 651. As a matter of legal history, the State in South Carolina was required to open fully on the law and the facts.

The more recent practice developed in South Carolina when the Circuit Court Rules were changed. This change was noted in *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971). Again, the defense counsel requested that the State be required to open fully on the law and the facts. This request was denied by the trial judge. The Court noted that since the decision in *Atterberry*, Rule 59 of the Circuit Court Rules had been changed to Rule 58 and the rule then read, "The party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party." The South Carolina Supreme Court in *Lee* concluded that "It follows that the trial judge, under the changed rule, was correct in holding that a solicitor is no longer required to make an opening argument to the jury on issues of fact." *Lee,* at 318, 178 S.E.2d at 656. Thus began the more recent, but incorrect, practice of requiring the State to open only on the law and not the facts.

Today, Rule 43(j) of the South Carolina Rules of Civil Procedure controls the order of argument in civil cases. This rule now provides that the plaintiff shall have the right to open and close at the trial of the case. The rule then concludes, "The party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter." With Rule 43(j) of the South Carolina Rules of Civil Procedure, the long practice in civil cases of plaintiff's lawyers "sandbagging" and saving their real argument for their last argument, came to an end. But the practice, without any support in the law, continued in the general sessions courts not based upon the law or logic, but upon misapplication of the civil rules.

In the opinion in this case, the court below summarized the state of the closing argument in South Carolina:

> Our current closing argument rules consist of the following patchwork: Pursuant to the common law rule pronounced in [*State v.*] *Brisbane*[, 2 S.C.L. 451 (S.C. Const. App. 1802)] and as clarified in [*State v.*] *Garlington*, [90 S.C. 138, 72 S.E. 564 (1911)], in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close, but may waive the right to both or may waive opening and present full argument after the State's closing argument. Pursuant to the common law rule set forth in [*State v.*] *Huckie*, [22 S.C. 298 (1885)], if two or more defendants are jointly tried, if any one defendant introduces evidence, the State has the final closing argument. Pursuant to the common law rule as clarified in [*State v.*] *Gellis*, [158 S.C. 471, 155 S.E. 849 (1930)], in cases in which a defendant introduces evidence of any kind, even through a prosecution witness, the State has the final closing argument. However, in cases in which the State is entitled to the reply argument, there is no common law or codified rule as to whether the State must open in full on the law, or the facts, or both, or neither, and there is no rule governing the content of the State's reply argument.

Beaty, 423 S.C. at 42, 813 S.E.2d at 510-11 (2018). The South Carolina Supreme Court then held:

> Article V, section 5 of the South Carolina Constitution limits this Courts authority to correcting errors of law and does not empower us to promulgate a procedural rule for future cases by simply issuing an opinion. Article V, section 4A, of the South Carolina Constitution prohibits this Court from adopting any rules of practice and procedure—even a much-needed rule governing the practice and procedure of closing arguments in criminal cases—without first going through the prescribed legislative process.

Beaty, 423 S.C. at 46, 813 S.E.2d at 512. The South Carolina Supreme Court refused to declare this order and content of closing argument violated the due process clause. Further, as a result, each individual trial judge in South Carolina must establish their own rule regarding the order and content of closing arguments.

The majority of states and the federal courts require the prosecutor to open fully on the law and the facts. *See, e.g.* Fed. Rule Cr. Proc. 29.1; ARK. CODE ANN. 16-89-123; GA. CODE ANN. § 17-8-71; NEV. REV. STAT. ANN 175.141; TENN. RULES OF CRIM. PROC. Rule 29.1; In Re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE-FINAL ARGUMENTS, 957 So.2d 1164 (Fla. 2007) *but see*, *Degadillo v. State*, 262 S.W.3d 371 (Tex. Ct. App. (2008). *See also United States v. Maloney*, 755 F.3d 1044 (9th Cir. 2014) (held that prosecutor's improper comment during rebuttal warranted reversal of conviction).[3] Treatise writers also support the

3. The oral argument in *Maloney* is enlightening and can be viewed at https://www.youtube.com/watch?v=HgafGnA4Eow&feature=youtu.be (last viewed August 26, 2018).

requirement that the State open fully on the law and evidence. *See* JACOB STEIN, CLOSING ARGUMENTS 2d, § 1:6 (2010) and 75A AM. JUR. 2D Trial§ 448 (2010). In revising its rules as to closing argument the Florida Supreme Court noted, "The statute provides that in accord with the common law, the prosecuting attorney shall open the closing arguments, defendant or his or her attorney may reply, and the prosecuting attorney may reply in rebuttal." In re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE-FINALARGUMENTS, 957 So.2d at 1166.

In commenting on the proposed amendment to Federal Rule 29.1 of the Federal Rules of Criminal Procedure, the committee said it "believes that, as the Advisory Committee Note has stated, fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply."[4] H.R. REP. 94-247, 17, 1975 U.S.C.C.A.N. 674, 689

The order of closing argument and the content of the argument should afford both parties a fair opportunity to present their side and refute the argument of the other side. As seen, this worthy goal is recognized in virtually

4. The South Carolina appellate courts acknowledge the inherent logic of this position concerning reply briefs and oral argument. "An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief." *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989). The reason of this rule in the appellate court is a party should have a fair chance to respond to matters raised by counsel in their briefs. The rule should also be applied to arguments before a jury.

every state in the union in which the government is required to fully open on the law and the facts, including its theory as to how and why the defendant committed the crime. The defendant, then having fully heard the State's theory, is able to refute that theory and give its theory. The government in its final argument then refutes the theory the defendant proposed as to why the defendant is not guilty. Such a procedure is equally fair to both sides. As one court has said "The rule is rooted in the concepts of due process and fundamental fairness. Simply put, it is unfair and often highly prejudicial for plaintiff's or State's counsel to avoid treatment of certain issues in the opening summation so as to deprive defense counsel of the opportunity to reply." *Bailey v. State*, 440 A.2d 997, 1002 (Del. 1982). The practice of "sandbagging" in a closing argument was a basis for reversal of a criminal conviction in *Bailey*. The Court said "Application of these authorities to the facts at hand compels us to reverse and remand the case for a new trial on the ground that the Trial Court abused its discretion in permitting the State to utilize the inherently prejudicial "sandbagging" trial strategy." *Id*. In South Carolina "sandbagging" by a prosecutor is not only approved but is actually legalized. Without the opportunity by defense counsel to point out that there is no evidence in the record to support these arguments, the jury was left only with the authoritative statement of the Solicitor when they considered the evidence. A fair trial is not conducted when defense counsel hears the State's real theory of guilt and the State's interpretation of the facts for the first time during the prosecution's "rebuttal argument." If the State's case and argument is so strong, then the State should be willing to open fully on the facts and its theory of the case.

This Court should grant the writ, consider the issue, reverse the decisions below, and hold due process requires an accused to have a full and fair opportunity to respond to the prosecution's best closing argument.

CONCLUSION

This Court, therefore, should grant the writ and consider the constitutional issues presented in this case.

Respectfully submitted,

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August 27, 2018

APPENDIX

APPENDIX A — *STATE V. BEATY*, S.C. SUPREME COURT OP. NO. 27693, FILED DECEMBER 29, 2016

SUPREME COURT OF SOUTH CAROLINA

Opinion No. 27693

THE STATE,

Respondent,

v.

MICHAEL VERNON BEATY, JR.,

Appellant.

October 19, 2016, Heard
December 29, 2016, Filed

Appeal from Laurens County
W. Jeffrey Young, Circuit Court Judge
Appellate Case No. 2015-000718

AFFIRMED

CHIEF JUSTICE PLEICONES: Appellant was convicted of murdering his girlfriend and received a life sentence. While we affirm his conviction and sentence, we find two of the issues he raises require discussion.[1] Those two issues

1. The remaining issues are affirmed pursuant to Rule 220, SCACR. *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989); *State v. Phillips*, 416 S.C. 184, 785 S.E.2d 448 (2016); *State v. Sterling*, 396 S.C. 599, 723 S.E.2d 176 (2012); *State v. Scott*, 414 S.C. 482, 779 S.E.2d 529 (2015); *State v. Martin*, 415 S.C. 475, 783 S.E.2d 808 (2016); *State*

involve the trial judge's use of certain terms in his opening remarks to the jury, and the content requirements of a divided closing argument.

A. Opening Remarks

After the jury was sworn the trial judge gave preliminary remarks. These remarks began with a warning that a real trial was not like television, and outlined the roles, duties, and responsibilities of the lawyers and the jury. This was followed by a "non-charge," further advice about the proper role of the jury, and an explanation of trial procedure. During those remarks, the judge said:

> This . . . trial . . . is a search for the truth in an effort to make sure that justice is done. In searching for the truth and ensuring that justice is done is [sic] often slow, deliberate, and repetitive.
>
> [The attorneys] are sworn to uphold the integrity and the fairness of our judicial system and to help you as jurors to search for the truth.
>
> [Y]ou also just took an oath to listen to the evidence in this case and reach a fair and just verdict and you are expected to be professional, reasonable and ethical.

---

v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956); *State v. Vang*, 353 S.C. 78, 577 S.E.2d 225 (Ct. App. 2003).

> [Y]ou the jurors find [the facts] from the testimony from a witness from the witness stand or any other evidence, and after hearing that evidence you will deliberate and render a true and just verdict under the solemn oath that you just took as jurors.
>
> [I]n determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable.
>
> [A]fter argument of counsel and the charge on the law by me, you will then be in a position to determine what the true facts are and apply those facts to the law and thus surrender [sic] a true and just verdict.

Following this statement, appellant requested a sidebar, and his objection was later put on the record.

At trial, appellant objected to the use of the terms "search[ing] for the truth," "true facts," and "just verdict." Appellant complained these terms were especially concerning when linked with the Solicitor's "misstatement" of circumstantial evidence and reasonable doubt in his opening statement,[2] and because the Solicitor had informed the jury that it would have to pick between two competing theories. The Solicitor acknowledged to the trial judge that the "search for the truth" language is

2. Appellant did not contemporaneously object to these alleged misstatements.

disfavored but argued that its use here was not reversible error. The trial judge denied appellant's request for a curative instruction, holding that his remarks were merely an opening comment and not a jury instruction.

Appellant relies upon *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), which held that jury instructions on reasonable doubt which also charge the jury to "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant. The *Aleksey* court found there was no reversible error in the charge given there because the "seek the truth" language was given in conjunction with the credibility charge, and not with either the reasonable doubt or circumstantial evidence charge. *Cf. State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012) (instructing discontinuance of charge that jury's duty is to return a verdict just and fair to all parties).

It is true, as the trial judge noted, that the comments here can be distinguished from *Aleksey* in that his was a "statement" and not a jury charge. Further, the remarks were not linked to either reasonable doubt or circumstantial evidence as was condemned in *Aleksey*. However, we agree with appellant that a trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We

caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal. *Compare State v. Coggins*, 210 S.C. 242, 42 S.E.2d 240 (1947) (trial court's choice of words and comments, while not "happy," did not require reversal).

B. Closing Argument

Appellant also contends the trial court erred in failing to require the State to open fully on the law and facts in its closing argument, and to limit the State's reply to matters raised by appellant's counsel in his "middle" closing argument.[3] Appellant argues that without such a rule, his procedural due process rights are offended. *State v. Legg*, 416 S.C. 9, 785 S.E.2d 369 (2016) (procedural due process requires a fair hearing). We agree in part, and hold that in a criminal trial where the party with the "middle" argument requests, the party with the right to the first and last closing argument must open in full on the law and the facts, and in reply may respond in full to the

3. This is, in fact, the issue raised by appellant to the trial judge **prior** to the closing arguments by both oral and written motion. Justice Few confuses appellant's arguments concerning prejudice made after those arguments with the actual issue before the Court today.

other party's argument but may not raise new matter.[4] *Cf.* Rule 43(j), SCRCP; *compare Bailey v. State*, 440 A.2d 997 (Del. 1982) (due process offended when State permitted to "sandbag" by making perfunctory opening statement and then argue in full in reply, thereby depriving defendant the opportunity to counter State's arguments).

With the adoption of this rule governing the contents of closing arguments, we restore what had been, largely by court rule, the practice in this state for many years until 1971. *Compare State v. Huckie*, 22 S.C. 298 (1885) (identifying rule as having been "in existence" since 1796) *with State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971), *overruled in part on different grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (stating open in full practice altered with replacement of Circuit Court Rule 59 by Rule 58). In this case, we have reviewed the State's opening argument and its reply, and find that appellant is not entitled to a new trial as any error in the trial court's denial of his motion to require the State to open in full and

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4. Justice Few does not grasp that the common law rule we adopt today is **not** the rule we proposed to the General Assembly and that, as is its prerogative under the Constitution, it rejected. That rule would have required that the State open and close **in every case**. Today, we preserve the common law rule that the defendant has the right to open and close if he presents no evidence adopted in *State v. Brisbane*, 2 S.C.L. (2 Bay) 451, 452-4 (1802), the rule that would have been changed had Rule 21 been adopted. Moreover, in restoring the requirement that the party with the first argument open in full and raise no new matters in reply we exercise our **authority** and our **duty** to alter, and in this case restore, the common law rule. *E.g., Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d 85 (2007); *State v. Huckie, supra.*

limit its reply was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (harmless constitutional violation standard).

C. Conclusion

We instruct trial judges to omit any language, whether in remarks to the jury or in an instruction, which might have the effect of lessening the State's burden of proof in a criminal case. Further, we hold that in criminal cases tried after this opinion becomes final, if requested by the party with the right to second argument, the party with the right to open and close will be required to open in full on the law and the facts, and be limited in reply to addressing the other party's argument and not permitted to raise new matters.

After review of the record in this matter, appellant's conviction and sentence are

AFFIRMED.

BEATTY, KITTREDGE and HEARN, JJ., concur. FEW, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE FEW: I concur in section A, the majority's comments regarding the trial court's opening remarks to the jury. It is only fair to the trial court, however, and the other trial judges in South Carolina who have been using similar charges to introduce a jury to its responsibilities in a criminal trial, that we acknowledge our own responsibility in regard to the trial court's remarks. While "we have urged trial courts to avoid using any 'seek' language when charging jurors on either reasonable doubt or circumstantial evidence," *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (citing *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998)), that is not what the trial court did in this case. The trial court's "search for the truth" charge in this case was not connected to its charge on reasonable doubt or circumstantial evidence. What the trial court did do in this case is to use language almost identical to a "Preliminary Charge" this Court has continued to maintain for circuit judges on the judicial department intranet. Thus, we have been recommending that circuit judges use the very charge we now forbid.

I do not agree with section B, the majority's decision to change the rules of procedure regarding closing arguments for future criminal trials. As to the substance of the majority's new rule, the new rule is a better rule that will uphold the due process rights of defendants while adequately preserving the right of the State to present and argue its cases to the jury. But this Court does not have the power to promulgate new rules of procedure for future trials by writing opinions to decide cases. Rather, when we decide an appeal from a criminal conviction—as

we do here—our power is limited to correcting errors of law.[5] The majority's decision today exceeds that power.[6]

The Supreme Court does have the power to promulgate rules of procedure, but that power must be exercised pursuant to article V, section 4A of the South Carolina Constitution, which provides,

> All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to

5. *See* S.C. CONST. art. V, § 5 ("The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe."); *State v. Asbury*, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("This Court's scope of review is determined by our State constitution which limits our scope of review in law cases to the correction of errors of law." (citing S.C. CONST. art. V, § 5)); *State v. Francis*, 152 S.C. 17, 149 S.E. 348, 364 (1929) ("We think it not out of place to once again call attention to the fact that in criminal cases, even in those where men have been sentenced to death, this court, under the Constitution of this state, is absolutely limited to the correction of errors of law."). In *Asbury* and *Francis*, we cited the article V, section 5 limitation on our power to demonstrate we do not have the power to reach questions of fact. The limitation is even more important when the constitution specifically provides the manner in which we may act. *See* S.C. CONST. art. V, § 4A.

6. In most cases, of course, our decision to correct an error of law becomes precedent that is binding on courts in the future. *See, e.g., State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (finding an error of law in the use of the inferred malice jury charge, reversing the conviction, and noting the ruling is binding in future cases).

> the Judiciary Committee of each House of the General Assembly . . . .

S.C. CONST. art. V, § 4A.

It is particularly inappropriate that this Court would write this new rule in this case. On January 28, 2016, the Supreme Court proposed an amendment to the South Carolina Rules of Criminal Procedure to add new Rule 21, which would have changed the law precisely as the majority changes the law today. *Re: Amendments to the S.C. Rules of Criminal Procedure*, 2014-002673 (S.C. Sup. Ct. Order dated Jan. 28, 2016). The proposed rule provided, "Closing arguments in all non-capital cases shall proceed in the following order: (a) the prosecution shall open the argument in full; (b) the defense shall be permitted to reply; and (c) the prosecution shall then be permitted to reply in rebuttal." *Id.* The January 28 order proposing the rule specifically stated, "These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution." *Id.* Article V, section 4A provides the General Assembly may reject proposed rules. "Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting." S.C. CONST. art. V, § 4A. On April 26, 2016, the General Assembly rejected Rule 21 by concurrent resolution, stating:

> Be it resolved by the Senate, the House of Representatives concurring:

> That the amendments to the South Carolina Rules of Criminal Procedure, as promulgated by the Supreme Court of South Carolina and submitted to the General Assembly on January 28, 2016, pursuant to the provisions of Article V of the South Carolina Constitution are disapproved.

S. Con. Res. 1191, 121st Gen. Sess. (S.C. 2016).

Having attempted to change the rules of criminal procedure by following the requirements of the constitution, but having the changes rejected by the General Assembly (as the constitution provides it may do), this Court now makes an end-run around the constitution to change the rules anyway. While I respect the majority's determination to write rules of procedure that protect the due process rights of our citizens, we must do so within the constitutional limitations on judicial power.

In this case, Beaty's trial counsel raised a narrow issue that we could address without changing the rules of procedure for future trials. After the solicitor made his final closing argument, Beaty's counsel told the trial court the solicitor had "sandbagged his entire argument" and argued it was "a gross violation of due process." Counsel then requested the opportunity to "go through a list of things that we would like to have had the opportunity to refute" if given the opportunity to reply to the State's argument. As to one specific point, counsel argued the State presented a factual scenario for the first time in its final argument. Counsel then argued he could not have

anticipated such an argument, and Beaty deserved the right to reply to it. Counsel then listed numerous other points in the State's final argument he argued were misleading, and explained in detail how he would have structured his own closing argument to respond if he had the opportunity. Finally, counsel specifically requested he be allowed "to reargue before the jury" to protect Beaty's due process rights. The trial court stated, "I'm not going to do that."

Beaty raised this limited issue on appeal. The majority finds "any error in the trial court's [ruling] was harmless beyond a reasonable doubt." Presumably, the majority finds the error harmless because it finds Beaty's due process rights were not actually violated in this case. This limited ruling on this limited issue is sufficient to resolve this appeal. I therefore dissent from section B in which the majority adopts new rules regarding closing argument in all future criminal trials.

APPENDIX B — PETITION FOR REHEARING, FILED JANUARY 10, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2015-000718
S.C. Supreme Court Opinion No. 27693

THE STATE,

Respondent,

v.

MICHAEL VERNON BEATY, JR.,

Appellant.

APPEAL FROM LAURENS COUNTY
Court of General Sessions
W. Jeffery Young, Circuit Court Judge

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, the appellant, Michael Beaty, petitions for rehearing because this Court overlooked or misapprehended the points discussed in this petition. As discussed below, this Court did not discuss the facts of the case, explain why the two Constitutional violations do not require reversal, and address numerous issues raised by Mr. Beaty in his appeal.

Appendix B

I. ISSUES ADDRESSED IN THE COURT'S OPINION.

This Court found two constitutional violations but never explained why these violations do not require reversal under the facts of Mr. Beaty's case. Once these constitutional violations are considered in the context of the facts of this case, the need to reverse becomes apparent.

A. Opening Remarks.

This Court agreed that the trial judge, by "use of terms 'search for the truth,' 'true facts,' and 'just verdict,'" Slip Opinion, p. 3, departed from this Court's precedent in *State v. Daniels,* 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012), *State v. Alekesy,* 343 S.C. 20, 538 S.E.2d 248 (2000), and other cases relied on by Mr. Beaty in his Brief of Appellant, at pp. 28-37, and Reply Brief, at pp. 12-14. This Court found a constitutional violation and once again held, "These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." Slip Opinion, pp. 3-4. After admonishing trial courts to avoid using these terms, this Court concluded, "Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal." Slip Opinion, p. 4. This Court found Mr. Beaty was prejudiced by the trial judge's

unconstitutional comments but never explained why that prejudice as not sufficient to warrant a new trial.

This Court overlooked the Solicitor exploiting the trial judge's remarks in his closing argument. Rec. on App. 772, ll 4-12. This Court correctly observed, "[T]he Solicitor had informed the jury that it would have to pick between two competing theories." Slip Opinion, p. 3. Indeed, the parties did present the jurors with two competing theories, neither of which absolved Mr. Beaty of Emily Anna Asbill's death. Relying entirely on circumstantial evidence, the prosecution argued that Mr. Beaty intentionally strangled his girlfriend with a USB cord. Relying on his statement to investigators, expert testimony, and circumstantial evidence, Mr. Beaty established his girlfriend tried to jump out of a moving car and he failed to safely secure her inside the car, resulting in accidental death by positional asphyxiation. The jurors' role never was to determine which competing theory best explained the circumstances of the crime or to render a verdict they believed best served their perception of justice. Rather, the jurors' role was to determine whether the State met its burden of proving Mr. Beaty guilty beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1990). "Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge." *State v. Buckner,* 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000). The unconstitutional remarks, when considered with the Solicitor's opening statement and closing arguments, increase the need to apply this presumption.

Appendix B

This Court, additionally, did not apply the proper standard of review for a harmless constitutional violation when it held:

> Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal. *Compare State v. Coggins,* 210 S.C. 242, 42 S.E.2d 240 (1947) (trial court's choice of words and comments, while not "happy," did not require reversal).

Slip Opinion, p. 4. This Court, thus, required Mr. Beaty to not only show prejudice but also to show prejudice sufficient to warrant reversal. Rather, under the proper standard of review, "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." *Chapman v. California.* 286 U.S. 18, 24 (1967). The burden, therefore, is on this Court to explain why the error is harmless beyond a reasonable doubt and not on Mr. Beaty to explain why a prejudicial, constitutional error is sufficient to warrant reversal.

This Court's reliance on *Coggins* is misplaced for two reasons. First, it was decided two decades before *Chapman* and, therefore, does not represent the appropriate standard of review for determining a harmless constitutional violation. Second, the trial court's "[un]happy choice of words" in *Coggins* "did not constitute

[an] objectionable expression of the opinion of the judge." *Id.* 210 S.C. at 245, 42 S.E.2d at 241. Thus, this Court erred by applying a standard of review from a case where no constitutional violation occurred. This Court's error is further demonstrated by its complete failure to discuss the facts of this case.

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

B. Closing Argument.

Adopting the reasoning of *Bailey v. State,* 440 A.2d 997 (Del. 1982), this Court found the Solicitor's closing arguments violated Mr. Beaty's right to due process. Citing *Chapman,* this Court concluded, "[T]he trial court's denial of [Mr. Beaty's] motion to require the State to open in full and limit its reply was harmless beyond a reasonable doubt." Slip Opinion, pp. 4-5. Once again, this Court neither discussed the facts of the case nor explained why the error was harmless. Although *Bailey* recognized the trial judge has

> a measure of discretion as to the application of the rule governing the scope of a rebuttal, that discretion is not so broad as to permit a Trial Judge to oversee a blow to a defendant's right to a fair trial via the State's sandbagging. Closing argument is an aspect of which is implicit in the Due Process Clause of the Fourteenth Amendment by which the States are bound. It is encumbent [sic] on the Trial Judge to

> protect the defendant's right to a fair trial through constant vigilance over the conduct of all officers of the Court. . . .

Bailey, at 1003 (internal quotations and citations omitted). Like the Court in *Bailey,* this Court recognizes the trial court's responsibility to "safeguard the rights of litigants," *State v. Langford,* 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012), and the prosecution's "obligation to see the defendant is accorded procedural justice," *State v. Jones,* 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001).

As Justice Few acknowledged in a separate opinion:

> After the solicitor made his final closing argument, Beaty's counsel told the trial court the solicitor had "sandbagged his entire argument" and argued it was "a gross violation of due process." Counsel then requested the opportunity to "go through a list of things that we would like to have had the opportunity to refute" if given the opportunity to reply to the State's argument. As to one specific point, counsel argued the State presented a factual scenario for the first time in its final argument. Counsel then argued he could not have anticipated such an argument, and Beaty deserved the right to reply to it. Counsel then listed numerous other points in the State's final argument he argued were misleading, and explained in detail how he would have structured his own closing argument to respond if he had the opportunity. Finally,

> counsel specifically requested he be allowed "to reargue before the jury" to protect Beaty's due process rights.

Slip Opinion, p. 8.

The "sandbagging" in Mr. Beaty's case is much worse than the "sandbagging" by the United States Attorney in *United States v. Maloney,* 755 F.3d 1044 (9th Cir. 2014).[1] In *Maloney,*

> [t]hough there was never any evidence introduced regarding whether Maloney had luggage with him on the trip, for the first time in rebuttal during closing argument, the prosecutor argued that Maloney must have lied about the details of his trip because he had not luggage with him when he was apprehended, a fact from which the jury could infer knowledge.

Id. at 1045-46. After oral argument in *Maloney,*[2] the United States Attorney conceded error and moved the Court of Appeals "to summarily reverse the conviction, vacate the sentence, and remand to the district court." *Id.* at 1046 (citing *Berger v. United States,* 295 U.S. 78,

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1. Mr. Beaty cited *Maloney* during his oral argument on October 19, 2016, found at http://media.sccourts.org/videos/2015-000718.mp4 (last viewed January 8, 2017).

2. The oral argument in *Maloney* is enlightening and can be viewed at https://www.youtube.com/watch?v=HgafGnA4Eow&feature=youtu.be (last viewed January 8, 2017).

88 (1935) and *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993)).

In Mr. Beaty's case, the Solicitor not only argued facts outside the record, but also argued for the first time the State's theory about how Mr. Beaty allegedly strangled his girlfriend. The Solicitor argued the strangulation occurred in the driveway of the home of Mr. Beaty's mother and stepfather after his girlfriend was screaming loudly. Despite his request for a sur-rebuttal argument, the trial judge did not give Mr. Beaty an opportunity to refute the Solicitor's argument.

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

II. ISSUES NOT ADDRESSED IN THE COURT'S OPINION.

This Court completely overlooked Questions I, II, V, VI, VII, and VIII raised by Mr. Beaty in his appeal. Mr. Beaty will elaborate on three of these Questions in this petition for rehearing: (a) the trial court's failure to instruct involuntary manslaughter, (b) the State's failure to produce substantial circumstantial evidence of Mr. Beaty's guilt, and (c) this Court's failure to apply a cumulative error analysis. As discussed in more detail below, the cases cited by this Court in footnote 1 of its opinion, pursuant to Rule 220, SCACR, indicate it misapprehended the issues on appeal.[3]

3. Regarding the other issues on appeal, the cases cited in footnote one do not explains this Court's failure to address those

Appendix B

A. This Court erred in failing to consider the facts supporting the request for a charge on involuntary manslaughter.

In holding that Michael Beaty had not established sufficient facts to create a jury issue as to involuntary manslaughter, this Court either failed to consider the facts established by Mr. Beaty or adopted a new rule as to lesser included offenses.

This Court has long held that involuntary manslaughter is a lesser included offense of murder even though involuntary contains the element of recklessness that is

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issues on the merits. *State v. Phillips,* 416 S.C. 184, 785 S.E.2d 448 (2016) addressed the application of the waiver rule when the defendant presents evidence. Mr. Beaty's case-in-chief did not fill in any gaps of the State's theory of murder. Rather, as discussed in more detail in Section II(A), the expert testimony presented by Mr. Beaty further supported the trial court charging involuntary manslaughter. The reason for citing *State v. Smith,* 230 S.C. 164, 94 S.C.2d 886 (1956) is unclear. Mr. Beaty did not seek to introduce the affidavit of Valerie Jones; rather, she was available to testify, and Mr. Beaty introduced the affidavit as a proffer of her live testimony. Although there was evidence of Mr. Beaty's intoxication, he was never offered a test to determine his level of intoxication and, therefore, never refused such a test. Regarding *State v. Vang,* 353 S.C. 78, 577 S.E.2d 225 (Ct. App. 2003), Mr. Beaty demonstrated the prosecution attacked the defense lawyers, thereby establishing prejudice for the trial judge not asking *voir dire* questions number 9. Finally, it is not clear that any of the cases cited by this Court in footnote 1 apply the *State v. Edwards,* 298 S.C. 272, 379 S.E.2d 888 (1989) instruction, as opposed to the involuntary manslaughter instruction. Footnote 1 failed to address the Cumulative Error Doctrine.

not present in murder. "Involuntary manslaughter is a lesser-included offense of murder . . . ." *State v. Scott,* 531, 414 S.C. 482, 487, 779 S.E.2d 529 (2015); *See also State v. Elliott,* 346 S.C. 603, 610, 552 S.E.2d 727, 731 (2001) (Pliecones dissenting) *overruled on other grounds by State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005).

In determining if the lesser included of involuntary manslaughter should be given, now Chief Justice Beatty has said, "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be *inferred* that the defendant committed the lesser, rather than the greater, offense." *State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014) (emphasis added). And former Chief Justice Pliecones has also said, "The trial judge is to charge the jury on a lesser included offense if there is *any evidence* from which the jury could infer that the lesser, rather than the greater, offense was committed." *State v. Watson*, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002) (emphasis added). Further, this Court has said, "Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was *unintentional*." *Tisdale v. State*, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008) (emphasis added). Against these standards, this Court has now said, without discussion, that the act of a drunken driver in pulling an intoxicated passenger back into a moving automobile, positioning her onto the front floor board of the automobile, not rendering her aid and not keeping her from dying of positional asphyxiation does not create, as matter of law, facts from which a jury may infer Mr. Beaty was grossly negligent. This position is contrary to the position of this

Court in *Tisdale*. In *Tisdale* the physical facts were the deceased was shot twice in the back of the head. These physical facts were inconsistent with the statement of the defendant who claimed the gun went off while the defendant and the deceased were struggling over the gun. This Court said, "The fact that Victim's wounds may have been inconsistent with petitioner's testimony that the gun fired while in Victim's hand is not overwhelming evidence that petitioner intentionally killed Victim." *Tisdale*, 378 S.C. at 126, 662 S.E.2d at 412. Here the exact opposite is true. The physical evidence is more consistent with the theory of the Defendant than that of the State. The evidence at trial established that Ms. Asbill's hair was pulled up in a bun. The State's expert admitted that if the hair were up and the ligature mark did not go all the way around the neck of Ms. Asbill, then she was most likely pulled from behind. Rec. on App. at 526, ll 19-25. The State never presented any factual theory consistent with the evidence that would explain why the ligature mark did not go completely around the neck of Ms. Asbill. The only theory presented by the State was that the USB cord they contended caused Ms. Asbill's death was wrapped completely around her neck.

This Court further erred in relying upon *State v. Scott,* 414 S.C. 482, 779 S.E.2d 529 (2015). In that case this Court said, "Simply put, Scott has not presented any evidence that he acted with reckless disregard for the safety of others." *Id.* at 488, 779 S.E.2d at 532. This fact is simply not correct for Mr. Beaty in this case. Further, and perhaps most importantly, *Scott* further said, "As the trial court noted, if the jury accepted Scott's version of

the facts as true, he would be entitled to acquittal because the killing would have been justified." *Id.* In this case, if the jury accepted Mr. Beaty's eyidence as true, the jury would still conclude that Mr. Beaty was responsible for the death of Ms. Asbill. His defense was not a complete defense, but was a defense of a lesser included. *See State v. Chatman,* 336 S.C. 149, 153, 519 S.E.2d 100, 101-02 (1999) (involuntary manslaughter instruction required when "the evidence establishes that appellant was not attempting to strangle Victim with his hands").

This Court failed to note that an attempt to render aid, if recklessly done, can be a basis for finding a defendant guilty of involuntary manslaughter. As the North Carolina Supreme Court said, "Clearly there exists a conflict in our decisions regarding the propriety of submitting to the jury the issue of a defendant's guilt of involuntary manslaughter where there is evidence that the killing was unintentional and occurred when the defendant attempted to prevent the victim from committing suicide." *State v. Tidwell.* 112 N.C. Ct. App. 770, 775, 436 S.E.2d 922, 926 (1993). The Court then held that a reckless act in attempting to prevent a suicide would entitle a defendant to a charge of involuntary manslaughter. The same principle should be applied in this case.

As noted above, in order for a trial judge to be required to charge the lesser included charge of involuntary manslaughter, a defendant is only required to produce evidence from which it may be inferred the defendant acted with gross negligence. In making the determination as to whether sufficient evidence has been produced by

the defendant to make such a charge proper, this Court is not concerned with the weight of the evidence but the existence of the evidence. *State v. Reese,* 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006) *overruled on other grounds by State v. Belcher,* 385 S.C. 597, 685 S.E.2d 802 (2009). Whether the standard of review be that there must be evidence from which a jury may *infer* a lesser included, whether there must be *any evidence* of involuntary or evidence the killing was *unintentional,* Mr. Beaty presented evidence to satisfy any of these standards of review this Court has used in the past.

As this Court said in this case, the "seek the truth charge," "may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." Slip Opinion, pp. 3-4. In this case, where Mr. Beaty never denied causing the death of Ms. Asbill, the only "justice" the jury could do is to convict Mr. Beaty of murder as that was the only choice they had other than setting him free. By depriving Mr. Beaty of the jury electing to convict him of involuntary manslaughter, "the jury's perception of justice" insured a conviction of murder. The failure to charge the lesser included deprived Mr. Beaty of due process as guaranteed by the Fourteenth Amendment to the United State's Constitution and Article I, Section 3 of the South Carolina Constitution.

In the alternative, this Court might have affirmed the denial of the request to charge involuntary manslaughter

based upon a change in the standard of review of lesser included offenses. In *State v. Elliott*, 346 S.C. 603, 552 S.E.2d 727 (2001), this Court applied a two-part test for determining whether an offense is a lesser included offense. Initially, "[t]he test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense." *Id.* At 606, 552 S.E.2d at 728. *See*, Chris Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 Am. Crim. L. Rev. 445 (1984). In *Elliott*, this Court, nevertheless, adhered to precedent recognizing that assault and battery of a high and aggravated nature is a lesser included offense of attempted criminal sexual conduct, even though the same elements test was not satisfied. After recognizing "the existence of a few anomalies," this Court concluded, "We will continue to consider offenses on a case-by-case basis, beginning with the elements test." *Elliott*, at 608, 552 S.E.2d at 730. If this Court applied the same elements test in this case, then the lesser include charge of involuntary manslaughter could not have been given. The reason is that involuntary manslaughter included an element of recklessness that is not included in the charge of murder.

If this Court applied the standard of review used in *Elliott*, then the decision in this case would violate the *ex post facto* and due process clauses of the United States and South Carolina Constitutions. By adopting such a standard of review, this Court would have adopted a rule not previously applied to a case of involuntary manslaughter being a lesser included offense of murder. While this Court could adopt such a rule, it could only

have prospective application. *Bouie v. City of Columbia,* 378 U.S. 347 (1967).

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

B. This Court failed to consider that the theory used by the State to argue the basis for the conviction of Michael Beaty are speculation and is contrary to the undisputed facts in this case.

The State's theory of murder is based upon circumstantial evidence. As such, in reviewing the evidence this Court should be guided by the words of the United States Supreme Court in *United States v. Holland.* 348 U.S. 121, 135 (1955). "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." Here, the circumstances are hardly conclusive. No reasonable juror could conclude that other reasonable hypotheses have been excluded. The theory of the State, and the only theory, is that Michael Beaty wrapped a USB cord around the neck of Emily Anna Asbill and strangled her to death. If this theory is not correct, the State has no secondary theory to support the conviction. This Court failed to consider that when the undisputed evidence in this case is that the ligature mark did not go completely around the neck of Ms. Asbill, then the theory of the State is simply not proven. Dr. Ross agreed that if the mark did not completely around the neck, then she was being pulled from behind. Rec. on App. at 526, ll 19-25. Neither the facts

nor the testimony of the State's own expert supports the position of the State.

The Seventh Circuit has said, "Where a witness' testimony is such that reasonable men could not have believed the testimony, however, then exceptional circumstances are present and the district court may take the testimony away from the jury. The exception is an extremely narrow one, however, and can be invoked only where the testimony contradicts indisputable physical facts or laws." *United States v. Kuzniar*, 881 F.2d 466, 470-71 (7th Cir. 1989) (internal citations omitted). The same principle should be applied when this Court reviews the State's theory in a circumstantial evidence case. Here, this Court failed to consider the fact that the State's theory is not just inconsistent with the physical facts established by the State, but the facts established by the State make the theory impossible.

And the State fairs no better when it contends that the USB cord was used to strangle Ms. Asbill. As noted in the Brief of Appellat, at p. 18, the expert for the State testified the DNA on the cord was more consistent with a mere touching and not the grabbing required to strangle someone. As the physical facts and expert testimony for the State do not support the only theory of the State, this court erred in not holding the facts were insufficient to convict.

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

C. Cumulative Error Doctrine

The cumulative error doctrine "provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). *And see State v. Blurton,* 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) *reversed on other grounds by State v. Blurton.* 352 S.C. 203, 573 S.E.2d 802 (2002) (cumulative error of Solicitor's improper argument and improperly excluded evidence warranted reversal).

This Court's opinion demonstrates cumulative error. Regarding the trial judge's unconstitutional opening remarks, this Court held, "These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." Slip Opinion, pp. 3-4. As pointed out in Section I(A) *supra,* the Solicitor exploited the trial judge's opening remarks during his closing arguments. Then, in his final rebuttal argument, the Solicitor for the first time argued facts outside the record and advanced a theory about the circumstances surrounding the alleged crime, thereby increasing the chances that the jurors would render a verdict they believed best served their perception of justice. This danger was enhanced by the Solicitor's appeal to the jurors to seek justice for decedent and her family. Rec. on App. 85, l 15-86, l 14; 824, l 16-825, l 6.

Additionally, once this Court reconsiders the trial court's error in not instructing the jurors the lesser-included offense of involuntary manslaughter, an additional reason to apply the cumulative error doctrine becomes apparent. The Solicitor framed the trial as a choice between two competing hypothesizes, but the trial judge did not provided the jurors with the option of finding Mr. Beaty guilty of involuntary manslaughter. As discussed in Section II(A) *supra,* once the jurors concluded that Mr. Beaty was responsible for his girlfriend's death, they could find him guilty of murder as the verdict they believed best served their perception of justice, rather than holding the State to its burden of proof. Once the failure to instruct involuntary manslaughter is considered in connection with the trial judge's opening remarks and the Solicitor's closing arguments, the need to reverse is apparent.

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

III. CONCLUSION.

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

Appendix B

Respectfully Submitted,

By: /s/ C. Rauch Wise

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January 9, 2017
Greenwood, South Carolina

APPENDIX C — ORDER GRANTING PETITION FOR REHEARING, FILED MARCH 24, 2017

THE SUPREME COURT OF SOUTH CAROLINA

Appellate Case No. 2015-000718

THE STATE,

Respondent,

v.

MICHAEL VERNON BEATY, JR.,

Appellant.

ORDER

After careful consideration of the petition for rehearing, the petition for rehearing is granted. The previous briefs filed by the parties will be utilized, with no further briefing required. Counsel will be advised when oral arguments have been rescheduled.

/s/ _____ J.

/s/ _____ J.

/s/ _____ J.

Appendix C

We would deny the petition for rehearing.

/s/ _____ C.J.

/s/ _____ A.J.

Columbia, South Carolina
March 24, 2017

APPENDIX D — AMENDED ORDER GRANTING REHEARING, FILED MARCH 28, 2017

THE SUPREME COURT OF SOUTH CAROLINA

Appellate Case No. 2015-000718

THE STATE,

Respondent,

v.

MICHAEL VERNON BEATY, JR.,

Appellant.

AMENDED ORDER

After careful consideration of the petitions for rehearing, the petitions for rehearing are granted. The previous briefs filed by the parties will be utilized, with no further briefing required. Counsel will be advised when oral arguments are rescheduled.

/s/ _____ J.

/s/ _____ J.

/s/ _____ J.

Appendix D

We would deny the petitions for rehearing.

/s/ _____ C.J.

/s/ _____ A.J.

Columbia, South Carolina
March 28, 2017

APPENDIX E — *STATE V. BEATY*, S.C. SUPREME COURT OP. NO. 27693, FILED APRIL 24, 2018 AND FILED WITH TRIAL COURT ON MAY 31, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2015-000718

THE STATE,

Respondent,

v.

MICHAEL VERNON BEATY JR.,

Appellant.

Appeal from Laurens County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 27693
June 15, 2017, Heard; April 25, 2018, Refiled

AFFIRMED.

JUSTICE JAMES: Michael Vernon Beaty Jr. (Appellant) was convicted of murdering Emily Anna Asbill (Victim) and received a life sentence. We affirmed Appellant's conviction on December 29, 2016, in *State v. Beaty*, Op. No. 27693, 2016 S.C. LEXIS 413 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse 2017 Adv. Sh. No. 1

at 13). We subsequently granted the parties' petitions for rehearing and heard further argument. We affirm Appellant's conviction.

FACTUAL AND PROCEDURAL HISTORY

Appellant and Victim attended an evening party in their hometown of Clinton. They decided to leave the party between 9:00 pm and 10:00 pm and agreed to give their friend Will Alexander a ride home. Appellant drove the vehicle, Victim sat in the front passenger seat, and Alexander sat in the backseat. At approximately 11:00 pm, Appellant rang the doorbell at his parents' home and asked his stepfather for help. When Appellant's stepfather approached the car, he found Victim unconscious on the front passenger side floorboard and called 911. EMS arrived shortly thereafter and found Victim sitting on the floorboard with her head laid back on the passenger seat. She was not breathing and did not have a pulse. Appellant's shirt was wrapped around Victim's right arm. Victim was found to have severe "road rash" on her right and left arms and bruising to her neck. EMS transported Victim to the hospital, where she was pronounced dead. An autopsy revealed the cause of Victim's death was asphyxia due to strangulation.

At trial, the State introduced several of Appellant's statements to law enforcement into evidence. These statements varied materially. Appellant initially suggested Victim died of a self-inflicted cutting injury. Following law enforcement's receipt of the autopsy results, Appellant voluntarily returned to the police station and repeated

his earlier version of events. However, in this statement, Appellant stated he had to undo Victim's seatbelt when he realized she was unconscious after arriving at his parents' home. When Appellant was informed of the autopsy results, which showed Victim had been strangled and had "road rash," Appellant gave a written statement explaining he and Victim had argued during the car ride, Victim had opened the car door to jump out, and he had grabbed her shirt to pull her back into the car.

At trial, the State and Appellant presented expert witnesses to support their theories as to the events leading up to Victim's death. The State's theory was that Appellant strangled Victim with a USB cord after a fight during which she tried to jump out of the moving car. Appellant's theory was that when Victim tried to jump out of the moving car, he held her in by her tank top, which caused the ligature marks on her neck and rendered her unconscious, and that once he pulled her back into the car, she succumbed to positional asphyxiation due to the awkward position she assumed on the floorboard.

The pathologist who conducted the autopsy was called by the State and testified the ligature marks on Victim's neck were visible on the front and sides of her neck but not on the back of her neck. The pathologist identified a USB cord found in the car as consistent with the ligature marks and the abrasion on Victim's neck. DNA analysis of the USB cord showed Victim's DNA on the middle of the cord. The cord's ends had a mixture of at least two individuals' DNA, with Victim being the major contributor and Appellant being the minor contributor.

A forensic pathologist also testified for Appellant and stated the USB cord did not cause the injuries to Victim's neck and opined positional asphyxiation played a role in Victim's death. A mechanical engineer testified for Appellant and stated the ligature marks on Victim's neck could have been caused by someone holding her up by her tank top as she hung out of the car and that both Victim's abrasions and her blood found on the outside of the car were consistent with this scenario.

Appellant was convicted of murder and received a life sentence. Appellant timely filed a notice of appeal, and we certified the case from the court of appeals pursuant to Rule 204(b), SCACR. Appellant raised the following issues: (1) whether the State presented substantial circumstantial evidence proving Appellant committed murder; (2) whether the trial judge erred by denying Appellant's request to charge the lesser-included offense of involuntary manslaughter; (3) whether the trial judge erred in using certain language in his opening remarks to the jury; (4) whether the trial judge erred during the closing argument stage in not (a) requiring the State to open fully on the law and the facts of the case and (b) limiting the State's final closing solely to reply to new arguments presented during Appellant's closing arguments; (5) whether the trial judge erred in charging the law of circumstantial evidence as set forth in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013); (6) whether the trial judge erred in excluding testimony concerning a prior incident when Victim threatened to jump from an automobile; (7) whether the trial judge erred in denying one of Appellant's voir dire requests; and (8) whether a

new trial should be ordered based on the cumulative error doctrine.

In affirming Appellant's conviction in our prior opinion, we found two of the issues Appellant raised merited discussion. *State v. Beaty*, Op. No. 27693, 2016 S.C. LEXIS 413 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse 2017 Adv. Sh. No. 1 at 14-17). First, we addressed the trial judge's use of certain language in his opening remarks to the jury and the content requirements and order of closing argument. We affirmed Appellant's conviction but instructed trial judges to avoid language urging jurors to "search for the truth," find "true facts," and render a "just verdict." Second, we adopted a rule for closing argument in criminal cases, requiring the party with the right to open and close to open fully on the law and facts and limit its reply to those matters raised by the other party in its closing argument. We affirmed all of Appellant's remaining issues under Rule 220(b), SCACR.

We granted the parties' petitions for rehearing and have heard further argument. We issue this opinion to again address both the trial judge's use of certain language in his opening remarks to the jury and the rules governing the content and order of closing argument.[1] We affirm Appellant's conviction.

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1. All remaining issues are affirmed pursuant to Rule 220, SCACR. *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989); *State v. Phillips*, 416 S.C. 184, 785 S.E.2d 448 (2016); *State v. Sterling*, 396 S.C. 599, 723 S.E.2d 176 (2012); *State v. Scott*, 414 S.C. 482, 779 S.E.2d 529 (2015); *State v. Marin*, 415 S.C. 475, 783 S.E.2d 808 (2016); *State v. Smith*, 230 S.C. 164, 94 S.E.2d 886 (1956); *State v. Vang*, 353 S.C. 78, 577 S.E.2d 225 (Ct. App. 2003).

Appendix E

DISCUSSION

I. Trial Judge's Opening Remarks

After the jury was sworn, the trial judge gave preliminary remarks to the jury. The trial judge outlined the roles, duties, and responsibilities of the lawyers and the jury and explained trial procedure. During these remarks, the judge stated:

> This . . . trial . . . is a search for the truth in an effort to make sure that justice is done. Searching for the truth and ensuring that justice is done is often slow, deliberate, and repetitive.
>
> [The attorneys] are sworn to uphold the integrity and the fairness of our judicial system and to help you as jurors to search for the truth.
>
> You also just took an oath to listen to the evidence in this case and reach a fair and just verdict and you are expected to be professional, reasonable and ethical.
>
> You the jurors find [the facts] from the testimony from a witness from the witness stand or any other evidence, and after hearing that evidence you will deliberate and render a true and just verdict under the solemn oath that you just took as jurors.

Appendix E

> In determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable.
>
> After argument of counsel and the charge on the law by me, you will then be in a position to determine what the true facts are and apply those facts to the law and thus render a true and just verdict.

Appellant objected to the use of the phrases "search[ing] for the truth," "true facts," and "just verdict." Appellant argued these phrases were especially improper when linked with the State's "misstatement" of circumstantial evidence and reasonable doubt in its opening statement, and because the State had informed the jury that it would have to pick between two competing theories. The State acknowledged to the trial judge that the "search for the truth" language is disfavored but argued that its use here was not reversible error. The trial judge denied Appellant's request for a curative instruction, concluding that his remarks were merely an opening comment and not a jury instruction.

Appellant relies upon *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), in which we held that jury instructions on reasonable doubt which also charge the jury to "seek the truth" or "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant. In *Aleksey*, we found there was no reversible error because the "seek the truth" language was charged in conjunction with the credibility of witnesses charge,

and not with either the reasonable doubt or circumstantial evidence charges. *Id.* at 27-29, 538 S.E.2d at 251-53; *cf. State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012) (instructing discontinuance of charge that jury's duty is to return a verdict that is just and fair to all parties).

As the trial judge noted, the disputed comments can be distinguished from *Aleksey* because they were a mere statement to the jury and not a charge on the law. Further, the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in *Aleksey*. However, we agree with Appellant that a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict.[2] These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice. We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that Appellant has not shown prejudice from this error sufficient to warrant reversal. *Compare State v. Coggins*, 210 S.C. 242, 245, 42 S.E.2d 240, 241 (1947) (providing trial

2. We acknowledge the general sessions benchbook this Court previously supplied to all circuit judges contained language virtually identical to the disputed language employed by the trial judge.

judge's choice of words and comments, while not "happy," did not require reversal).

II. Closing Arguments

A. Background

During trial, before closing arguments, Appellant requested the trial judge to require the State to open fully on the law and facts of the case and then reply only to new matter raised by Appellant in his closing argument. Appellant stated to the trial judge, "I understand [the State is] going to open fully on the law and the facts, and not just open on some of the facts, but fully on the facts to explain their theory of the case so that --." The trial judge then interrupted and said, "[The State] will open and explain and then they will have final argument which I will allow them to go int[o] what they want to talk about." The solicitor responded, "[W]e believe the law in the state right now is the State [has the option] to bifurcate or to give one argument. We honestly would prefer to give one argument, but if [Appellant] demands that we open and close, I don't have any problem with it." The trial judge replied, "You can do it either way."

The State proceeded to open on the law and gave the facts only a cursory review. Appellant then gave his closing argument and stated to the jury that when he concluded his argument, the State would give a final argument and reply to everything he said. Appellant then informed the jury:

Then what's going to happen is this. The State's then going to come up with their real theory. How the arm got scratched, exactly how this alleged strangulation took place, and we have to sit mute. We will not have the chance to come back and refute that, and yet they'll have a chance to refute everything we've laid out there. That was their choice as to how they chose to do the closing arguments. I can't make them do it any differently.

During its reply argument,[3] the State reviewed the inconsistencies in the statements Appellant gave to law enforcement. The State also argued the murder took place in Appellant's car on the street in front of his parents' house and that Appellant murdered Victim because she was screaming and Appellant wanted to "shut her up." Appellant argues this was improper reply argument because he mentioned none of these points during his closing argument.

Appellant argued the State's reply argument "was nothing but one big sandbag, which we discussed in chambers"[4] and constituted a violation of his due process rights. Appellant asserted the State presented factual scenarios for the first time in its reply argument and

3. In this opinion, if used in conjunction with the State's second closing argument, the terms "the reply," "reply argument," "final argument," and "last argument" are synonymous.

4. When used as a transitive verb, Merriam—Webster defines "sandbag" as "to conceal or misrepresent one's true position, potential, or intent especially in order to gain an advantage over." Merriam—Webster Dictionary, http://www.merriam-webster.com/dictionary/sandbag.

requested either a mistrial or the opportunity to reply to the State's argument. The trial judge denied both requests.

In this appeal, Appellant contends the trial judge erred in refusing to require the State to open fully on the law and facts in its closing argument, in refusing to limit the State's reply argument to matters raised by Appellant's counsel in his closing argument, and in refusing to allow him to reply to new matter raised by the State in its reply argument. Appellant claims these errors violated his rights under the due process clauses of the South Carolina and United States Constitutions.[5]

In our prior opinion, we agreed in part, holding that in criminal trials, "where the party with the 'middle' argument requests, the party with the right to the first and last closing argument must open in full on the law and the facts, and in reply may respond in full to the other party's argument but may not raise new matter." Nevertheless, we concluded Appellant was not entitled to a new trial, as any error in the trial judge's denial of his motion to require the State to open in full on the facts and the law and to limit its reply was harmless beyond a reasonable doubt. Having revisited these issues upon rehearing, we now address the history of the rules governing the content and order of closing argument in criminal cases, and we address our authority to promulgate new rules governing the same. We also address Appellant's due process argument and conclude his conviction must be affirmed.

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5. Due process requires no person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV § 1; S.C. CONST. art. I, § 3.

Appendix E

B. Rules Governing Content and Order of Closing Argument

Prior to 1802, the practice regarding closing arguments in all public prosecutions on behalf of the State was to allow the State the privilege of opening and concluding the arguments in every case addressed to the jury. *See State v. Brisbane*, 2 S.C.L. (2 Bay) 451, 453 (1802). This partiality shown to prosecutors was a "relict of the kingly prerogative." *Id.* However, in *Brisbane*, the Constitutional Court of Appeals of South Carolina (a predecessor to this Court) formulated a rule governing closing argument in criminal courts, holding that in all cases in which a defendant calls no witnesses, he should have the privilege of concluding to the jury. *Id.* at 454.

In *State v. Huckie*, Prince Huckie and his codefendant Paris Bailey were jointly indicted and tried for burglary and larceny. 22 S.C. 298, 298-99 (1885). Following the State's presentation of evidence, Huckie declined to offer evidence in his defense, but Bailey called one witness. *Id.* at 299. Huckie argued it was error to deny him the last argument because he did not offer any evidence in his own behalf. *Id.* We noted there was no express rule giving the defendant a right to reply when the defendant offered no evidence but stated, "[R]esting upon the common law, such has been the practice." *Id.* We concluded that when a defendant in a criminal prosecution offers no evidence, he is entitled to the last argument; however, when two or more defendants are jointly tried, if any codefendant introduces evidence, the State is entitled to the reply

argument. *Id.* at 300-01.[6] *See also State v. Mouzon*, 326 S.C. 199, 485 S.E.2d 918 (1997); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972).

In *State v. Garlington*, 90 S.C. 138, 144-45, 72 S.E. 564, 566 (1911), we held that in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close during closing argument but may waive the right to both arguments or may waive the right to open and instead present full argument to the jury after the State's closing argument. In *State v. Gellis*, 158 S.C. 471, 485-86, 155 S.E. 849, 855 (1930), the defendant did not call any witnesses in his own defense, but he introduced letters and telegrams into evidence through a prosecution witness. Holding the defendant did not have the right to the final argument, we clarified that "if a defendant offers *any evidence* on trial of the case, the state is not deprived of its general right to the opening and concluding arguments." *Id.* at 486-87, 155 S.E. at 855 (emphasis added). Consequently, the loss of the right to make the final argument depends upon whether a defendant introduces any evidence at all, not upon whether he calls any witnesses.

In *State v. Atterberry*, 129 S.C. 464, 469, 124 S.E. 648, 650 (1924), the defendant was indicted for possession of "a quantity of whisky" in violation of the Prohibition Law and was found guilty by a jury. For perhaps the first time, we applied a codified court rule to closing arguments in a

6. The rationale behind this particular rule, as explained in *Huckie*, is curious but irrelevant to the instant case.

criminal trial. The defendant introduced evidence during the trial, and prior to closing arguments, he demanded the trial court to require the State to open in full on the facts and the law. *Id.* at 471, 124 S.E. at 651. The trial judge refused the defendant's request and allowed the State to fully waive its opening argument. *Id.* At that time, Circuit Court Rule 59 provided, "The party having the opening in an argument shall disclose his entire case; and on his closing shall be confined strictly to a reply to the points made and authorities cited by the opposite party." We explained Rule 59 was clear and mandatory and held the trial court's failure to require the State to open fully on the law and facts was reversible error. *Atterberry*, 129 S.C. at 471, 124 S.E. at 651. Noting the "wisdom of this rule" was most clearly evident in circumstantial evidence cases, we explained that if the rule did not require the State to open in full on the facts and the law, an able prosecutor would be able to present a connection of circumstances to the jury during his last argument that the defendant would not be allowed to rebut. *Id.*

Subsequent to *Atterberry*, Circuit Court Rule 59 and any wisdom it possessed were replaced by Circuit Court Rule 58, which provided in relevant part, "The party having the opening in an argument shall disclose fully *the law* upon which he relies if demanded by the opposite party." (emphasis added). We addressed Rule 58 in *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971), *overruled in part on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). In *Lee*, the defendant introduced evidence to the jury. At the close of the trial, the defendant requested the trial judge to require the State to open fully

on the law and the facts during its closing argument. *Id.* at 317, 178 S.E.2d at 656. The trial judge required the State to open on the law but refused to require the State to open on the facts. *Id.* We held "the trial judge, under the changed rule, was correct in holding that a solicitor is no longer required to make an opening argument to the jury on issues of fact." *Id.* at 318, 178 S.E.2d at 656. There was no discussion of due process concerns or "the wisdom" inherent in the former Rule 59.[7]

On July 1, 1985, the South Carolina Rules of Civil Procedure went into effect. *See* Rule 86, SCRCP. Rule 1, SCRCP, limits the application of those rules to civil cases.[8] Rule 85(b), SCRCP, also effective as of July 1, 1985, retained ten enumerated criminal practice rules contained in the Appendix of Criminal Practice Rules; according to Rule 85(b), SCRCP, those ten rules were renumbered as Criminal Practice Rules 1 through 10 and were to "continue in full force and effect." Circuit Court Rule 58 was not one of those ten retained rules. Rule 85(c), SCRCP,

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7. Both Rule 59 and Rule 58 were part of an appendix to the Code of Civil Procedure. In his concurrence in *Atterberry*, Acting Associate Justice Aycock observed that nothing limited the application of these rules to civil cases. 129 S.C. at 473, 124 S.E. at 651. Circuit Court Rules 59 and 58, while they were in effect, were properly applied to criminal cases.

8. Rule 43(j), SCRCP, controls the content and order of argument in civil cases. This rule essentially provides that the plaintiff shall have the right to open and close at the trial of the case and must open in full, and in reply may respond in full but may not introduce any new matter. This rule has never been applied to criminal cases, and Rule 1, SCRCP, expressly prohibits such application.

also effective July 1, 1985, provides that all other Circuit Court Rules were repealed as of that date. Consequently, Circuit Court Rule 58 no longer existed as a codified rule as of July 1, 1985.

On September 1, 1988, the South Carolina Rules of Criminal Procedure went into effect. *See* Rule 40, SCRCrimP. No rule contained within the South Carolina Rules of Criminal Procedure addresses the content and order of closing arguments in criminal trials. Rule 39, SCRCrimP, expressly repealed all existing Criminal Practice Rules. With the repeal of Circuit Court Rule 58 by Rule 85(c), SCRCP, and with the adoption of Rule 39, SCRCrimP, there is no codified or otherwise duly adopted court rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence. However, Rule 37, SCRCrimP, provides in part, "In any case where no provision is made by statute or these rules, *the procedure shall be according to the practice as it has heretofore existed* in the courts of the State." Rule 37, SCRCrimP (emphasis added). In the instant case, both the content and order of closing arguments were in keeping with repealed Circuit Court Rule 58, which required the State to open only on the law. *Lee*, 255 S.C. at 318, 178 S.E.2d at 656. We must first determine whether, almost thirty years after its adoption, Rule 37 preserves the application of repealed Circuit Court Rule 58 in criminal cases in which a defendant introduces evidence. We hold it does not.

This Court cannot simply assume that from July 1, 1985 through the trial of the instant case, the criminal

trial courts of this State have uniformly continued to follow repealed Circuit Court Rule 58 to the extent that it remains the "practice as it has heretofore existed" in criminal cases in which the defendant introduces evidence. We have no effective way to ascertain the prevailing practices of current and past trial judges. We can only conclude that absent a published court rule or a defined common law rule, individual trial judges have developed their own practices governing closing argument in cases in which a defendant introduces evidence. That is an untenable approach to such an important phase of a criminal trial.

One may inquire whether this Court may simply create a much-needed practice or procedural rule simply by exercising its authority to alter the common law. This is a reasonable inquiry, especially since the courts of this State attend on a daily basis to the notions of order, predictability, and due process in criminal proceedings. Indeed, "[t]he common law changes when necessary to serve the needs of the people. We have not hesitated to act in the past when it has become apparent that the public policy of the State is offended by outdated rules of law." *Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992) (citations omitted). *See also Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d 85 (2007) (altering the common law of social host liability); *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991) (abolishing contributory negligence); *Hossenlopp v. Cannon*, 285 S.C. 367, 329 S.E.2d 438 (1985) (observing that since the dog-bite law was of common law origin, it could be changed by common law mandate); *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (abolishing sovereign immunity).

In the foregoing cases, we certainly did alter the common law and were within our authority to do so. However, those cases involved substantive common law, not common law procedural rules. We are prohibited on two fronts from promulgating a new rule in the course of deciding the issues in this case. First, this Court does not have the power to adopt new rules of procedure for future trials by writing opinions to decide cases. Instead, when we decide an appeal from a criminal conviction—as we do here—our power is limited to correcting errors of law.[9]

Second, the South Carolina Constitution limits this Court's power to promulgate rules governing practice and procedure in the courts of this State. Before 1973, the South Carolina Constitution did not address in any manner the power of this Court to implement rules of practice and procedure in the courts of this State. On April 4, 1973, article V, section 4 of the South Carolina Constitution was amended to grant power to this Court, subject to statutory law, to "make rules governing the practice and procedure in all such courts [in the unified judicial system]." S.C. CONST. art. V, § 4. While this amendment was in effect, we did not make any rules governing the content and order of closing argument in criminal cases, and Circuit Court Rule 58 and other Circuit Court Rules carried the day until July 1, 1985, when the South Carolina Rules of Civil Procedure came into being, with Rule 85, SCRCP, preserving some criminal practice rules and repealing others, including Circuit Court Rule 58.

9. *See* S.C. CONST. art. V, § 5 ("The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe.").

Appendix E

On February 26, 1985, article V, section 4A of the South Carolina Constitution took effect. It remains in effect today and provides:

> *All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly* during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.

S.C. CONST. art. V, § 4A (emphasis added).

On January 28, 2016, we initiated the prescribed legislative process by proposing an amendment to the South Carolina Rules of Criminal Procedure to add Rule 21. *See Re: Amendments to the South Carolina Rules of Criminal Procedure*, 2014-002673 (S.C. Sup. Ct. Order dated Jan. 28, 2016). Proposed Rule 21 stated, "Closing arguments in all non-capital cases shall proceed in the following order: (a) the prosecution shall open the argument in full; (b) the defense shall be permitted to reply; and (c) the prosecution shall then be permitted to reply in rebuttal." *Id.* However, by concurrent resolution, the General Assembly, as was its prerogative, rejected

proposed Rule 21 in April 2016. *See* S. Con. Res. 1191, 121st Gen. Sess. (S.C. 2016).

While we acknowledge and respect the limitations placed on this Court's power pursuant to article V, section 4A of our constitution, in order for our criminal court system to operate efficiently, effectively, and consistently, clearly stated rules governing the content and order of closing argument are required. Our current closing argument rules consist of the following patchwork: Pursuant to the common law rule pronounced in *Brisbane* and as clarified in *Garlington*, in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close, but may waive the right to both or may waive opening and present full argument after the State's closing argument. Pursuant to the common law rule set forth in *Huckie*, if two or more defendants are jointly tried, if any one defendant introduces evidence, the State has the final closing argument. Pursuant to the common law rule as clarified in *Gellis*, in cases in which a defendant introduces evidence of any kind, even through a prosecution witness, the State has the final closing argument. However, in cases in which the State is entitled to the reply argument, there is no common law or codified rule as to whether the State must open in full on the law, or the facts, or both, or neither, and there is no rule governing the content of the State's reply argument.

This case falls within the last category. Appellant introduced evidence during trial. Under our holdings in *Huckie* and *Gellis*, the State was entitled to the reply argument. Appellant asked the trial court to require the

State to open in full on the facts and the law and asked the trial court to restrict the State's reply argument to rebuttal to matters raised by Appellant in his closing argument. The trial court denied these requests and essentially followed repealed Circuit Court Rule 58, allowing the State to open on the law and give the facts a cursory review. Appellant then presented his closing argument. After the State made its reply argument, Appellant asked to be allowed to rebut what he argued was new matter raised by the State. The trial court denied this request as well. Appellant claims his due process rights were violated by this procedure.

C. Due Process

While this Court's authority to promulgate rules is restricted by article V, section 4A of the South Carolina Constitution, we retain the authority to determine—on a case-by-case basis—whether a defendant's due process rights have been violated by procedural methods employed during a trial. Stated another way, our authority to rectify a specific due process violation falls within our constitutional power to correct errors of law and trumps our inability to adopt a clearly stated practice or procedural rule. We must therefore determine whether Appellant's due process rights were violated in this instance.

"Due Process is not a technical concept with fixed parameters unrelated to time, place, and circumstances; rather it is a flexible concept that calls for such procedural protections as the situation demands." *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016). In any

case, procedural due process contemplates a fair trial. *Id.* This concept applies to closing arguments. South Carolina 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. Generally, "[i]mproper comments [made during closing argument] do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). The relevant inquiry is whether the State's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* "A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." *State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997).

Appellant cites *Bailey v. State*, 440 A.2d 997, 1003 (Del. 1982), in which the Delaware Supreme Court held the trial court abused its discretion in permitting the State to utilize the "sandbagging" trial strategy in its reply argument. Appellant acknowledges there is no rule in South Carolina that prohibits "sandbagging," but he asserts his due process rights were violated because the State was allowed, in its reply argument, to present to the jury for the first time "two crucial theories" and "an out of context statement of Appellant."

Appendix E

Appellant's defense at trial was that he accidentally strangled Victim when he pulled her back into the moving vehicle by pulling on her tank top, thereby rendering her unconscious, with Victim then succumbing to positional asphyxiation on the front passenger floorboard. The State's theory of the case was that Appellant strangled Victim to death with the USB cord found in Appellant's car. The Appellant's parents' driveway as a potential scene of the murder was put before the jury through the State's witnesses—the first responders who found Victim deceased in the driveway of Appellant's parents' house. Appellant contends the first new theory argued by the State in its reply argument dealt with the location of the murder, i.e., that Appellant strangled Victim in Appellant's car in the driveway in front of Appellant's parents' house. Appellant claims his due process rights were violated when the State was permitted, in its reply, to argue this point to the jury. Appellant contends that at the least, he should have been permitted to respond. 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. Whatever the case, the question of exactly where Victim's death occurred was largely inconsequential to the question of whether Appellant murdered Victim or whether Victim instead died of causes unrelated to Appellant's criminal conduct.

Appellant contends the second new theory argued by the State in its reply was that Appellant murdered Victim because Victim was screaming at Appellant during the drive home, and Appellant wanted to "shut her up."

The fact that the two were in an argument and Victim was screaming at Appellant was entered into evidence through Appellant's own statement to law enforcement. Again, the State's advancement of this theory in reply was arguably a proper response to the sequence of events argued by Appellant in his closing argument. Even if it could be considered new matter, we conclude the State's advancement of this theory was relatively insignificant.

During its reply argument, the State also presented a PowerPoint summary of one of Appellant's statements to law enforcement. Appellant argues the State took the statement out of context when it "implied that [Appellant] said that [Victim] made it seem like I made her want to hurt herself." Appellant's actual statement to law enforcement was, "Yet a little before or at this point, I believe, that [Victim] made it seem like I had made her want to hurt herself, which is common for us when we argue." We conclude this minor point was insignificant to the jury's consideration of the issues.

While the State perhaps did not restrict its reply argument to matters raised by Appellant, and while Appellant was not allowed to respond to the foregoing three points, we conclude Appellant did not suffer prejudice as a result. *See Humphries*, 351 S.C. at 373, 570 S.E.2d at 166 (errors in closing argument "do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument"); *id.* (noting the relevant inquiry is whether the State's comments "so infected the

trial with unfairness as to make the resulting conviction a denial of due process"). Neither the State's reply arguments on these three points nor the trial court's refusal to allow Appellant to respond denied Appellant "the fundamental fairness essential to the concept of justice." *See Hornsby*, 326 S.C. at 129, 484 S.E.2d at 873. Therefore, we conclude Appellant has not established a due process deprivation.

CONCLUSION

We instruct trial judges to omit any language, whether in remarks to the jury or in an instruction, which might have the effect of lessening the State's burden of proof in a criminal case. Such language includes, but is not limited to, any language suggesting to the jury that its task is to "search for the truth" or to find "true facts," or that the jury should render a "just verdict." However, we hold Appellant has failed to show prejudice from these remarks sufficient to warrant reversal.

Article V, section 5 of the South Carolina Constitution limits this Court's authority to correcting errors of law and does not empower us to promulgate a procedural rule for future cases by simply issuing an opinion. Article V, section 4A, of the South Carolina Constitution prohibits this Court from adopting any rules of practice and procedure—even a much-needed rule governing the practice and procedure of closing arguments in criminal cases—without first going through the prescribed legislative process.

Appendix E

Currently, 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. Consequently, trial judges must, on a case-by-case basis, ensure that a defendant's due process rights are not violated during the closing argument stage. Absent authority to formally adopt procedural rules, our authority—and the authority of the trial court—is but to address due process considerations as they arise. 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. This authority remains in keeping with the trial judge's authority to ensure that a defendant's due process rights are not violated during a criminal trial. We remain mindful of the need for clearly articulated rules governing the content and order of closing arguments in cases in which a defendant introduces evidence. The uncertainty resulting from the absence of such rules is unfortunate. We hope the day will soon come when such rules are firmly in place.

We hold Appellant has not established prejudice resulting from the trial judge's opening remarks, and we hold Appellant was not denied due process during the closing argument stage of the trial. Appellant's conviction is therefore

AFFIRMED.

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur.

APPENDIX F — PETITION FOR REHEARING, FILED MAY 11, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2015-000718

S.C. Supreme Court Opinion No. 27693

THE STATE,

Respondent,

v.

MICHAEL VERNON BEATY, JR.,

Appellant.

APPEAL FROM LAURENS COUNTY
Court of General Sessions
W. Jeffery Young, Circuit Court Judge

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, the appellant, Michael Beaty, petitions for rehearing because this Court overlooked or misapprehended the points discussed in this petition. Once again, this Court discussed only two of the issues raised in Mr. Beaty' s brief. The two issues discussed in this Court's opinion leave unaddressed two federal questions, which are:

1) Does this Court's standard for determining harmless constitutional error depart from the mandates of *Chapman v. California,* 286 U.S. 18, 24 (1967)?

2) Does Due Process confer a right for an accused to have a full and fair opportunity to respond to the prosecution's best 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?

After addressing these two issues, this petition will address several of the issues not discussed in this Court's opinion.

I. ISSUES ADDRESSED IN THE COURT'S OPINION.

A. Opening Remarks.

This Court issued its first opinion in this case on December 29, 2016. On January 9, 2017, Mr. Beaty petitioned this Court for rehearing. By order dated March 24, 2017, amended on March 28, 2018, this Court granted Mr. Beaty's petition. On April 25, 2018, this Court reissued its opinion. Although making stylistic changes to the section captioned "Trial Judge's Opening Remarks," the substance of the opinion is the same.

In both opinions, this Court agreed that the trial judge, by "use of terms 'search for the truth,' 'true facts,'

and 'just verdict,'" ignored this Court's precedent in *State v. Daniels,* 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (instructing discontinuance of charge that jury's duty is to return a verdict that is just and fair to all parties), *State v. Alekesy,* 343 S.C. 20, 538 S.E.2d 248 (2000), and other cases relied on by Mr. Beaty in his Brief of Appellant, at pp. 28-37, and Reply Brief, at pp. 12-14. This Court found a constitutional violation and once again held, "These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice." Slip Opinion at 3. After admonishing trial courts to avoid using these terms, this Court once again concluded:

> Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that Appellant has not shown prejudice from this error sufficient to warrant reversal. *Compare State v. Coggins,* 210 S.C. 242, 245, 42 S.E.2d 240, 241 (194 7) (providing trial judge's choice of words and comments, while not "happy," did not require reversal).

Slip Opinion at 3. This Court once again found Mr. Beaty was prejudiced by the trial judge's unconstitutional comments but still did not explain why that prejudice was not sufficient to warrant a new trial, even after Mr. Beaty's initial petition for rehearing pointed out this error.

Appendix F

This Court once again overlooked the Solicitor exploiting the trial judge's remarks in his closing argument, Rec. on App. 772, ll4-12, even after Mr. Beaty' s petition for rehearing pointed out this error. This Court continues to acknowledge the "State had informed the jury that it would have to pick between two competing theories." Slip Opinion at 3. Indeed, the parties did present the jurors with two competing theories, neither of which absolved Mr. Beaty of Emily Anna Asbill's death. Relying entirely on circumstantial evidence, the prosecution argued that Mr. Beaty intentionally strangled his girlfriend with a USB cord. Relying on his statement to investigators, expert testimony, and circumstantial evidence, Mr. Beaty established his girlfriend tried to jump out of a moving car and he failed to safely secure her inside the car, resulting in her death by positional asphyxiation. The jurors' role never was to determine which competing theory best explained the circumstances of the crime or to render a verdict they believed best served their perception of justice. Rather, the jurors' role was to determine whether the State met its burden of proving Mr. Beaty guilty of murder beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1990). "Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge." *State v. Buckner,* 341 S.C. 241,247,534 S.E.2d 15, 18 (Ct. App. 2000). The unconstitutional remarks, when considered with the Solicitor's opening statement and closing arguments, increase the need to apply this presumption.

This Court, once again, did not apply the proper standard of review for a harmless constitutional violation when it held:

> Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that Appellant has not shown prejudice from this *error sufficient to warrant reversal. Compare State v. Coggins,* 210 S.C. 242, 245, 42 S.E.2d 240, 241 (1947) (providing trial judge's choice of words and comments, while not "happy," did not require reversal).

Slip Opinion at 3 (emphasis added). This Court, thus, continues to require Mr. Beaty to not only show prejudice but also to show prejudice sufficient to warrant reversal, even after Mr. Beaty's initial petition for rehearing pointed out this error. As set forth in Mr. Beaty' s initial petition for rehearing, under the proper standard of review, "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." *Chapman v. California,* 286 U.S. 18, 24 (1967). The burden, therefore, is on this Court to explain why the error is harmless beyond a reasonable doubt and not on Mr. Beaty to explain why a prejudicial, constitutional error is sufficient to warrant reversal.

This Court's continued reliance on *Coggins* is misplaced for two reasons. First, it was decided two decades before *Chapman* and, therefore, does not represent the appropriate standard of review for determining a harmless constitutional violation. Second, the trial court's "[un]happy choice of words" in *Coggins* "did not constitute [an] objectionable expression of the

opinion of the judge." *Id.* 210 S.C. at 245, 42 S.E.2d at 241. Thus, this Court once again erred by applying a standard of review from a case where no constitutional violation occurred.

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

B. Closing Argument.

1) The Common law.

In the opinion this Court concluded, "This Court cannot simply assume that from July 1, 1985 through the trial in the instant case, the criminal trial courts of this State have uniformly continued to follow repealed Circuit Court Rule 58 to the extent it remains the 'practice as it has heretofore existed in criminal cases in which the defendant introduces evidence." Slip Opinion at 7. The present Court has 36 years of combined experience on the circuit court bench. This Court has approximately 62 years of combined appellate experience reviewing the testimony and arguments of counsel in criminal cases. This Court has ample experience with the criminal courts of our State to know what the standard practice has been since the repeal of Rule 58. That standard practice has been to require the State to open on the law and not the facts, when the defendant presents evidence.

This Court further concluded that "absent a published order, court rule, or a defined common law rule, individual judges have developed their own practices governing

closing arguments in cases in which a defendant introduces evidence." Slip Opinion at 7. This statement is wrong for two reasons. First, there are no facts in the record of this case or cited by the court to support this conclusion. As this Court has acknowledged, erroneously in the opinion of undersigned counsel, the Court cannot assume what the practice is, this Court cannot conclude that individual trial judges have developed their own practices concerning the content and order of closing argument. Second, this Court has ignored that since at least 1795, the trial courts of our state have required the party having the burden to open and close on the case. As this Court held quoting an old Rule 59:

> And on all motions or special matters either springing out of a cause or otherwise, the actor or party submitting the same to the court, shall, in like manner, begin and close; and so shall the defendant, where he admits the plaintiff's cause by the pleadings, and takes upon himself the burden of proof, have the like privilege." This rule, with slight modification, has been in existence in this state ever since 1796 (see Miller's Compilation), ...

State v. Huckie, 22 S.C. 298, 299 (1885).

The fact that the State has the obligation to open fully on the facts and then reply to new matter has been part of the common law since the founding of our country. Nicole Velascoal, TAKING THE "SANDWICH" OFF OF THE MENU: SHOULD FLORIDA DEPART FROM OVER

Appendix F

150 YEARS OF ITS CRIMINAL PROCEDURE AND LET PROSECUTORS HAVE THE LAST WORD?, 29 NOVA L. REV. 99, 112 (2004) As the author stated:

> The rationale behind the common law rule is that the party with the burden of proof should be entitled to the opening and closing arguments to the jury. This structure for the order of closing arguments is grounded in the premise that justice is best served if the defendant knows the actual arguments that the prosecution will make in support of a conviction before the defendant is faced with the decision whether to reply, and if so, what to reply."

Id. at 128-129.

Thus, the law in our State, in the absence of a rule promulgated by this Court, is that the State be required to open fully on the facts and respond only to new matter raised by the defendant. We have never had a hodgepodge of closing arguments determined by the peculiarities of each individual judge, until now. This Court should recall the opinion, instruct the judges they are to follow the long established common law and reverse the conviction of Michael Beaty.

2) Due Process.

Regardless of whether this Court analyzes this case based upon a violation of the common law rule or the Due Process clause of the State and Federal Constitutions,

the argument in this case was prejudicial to Michael Beaty. The reason is simple. As discussed at the two oral arguments in this case, Mr. Beaty simply asked for the opportunity to respond to the best argument of the State. This request was denied. No understanding of the meaning of a fair trial can mean that one side is deprived of the opportunity to respond to the best argument of the other side. As noted by this Court, the Powerpoint presentation, which represents the best argument of the State, was used in the reply argument. The opinion in this case sanctions the state using its Powerpoint presentation, and thus its best argument, in reply.

This Court found that the final reply argument of the State did not prejudice Mr. Beaty when the State introduced for the first time the theory was Mr. Beaty strangled Ms. Asbil because she was screaming in front of his parent's house. No testimony at trial would have prepared Mr. Beaty's counsel for that argument. As noted Mr. Beaty's brief, the evidence to refute that argument was available, but the jury never hear it. Even this Court noted in the opinion that "the ligature marks on Victim's neck but not on the back of the neck." Slip Opinion at 1. This fact seriously questions the theory of the state as to how Ms. Asbill lost her life. This fact proves the theory of the biomechanical engineer was more probable. But notwithstanding these facts, this Court concluded that Mr. Beaty was not prejudiced by not being able to respond to the best argument of the state. The facts recognized by this Court establish this is a questionable case where the least error could have been prejudicial to the defendant.

As to closing arguments, the United States Supreme Court has said:

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

Herring v. New York, 422 U.S. 853, 862 (1975)

Counsel for Mr. Beaty did not have the last clear chance to respond to the best argument of the State. In depriving Mr. Beaty of this opportunity, the lower court denied Mr. Beaty Due Process of law as guaranteed by Article I, Sec. 3 of the Constitution of the State of South Carolina and by the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

3) Alternate Way to Address this Issue.

This Court recognized trial judges have the "authority to ensure that a defendant's Due Process rights are not violated during a criminal trial," including that "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." Slip Opinion at 10. Yet, this Court reasoned, "We remain mindful of the need for clearly articulated rules governing the content and order of closing arguments in cases in which a defendant introduces evidence. The uncertainty resulting from the absence of such rules is unfortunate." Slip Opinion at 10. Because this Court is the head of our state's "unified judicial system," S.C. Const. art. V, § 1, it is strange that this Court would recognize the trial judges have more authority than this Court to protect the Due Process rights of an accused.

This Court, in fact, exercised the very rulemaking authority it claims to lack by issuing its memorandum dated April 26, 2018, a copy of which is attached.[1] This memorandum strongly urges trial judges to require the State to open in full on the facts and the law and to restrict the State's reply argument to matters raised by the defense in closing. It is difficult to imagine trial courts ignoring such a strong admonition from this Court. This Court, therefore, has conferred on future defendants the very rights Mr. Beaty sought from his trial judge and this Court.

The solution is simple. This Court should hold Due Process requires an accused to have a full and fair

1. "A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee,* 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984).

opportunity to respond to the prosecution's best 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. Certainly, this Court has that inherent authority pursuant to S.C. Const. art. V, § 1. This Court, in fact, exercised similar inherent authority in *State v. Langford,* 400 S.C. 421, 735 S.E.2d 471 (2012).

II. ISSUES NOT ADDRESSED IN THE COURT'S OPINION.

This Court completely overlooked Questions I, II, V, VI, VII, and VIII raised by Mr. Beaty in his brief.

A. This Court erred in failing to consider the facts supporting the request for a charge on involuntary manslaughter.

Sections II(B) of Mr. Beaty's initial petition for rehearing argued, "This Court erred in failing to consider the facts supporting the request for a charge on involuntary manslaughter." In his initial petition for rehearing, at p. 1, Mr. Beaty pointed out, "[T]his Court did not discuss the facts of the case." Although the opinion reissued on April 25, 2018 discussed the facts, this Court did not explain why those facts did not warrant the trial judge instructing the jurors about involuntary manslaughter. In continuing to hold that Michael Beaty did not establish sufficient facts to create a jury issue as to involuntary manslaughter, this Court either continues to overlook the facts established by Mr. Beaty or has adopted a new rule as to lesser included offenses.

Appendix F

1) Involuntary Manslaughter as a Lesser Included Offense.

This Court has long held that involuntary manslaughter is a lesser included offense of murder even though involuntary contains the element of recklessness that is not present in murder. "Involuntary manslaughter is a lesser-included offense of murder ...." *State v. Scott,* 531,414 S.C. 482,487, 779 S.E.2d 529 (2015); *See also State v. Elliott,* 346 S.C. 603,610,552 S.E.2d 727, 731 (2001) (Pliecones dissenting) *overruled on other grounds by State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005).

In determining if the lesser included of involuntary manslaughter should be given, now Chief Justice Beatty has said, "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be *inferred* that the defendant committed the lesser, rather than the greater, offense." *State v. Sams,* 410 S.C. 303, 308 764 S.E.2d 511, 513 (2014) (emphasis added). And former Chief Justice Pliecones has also said, "The trial judge is to charge the jury on a lesser included offense if there is *any evidence* from which the jury could infer that the lesser, rather than the greater, offense was committed." *State v. Watson,* 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002) (emphasis added). Further, this Court has said, "Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was *unintentional." Tisdale v. State,* 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008) (emphasis added).

2) Mr. Beaty's Statements to Law Enforcement.

> In recognizing the statements Mr. Beaty made to law enforcement, this Court stated:
>
> > At trial, the State introduced several of Appellant's statements to law enforcement into evidence. These statements varied materially. Appellant initially suggested Victim died of a self-inflicted cutting injury. Following law enforcement's receipt of the autopsy results, Appellant voluntarily returned to the police station and repeated his earlier version of events. However, in this statement, Appellant stated he had to undo Victim's seatbelt when he realized she was unconscious after arriving at his parents' home. When Appellant was informed of the autopsy results, which showed Victim had been strangled and had "road rash," Appellant gave a written statement explaining he and Victim had argued during the car ride, Victim had opened the car door to jump out, and he had grabbed her shirt to pull her back into the car.

Slip Opinion at 1. This Court, however, did not explain how Mr. Beaty's statement that Ms. Asbill "opened the car door to jump out, and he had grabbed her shirt to pull her back into the car" does not establish facts supporting an involuntary manslaughter instruction. The tone of this Court's discussion about Mr. Beaty's statements suggests the Court might have discounted Mr. Beaty's

statement about Ms. Asbill's attempt to jump out of the moving vehicle because that statement "varied materially" from his other statements. If the Court did so, then this Court overlooked its longstanding rule that evidence supporting a lesser included can come from any source in the record, even if from an accused's statements that "varied materially."

In *State v. Knoten,* the prosecution "introduced all three of [Knoten's] written statements at trial." 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001). Knoten's second statement established facts supporting a voluntary manslaughter instruction. On appeal, the State "contend[ed] that because Appellant recanted the confession at trial, he was not entitled to a charge on voluntary manslaughter." *Id.* 347 S.C. at 305, 555 S.E.2d at 396. This Court held, "Were a jury to believe the facts as represented in [Knoten's] second statement, ... [then] [i]t follows that a charge on voluntary manslaughter was required." *Id.* 347 S.C. at 306, 555 S.E.2d at 396. Not reversing Mr. Beaty's convictions based on the trial judge's failure to charge involuntary manslaughter is inconsistent with *Knoten.*

This Court failed to note that an attempt to render aid, if recklessly done, can be a basis for finding a defendant guilty of involuntary manslaughter. As the North Carolina Supreme Court said, "Clearly there exists a conflict in our decisions regarding the propriety of submitting to the jury the issue of a defendant's guilt of involuntary manslaughter where there is evidence that the killing was unintentional and occurred when the defendant attempted to prevent

the victim from committing suicide." *State v. Tidwell*, 112 N.C. Ct. App. 770, 775, 436 S.E.2d 922, 926 (1993). The Court then held that a reckless act in attempting to prevent a suicide would entitle a defendant to a charge of involuntary manslaughter. The same principle should be applied in this case.

3) Expert Testimony.

Mr. Beaty's statement that Ms. Asbill "opened the car door to jump out, and he had grabbed her shirt to pull her back into the car" is supported by expert testimony. In the opinion reissued on April 25, 2018, after reviewing the prosecution's evidence and theory of the case, this Court observed:

> A forensic pathologist also testified for Appellant and stated the USB cord did not cause the injuries to Victim's neck and opined positional asphyxiation played a role in Victim's death. A mechanical engineer testified for Appellant and stated the ligature marks on Victim's neck could have been caused by someone holding her up by her tank top as she hung out of the car and that both Victim's abrasions and her blood found on the outside of the car were consistent with this scenario.

Slip Opinion at 2. This Court, however, did not explain why this expert testimony did not warrant an instruction on involuntary manslaughter.

Against the standards set forth in Subsection II(A)(1) above, this Court has now said, without legal discussion, that the act of a drunken driver rendering an intoxicated passenger unconscious by pulling her clothing from behind back into a moving automobile, positioning her onto the front floor board of the automobile, not rendering her aid and not keeping her from dying of positional asphyxiation does not create, as a matter of law, facts from which a jury may infer Mr. Beaty was grossly negligent. This position is contrary to the position of this Court in *Tisdale.* In *Tisdale* the physical facts were the deceased was shot twice in the back of the head. These physical facts were inconsistent with the statement of the defendant who claimed the gun went off while the defendant and the deceased were struggling over the gun. This Court said, "The fact that Victim's wounds may have been inconsistent with petitioner's testimony that the gun fired while in Victim's hand is not overwhelming evidence that petitioner intentionally killed Victim." *Tisdale,* 3 78 S.C. at 126, 662 S.E.2d at 412. Here the exact opposite is true. The physical evidence is more consistent with the theory of the Defendant than that of the State. The evidence at trial established that Ms. Asbill' s hair was pulled up in a bun, and this Court found "the ligature marks on [her] neck were visible on the front and sides of her neck but not on the back of her neck." Slip Opinion at 1. The State's pathologist admitted that if the hair were up and the ligature mark did not go all the way around the neck of Ms. Asbill, then she was most likely pulled from behind. Rec. on App. at 526, ll 19-25. The State never presented any factual theory consistent with the evidence that would explain why the ligature mark did not go completely

around the neck of Ms. Asbill. The only theory presented by the State was that the USB cord they contended caused Ms. Asbill' s death was wrapped completely around her neck.

As noted above, in order for a trial judge to be required to charge the lesser included charge of involuntary manslaughter, a defendant is only required to produce any evidence from which it may be inferred the defendant acted with gross negligence. In making the determination as to whether sufficient evidence has been produced by the defendant to make such a charge proper, this Court is not concerned with the weight of the evidence but the existence of the evidence. *State v. Reese,* 3 70 S.C. 31, 36, 633 S.E.2d 898, 900 (2006) *overruled on other grounds by State v. Belcher,* 385 S.C. 597, 685 S.E.2d 802 (2009). Whether the standard ofreview be that there must be evidence from which a jury may *infer* a lesser included, whether there must be *any evidence* of involuntary or evidence the killing was *unintentional,* Mr. Beaty presented evidence to satisfy any of these standards of review this Court has used in the past.

As this Court said in this case, the "seek the truth charge," "may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." Slip Opinion, pp. 3-4. In this case, where Mr. Beaty never denied causing the death of Ms. Asbill, the only "justice" the jury could do is to convict Mr. Beaty of the only choice they had—

other than setting him free—murder. By depriving Mr. Beaty of the jury electing to convict him of involuntary manslaughter, "the jury's perception of justice" insured a conviction of murder. The failure to charge the lesser included deprived Mr. Beaty of Due Process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution.

4) Did this Court Adopt a New Rule for Lesser Included Offenses?

In the alternative, this Court might have affirmed the denial of the request to charge involuntary manslaughter based upon a change in the standard of review of lesser included offenses. In *State v. Elliott,* 346 S.C. 603, 552 S.E.2d 727 (2001), this Court applied a two-part test for determining whether an offense is a lesser included offense. Initially, "[t]he test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense." *Id.* at 606, 552 S.E.2d at 728. *See,* Chris Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine,* 21 Am. Crim. L. Rev. 445 (1984). In *Elliott,* this Court, nevertheless, adhered to precedent recognizing that assault and battery of a high and aggravated nature is a lesser included offense of attempted criminal sexual conduct, even though the same elements test was not satisfied. After recognizing "the existence of a few anomalies," this Court concluded, "We will continue to consider offenses on a case-by-case basis, beginning with the elements test." *Elliott,* at 608, 552

S.E.2d at 730. If this Court applied the same elements test in this case, then the lesser include charge of involuntary manslaughter could not have been given. The reason is that involuntary manslaughter includes an element of recklessness that is not included in the charge of murder.

If this Court applied the standard of review used in *Elliott,* then the decision in this case would violate the *ex post facto* and Due Process clauses of the United States and South Carolina Constitutions. By adopting such a standard of review, this Court would have adopted a rule not previously applied to a case of involuntary manslaughter being a lesser included offense of murder. While this Court could adopt such a rule, it could only have prospective application. *Bouie v. City of Columbia,* 378 U.S. 347 (1967).

5) *State v. Scott,* 414 S.C. 482, 779 S.E.2d 529 (2015).

This Court further erred in relying upon *State v. Scott,* 414 S.C. 482, 779 S.E.2d 529 (2015). In that case this Court said, "Simply put, Scott has not presented any evidence that he acted with reckless disregard for the safety of others." *Id.* at 488, 779 S.E.2d at 532. This fact is simply not correct for Mr. Beaty in this case. Further, and perhaps most importantly, *Scott* further said, "As the trial court noted, if the jury accepted Scott's version of the facts as true, he would be entitled to acquittal because the killing would have been justified." *Id.* In this case, if the jury accepted Mr. Beaty' s evidence as true, the jury would still conclude that Mr. Beaty was responsible for the death of Ms. Asbill. His defense was not a complete

defense, but was a defense of a lesser included. *See State v. Chatman,* 336 S.C. 149, 153, 519 S.E.2d 100, 101-02 (1999) (involuntary manslaughter instruction required when "the evidence establishes that appellant was not attempting to strangle Victim with his hands").

B. This Court failed to consider that the theory used by the State to argue the basis for the conviction of Michael Beaty are speculation and is contrary to the undisputed facts in this case.

Sections Il(B) of Mr. Beaty' s initial petition for rehearing argued, "This Court failed to consider that the theory used by the State to argue the basis for the conviction of Michael Beaty are speculation and is contrary to the undisputed facts in this case." Mr. Beaty incorporates by reference Section II(B) of his initial petition for rehearing as if set forth here verbatim. For the same reasons set forth in Section II(B) of the initial petition for rehearing, this Court should reverse Mr. Beaty's convictions and enter an order directing a verdict of acquittal.

C. Cumulative Error Doctrine.

Section II(C) of Mr. Beaty's initial petition for rehearing explained why this Court erred by not applying the cumulative error doctrine. Mr. Beaty incorporates by reference Section II(C) of his initial petition for rehearing as if set forth here verbatim. For the same reasons set forth in Section II(B) of the initial petition for rehearing, this Court should reverse Mr. Beaty's convictions and order a new trial.

III. CONCLUSION.

This Court should rehear this appeal, reverse Mr. Beaty's convictions and sentences, and order a new trial.

Respectfully Submitted,

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Michael Beaty

May 10, 2018
Greenwood, South Carolina

APPENDIX G — ORDER DENYING PETITION FOR REHEARING, FILED MARCH 25, 2018

THE SUPREME COURT OF SOUTH CAROLINA

Appellate Case No. 2015-000718

THE STATE,

Respondent,

v.

MICHAEL VERNON BEATY, JR.,

Appellant.

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

/s/ _____ C.J.

/s/ _____ J.

/s/ _____ J.

Appendix G

/s/ _____ J.

/s/ _____ J.

Columbia, South Carolina
May 25, 2018

APPENDIX H — REMITTITUR, FILED IN TRIAL COURT MAY 31, 2018

THE SUPREME COURT OF SOUTH CAROLINA

May 25, 2018

The Honorable Lynn W. Lancaster
Clerk of Court, Laurens County
PO Box 287
Laurens SC 29360-0287

REMITTITUR

Re: The State v. Michael V. Beaty, Jr.
Lower Court Case No. 2013-GS-30-01553
Appellate Case No. 2015-000718

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

/s/_____
CLERK