No. 19-____

IN THE
SUPREME COURT OF THE UNITED STATES

PRESTON SHANDS, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SOUTH CAROLINA COURT OF APPEALS

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

I.

As applied to Preston Shands, Jr., is South Carolina's kidnapping statute, S.C. Code Ann. § 16-3-910, vague and overbroad, in violation of due process, because it did not put him on notice of what conduct is prohibited?

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?

III.

Did the South Carolina Court of Appeals correctly apply the comparative juror analysis under the third step of *Batson v. Kentucky,* 476 U.S. 79 (1986)?

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iv

List of Parties and Corporate Disclosure 1

Opinion Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Why the Writ Should be Granted 4

I. As applied to Preston Shands, Jr., is South Carolina's kidnapping statute, S.C. Code Ann. § 16-3-910, vague and overbroad, in violation of due process, because it did not put him on notice of what conduct is prohibited? 4

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? 9

III. Did the South Carolina Court of Appeals correctly apply the comparative juror analysis under the third step of *Batson v. Kentucky,* 476 U.S. 79 (1986)? 17

Conclusion 20

APPENDIX

State v. Shands A1

Petition for Rehearing A19

Order Denying Petition for Rehearing A27

Petition for Writ of *Certiorari* A28

Order Denying Petition for Writ of *Certiorari* A59

Remittitur..... ..... A60

Kidnapping Indictment A61

TABLE OF AUTHORITIES

Cases

Bailey v. State, 440 A.2d 997 (Del. 1982) 13, 14

Batson v. Kentucky, 476 U.S. 79 (1986) 1, 2, 17

Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989) 13

Chapman v. California, 286 U.S. 18 (1967) 16

Collins v. Kentucky, 234 U. S. 634 (1914) 8

Connally v. Gen. Const. Co., 269 U.S. 385 (1926) 8

Degadillo v. State, 262 S.W.3d 371 12

Flowers v. Mississippi, ___ U.S. ___, 139 S. Ct. 2228 (2019) 19

In Re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE-FINAL ARGUMENTS, 957 So.2d 1164 (Fla. 2007) 12

International Harvester Co. v. Kentucky, 234 U. S. 216 (1924) 8

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) 17

Lozada v. S.C. Law Enf't Div., 395 S.C. 509, 719 S.E.2d 258 (2011) 8

Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998) 18

Sessions v. Dimaya, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018) 8

State v. Atterberry, 129 S.C. 464, 124 S.C. (1924) 10

State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018) 9, 11, 12, 14, 15

State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) 3

State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982) 8

State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) 8

State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014) 18

State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982) 8

State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971) 10, 11

State v. Scott, 406 S.C. 108, 749 S.E.2d 160 (Ct. App. 2013) 19

State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018) 1, 3, 8, 14, 15, 16, 18, 19

State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001) 19

State v. Smith, 275 S.C. 164, 268 S.E.2d 276 (1980) 8

State v. Stewart, 413 S.C. 308, 775 S.E.2d 416 (Ct. App. 2015) 18

State v. Brisbane, 2 S.C.L. 451 (S.C. Const. App. 1802) 11

State v. Garlington, 90 S.C. 138, 72 S.E. 564 (1911) 11

State v. Gellis, 158 S.C. 471, 155 S.E. 849 (1930) 11

State v. Huckie, , 22 S.C. 298 (1885) 11

United States v. Davis, ___ U.S. ___, 139 S.Ct. 2319 (2019) 9

United States v. Maloney, 755 F.3d 1044 (9th Cir. 2014) 12

Statutes

ARK. CODE ANN. 16-89-123 12

GA. CODE ANN. § 17-8-71 12

NEV. REV. STAT. ANN 175.141 12

S.C. Code Ann. § 14-7-1110 17

S.C. Code Ann. § 16-3-910 ..... 1, 2, 4, 8

S.C. Code § 17-25-45(A) 2

Constitutional

Article I § 3 of the Constitution of the State of South Carolina 3

Article V, section 4A, of the South Carolina Constitution 12

Article V, section 5 of the South Carolina Constitution 12

U.S. Const. Am. V 1

U.S. Const. Am. XIV 1

Rules

Fed. Rule Cr. Proc. 29.1 ..... 12, 13

Rule 43(j) of the South Carolina Rules of Civil Procedure 11

Rule 203(d)(1)(A)(ii), SCACR 3

Rule 204(a), SCACR 3

TENN. RULES OF CRIM. PROC. Rule 29.1 12

Other Authorities

H.R. REP. 94-247, 17, 1975 U.S.C.C.A.N. 674, 689 13

STEIN, CLOSING ARGUMENTS 2d, § 1:6 (2010) 12

LIST OF PARTIES AND CORPORATE DISCLOSURES

Preston Shands, Jr. is a natural person. The respondent is the State of South Carolina. No corporations are involved in this petition.

OPINION BELOW

The opinion of the South Carolina Court of Appeals is published, *State v. Shands*, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018), and reprinted in the Appendix (hereinafter "A.") at A. 1-18.

JURISDICTION

On June 13, 2018, the South Carolina Court of Appeals issued its opinion. A. 1-18. On June 27, 2018, Mr. Shands petitioned for rehearing. A. 19-26. On August 16, 2018, the Court of Appeals denied the petition for rehearing in an unpublished order. A. 27. On September 24, Mr. Shands filed a petition for writ of *certiorari* in the South Carolina Supreme Court. A. 28-58. On May 9, 2019, the South Carolina Supreme Court denied Mr. Shands petition for a writ of *certiorari*. A. 59. On May 15, 2019, the Court of Appeals issued the Remittitur. A. 60.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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; nor deny to any person within its jurisdiction the equal protection of the laws."

This appeal also involves a challenge to the constitutionality of South Carolina's kidnapping statute, S.C. Code Ann. § 16-3-910.

STATEMENT OF THE CASE

On July 21, 2015, the State charged Preston Shands, Jr., with first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a knife during the commission of a violent crime. Record on Appeal (hereinafter "R.")[1] 294-98. The Laurens County Grand Jury indicted Mr. Shands for these charges on October 3, 2014. R. 299-310. On September 4, 2014, the State served notice of intent to seek imprisonment for life without the possibility of parole, pursuant to S.C. Code § 17-25-45(A), regarding the charges of first-degree burglary, kidnapping, and attempted murder. R. 311.

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

Mr. Shands appealed to the Court of Appeals. Charles Grose represented Mr. Shands. David A. Spencer, of the South Carolina Attorney General's Office, represented the State. Mr. Shands raised eight questions on appeal, which included the following issues relevant to this petition:

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

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[1] The Record on Appeal is the record that was before the South Carolina Court of Appeals.

2. Did the trial judge err in failing to require the State to open fully on the law and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America by his counsel not being able to respond to the arguments made by the State in its rebuttal closing argument?

3. Did the trial court judge err by not applying the third step of *Batson's* comparative juror analysis when the Solicitor struck three men based on their prior criminal convictions but sat a similarly situated female who also had a criminal conviction?

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

On November 8, 2017, the Court of Appeals convened an oral argument. On June 13, 2018, the Court of Appeals reversed Ms. Shands conviction for attempted murder because the trial judge instructed the jurors they could infer malice from the use of a deadly weapon, which is contrary to the holding in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). The Court of Appeals affirmed Mr. Shands other convictions and sentences. *State v. Shands*, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018). A. 447-64. Both parties petitioned for rehearing, and the Court of Appeals denied those petitions on August 16, 2018. A. 456-82.

On September 24, 2018, Mr. Shands filed a petition for writ of *certiorari* in the South Carolina Supreme Court, which included the following issues relevant to this petition:

1. Did the trial judge err by denying Preston Shands Jr.'s motion for a directed verdict on the kidnapping charge because the kidnapping statute, as applied to

Mr. Shands, is unconstitutionally vague and overbroad because it did not put him on notice of what conduct is prohibited?

2. 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?

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

A. 28-58. The State filed a cross-petition. On May 9, 2019, the South Carolina Supreme Court denied both petitions for a writ of *certiorari*. A. 59. On May 15, 2019, the Court of Appeals issued the Remittitur. A. 60. This petition for a writ of *certiorari* follows.

WHY THE WRIT SHOULD BE GRANTED

I.

As applied to Preston Shands, Jr., is South Carolina's kidnapping statute, S.C. Code Ann. § 16-3-910, vague and overbroad, in violation of due process, because it did not put him on notice of what conduct is prohibited?

On Sunday, July 20, 2014, Sharron Copeland Shands had been married to Preston Shands, Jr. for ten years. Mr. Shands watched the couple's two minor children, T.C. and J.S.,[2] while his wife went to church. That evening, Mr. and Ms. Shands got into an argument. Ms. Shands left the house through the garage. The garage door was half closed. Mr. Shands pulled Ms. Shands by the hair. She went next door to the home of Clarence ("Bill") and Martha Koon. Mr. Shands broke a sliding glass door, entered the Koons' home, and cut Ms. Shands. Ms. Shands was treated for her injuries at Greenville Memorial Hospital. R. 55-67; *see also* R. 71-78, 81-84, 86-94, 98-

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

100 (testimony of T.C., J.S., Bill Koon, and Martha Koon). Bill Koon testified that Mr. Shands was cut and covered in blood, but he did not see how it occurred. R. 95-96. T.C. also got cut, which was the basis of the first-degree assault and battery charge. R. 77-78.

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

Mr. Shands testified he does not have a memory of the incident but, after reviewing the evidence, realized his conduct was responsible for his wife's injuries. He testified about the events, which he could remember, leading up to the incident. After Mr. Shands cooked breakfast for the family, Ms. Shands went to church. Mr. Shands took care of the two boys. They cleaned house. Mr. Shands helped T.C., who has a learners permit, practice driving. Mr. Shands had one Bud Light. Mr. Shands had bought some "homemade moonshine" at work. He started drinking it. It was too strong to drink straight, so he mixed it with Coca Cola. Normally, Mr. Shands goes to sleep when he drinks alcohol, but this time he had a different reaction. "This had some effect that took me slap clean out of my mind." R. 188-96. Travis McBeth testified that Ms. Shands acknowledged to him the possibility that Mr. Shands had been poisoned. R. 210-11. Mr. Shands contended at trial that he lacked criminal intent, and he requested a jury instruction on involuntary intoxication. R. 213-15, 293.

In its opening statement, the prosecution told the jurors:

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

R. 43-44.

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

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

R. 170; A 61-62 The Solicitor contended:

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

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

In its initial closing argument, the prosecution argued—as it had telegraphed in its opening statement—without any additional explanation, "[T]his isn't a traditional kidnapping." R. 220-23. Mr. Shands argued in full. R. 223-30. During Mr. Shands' closing argument, counsel told the jurors:

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

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

During its final reply argument, the prosecution revealed to the jurors for the first time the State's theory about the kidnapping charge:

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

R. 234.

Ms. Shands and her two children were the only witnesses that could have observed Mr. Shands' conduct related to the garage door and pulling his wife's hair. Ms. Shands actual testified, "[W]e tried to get out of the garage. It was halfway so we couldn't get out." And, "I remember him pulling me by my hair to try to get me back in the backdoor." R. 58. At this point, she did not testify that Mr. Shands did anything to close an open garage door or actually restrain her by her hair. Later on, Ms. Shands testified, I was trying to open it and he was trying to close it," but, she still never testified that Mr. Shands restrained her. R. 66-67. T.C. testified that Mr. Shands "tried to close the garage" door, but never testified that he actually did. R. 74-75. T.C. did not offer any testimony about Mr. Shands pulling Ms. Shands' hair. J.S. did not offer any testimony

about the garage door. J.S. testified that his father "got my mom by the hair," but never said his father actually restrained his mother. R. 83.

S.C. Code Ann. § 16-3-910 provides, "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law . . . is guilty of" kidnapping. The South Carolina Court of Appeals, bound by state precedent, concluded "our supreme court has already held the kidnapping statute is not unconstitutionally vague and overbroad." *Shands*, 424 S.C. at 136, 817 S.E.2d at 540 (citing *Lozada v. S.C. Law Enf't Div.*, 395 S.C. 509, 513, 719 S.E.2d 258, 260 (2011) (acknowledging "the crime of kidnapping in South Carolina is broad in scope") and *State v. Smith*, 275 S.C. 164, 166, 268 S.E.2d 276, 277 (1980) (holding "terms of this statute are clear and unambiguous")).[3]

As this Court has long observed:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926) (citing *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221 (1924) and *Collins v. Kentucky*, 234 U. S. 634, 638 (1914)); *cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018) (residual clause of the federal criminal code's definition of "crime of violence," as incorporated into the Immigration and

[3] The South Carolina Supreme Court has considered the constitutionality of S.C. Code Ann. § 16-3-910 on multiple occasions. *E.g. State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982); *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982), *overruled on other grounds by State v. Burdette*, No. 2017-001990, 2019 WL 3437783 (S.C. July 31, 2019).

Nationality Act's (INA) definition of aggravated felony, was impermissibly vague in violation of due process). This Court recently explained:

> Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. Vague laws contravene the first essential of due process of law that statutes must give people of common intelligence fair notice of what the law demands of them. Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to "make an act a crime." Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide.

United States v. Davis, ___ U.S. ___, ___, 139 S.Ct. 2319, 2325 (2019) (internal citations and quotations omitted). This Court should grant the writ and consider the constitutional issue. The State did not present evidence of kidnapping beyond what was alleged in the assaults. This Court's guidance is needed to resolve whether every assault offense in South Carolina involving attempt to grab or hold the other person would also support a kidnapping conviction.

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.

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. *State v. Beaty*, 423 S.C. 26, 46, 813 S.E.2d 502, 512 (2018). Individual trial judges must address this situation in individual cases. Preston Shands, Jr.'s trial judge followed a procedure allowing the State to open only on the law and then close fully on the facts ***after*** the accused makes his final argument. Prior to closing arguments, Mr. Shands moved for the trial judge to require the prosecution to open fully on the law and facts. R. 217-18. The trial judge denied the motion.

This closing argument procedure followed by Mr. Shands' 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, "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 the *Beaty* case, the South Carolina Supreme Court summarized the "rules" for the closing argument in this state:

> 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 though 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 refused to fill the void by holding:

> 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 thus 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).[4] Treatise writers also support the 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

[4] 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 4, 2019).

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."[5] 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 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

[5] 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.

"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.

The opinion below illustrates five deficiencies in South Carolina's closing argument procedure, even after *Beaty*. First, as pointed out in Mr. Shands' petition for rehearing, A. 24-25, neither the South Carolina Court of Appeal's opinion in this case nor the state Supreme Court's opinion in *Beaty* answers the question of whether due process requires the accused to have an opportunity to respond to the prosecution's best closing argument. This Court should grant the writ and decide whether it is fundamentally unfair to allow the State to withhold its theory of the case until after it hears the accused's closing argument.

Second, the state Court of Appeals looked to *Beaty* and observed, South Carolina's "case law focuses upon allegedly inflammatory or unsupported content of the State's closing argument, not upon whether the State must open in full on the facts and not upon reply arguments which have a basis in the record but to which a defendant is not allowed to respond." *Shands*, 424 S.C. at 134, 817 S.E.2d at 539 (quoting *Beaty*, 423 S.C. at 43, 813 S.E.2d at 511). South Carolina lacks such

law because, until the *Beaty* opinion, many in the bench and bar—like Mr. Shands' trial judge—did not understand trial courts have discretion to grant the relief requested by Mr. Shands. This Court's guidance is needed for consistency in South Carolina.

Third, the court below followed the state Supreme Court's lead in *Beaty* when it stated, "[T]he State's comments during its reply closing argument were arguably in response to Shands's closing argument." *Shands*, 424 S.C. at 134-35, 817 S.E.2d at 539 (mirroring *Beaty*, 423 S.C. at 44, 813 S.E.2d at 512 (2018) ("We first note that the State's presentation of this theory during its reply was arguably a proper response to the theory Appellant advanced in his closing argument.")). The court below actually reasoned, "[T]he State's comments in its closing argument regarding kidnapping were arguably in reply to Shands's closing argument comment that he 'had no idea how [the State] would explain kidnapping to [the jury] under this evidence.'" *Id.* An appellate court in South Carolina always will be able to make these types of observations when the trail court allows the prosecution to hear the accused's closing argument before requiring it to commit to its theory of the case. Neither the court below in this case nor the state Supreme Court in *Beaty* explained how this scenario complies with due process.

Fourth, the procedure sanctioned by the South Carolina Court of Appeals in this case requires defense counsel to anticipate the prosecutor's factual argument. The Court below acknowledged "the jury had not yet heard the State's full theory for kidnapping" when Mr. Shands made his closing argument, but reasoned Mr. "Shands was aware of the State's theory of the kidnapping charge because the State explained what facts it believed supported the charge in response to Shands's directed verdict motion." *Id.* As discussed in Question I above, the State argued at the directed verdict stage that Mr. Shands' unsuccessful attempt to keep his wife from leaving their garage constituted the kidnapping. Even after the prosecution made this statement,

how could Mr. Shands be assured the State would not switch theories during its reply argument and argue the kidnapping occurred when Mr. Shands was on top of his wife inside the Koons' home?[6] *See, e.g.*, R. 92. Neither the court below in this case nor the state Supreme Court in *Beaty* explained why requiring defense counsel to anticipate the Solicitor's real theory of the case complies with due process.

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

This Court should grant the writ and consider the issue. This Court's guidance is needed not only for consistence in the closing argument procedure in South Carolina but also to remind the South Carolina Supreme Court of its inherent authority to make rules to protect the due process rights of the accused.

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

III.

Did the South Carolina Court of Appeals correctly apply the comparative juror analysis under the third step of *Batson v. Kentucky*, 476 U.S. 79 (1986)?

The trial court judge conducted *voir dire*. Only two potential jurors—numbers 118 and 122—responded to any of the trial judge's questions. R. 13-14. All potential jurors affirmed they could be fair to both the prosecution and Mr. Shands. R. 11-15. During jury selection, the prosecutor exercised four of the State's possible five preemptory challenges[7] to remove jurors 126 (a female), 125 (a male), 115 (a male) and 156 (a male). The resulting jury consisted of nine women and three men.[8] R. 16-22.

Pursuant to *Batson v. Kentucky,* 476 U.S. 79 (1986), Mr. Shands challenged the prosecutor striking jurors 125, 115, and 156 (all men) based on gender. R. 22, l. 2 – 23, l. 4. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (held that intentional discrimination on the basis of gender by state actors in use of peremptory strikes in jury selection violates equal protection clause). The Solicitor explained the State's strikes. Jurors 125 and 156 had convictions for criminal domestic violence. The State argued, "[T]his is a case involving domestic violence." Juror 115 had "convictions for lottery law violations." The Solicitor, however, acknowledged seating juror 54 (a female), who has a fraudulent check conviction. The Solicitor had a strike available to her when she sat juror 54. R. 23. Mr. Shands argued, "[T]here is really no way to separate juror number 54 which is the sixth juror [sat] who is a black female who does have a conviction for [a] fraudulent check. . . . If you are going to use criminal record as a reason to strike

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[7] In South Carolina, the prosecution is allowed five peremptory challenges in cases involving one defendant and ten in cases involving jointly tried co-defendants. S.C. Code Ann. § 14-7-1110.

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

somebody then you have got to be consistent otherwise." R. 23-24. The trial judge was confused because the initial motion was based on the prosecutor striking men, and Mr. Shands then pointed to juror number 54, a female. The trial judge operated under the mistaken belief that the trial court could not consider a similarly situated female juror because Mr. Shands challenged the Solicitor striking male jurors. Counsel tried to explain that the State seating a similarly situated female juror pertained to the third step of the *Batson* analysis. The trial court denied Mr. Shands' *Batson* motion. R. 24-26. Mr. Shands renewed his objection prior to the trial court swearing the jurors. R. 32.

On appeal, Mr. Shands argued the trial judge did not properly apply the third step of *Batson's* "three-step process for evaluating claims that peremptory challenges have been exercised in a manner violative of the Equal Protection Clause." *State v. Giles*, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted). "In the third step, the opponent of the strike must show that the race-neutral explanation given was mere pretext." *Payton v. Kearse*, 329 S.C. 51, 55, 495 S.E.2d 205, 208 (1998). Pretext "generally is established by showing the party did not strike a similarly-situated member of another race or gender." *State v. Stewart*, 413 S.C. 308, 314, 775 S.E.2d 416, 419 (Ct. App. 2015). The Court of Appeals agreed "the trial court misapplied the third step of the *Batson* analysis by not properly considering whether the female juror was similarly situated to the potential male jurors." *Shands*, 424 S.C. at 118, 817 S.E.2d at 530. The court below, however, held:

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

record, we find Shands did not meet his burden of showing the State's use of its peremptory strikes was impermissible.

Id. 424 S.C. at 118-19, at 530–31.

During the oral argument at the Court of Appeals and during his Petition for Rehearing, A. 20-22, Mr. Shands contended the State's argument would have been more persuasive if the prosecution had limited its strikes, based on criminal history, to the two male jurors with domestic violence convictions. The State, however, "negated" the use of criminal history when it struck the male juror with lottery law convictions and sat the female juror with a fraudulent check conviction. The totality of the circumstances supports ordering a new trial. *See State v. Scott*, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013) ("Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record.") (citing *State v. Shuler,* 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)). During jury selection in this case, the Solicitor had twenty-seven decisions on whether to exercise one of the State's preemptory strikes. The State struck three of the nine men (33%) presented. The State struck just one of the eighteen women (about 5.5%) presented. The Solicitor, therefore, was six times more likely to strike men than women. The Solicitor directed the State's closing argument towards the female jurors, including, "[T]his is a jealous, controlling husband who was not going to let his property leave that house." R. 232.

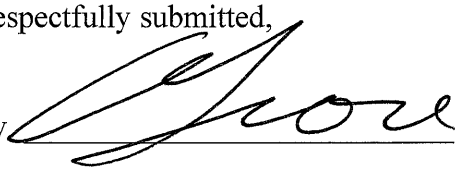
In *Flowers v. Mississippi,* this Court reaffirmed, "The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." ___ U.S. ___, ___, 139 S. Ct. 2228, 2243 (2019). As the Court of Appeals held, the trial judge did not properly apply the third stem of *Batson.* The Court of Appeals limited its inquiry to discussing the reasons stated by the prosecution without considering the fact that the resulting jury was mostly female. This Court should grant to writ,

consider the issue, and provide guidance for when the State selectively uses criminal history to strike similarly situated jurors, particularly in situations where our state's limited *voir dire* procedure yields limited information for parties to consider when exercising preemptory strikes.

CONCLUSION

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

Respectfully submitted,

By 

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