

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF GENERAL SESSIONS
FOR THE NINTH JUDICIAL CIRCUIT
INDICTMENT NUMBER: 2016-GS-08-02603
WARRANT NO.: 2016A0810400692

STATE OF SOUTH CAROLINA,)
)
Plaintiff,)
)
-versus-)
)
MICHAEL COLUCCI,)
)
Defendant.)
_____)

**MOTION AND MEMORANDUM
IN SUPPORT OF MOTION
TO EXCLUDE PREJUDICIAL TERMS**

Michael Colucci, asks this Court for the entry of an Order prohibiting the use of prejudicial terms in the course of jury selection and trial of the above-captioned indictment. Specifically, Colucci requests the following relief:

1. That at trial, the Court order that all prosecuting attorneys and witnesses are precluded from referring to the deceased, Sara Colucci, as “victim.”
2. That at trial, the Court order that all prosecuting attorneys and witnesses are precluded from referring to Mr. Colucci as “Defendant.”
3. That at trial, the Court, the parties and all witnesses refer to all persons, including both Mr. Colucci and Sara Colucci, by their individual names.
4. That no jury charges issued in this case refer to Sara Colucci as “victim.”
5. That no jury charges issued in this case refer to Mr. Colucci as “Defendant.”

FILED
2016 SEP 27 PM 4:04
HARRY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

Log

MATERIAL FACTS

On May 20, 2015, Sara Colucci died. The cause of death was asphyxia by neck compression and the manner of death was undetermined. The South Carolina Law Enforcement Division (SLED) investigated Mrs. Colucci's death and on May 4, 2016, arrested Michael Colucci for murder. Those public officials statutorily charged with determining the manner of death as of this date shall conclude that the manner of death is best described as "undetermined."

ARGUMENT

References to the Deceased as "Victim" Violates the Presumption that Colucci is Innocent

Mr. Colucci is presumed innocent. This is undisputed under South Carolina law and the State and Federal constitutions. See U.S. Const. Amend. XIV; S.C. Const. Art. I § 3. The presumption of innocence has deep historical roots and is a core tenet of criminal law. *Coffin v. United States*, 156 U.S. 432, 453 (1895). Moreover, the U.S. Supreme Court has stated: "[d]ue process commands that no man shall lose his liberty unless the Government has borne the burden of...convincing the fact finder of his guilt." *In re Winship*, 397 U.S. 358, 364 (1970). South Carolina has long recognized the weight and extent of the State's burden: "[T]he guilt of the accused...must be proven beyond a reasonable doubt. All presumptions of law...are in favor of innocence and every person is presumed to be innocent until he is proved to be guilty." *State v. Hyder*, 242 S.C. 372, 379, 131 S.E.2d 96, 100 (1963).

As in this case where a defendant denies the allegations, references to the deceased as a

“victim” necessarily conveys the speaker’s opinion that a crime in fact occurred, evincing a bias against a defendant which patently violates the presumption of innocence. *Jackson v. State*, 600 A.2d 21, 24 (Del. 1991) (“...the word ‘victim’ should not be used in a case where the commission of a crime is in dispute.”); *State v. Wright*, 2003 WL 21509033, at *2 (Ohio App. July 2, 2003) (unpublished opinion in Northeastern Reporter) (“[T]he trial court should refrain from using the term ‘victim,’ as it suggests a bias against the defendant before the State has proven a ‘victim’ truly exists.”).

In South Carolina the term “victim” refers to someone who has suffered a wrong which *is a crime*.

‘Victim’ means a person who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a crime against him. The term ‘victim’ also includes the person's spouse, parent, child, or lawful representative of a crime victim who is deceased, who is a minor or who is incompetent or who was a homicide victim or who is physically or psychologically incapacitated.

S.C. Const. Art. I §24 (C)(2)

It would be erroneous to refer to the deceased as a “victim” when the existence of a crime is in dispute. *See Jackson, supra*. The term “victim” creates a bias in that it assumes the commission of a crime prior to any such determination by a jury and is accordingly inconsistent with the presumption of innocence. Under the South Carolina Victim’s Bill of Rights found in the South Carolina Constitution, no right is established to be referred to as a “victim” during trial, nor is there any such understanding in the definitions of victims under South Carolina’s statutory scheme. *See S.C. Code Ann. §16-3-1110 (8)* (“‘Victim’ means a person who suffers direct or threatened physical,

emotional or financial harm as the result of an act by someone else, which is a crime.”). Therefore, the deceased in this case has no right to be referred to as “victim.”

At Trial, References to the Deceased As “Victim” by the Court or Prosecutors Would Improperly Express a Personal Belief that Colucci is Guilty

The implicit notion attached to the term “victim” suggests an inference of guilt on a defendant, particularly in a case where the jury is asked to determine whether the crime took place. When a judge or prosecutor refers to the deceased as a “victim,” this instantly legitimizes the injured party’s claim and places a defendant in a position where he must rebut the term itself in order to maintain his cloak of innocence. *See State v. Primus*, 349 S.C. 576, 584, 564 S.E.2d 103, 107 (2002) overruled on other grounds by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). (“It is elementary that an accused is presumed innocent until proven guilty and that the burden is upon the State to prove the accused committed the crime charged. An accused has the right to rely entirely upon this presumption of innocence and the weakness of the State’s case against him.”)

South Carolina law recognizes that it is improper for the prosecutor or the court to express a personal belief in the credibility of a prosecution witnesses. *Vaughn v. State*, 362 S.C. 163, 169 607 S.E.2d, 75, 72 (2004) (“[A] prosecutor cannot vouch for a witness’s credibility.”); *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (“Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony.”); *State v. Brisbon*, 323 S.C.

324, 331 474 S.E.2d 433, 437 (1996) (“It is well established that a trial judge must refrain from any comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of an accused, or any fact in controversy.”).

The sensitive nature of this case requires that all parties use content-neutral terms in order to ensure civility and reduce any commentary which would “infect the entire trial with unfairness” and make the trial a denial of due process. *State v. Day*, 341 S.C. 410, 423, 535 S.E.2d 431, 438 (2000). It would also avoid confusion not only by the Court and counsel, but also by the many witnesses in this case, and ensure an accurate record.

By Using the Term “Victim” in Jury Charges, the Court Makes Conclusions of Fact and Thereby Invades the Province of the Jury

The term “victim” should not be included in the charges to the jury. Jurors are the exclusive judges of all questions of fact and the credibility of witnesses. *State v. Nomura*, 79 Hawai’i 413, 417, 903 P.2d 718, 721 (Haw. Ct. App. 1995) “The term ‘victim’ is conclusive in nature and connotes a predetermination that the person referred to had in fact been wronged.” *Nomura*, at 417, 721. In *Nomura*, the court held that the use of the term “victim in a jury instruction violated a state evidentiary rule precluding the court from commenting on the evidence.” *Id.* The court reasoned that the witness’s status as a victim was the precise issue to be determined by the jury:

[W]e hold that the reference to a complaining witness as “the victim” in criminal jury instructions is inaccurate and misleading where the jury must yet determine from the evidence whether the complaining witness was the object of the offense and whether the complaining witness was acted upon in the manner required under the statute to prove the offense charged.

Nomura, at 722.

In the context of this case, a jury instruction cannot refer to the deceased as a victim without necessarily and wrongly implying that Colucci is a criminal. Any reference to the term “victim” in the jury instructions for this case would be highly improper because this term is the functional equivalent of instructing the jury that Colucci is guilty. It should go without saying that the State’s instructions should be “drawn in such a manner as to eliminate the possibility that it may be construed as assuming that the evidence shows the guilt of the defendant.” *State v. Kinard*, 245 S.W.2d 890, 895 (Mo. 1952).

Reference to Colucci as the “Defendant” at Trial or in the Jury Instruction Unduly Prejudices Colucci by Implying He Bears a Burden to Defend the Charges and Prove Himself Innocent

Colucci is presumed innocent. This is undisputed under South Carolina law and the State and Federal Constitutions. *See* U.S. Const. Amend. XIV; S.C. Const. Art. I § 3. The presumption of innocence has deep historical roots and is a core tenet of criminal law. *Coffin v. United States*, 156 U.S. 432, 453 (1895). Moreover, the U.S. Supreme Court has stated: “[d]ue process commands that no man shall lose his liberty unless the Government has borne the burden of...convincing the fact finder of his guilt.” *In re Winship*, 397 U.S. 358, 364 (1970). South Carolina has long recognized the weight and extent of the State’s burden: “[T]he guilt of the accused...must be proven beyond a reasonable doubt. All presumptions of law...are in favor of innocence and every person is presumed to be innocent until he is proved to be guilty.” *State v. Hyder*, 242 S.C. 372, 379, 131 S.E.2d 96, 100 (1963).

In this matter, referring to Colucci as the Defendant instantly implies to the jury that Colucci bears some burden to actively defend himself. He simply does not.

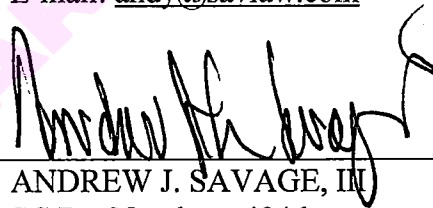
CONCLUSION

For the aforementioned reasons, Colucci requests this Court require that all parties refer to the deceased as Sara Colucci and otherwise require that all parties be referred to by their respective names, both at trial and in jury instruction.

Respectfully submitted,

SAVAGE LAW FIRM
15 Prioleau Street
Charleston, SC 29401
Telephone: (843) 720-7470
E-mail: andy@savlaw.com

BY:



ANDREW J. SAVAGE, III
SC Bar Number: 4946

ATTORNEY FOR MICHAEL COLUCCI

Charleston, South Carolina

October 9/27, 2018.