STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY)	INDICTMENT NUMBER: 2016-GS-08-02603
)	WARRANT NUMBER: 2016A0810400692
STATE OF SOUTH CAROLINA,)	
)	
Plaintiff,)	
)	
-versus-)	**MOTION FOR STATE TO OPEN CLOSING IN FULL**
)	
MICHAEL COLUCCI,)	
)	
Defendant.)	
)	

INTRODUCTION

Michael Colucci seeks from this Court an order that requires the State to open in full on the facts and the law and restrict any reply argument to rebuttal matters. The Court has the authority to control the order of business, to include the order of argument, to ensure that due process rights of Mr. Colucci are not violated.

ANALYSIS

The current practice in South Carolina criminal practice seems to be that if the defense introduces any evidence, the State has the right of last argument. The defense may request that the State open on the law, but there is no statutory authority or rule that governs the order of presentation. *State v. Beaty*, Op. No. 27693 (S.C. Sup. Ct. filed Apr. 25, 2018). Current practice is based on the common law; however, this has not always been the case in South Carolina criminal courts.

At one time, the State was required to close fully on the law and the facts. In *State v. Atterberry*, the South Carolina Supreme Court reversed a conviction because the trial judge refused a defendant's request to require the Solicitor make his closing argument first. 129 S.C. 464 (1924). At the time of that ruling, South Carolina Circuit Court Rule 59 stated, "[t]he 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 opposing party." Acting Associate Justice W. T. Aycock noted in his concurring opinion, "there is nothing in the rules of the Circuit Court to suggest that rule 59 applies solely to the Common Pleas, and not to the Court of General Sessions." *Atterberry* at 473.

Subsequent to *Atterberry*, the South Carolina Supreme Court next took up the issue of order of closing in *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971). In *Lee*, the defendant appealed his conviction, in part arguing that the trial court erred by refusing Lee's request that the State be required to open fully on the law and the facts in arguments to the jury. While acknowledging their decision in *Atterberry*, the *Lee* court noted that in the interim Cir.Ct.R. 59 was renumbered to Rule 58. Importantly, Cir. Ct.R. 58 was also substantively changed to read, "[t]he party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party." In light of the rule change, the *Lee* court found that the trial judge was correct in holding that a solicitor was no longer required to make an opening argument to the jury on issues of fact. *Lee* at 318, 656.

Effective July 1, 1985, the Supreme Court adopted the South Carolina Rules of Civil Procedure. The upshot of this action was the elimination of the Circuit Court rules and their division between the rules that govern the Court of Common Pleas and the Court of General Sessions. The

few Circuit Court Rules that applied to criminal cases were placed in an appendix to the South Carolina Rules of Civil Procedure. *See* SCRCP 85. Finally, on September 1, 1988, the rules that govern all criminal proceedings, the South Carolina Rules of Criminal Procedure, took effect. SCRCrimP. 39, 40.

ARGUMENT

I. The Basis Used to Justify the Order of Closings in *Atterberry* and *Lee* is not Dispositive

The *Atterberry* and *Lee* courts relied upon the then-current Circuit Court rule to justify their respective holdings. Subsequently, the South Carolina Supreme Court implemented and adopted the Rules of Civil Procedure and the Rules of Criminal Procedure to replace the former Circuit Court rules. Given that Circuit Court Rules 58 and 59 are no longer in effect, the holdings in *Atterberry* and *Lee* are not binding.

The South Carolina Rules of Criminal Procedure contain no guidance as to the order of argument. Thus, it is helpful to seek a principled basis in law to determine the most logical approach. When *Atterberry* and *Lee* were decided, the rule-based closing argument order was applied to both the Court of Common Pleas and the Court of General Sessions. If this were the case today, Rule 43, SCRCP, would control.

Rule 43(j), SCRCP governs the right to open and close at trial and states:

> The moving party upon a motion shall have the right to open and close argument, and the plaintiff shall have the right to open and close upon trial…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.

Thus, under Rule 43, SCRCP, the party with the burden of proof must open fully in

argument and limit a second closing for rebuttal. That procedure mirrors that which Mr. Colucci asks the Court to order the State to follow in the case at bar.

Alternatively, one may look to the Federal Rules of Criminal Procedure, which as the Ninth Circuit Solicitor is fond of saying, are an analogue of our State rules and provide guidance when our rules are silent. The order of closing arguments as set forth in Fed. R. Crim. P. 29.1 is as follows: (1) government; (2) defense; (3) government rebuttal. Thus, reference to the Fed. R. Crim. P. would generate the same result which is what Mr. Colucci seeks. The party with the burden of proof must open fully in argument and limit its second closing to rebuttal matters.

Finally, one can look at proposed legislation that sought to fill in gaps where our criminal rules are silent. On January 28, 2016, pursuant to Article V, §4A of the South Carolina Constitution, the South Carolina Supreme Court submitted proposed rule changes to the South Carolina General Assembly. One of those rule changes the addition of Rule 21 to the South Carolina Rules of Criminal Procedure. Proposed Rule 21, similar to its federal counterpart, 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." *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 was similar to the Federal Rule. Regrettably, the legislation not make it out of committee. *See* S. Con. Res. 1191, 121st Gen. Sess. (S.C. 2016).

II. The Current Order of Closing is a Product of Common Law and Within the Discretion of the Trial Judge

Currently, there exists no rule or controlling case law governing the order of closing arguments in General Sessions Court. At common law, all matters necessary for the proper

administration of justice, not regulated by precise rules, were within the discretion of the trial judge. *Powers v. Rawls*, 119 S.C. 134 (1922). Thus, it is up to this Court to determine the argument order.

Common law is a judicial creation in South Carolina and it is "within the power of courts to abrogate that which they have created." *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) at 178, 560. More specifically, it is within the court's "inherent power to control the order of its business." *State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) (internal quotations omitted). It is vital to our system of justice that courts do not fall prey to the status quo. Courts should not "perpetuate injustice resulting from the application of a doctrine in need of reevaluation, no matter how long or often it has been applied." *Langley* at 180-181. It is incumbent that this Court not perpetuate injustice by adhering to procedures that are fundamentally unfair.

As no specific rule governs the order of closing argument, it is within the discretion of this Court to order that closings be conducted in a manner that ensures the proper administration of justice. For the reasons below, justice demands that this Court order the State to open fully on the law and the facts.

III. Failure to Order the State to Open Closings Fully Violates Due Process, the Right to Present a Defense and is Unfairly Prejudicial

The current practice with respect to the order of closing arguments deprives Mr. Colucci of the ability to present a full and complete defense. It also denies him a full and complete opportunity to confront the charges against him and to hold the entire State's case up to the crucible of counter argument that our advocacy and judicial system is based on. Such a limitation on the defense irreparably prejudices Mr. Colucci and amounts to a violation of his Due Process rights under the 5th and 14th Amendments as well as a violation of his right to confront witnesses under the 6th Amendment to the Constitution of the United States and Article I, §3 and §14 of the Constitution of South Carolina .

The South Carolina Supreme Court has recognized that the "right to present a defense" is "a

fundamental element of due process of law." *State v. Inman*, 395 S.C. 539 (2011), quoting *Washington v. Texas*. Not only does an accused have the right to present a defense, but the opportunity to do so must be "meaningful." *Holmes v. South Carolina*, 547 U.S. 319 (2006) ("[t]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.").

"Closing argument is 'an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment.'" *Bailey v. State*, 440 A.2d 997 (Del. 1982), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1967). "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." *Beaty* at 17. To deny an accused the opportunity to respond to the State's closing argument against him, he will not enjoy "a meaningful opportunity to present a complete defense."

Mr. Colucci requests that the Court order closings to be conducted in the same manner as a civil trial in Common Pleas court, in the same manner as the Federal Court Criminal Rules of Procedure dictate and in accordance with common sense and justice: State closing argument followed by Defense closing argument and finally State rebuttal argument. If that order of argument is considered fair enough for civil trial wherein a defendant typically faces only financial loss, then it certainly should be considered fair enough for a criminal trial wherein one's liberty, and often life, are at risk.

CONCLUSION

For the reasons stated above, Mr. Colucci respectfully requests that the Court change the outdated and unfair sequence of closing arguments in this case and order the State to close on both law and facts in its first closing argument to protect rights and ensure the proper administration of justice.

Respectfully submitted,

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