STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYREL R. COLLINS,

PETITIONER

APPELLATE CASE NO. 2016-000877

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

ISSUES PRESENTED

I. Did the Court of Appeals err in affirming the trial judge's erroneous limitation on the introduction of evidence of the deceased's reputation in the community where the evidence was necessary to Petitioner's presentation of a complete defense and where the prosecutor opened the door to such evidence during his opening statement?

II. Did the Court of Appeals err in concluding Petitioner's second trial was not barred by double jeopardy where the grant of the mistrial during defense counsel's opening statement at the first trial was not dictated by manifest necessity or the ends of public justice after consideration of all the facts and circumstances?

STATEMENT OF THE CASE

On September 10, 2012, a Charleston County grand jury indicted Petitioner for murder (2012-GS-10-5449) and possession of a firearm during the commission of a violent crime (2012-GS-10-5452). R. 380-381; R. 383-384. Almost one year later, on September 9, 2013, the state, represented by Stephanie B. Linder and Gregory Voigt, called the case for trial before the Honorable J.C. Nicholson, Jr., and a jury. Jason T. King and Luke J. Malloy, III, represented Petitioner. R. 1. During defense counsel's opening statement, the prosecutor objected to some remarks and moved for a mistrial. R. 22, line 23 – R. 23, line 17. Ultimately, Judge Nicholson granted the prosecutor's motion for a mistrial. R. 35, lines 3-11.

The state, again represented by Linder and Voigt, called the case for a second trial on January 6, 2014, before the Honorable Roger M. Young, Sr., and a jury. King and Malloy represented Petitioner. R. 36. Petitioner immediately moved to bar his prosecution based on double jeopardy. R. 37, line 1. Ultimately, Judge Young held the granting of the mistrial did not bar the subsequent prosecution of Petitioner. R. 58, lines 18-24. At the conclusion of the second trial, the jury found Petitioner guilty as charged. R. 368, lines 11-16. Judge Young sentenced Petitioner to life imprisonment without the possibility of parole for the murder conviction. R. 369, line 21; R. 382. Judge Young did not impose a sentence on the gun charge because he had sentenced Petitioner to life without parole on the murder charge. R. 369, lines 22-23; R. 385.

On January 16, 2014, Petitioner moved Judge Young to reconsider his sentence. R. 375-376. The state responded on January 17, 2014. R. 377-378. By an order filed on January 24, 2014, Judge Young denied the request for reconsideration. R. 379.

On January 31, 2014, Petitioner filed and served his notice of appeal, which was perfected by undersigned counsel. A three-judge panel of the Court of Appeals, which included

the Honorable Paul E. Short, Jr., the Honorable Paula H. Thomas, and the Honorable John D. Geathers, decided the case without oral argument on January 20, 2016. State v. Collins, 2016-UP-034 (S.C. Ct. App. filed Jan. 20, 2016); App. 1-3. On February 4, 2016, Petitioner filed a petition for rehearing. App. 4-19. The Court of Appeals denied rehearing on March 24, 2016. App. 20.

On May 13, 2016, Petitioner filed a petition for writ of certiorari. On June 9, 2016, the state filed its return. On December 1, 2016, this Court granted the petition and ordered briefing. Pursuant to Rule 242(i), SCACR, Petitioner files this brief.

STATEMENT OF FACTS

On the notorious East Side of Charleston, on October 27, 2011, Solomon Chisolm was shot while he and three others were playing cards on bleachers in a park. R. 144, line 7 – R. 145, line 24. Raymond Clement, one of the card players and Chisolm's brother, ran away after the shots were fired. R. 148, lines 22-24. Later, at the trial, Clement would claim that while running away, he saw Petitioner, without anything covering his face, get into a car and ride away. R. 150, lines 3-16. After some time away, Clement returned to the park. R. 150, lines 17-21. Oddly, however, Clement did not speak to the police, despite the presence of many officers at the park. R. 151, lines 1-15.

The following day, Clement saw police officers at Petitioner's mother's home. R. 153, lines 19-25. On that same day, the police approached Clement and questioned him about the shooting. R. 154, lines 1-8. Although Clement would claim at trial that Petitioner was the shooter, he did not tell the police this vital information on the day following his brother's death. According to Clement, "the East Side is known, you know, like you tell on somebody, you cooperate with the police, there's going to be harm for you and your family or whatever. So I didn't want to get involved at first." R. 154, lines 12-19. Although Clement essentially claimed that on the East Side, "snitches get stitches," and that his fear of said stitches influenced his decision not to cooperate with the police concerning the shooting of his brother, he was forced to admit he had been an informant for local *and* federal law enforcement officers for several years. In fact, the information he provided to the police had resulted in the arrests and convictions of "a lot of people." R. 167, lines 11-24; R. 169, line 10 – R. 170, line 11.

Over the course of the investigation, Clement claimed Petitioner shot Chisolm. R. 148, lines 15-21. Although he recanted his statement to police that Petitioner was the shooter,

Clement testified against Petitioner at the trial. R. 160, line 1 – R. 161, line 14. Perhaps unsurprisingly, at the time of the trial, Clement had a pending reckless homicide charge, which was being prosecuted by the Ninth Circuit Solicitor's Office, the same office prosecuting Petitioner. R. 167, lines 1-3; R. 170, lines 12-19. Clement described the shooter as brown-skinned, tall, slim, wearing a black T-shirt, blue jeans, and a shirt over his head. R. 149, lines 14-19. Although the initial officer who interviewed Clement testified that he noticed no wound on Clement, Clement told the jurors he was, in fact, shot in the leg during the incident. R. 94, lines 4-9; R. 149, lines 20-22.

The first trial

The solicitor delivered his opening statement to the jury, primarily discussing the history of the area where the alleged murder occurred – the East Side of Charleston. He wanted to give the jury "some perspective on what we face in this particular community." R. 15, lines 20-21. He began by discussing the plans of Henry Laurens, "a great South Carolina patriot," for the area in the 1760s. R. 15, lines 22-24. According to the solicitor, the area contained "the largest concentration of freed slaves in Charleston" after the Civil War. R. 16, lines 8-14. Thereafter, the area "became a working-class neighborhood." R. 16, lines 15-19. He then described how the East Side had been affected by "cruelty of Jim Crow, segregation, [and] hard economic times." R. 17, line 13 – R. 18, line 4. He claimed "[t]he East Side became a tough place, tough place to raise a family, tough place to do business, tough place to do police work." R. 18, lines 4-6.

The solicitor promised the jury a "flavor of the East Side" during the trial: "In all of our Charleston neighborhoods, this was perhaps one of the most lawless. This has the highest incidence of illiteracy, highest unemployment rate, fewest college degrees. … And the problem with lawlessness is that it breeds lawlessness." R. 18, lines 16-22. Due to what the solicitor

described as the "lawlessness" of the East Side, the jurors would hear "substantially less" evidence in this case than in others. In the East Side, "[t]here's a cultural bias against working with the police for any reason. There's genuine fear in the streets for cooperating with the police for any reason." This fear and cultural bias "shape[d]" how the solicitor had "to tell this story to [the jury], how the evidence [he got] to present and what the witnesses [said]." R. 18, line 23 – R. 19, line 8.

According to the solicitor, on the East Side, "[i]t's real ... and it's palpable." Here, "people don't tell their stories and people count on people not telling their stories and not explaining things and not seeing what they saw. This was a lawless area." R. 19, lines 9-14. He provoked the jurors with images of Wild Bill and warned against allowing lawlessness: "[W]e can't allow lawlessness. We can't allow our streets to be this way." R. 19, lines 15-22.

The solicitor went to great pains to tell the jury that the state did not have to prove motive in the case. Although the solicitor had an idea of motive, he was not required to prove "the why." He warned the jury that this may not be satisfactory to them, but the state was not required to prove motive. R. 20, line 19 – R. 21, line 6.

Then, defense counsel began his opening statement: "Good morning. The solicitor talked about the East Side. This is the East Side, the common area. And Solomon Chisolm was legendary in this area as a killer." R. 22, lines 19-22. The solicitor immediately objected, and the judge excused the jury to consider the objection. R. 22, line 23 – R. 23, line 17. The solicitor argued a mistrial was necessary "because he's now rung a bell that we can't unring." He further argued it was "designed to be improper," "designed to come out before an objection [could] be made," "designed to be heard so it can't be unheard." Thus, he argued, "there's no curative instruction that fixes it." R. 24, lines 4-13; see also R. 24, line 25 – R. 25, line 1. He

noted that the deceased was never convicted of any homicide, but agreed that was not the same as not being a killer. The solicitor was incensed that defense counsel had made the remark when he had "no burden to prove anything, no obligation to prove anything." He accused defense counsel of "drop[ping] a bomb," "slinging mud and trying to prejudice" the jury. R. 102, lines 14-24. The prosecutor *admitted* the evidence of the deceased's violent history would be admissible during the trial, but he took umbrage with defense counsel mentioning it during his opening statement. R. 27, line 19 – R. 28, line 1.

The trial judge determined that telling the jury that "he's a legendary killer is totally improper." R. 25, lines 6-10. When the judge inquired how the opening related to the deceased's reputation for violence, defense counsel explained that his remarks went directly to the deceased's reputation in the community for having killed a dozen people. R. 25, line 11 – R. 26, line 8. According to defense counsel, the "point" was that due to his reputation as a legendary killer, "[a]ny number of people could have wanted to kill him." R. 26, lines 12-15; R. 29, line 17 – R. 30, line 4. When, the judge asked what proof defense counsel had to support this contention, defense counsel noted he could ask Raymond Clement, the deceased's brother, and the leading detective in the present case because he had worked cases where the deceased was the prime suspect. R. 26, lines 9-15. Defense counsel noted a recent newspaper article chronicling the "legend" surrounding the deceased due to his history of violent crimes, including three murder charges in less than four months. R. 27, lines 7-18. The newspaper headline was "Killing claims man named one of Charleston's worst criminals." R. 27, lines 7-9. The article described the deceased as "long considered one of the city's worst criminals." R. 27, lines 9-11. The article explained that the Charleston Police named the deceased "to a list of its most hard-

core offenders after a string of violent crimes. He more than lived up to the reputation racking up three murder charges in less than four months during that period." R. 27, lines 12-16.

Further, defense counsel explained the evidence responded directly to the solicitor's opening statement about motive. R. 26, lines 16-19; R. 33, line 24 – R. 34, line 3. As defense counsel described any number of people had a reason to kill the deceased because he was in the drug business and was believed to have killed many people. R. 34, lines 1-3. The judge responded that the deceased "may be a blue ribbon killer that killed the sorriest son of a bitch in Charleston ... but that's not the point." R. 34, ll. 4-6.

The judge found defense counsel's statement was "very clearly improper in opening statement"; however, he noted "[i]t would have been perfectly proper in closing arguments." R. 30, line 22 – R. 31, line 10. The judge also determined that defense counsel could prove the deceased's reputation in the community throughout the course of the trial; however, where he had "a problem" was "in making that argument in opening statements." R. 31, line 24 – R. 32, line 1. According to the judge, defense had "to offer some foundation before [he could] just stand up there and say, hey, he's a legendary killer." He then analogized the situation to "ask[ing] some woman is she a prostitute if you don't have any basis to know that she's a prostitute." The judge admonished defense counsel that he had "to have some foundation, some basis of what you are doing, not something you read in a damn newspaper." R. 35, ll. 8-10. Thereafter, he granted the state's motion for a mistrial. R. 35, lines 3-11.

Importantly, the judge made no findings regarding the mistrial being granted as a product of manifest necessity or to the ends of public justice. The judge went through no discussion of alternatives to granting a mistrial and why those alternatives were not viable. Perhaps most importantly, the judge indicated that the presentation of the proposed evidence would be proper

and even that counsel's argument would have been proper in closing argument, but decided to grant a mistrial because defense counsel's statements were made during opening, which was intended to be non-argumentative.

The second trial

The state, again represented by Linder and Voigt, called the case for a second trial on January 6, 2014, before the Honorable Roger M. Young, Sr. and a jury. King and Malloy represented Petitioner. R. 36. Petitioner moved to bar his prosecution based on double jeopardy. R. 37, line 1. Defense counsel noted the solicitor's opening statement discussed the high crime rate in the East Side during the first trial. R. 52, lines 20-23. Further, defense counsel argued the mistrial was "improperly granted and not dictated by manifest necessity." He explained that a "curative instruction could have been given" and that nothing he said was evidence. R. 53, lines 2-8.

The solicitor argued that defense counsel failed to object to the granting of the mistrial motion. Additionally, he argued the defense acquiesced. R. 53, line 15 – R. 55, line 9. When questioned by the judge regarding the clear evidence in the record that defense counsel argued against the motion, the solicitor pontificated:

> I've done this from both sides. And I taught myself to protect the record. And objecting on the record, especially in mistrials, is how we get the ball rolling. It's how we keep the record intact for our client. It's not hard to do. It's not a magic formula. But there are magic words. And just – – like I said, the essence of that transcript argument is not an objection to the granting of the mistrial. It's an explanation as to why he shouldn't be held in contempt and why what he did was not a purposeful act, why he thought he could do it, despite the fact that he could not.

R. 55, line 19 – R. 56, line 4. The solicitor repeated his argument that the "bell could not have been on unrung. Those things could not have been unsaid." R. 56, lines 5-11; R. 57, lines 8-9 ("I don't think you could have put that genie back in the bottle"). According to the solicitor, "a

mistrial was the easiest, cleanest way of cauterizing and removing that particular stain from that trial." R. 56, lines 12 – 15.

Defense counsel pointed to where he argued against the mistrial motion and argued in favor of his presenting the relevant evidence to the jury. R. 57, lines 16-21. Additionally, defense counsel explained that a jury instruction to disregard his statement in opening would have cured any error. Further, defense counsel argued there existed no manifest necessity to order a mistrial. R. 58, lines 3-12.

The trial judge found it was "clear" that defense counsel argued against the motion and did not acquiesce in the granting of the mistrial. According to the trial judge, defense counsel was not required to "say the magic words 'I'll object.'" R. 58, lines 13-17. However, the trial judge found that Judge Nicholson "acted within his sound discretion to grant a mistrial." He determined "there was clearly a misunderstanding of what [defense counsel] could and couldn't say." After noting that "it was brought about by the defense, and not by the prosecution," the trial judge held the granting of the mistrial did not bar the subsequent prosecution of the Petitioner. R. 58, lines 18-24.

Additionally, the solicitor moved to bar evidence of the deceased's reputation. R. 38, line 23 – R. 39, line 4. Defense counsel argued evidence of the deceased's reputation was relevant because "[h]e was the most notorious person in that area in a long time," including being "accused of three different murders" and "rumored to have killed anywhere from eight to a dozen people." R. 39, lines 10-17. Further, defense counsel noted he wanted to use the evidence to show "there could have been any number of people who would have wanted to kill Solomon Chisolm, because of the enemies that he made and the reputation." R. 40, lines 4-7. The judge

refused to permit the introduction of evidence on this basis stating that defense would have to "present a little bit more evidence" than that. R. 40, lines 8-12.

According to defense counsel, four days before the deceased's death, Petitioner had been a passenger in a car on the interstate when the driver was shot and killed. The deceased was the only suspect though he was never charged. R. 41, lines 3-10. Based upon this event, Petitioner was the primary suspect when the deceased was shot. The police and others believed the death of the driver gave Petitioner a motive to kill the deceased. Defense counsel wanted to use this evidence to attack the investigation. R. 41, line 11 – R. 42, line 16.

The judge ruled that defense counsel could not present the evidence:

> I wouldn't at this point see any relevance to a defense that you've indicated to me that you have. If anything, it supplies motive for your client. And if it's kind of a backhanded reputation of victim evidence, well, again, I don't see where that's relevant since you're not putting up self-defense. And it really doesn't seem to accomplish the point at all.

R. 43, lines 9-16.

Thereafter, the solicitor delivered his opening statement in the second trial. This statement was almost identical to his opening during the first trial, including the references to the history of the East Side. R. 71, line 19 – R. 79, line 14. He talked about Henry Laurens and his plan for the area – "the place where all the rich rice planters from Georgetown would come and build their vacation homes." R. 73, lines 6-9. Again, he told the jurors the East Side had the "lowest literacy" rates in the city coupled with the "[h]ighest unemployment." R. 74, lines 17-19. Although the area may not have the "most crime," it was "one of the least-blessed neighborhoods" in Charleston. R. 74, lines 19-23. He candidly admitted that there were many people who witnessed Chisholm's shooting, but that the jurors would not hear from many of them. He initially blamed this on the Genovese Effect or Bystander Effect. R. 75, lines 1-19.

The solicitor told the jurors they would not hear from some witnesses because of "selfish" reasons. R. 76, line 8.

In closing, the solicitor went right back to his trial theme – the lawlessness and violence of the East Side:

> The kind of person who commits this crime, the kind of person who walks into a public park in the daytime hours, the kind of person who walks up with a gun outstretched and shoots a defenseless man playing cards, not once, not twice, not three, not four, but five times, in his back, in his chest, neck, and in his head, that's the kind of person who knows the type of neighborhood the East Sid is. That's the type of person that knows that things that happen in the East Side tend to stay in the East Side.
>
> To that kind of person, we're outsiders. To that kind of person, we are not meant to be here. To that kind of person, we are not wanted to intervene. And this defendant, Tyrel Collins, was counting on that. Be we are here. We are here. And we are here because there are laws. There are laws in our society and there are laws that we are here to uphold. There are laws in civilized society.

R. 332, line 21 – R. 333, line 11. The solicitor reminded the jurors about the "little history lesson about the East Side" that had been delivered in opening. R. 333, lines 15-17. Further, the solicitor reminded the jurors that "about the history and culture of the East Side neighborhood of Charleston." R. 333, lines 16-18.

The solicitor explained that "a lot of people from the state's witness list" that were read during *voir dire* "were not presented" to the jury. R. 345, lines 20-21. He told the jurors to "remember who was here. Only one eyewitness for the State testified. Only one person was brave enough and willing to go against the East Side. Only one person, who you heard was threatened by numerous people, came to court." R. 345, line 22 – R. 346, line 1. Thereafter, the state reviewed its view of Clement's testimony. R. 346, line 2 – R. 348, line 5. The state even vouched for Clement's story – "The defense mentions how Ray should not be trusted. I will submit he was extremely forthright with you; yes, he has a pending charge. You heard from him

and the prosecutor on that case that the charge was a tragic accident that is in the process of being dismissed." R. 348, lines 8-13. The prosecutor continued to minimize Clement's motive to lie, and buttress his credibility: "Yes, he has cooperated with law enforcement in the past. He has cooperated with federal law enforcement, local law enforcement on numerous cases that resulted in convictions. Law enforcement chose to work with him." R. 348, lines 13-17. The obvious implication for the state was that Clement provided *credible* information to law enforcement in the past, and the jury should find his current testimony credible as a result.

Working to a crescendo with his theme, the solicitor concluded:

> So, Ray came in here. He came in here against adversity. He came in here to be brave. He came in here because that was his brother. He came in here to tell the East Side that that is enough. Enough to the street justice, enough to Tyrel Collins who cowardly walked up, shot Solomon on the back without saying a word, fired again and again. Enough. Enough. It's time that we all say enough.

R. 349, lines 9-16. Thereafter, he asked the jury to find Petitioner guilty based on the word of Clement alone. R. 349, lines 17-21.

ARGUMENT

I. The Court of Appeals erred in affirming the trial judge's erroneous limitation on the introduction of evidence of the deceased's reputation in the community where the evidence was necessary to Petitioner's presentation of a complete defense and where the prosecutor opened the door to such evidence during his opening statement.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Gillian, 360 S.C. 433, 449–450, 602 S.E.2d 62, 71 (Ct. App. 2004); accord State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986). The Due Process Clause of the Fourteenth Amendment ensures these rights are extended to criminal defendants in state courts. See U.S. Const. amend. XIV; Pointer v. Texas, 380 U.S. 400, 403–404 (1965)(holding the Sixth Amendment applicable to the states through the Fourteenth Amendment); Mizzell, 349 S.C. at 330, 563 S.E.2d at 317 ("The Sixth Amendment is applicable to the states through the Fourteenth Amendment."). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

The South Carolina Rules of Evidence provide that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Rule 404(a), SCRE. Thus, it is clear from the text of the rule that the exclusion of character evidence applies when the purpose of the evidence is to prove action in conformity with the character. Additionally, the rule provides several exceptions to the general rule

against admissibility for proving conducting conforming to character. For example, character evidence of the accused is admissible when offered by an accused or by the prosecution to rebut the same. See Rule 404(a)(1), SCRE. Additionally, the rules permit the introduction of "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor." Rule 404(a)(2), SCRE. Finally, character of a witness is permissible as long as other evidentiary rules are satisfied. Rule 404(a)(3), SCRE. The last portion of the rule provides that "[e]vidence of other criems, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. Thus, the limitation on specific character evidence is when it is offered to prove conduct in conformity therewith. This rule too has exceptions – when the evidence is offered to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE. Proof of character "may be made by testimony as to reputation or by testimony in the form of an opinion." Rule 405(a), SCRE.

In State v. Major, 301 S.C. 181, 185, 391 S.E.2d 235, 238 (1990), this Court explained "[w]hen the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the solicitor has the right to cross-examine him as to particular bad acts or conduct." The prosecution is restricted "to showing bad character only for the traits initially focused on by the accused." Id. When Major denied having ever used crack cocaine, the prosecutor was permitted to introduce evidence of a prior conviction for simple possession of cocaine. This Court found Major had made a "clear attempt ... to communicate to the jury that he [was] not the sort of individual who would become involved in the drug trade." Id. at 185-186, 391 S.E.2d at 238. In short, the state was permitted to respond with evidence of Major's previous drug conviction

because Major had insinuated to the jury that he was not the type of person who would engage in the drug business. Id. at 186, 391 S.E.2d at 238.

In State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984), this Court found a defendant had opened the door to his previous participation in two armed robberies because he had questioned an accomplice regarding prior housebreakings. The accomplice had been charged with the same crimes for which Stroman stood trial. However, the accomplice had entered guilty pleas and agreed to testify for the state. After Stroman questioned the accomplice about prior housebreakings, the prosecutor was permitted to question the accomplice about two robberies in which Stroman was an accomplice. Id. at 512-513, 316 S.E.2d at 398-399. This Court held "'[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially.'" Id. at 513, 316 S.E.2d at 399 (quoting State v. Albert, 277 S.E.2d 439 (N.C. 1981)).

In a post-conviction relief case, Vaughn v. State, 362 S.C. 163, 171, 607 S.E.2d 72, 76 (2004), this Court held a defendant was entitled to a new trial based upon the solicitor's improper closing argument where the defendant's attorney had opened the door to invited reply during the defense's closing argument. The defendant's attorney asked the jury to remember that only one officer testified on behalf of the prosecution concerning observing drugs despite the fact that another officer and civilians were present. Id. at 167, 607 S.E.2d at 74. The solicitor then informed the jury she did not present additional witnesses because she did not want to waste the jurors' time. She also stated that the rules of evidence did not permit the presentation of duplicative testimony. She told the jury that if any of the potential witnesses listed by the defendant's attorney would have testified differently than the testifying witness, then the defendant had the ability to subpoena those

witnesses to testify. She also stated she did not call the other witnesses because they would have said "the very same thing" that the officer presented said. Id. at 168, 607 S.E.2d at 74.

This Court recognized that improper argument includes vouching for witnesses and initiating argument about the testimony of absent witnesses. Id. at 169, 607 S.E.2d at 75. Additionally, this Court recognized that the defendant "'opened the door' to some response from the solicitor" based on his closing argument concerning the absence of witnesses. Id. at 170, 607 S.E.2d at 75. This Court held that the solicitor's response was unfair and prejudicial in light of the lack of evidence of the defendant's guilt. Id. at 170, 607 S.E.2d at 75-76. Thus, this Court found trial counsel was ineffective for failing to object to the solicitor's closing argument. Id. at 171, 607 S.E.2d at 76.

The evidence of the deceased's reputation was necessary for a full and fair presentation of Petitioner's defense. The prosecution's evidence against Petitioner was very weak. Essentially, the entire prosecution case rested on the testimony of Clement, who gave multiple inconsistent statements. No physical evidence tied Petitioner to the crime. The deceased's reputation in the community, particularly, his reputation for violence in the community, was essential to Petitioner's defense that someone other than Petitioner shot the deceased. This evidence complied with the rules of evidence, which permit character evidence of the deceased as long as the evidence is not being offered to prove conduct in conformity with that character trait. Here, petitioner was arguing the deceased's character – that he was a legendary killer – made him a target of many people, and as such, many people had as much, if not more, of a motive to kill the deceased than Petitioner did. Petitioner did not shoot the deceased; therefore, he could not rely upon self-defense or defense of others. Further, he was unable to argue the crime was something less than murder due to his defense that he was not the shooter. Thus, his defense was that someone else committed the crime

and relied upon the weak case of the prosecution to make this clear. However, the jury was left with only the testimony of Clement that Petitioner was the shooter and no other plausible theory of who may have shot the deceased.

Additionally, the evidence of the deceased's reputation was a fair rebuttal to the prosecution's opening statement. Although the history of the area and the crime rate of the area were completely unnecessary for the prosecution to explain in opening, the prosecutor chose to do so at the first and second trials. As a result of this choice, the prosecutor opened the door to evidence about the deceased's reputation in the community, particularly, his reputation for violence. The prosecutor told the jury that the area was "lawless" and the reason for his weak case was because people did not want to cooperate with the police, fearing retaliation. These statements invited defense counsel's reply that the area was lawless and that the deceased was part of that lawlessness.

Based upon the clear invitation by the prosecutor during his opening statement and the constitutional right to present a complete defense, the trial judge erred in excluding the evidence of the deceased's reputation, particularly for violence, in the community. This evidence was essential to Petitioner's defense that someone else shot the deceased as it showed many people in the community had a motive to harm the deceased. The evidence also responded to the opening statement of the prosecutor and his theme of "lawlessness" used throughout the trial.

II. Double jeopardy barred Petitioner's second trial where the grant of the mistrial was not dictated by manifest necessity or the ends of public justice after consideration of all the facts and circumstances.

Both the United States Constitution and the South Carolina Constitution protect individuals from being twice placed in jeopardy by the state. "No person shall be... Subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend V.[1] "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty." S.C. Const. Art. 1, § 12. "It is a rule of general recognition that one is in jeopardy when a legal jury is sworn and impaneled to try him, upon a valid indictment, in a competent Court, unless the jury before reaching a verdict be discharged with the prisoner's consent, or upon some ground of legal necessity or the verdict, if rendered be set aside according to law." Ex Parte Prince, 185 S.C. 150, 159, 193 S.E. 429, 433 (1937); see also State v. Baum, 355 S.C. 209, 214, 485 S.E.2d 419, 421 (2003). The theory of former jeopardy protects an individual from multiple prosecutions for the same offense after an improvidently granted a mistrial. State v. Kirby, 269 S.C. 25, 27 – 28, 236 S.E.2d 33, 34 (1977).

Double jeopardy bars a subsequent trial where a mistrial is granted over the defendant's objection unless the mistrial was required due to a manifest necessity based upon a consideration of all the circumstances. Kirby, 269 S.C. at 28, 236 S.E.2d at 34. "The pivotal issue determinative of the constitutional prohibition against double jeopardy is thus the existence of 'manifest necessity' for the mistrial." Id.

The constitutional prohibition against double jeopardy prevents a retrial following a mistrial only if there were manifest necessity for the mistrial. Id., at 29, 236 S.E.2d at 34. The

[1] The Fifth Amendment is made applicable to the states through the Fourteenth Amendment's Due Process clause. Benton v. Maryland, 395 U.S. 784 (1969).

test is "whether the mistrial was dictated by manifest necessity or the ends of public justice," which is defined as "the public's interest in a fair trial designated to end in just judgment." Id. at 29, 236 S.E.2d at 35; see also, Illinois v. Somerville, 410 U.S. 458 (1973); Wade v. Hunter, 336 U.S. 684 (1949); State v. Kelsey, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998); State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983); State v. Garris, 394 S.C. 336, 345, 714 S.E.2d 888, 893 (Ct. App. 2011); State v. White, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (Ct. App. 2006).

"The power of the court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes." Kirby, 269 S.C. at 29, 236 S.E.2d at 34; see also State v. Prince, 279 S.C. 30, 310 S.E.2d 471 (1983). "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005); see also State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). "Manifest necessity stands as a command to trial judges not to foreclose the defendant's option to unscrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by continuation of the proceedings." United States v. Jorn, 400 U.S. 470, 485 (1971).

In determining whether to grant a mistrial motion, the trial judge should consider the following factors: "the character of the testimony, the circumstances under which it was offered, the nature of the case, and the other testimony in the case." State v. Creech, 314 S.C. 76, 82, 441 S.E.2d 635, 638 (Ct. App. 1994)(citing State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988)).

An examination of federal and state jurisprudence regarding double jeopardy demonstrates that the mistrial order during Petitioner's first trial was not dictated by manifest

necessity or the ends of public justice. As demonstrated by the cases discussed infra, manifest necessity and the ends of public justice require a powerful showing, which simply did not exist at Petitioner's first trial.

This Court found manifest necessity was established where the solicitor prosecuting the case died during the trial and the assistant solicitor had not been present for any of the trial and was totally unprepared to prosecute the remainder of the case. Kirby, 269 S.C. at 29, 236 S.E.2d at 35. In Baum, 355 S.C. at 214, 485 S.E.2d at 421, this Court affirmed a mistrial grant where the deceased's body was found during the trial because the public's interest in a fair adjudication was implicated by the discovery of the body, which was an extremely important piece of evidence with as much potential to exonerate as to inculpate the accused and finding.

In State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000), the Court of Appeals held that the double jeopardy clause barred the defendant's prosecution after an improvidently granted mistrial. After the jury was sworn, the prosecution moved for a continuance based on the absence of a material witness. Id. at 456, 539 S.E.2d at 718. The judge denied the continuance motion but granted the State's alternate motion for a mistrial. Id. When the case was called to trial again, the defendant moved to dismiss based on double jeopardy. Id. The court held the mistrial was not dictated by necessity or by the ends of public justice based upon the absence of a material witness. Id. at 459, 539 S.E.2d at 720.

In Prince, 279 S.C. at 33, 310 S.E.2d at 472-473, this Court found the granting of a mistrial where the jury asked to hear testimony was improper. The jury had been deliberating for less than six hours, a portion of which had been used for an evening meal, and the court had invested two days in the trial. Id. After noting "[t]he 'manifest necessity' rule is easy to state but sometimes difficult to apply" and that "[i]n borderline cases, it is the inclination of the

appellate courts to sustain the judge in the exercise of his discretion," this Court held that record failed to reveal facts to justify declaring a mistrial over the defendant's objection. Id. at 33, 310 S.E.2d at 473.

Further, the jurisprudence of South Carolina and the United States Supreme Court requires consideration of alternatives to the granting of a mistrial, such as giving an curative instruction. "If the trial [court] sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-912 (1996). A curative instruction is generally deemed to cure any error. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); see also State v. McEachern, 399 S.C. 125, 147, 731 S.E.2d 604, 615 (Ct. App. 2012); State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010); State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005); State v. Moyd, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996).

The Court of Appeals' decision in State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012) is instructive with regard to factors to consider when a party moves for a mistrial. Manning was charged with felony DUI and drug possession, and at the beginning of jury selection, the trial judge read both indictments to the prospective jurors. After jury selection, Manning moved to sever the charges, and the judge granted the motion. Thereafter, Manning moved for a mistrial because the jurors were aware of both charges. The trial judge denied the motion. Id. at 268-269, 734 S.E.2d at 320. Although the court found Manning waived this issue on appeal, the court addressed the merits and found the "single reference to the schedule three drug charge contained in the indictments read at the beginning of trial [did] not constitute sufficient prejudice to justify a mistrial." Id. at 270, 734 S.E.2d at 320 (emphasis added). The

fact that the jury heard only a single reference to the other charge was foundational to the court's decision.

In State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003), a police officer, testifying on behalf of the prosecution, informed the jury that Thompson had warrants pending against him. Thompson moved for a mistrial based upon the prejudicial and improper testimony. Id. at 560, 575 S.E.2d at 82. The court held the officer's "single reference to warrants that existed against Thompson did not constitute sufficient prejudice to justify a mistrial." Id. at 561, 575 S.E.2d at 82 (emphasis added). The officer's statement did not convey that the warrants concerned unrelated charges or other bad acts. In light of the jury hearing evidence that the police were looking for Thompson in connection with the offense for which he was on trial, "it would be reasonable to assume the jury inferred that the warrants related to the charged offenses." Id. at 561-562, 575 S.E.2d at 82-83. As in Manning, supra, the single reference was of singular importance in arriving at the ultimate conclusion.

In State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004), the judge learned that a newspaper containing an article about the trial was in the jury room. The judge questioned the jurors regarding their having read, seen, or heard about the article. Six jurors responded affirmatively. Only one juror admitted to having read the article. She remembered details in a paragraph following one reference to the defendant's prior record. As a result, this juror was excused by the trial judge. The court held the trial judge's actions were proper and a mistrial was not warranted where the other five jurors had very limited exposure to the article and testified the article had not caused them to form any opinions. Id. at 184-185, 603 S.E.2d at 913-914.

According to Respondent, the United States Supreme Court's decision in Arizona v. Washington, 434 U.S. 497 (1978) "is directly on point and is controlling." Ret. at 20. Further, the Respondent characterized the facts of Arizona v. Washington as "remarkably similar to the situation at hand – an inappropriate comment by defense in opening statement where the facts of the comment could not be received into evidence." Ret. 20. While the broad brush used by Respondent is accurate, the specifics of the case bear mentioning. Washington's conviction was overturned by the Arizona Supreme Court based upon the prosecution withholding evidence. Washington, 434 U.S. at 498. At Washington's second trial, defense counsel told the jurors during his opening statement that Washington had been ordered a new trial based on the prosecution suppressing and hiding evidence. Id. at 499. Defense counsel described the actions as "misconduct" and detailed what the prosecutor had hidden. Id.

The Supreme Court made clear that "in view of the importance of the right" not to be put in jeopardy twice, "the prosecutor must shoulder the burden in justifying the mistrial if he is to avoid the double jeopardy bar." Id. at 505. This burden is "a heavy one" and "[t]he prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." Id. The Court then described the "necessity" continuum. According to the court, "[a]t one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence." Id. at 507. "Thus, the strictest of scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the state to harass or to achieve a tactical advantage over the accused." Id. at 508. At the other end of the continuum exists the mistrial "premised upon the trial judge's belief that the jury is unable to reach a verdict." Id. at 509.

Thereafter, the Court explained, as Respondent conceded, that the "mistrial was not 'necessary'" in Washington's case. Id. at 511; Ret. 21. However, the majority determined "the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." Washington, 434 U.S. at 511. The Court cautioned against "[t]he adoption of a stringent standard of appellate review" when a trial judge grants a mistrial over the defendant's objection based upon a finding of manifest necessity because of society's interest in "orderly, impartial procedure." Id. at 513. Despite affording "great deference" to trial judges, the Court recognized appellate courts must review the decisions to ensure the trial judges exercised "'sound discretion.'" Id. at 514.

Respondent's argument for application of Washington to the present case would render review of mistrial grants when requested by the state unreviewable by appellate courts as long as the trial judge afforded defense counsel an opportunity to argue his point. See Ret. 22. While Petitioner accepts and agrees that the United States Supreme Court has determined that the grant of a mistrial in favor of the prosecution warrants review under an abuse of discretion standard. However, such a standard must *not* be a complete abdication of the duty to review as Respondent insists. As this Court explained, "[i]n borderline cases, it is the inclination of appellate courts to sustain the judge in the exercise of his discretion." Prince, 279 S.C. at 33, 301 S.E.2d at 473. Nevertheless, this Court undertook a "search of the record" and determined the record "fail[ed] to reveal facts which would justify declaring a mistrial over the objection of the defendant and by so doing subject him to a new trial before another jury at a different time." Id. "If the record reveals that the trial judge has failed to exercise the 'sound discretion' entrusted to him, the reason for ... deference by an appellate court disappears." Washington, 434 U.S. at 510 n. 28.

Numerous courts have recognized "the well established principle that when 'an opening statement is an objective summary of evidence [counsel] reasonably expects to produce, *a subsequent failure in proof will not necessary result in a mistrial.*'" United States v. Sloan, 36 F.3d 386, 398 (4th Cir. 1994)(quoting United States v. Wright-Barker, 784 F.2d 161, 175 (3d Cir. 1986))(alteration and emphasis in original). Such a principle aligns with the instructions given by the trial judge that statements by counsel are not evidence.

Petitioner's argument regarding the erroneous mistrial grant is two-fold. First, the evidence was admissible, see Issue I, supra. Therefore, the granting of a mistrial was erroneous because there was no error in defense counsel using his opening statement to foreshadow what the evidence would be. Second, even if this Court were to determine that the evidence was not admissible, the mistrial was not dictated by manifest necessity or the ends of public justice. What defense counsel said to the jury was not evidence and was merely a roadmap of where the case would go. Defense counsel made a single reference to the deceased's reputation. Thus, it was unlikely that the single reference had prejudiced the jury. Certainly, a curative instruction to disregard the statement would have cured any error created by defense counsel's opening statement.

CONCLUSION

Concerning Issue I, Petitioner respectfully requests this Court reverse his convictions and remand for a new trial. Concerning Issue II, Petitioner respectfully requests this Court vacate his convictions and sentences because his second trial was barred by double jeopardy.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYREL R. COLLINS,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Tyrel R. Collins, #338147, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 3rd day of January, 2017.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of January, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.