**REL: April 12, 2019**



# ALABAMA COURT OF CRIMINAL APPEALS

**OCTOBER TERM, 2018-2019**

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**CR-17-0360**

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**Alfonzo Ramon Jarmon**

**v.**

**State of Alabama**

**Appeal from Lauderdale Circuit Court**
**(CC-16-573)**

PER CURIAM.

Alfonzo Ramon Jarmon appeals his conviction of murder, a violation of § 13A-6-2, Ala. Code 1975, and his resulting sentence of life imprisonment. The trial court also ordered Jarmon to pay $8,165.51 in restitution, $50 to the Crime

Victims Compensation Fund, and court costs. We reverse the judgment of the trial court and remand the case for a new trial.

Facts and Procedural History

Jarmon does not challenge the sufficiency of the evidence on appeal. Therefore, a brief recitation of the facts will suffice. On April 29, 2016, Jarmon shot Charles Perkins in the head on the front lawn of Perkins's residence. The shooting was witnessed by Frederick Minnis, who was driving by when Jarmon shot Perkins, and by Steven Andrews, who was a passenger in Minnis's vehicle. Police responded to reports of "shots fired" and found Perkins's body in the front yard. (R. 250.) A person standing in the crowd at the scene told police that Perkins's next-door neighbor, Jarmon, shot Perkins.

Jean Darby represented Jarmon at trial. During Darby's closing argument, Darby developed unexpected health issues that prevented her from continuing. The trial court ordered a recess. With Darby unable to return to court, the trial court appointed new defense counsel to represent Jarmon for the remainder of the trial proceedings. Shortly following their appointment, defense counsel moved to remain in recess,

moved for a mistrial, and objected to the trial court's jury instructions. The trial court denied those motions and instructed the jury on the applicable principles of law. Following deliberations, the jury found Jarmon guilty of murder.

The record indicates that the trial began on Monday, October 16, 2017, and that closing arguments began on Thursday, October 19, 2017. During the closing arguments, Darby collapsed and a juror administered CPR before Darby was removed from the courtroom to obtain urgently needed medical care. When the record resumed outside the presence of the jury, the following transpired:

> "THE COURT: We're on the record in State of Alabama versus Alfonso Jarmon. ...
>
> "We are -- we have finished the testimony. Yesterday I had instructed the jury on the closing arguments. Mr. Connolly -- the reason I'm recounting this is because I doubt you were recording these. Mr. Connolly had given his opening. I would say in the middle -- I don't know where Miss Darby --
>
> "MR. CONNOLLY (the prosecutor): Closing.
>
> "THE COURT: I mean closing. Miss Darby was in her closing when she collapsed and our condolences go to the Darby family and to her friends who are still in the courtroom that are trying to struggle on.

"We called 911. Paramedics came, and ambulance came, heroic events and Miss Darby is on her way to the hospital. Someone in my absence had the wherewithal to have the jury recess to the jury room except for Mrs. [T.] who is an RN. I think Mrs. [T.] performed -- a member of the jury performed CPR on Miss Darby while paramedics were on the way. Those fourteen are now in my jury room. It's premature to -- in my opinion -- to release the jury. Miss Darby hopefully, prayerfully will be fine. I don't see how she could get back up here as far as today goes anyway and we've all been -- we were all dear friends with Miss Darby and all are quite traumatized.

"What my proposal is in the sense of justice and probably what Miss Darby would want is to not declare a mistrial at this point. I think it's a little premature. I'll have the jury return. I instruct them and we recess for the balance of the day and instruct the jury to check the jury hotline tonight for further instructions, but plan on being here at 9:00 in the morning.

"I'm hopeful that Miss Darby will be fine. It was some sort of event, okay, and I'm trying to look out for not only the defendant's rights but to look out for the rights of the victim's family also to try to keep from going through this trial again. So I'm just a little hesitant to put an end to it at this point.

"I had just -- so the record is clear, I had invited Darryl Tatum who is the investigator, not an attorney, but he is intimately involved in the case through the trial. He is the next best representative I know. I asked him to come to my chambers as well as Mrs. Moody and Mr. Connolly and we kind of discussed things, trying to remain as professional and conscientious as we can despite the chaos. From the State anything that -- as we protect the record or at least document the record?

> "MR. CONNOLLY: I agree that that's an appropriate way to handle it, Judge.
>
> "THE COURT: Mr. Tatum, I know you're not trained in the law but you're probably as knowledgeable as anybody I know. Any fundamental unfairness to that that you see?
>
> "MR. TATUM: No, sir.
>
> "THE COURT: All right. Miss Wallace, if you will bring the fourteen back out. I'm going to put them in recess until tomorrow at nine until we can get an evaluation of Miss Darby's wellbeing."

(R. 604-07.)

After the jury returned to the courtroom, the trial court instructed the jury and informed the jury that it was going to stand in recess until 9 a.m. the following morning. In giving the jury instructions, the trial court stated, in pertinent part:

> "I'm also hopeful that Miss Darby is going to be just fine and she will be -- she can be here in the morning to conclude her closing arguments. I don't know that but I'm just not willing to say -- to declare a mistrial at this point.
>
> "....
>
> "[I] may say that despite everyone's efforts that the trial has been mistried, okay, because there's no backup, you know? Mr. Tatum is schooled in the law and an investigator and has a lot of credentials. He's not trained in the law and I can't ask him to finish the closing arguments, and she doesn't practice with anyone else and there's

> not another lawyer in the case. I'm probably telling you more than you need to know but that's the situation."

(R. 608-10.)

After the jury recessed, the trial court entered an order on October 19, 2017, appointing two new attorneys to represent Jarmon for the remainder of the trial proceedings.

On October 20, 2017, the trial court conducted a hearing with the parties at which Jarmon was represented by his new trial counsel. At the hearing, the trial court and the prosecutor recounted the discussions Darby had had regarding jury instructions. New counsel for Jarmon then objected, stating:

> "[New counsel] were given less than twenty-four hours to not have the time -- appropriate time in which to discuss all this with our client, to review the facts and to make an informed and logical argument in regards to these various charges. So we just want to make that crystal clear."

(R. 621.) Defense counsel informed the trial court that after being appointed on Thursday afternoon, counsel had tried to visit with Jarmon, but Jarmon did not want to speak with them and "was happy to wait until Miss Darby got better or wait and however much time it took." (R. 622.) Clarifying their position, defense counsel informed the court "our client has

asked us to secure a new trial and attempt to obtain a mistrial for him." (R. 622.)

Counsel asked the court to allow Jarmon to state on the record how he wished to proceed. Jarmon told the court that he wanted what could best help him. The trial court told Jarmon: "[I]f I thought Miss Darby would be better by next week I might entertain continuing this till she could get back, but information I have does not suggest that and so, you know, in the totality of the circumstances is why I'm electing to proceed this morning." (R. 623.) Jarmon again stated that he wanted whatever could help him. Counsel then filed a motion for the trial to remain in recess for the weekend. Counsel said that "Darby became indisposed at a critical juncture in the proceedings," but that she might return later and be able to complete the trial, thereby providing Jarmon with the effective assistance of counsel. They argued that a weekend recess would allow counsel to review the trial proceedings so that they could render sufficient assistance of counsel to Jarmon. The State objected, stating that a recess would create "logistical issues with the paneled jury," and that all the evidence was before the jury and all that

remained was for the court to charge the jury. (R. 628-29.) The State concluded: "[T]here's no real purpose that would be served by putting this jury on ice for the weekend." (R. 629.) The trial court denied the motion to remain in recess.

Defense counsel argued that the trial court should declare a mistrial because Darby failed to complete her closing argument to the jury after the defense had elected to present a closing argument as allowed by Rule 19.1, Ala. R. Crim. P. The defense continued, asserting that "to deny the defendant an opportunity to have his voice heard through a well reasoned and [sic] closing argument would constitute reversible error under Herring v. New York, 422 U.S. 853 U.S. 1975." (R. 630.)

In response, the State argued:

> "Judge, we would submit a couple of things. One, the Alabama Rules of Procedure 19.1 address closing arguments and says that they may be given. Not shall be given. Just -- so that's one thing. But more importantly we would -- this would be a totally different issue if the defense had been deprived of any closing arguments. The fact of the matter is the -- Miss Darby gave a closing argument. She covered many, many salient points of the defendant's defense including self-defense at some length and then to a lesser degree the issue of mental disease defense.
>
> "Miss Darby prior to -- just as we stood in your chambers fixin' to go give the closing arguments

> stated to both Mrs. Moody and myself that she intended to be brief and that, you know, so it's the State's position that this is not a denial of the right to a closing argument that they -- a closing argument was given in some substance and ably by Miss Darby so, I mean, I think it's -- with all due respect to new counsel it's not factually accurate to say there was no closing argument given.
>
> "....
>
> "THE COURT: I will mention without being an advocate, which is not my role, I think the record will reveal that Miss Darby's focus in her defense of Mr. Jarmon was self-defense. In fact, quite frankly I asked her before we started. She signaled she may well abandon mental disease or defect but at the last moment decided to leave that in .... Now -- and what Miss Darby seemed to conclude in her closing was her argument on self-defense. She had completed that argument and had then transitioned into the mental disease and defect when she was stricken, okay, so just -- and I believe [the court reporter] will have the audio."

(R. 633-35.)

Defense counsel responded that a mistrial was appropriate because Darby's closing argument was incomplete, that an "incomplete argument is the same as no argument," and that who can say what Darby might have argued to persuade one juror to vote not guilty. (R. 637.) Further, counsel stated that a mistrial was the only thing that could cure the denial of Jarmon's "opportunity to have a fair and complete closing argument." (R. 638.)

In response, the State suggested a curative instruction and offered: "One approach, Judge would be instruct [the jury] to disregard the State of Alabama's closing argument and to consider carefully the closing argument made by Miss Darby." (R. 638.) The trial court agreed with the State's proposal and instructed the jury, in pertinent part:

> "We have had an intense several days of testimony, trial and arguments and we are at that point of the trial where we were into the closing as you know. My question to you is given the extraordinary circumstances of yesterday, could each of you put aside those events and proceed with the remainder of the trial and be able to discern and determine what the true facts are, call it down the middle irrespective of what happened yesterday, apply it to the law as I would instruct you and arrive at a true verdict? Each -- let the record reflect that everybody's nodding their head. All fourteen. We can proceed, and you would set that aside, setting aside any sympathy or emotion one way or another for or against anyone and call it down the middle? If we proceeded all fourteen jurors are nodding their head in the affirmative.
>
> "....
>
> "You have heard all the evidence in this case presented by both sides. With regards to the closing arguments I'm going to instruct you in this way: I ask you to disregard and consider for naught the closing arguments made by Mr. Connolly on behalf of the State of Alabama, okay? In fairness and in equality I'm asking you to disregard just that portion for Mr. Connolly's closing arguments. But you're welcome to consider Miss Darby's. Okay?"

(R. 641-42.) After it instructed the jury, the trial court denied Jarmon's motion for a mistrial.

Discussion

On appeal, Jarmon challenges the trial court's denial of his motion to remain in recess, the trial court's denial of his motion for a mistrial, and the trial court's decision to instruct the jury over his objection. Specifically, Jarmon argues that he was denied his constitutional right to counsel and to have his counsel make a proper closing argument and, thus, that the judgment of the trial court should be reversed and the case should be remanded for a new trial. Because we reverse on the basis that the trial court should have granted the motion to remain in recess, we pretermit discussion of the other issues.

The right to have counsel present a closing statement to the jury is a fundamental right under the Sixth Amendment's guarantee of the effective assistance of counsel.[1]

[1]The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

> "No one doubts the fundamental character of a criminal defendant's Sixth Amendment right to the 'Assistance of Counsel.' In Gideon v. Wainwright, 372 U.S. 335 (1963), the Court explained:
>
> > "'"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."' Id., at 344–345 (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932))."

Luis v. United States, 136 S. Ct. 1083, 1088–89 (2016).

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> shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S. Const. amend VI.

In Herring v. New York, 422 U.S. 853 (1975), the United States Supreme Court stated:

> "The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process.
>
> "There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge."

422 U.S. at 858.

The Court went on to say,

> "'The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such right.' [Yopps v. State, 228 Md. 204], 207, 178 A.2d [879], 881 [(1962)].
>
> "The widespread recognition of the right of the defense to make a closing summary of the evidence to the trier of the facts, whether judge or jury, finds solid support in history. In the 16th and 17th centuries, when notions of compulsory process, confrontation, and counsel were in their infancy, the essence of the English criminal trial was

> argument between the defendant and counsel for the Crown. Whatever other procedural protections may have been lacking, there was no absence of debate on the factual and legal issues raised in a criminal case. As the rights to compulsory process, to confrontation, and to counsel developed, the adversary system's commitment to argument was neither discarded nor diluted. Rather, the reform in procedure had the effect of shifting the primary function of argument to summation of the evidence at the close of trial, in contrast to the 'fragmented' factual argument that had been typical of the earlier common law.
>
> "It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. See In re Winship, 397 U.S. 358 [(1970)].
>
> "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment."

Herring, 422 U.S. at 860-62.

In the present case, although Jarmon was not prohibited from presenting part of a closing argument, it is undisputed that Darby did not complete her closing argument before she collapsed and that no further closing arguments were offered by either defense counsel or the State. Under the particular facts of this case, there is little doubt that a complete closing argument could have served to "sharpen and clarify the issues for resolution by the trier of fact." Herring, 422 U.S. at 862. It appears that Darby had completed her argument on self-defense and was transitioning into her argument on mental disease or defect when she collapsed. The trial court noted that "Darby's focus in her defense of Mr. Jarmon was self-defense" and that "she signaled she may well abandon mental disease or defect but at the last moment decided to leave that in." However, based on the evidence presented at trial, Jarmon's mental-disease-or-defect defense should not be dismissed as a defense that was so weak and unsupported by the evidence that it did not implicate Jarmon's "right to have his counsel make a proper argument on the evidence and the applicable law in his favor." Herring, 422 U.S. at 860.

The following facts related to Jarmon's psychiatric history, particularly his extensive contacts with Riverbend Center for Mental Health ("Riverbend") and his diagnosis of, and treatment for, bipolar disorder, would support his mental-disease-or-defect defense.

Days after Darby was appointed to represent Jarmon, Darby requested that the court order a mental examination of Jarmon. The trial court appointed a certified forensic examiner, Dr. Glen King, to conduct a clinical examination of Jarmon's mental condition at the current time and at the time of the offense. Nine days after the trial court entered the order for a forensic examination, Darby filed a motion seeking an order for transportation of Jarmon from the jail to Riverbend for an outpatient assessment of his mental health. In support of the motion, Darby stated that Jarmon had "a history of mental illness as documented by voluminous records from Riverbend Center of Mental Health." (C. 63.) She further stated that Jarmon had refused to eat or drink for weeks while he was incarcerated and that he became so gravely ill that he required emergency surgery. Immediately after he was discharged from the hospital and returned to jail, he was

"again exhibiting signs of mental illness," e.g., he refused to eat and he would not speak. (C. 63.) The trial court granted Darby's motion and entered an order for a mental-health assessment to be conducted at Riverbend. Approximately three weeks later, the parties filed a joint motion to release Jarmon from custody and to place him under house arrest at his parents' residence with specific conditions, one of which was that Jarmon "cooperate with mental health professionals regarding any recommended treatment and medication," and to "execute appropriate releases authorizing mental health professionals to provide reports to the court regarding his compliance with recommended treatment." (C. 68.) The trial court granted the joint motion and imposed the conditions as requested by the parties.

Darby filed a motion requesting that the trial court postpone Jarmon's arraignment until Dr. King completed his forensic evaluation, and the State did not oppose the motion. The trial court granted the motion to continue, and Jarmon's arraignment was postponed for three months. At his arraignment Jarmon entered a plea of not guilty or not guilty by reason of mental disease or defect.

At trial, Darby presented two lines of defense for Jarmon -- that Jarmon had acted in self defense and that he was not guilty by reason of mental disease or defect. On the joint stipulation of the parties, the trial court admitted into evidence an exhibit containing more than 600 pages of records from Riverbend. The records included significant information about Jarmon's mental-health issues and treatment, such as:

1. Jarmon, who was 32 years old at the time of the shooting, had been under psychiatric care at Riverbend at least since he was 14 years old. (C. 787.)

2. Jarmon had been consistently diagnosed as having bipolar disorder, but at various times during his years of treatment at Riverbend, he had been diagnosed also with impulse-control disorder. Jarmon was also treated for depression and anxiety. He had taken part in group-therapy sessions at Riverbend.

3. A petition for involuntary commitment to Riverbend had been filed in June 2001, when Jarmon was 17 years old, for threatening and becoming physically aggressive toward his mother. The records indicate that Jarmon was taking medications to treat psychotic

conditions and depression at the time. A staff psychiatrist at Riverbend sent a follow-up letter to the county district judge who had ordered the examination stating that, at the time of his admission, Jarmon had "a diagnosis of Bipolar Disorder and a long history of treatment for mental illness" at Riverbend. (C. 602-03.) The psychiatrist further stated: "At the time of his admission, Mr. Jarmon reported hearing voices and becoming aggressive with his mother." (C. 603.) After his admission, the doctor wrote, Jarmon became calmer, expressed regret for the incident, and exhibited no psychotic symptomology at that time. The doctor recommended that the petition for commitment be dismissed and that Jarmon follow up with Riverbend for outpatient services. The records indicate that Jarmon continued treatment at Riverbend.

4. During most of, if not all, the time Jarmon was under care at Riverbend, he had been prescribed a variety of psychiatric medications to treat his symptoms. Most notably, he had been taking an antipsychotic medication, Seroquel, for years before Perkins was killed. (C. 814.)

5. A progress note from Jarmon's January 12, 2016, appointment with the staff psychiatrist at Riverbend included information that Jarmon reported that he was having good results from the Seroquel and that the psychiatrist's diagnosis was "Bipolar 1 disorder, Current or most recent episode manic, in full remission." (C. 816.)

6. The records reflect that Jarmon's last contact with Riverbend occurred on April 8, 2016, three weeks before Perkins was shot. According to a progress note dated April 12, 2016, Jarmon appeared at the April 8th appointment for a review of his treatment plan for bipolar disorder, and he met with a nurse. The note indicates that Jarmon reported that he was taking Seroquel XR, and that the medication was causing side effects, including drowsiness and headaches in the morning. The note continues:

> "Client requesting Plain Seroquel instead of Seroquel XR. Client reports he has enough Seroquel XR for the weekend. Instructed client this nurse will staff above with Donna Grace, CRNP 4/11/16 and call [client].

> "4/11/16- Staffed above with Donna Grace, CRNP. No medication changes made. Client will need to wait until next appointment. Returned call to client [but was unable to make contact].
>
> "4/12/16- Returned call to client ..., relayed above information from Donna Grace, CRNP. Client reports he will not continue taking current medication and request[s] to see Donna Grace/Nurse. Client offered appointment for 4/13/16 and 4/14/16. Client declines both appointments stating he will have to see when available and call back.
>
> "Plan: Keep Appointment as Scheduled, Continue Medications as Prescribed, Discussed Meds, Dosage, Instructions"

(C. 848 (emphasis added).)

Another progress note from the April 8 appointment contains the following: "Does client need to continue with treatment?: Yes" (C. 836.)

Jarmon's mother, Ravina Jarmon ("Ravina"), testified that Jarmon had exhibited mental problems in kindergarten, at around age five, and that he started receiving treatment at Riverbend at that young age. Jarmon had lived with her and her husband nearly all of his life, and they took Jarmon to "his treatments" at Riverbend. (R. 588.) Ravina testified that Riverbend diagnosed Jarmon with bipolar disorder, and

that he had been taking Seroquel as treatment for that disorder for a long time. She said that Jarmon was very calm when he took the Seroquel. But, she said, there had been occasions when he failed to take it, and he was "very jittery" when that happened. Ravina said that, approximately two years before the shooting, Jarmon began staying with her brother for a few days each week. She said that she monitored Jarmon's medication to ensure that he took it daily, and she left the medication for him at her brother's house when Jarmon stayed there. She could not say that Jarmon took the medicine when he stayed there. She believed, based on Jarmon's actions around the time of the shooting, that he was not taking his medicine as he should have been.

The State called Dr. Glen King, who testified by way of deposition about the forensic evaluation of Jarmon that he conducted pursuant to the court's order. Dr. King acknowledged that Jarmon had received treatment at Riverbend for many years. He testified that Jarmon reported to him that he was taking Seroquel. Although contradicted by the voluminous records from Riverbend, Dr. King's opinion was that Jarmon had "no evidence" of "any serious mental illness which

would typically be manic depressive disorder, which is now referred to as bipolar disorder or schizophrenia. He didn't seem to be receiving any usual treatment for either one of those conditions." (R. 557.) This, in spite of the fact that just weeks before the murder, Jarmon met with a psychiatrist at Riverbend and reported that he had been taking his prescribed antipsychotic, Seroquel, and in spite of the fact that the Riverbend records reflect that, for years before the shooting, Jarmon had been prescribed and had been taking Seroquel for his diagnosed bipolar disorder. Dr. King's sole diagnosis for Jarmon was malingering. He also testified that Jarmon was competent to stand trial and that he did not have a mental-state defense.

Initially, we note that the apparent strength or weakness of the defendant's argument has no effect on the defendant's right to make a closing summation concerning that argument to the jury, unless the argument is so weak and unsupported by the evidence that the argument falls outside the issues actually presented at trial. Herring, 422 U.S. at 858, 860 (stating that "counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case

for the prosecution may appear to the presiding judge" and that "[t]he Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, ... unless the argument is not within the issues in the case"). In this case, the evidence establishes that Jarmon's mental-disease-or-defect defense should not be dismissed as a weak defense that was unsupported by the evidence.

Under the unique facts of this case, in which voluminous records regarding the defendant's mental state were introduced for the jury's consideration, there is little doubt that a complete closing argument could have served to "sharpen and clarify the issues for resolution by the trier of fact." Herring, 422 U.S. at 862. For example, Darby might have been planning to emphasize certain aspects of the defendant's mental-health history by highlighting certain portions of the records so that the jury would not have been faced with poring through all of them. Darby might have been planning to read segments of the records or summarize them, or she might even

have been planning to attempt to relate the defendant's mental health to his self-defense claim. Any determination by this Court or the trial court as to what her complete closing argument might have included would be no more than pure speculation. In fact, Darby was not able to complete her closing argument; therefore, Jarmon's "right to have his counsel make a proper argument on the evidence and the applicable law in his favor," i.e., his fundamental right to the assistance of counsel under the Sixth Amendment to the United States Constitution, was violated.

Having established that Jarmon's right to the assistance of counsel was violated, we now address what action the trial court should have taken. Under the unique circumstances of this case, we hold that the trial court should have granted newly appointed counsel's motion to remain in recess. Although the denial of a continuance is something that we normally would not disturb on appeal, the trial court exceeded its discretion when it denied counsel's motion to remain in recess in the present case.

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to

> offer evidence or is compelled to defend without counsel. Avery v. Alabama, 308 U.S. 444 [(1940)]. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. Chandler v. Fretag, 348 U.S. 3 [(1954)]. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. Nilva v. United States, 352 U.S. 385 [(1957)]; Torres v. United States, 270 F.2d 252 (C.A. 9th Cir. [1959)]); cf. United States v. Arlen, 252 F.2d 491 (C.A.2d Cir. [(1958)]."

Ungar v. Sarafite, 376 U.S. 575, 589–90 (1964).

In United States v. Griffiths, 750 F.3d 237 (2d Cir. 2014), the court faced a situation similar to the present one. In Griffiths, after the close of evidence and after the completion of the charging conference on May 14, 2012, the defendant's counsel, Jared Scharf, suffered two strokes and was hospitalized. On May 16, 2012, with only closing arguments remaining and the jury empaneled, the trial court adjourned the trial for five days and appointed another attorney, Bennett Epstein, "to advise [the defendant] solely on the issue of how to proceed in light of Scharf's condition." Griffiths, 750 F.3d at 240. The trial court also expressed a willingness to adjourn the trial for up to three

weeks. On May 21, 2012, the projected length of Scharf's absence was deemed indefinite, and, rather than declare a mistrial, the trial court appointed Epstein as trial counsel and instructed him to prepare for summations on May 29, 2012, which was two weeks after the first adjournment. On May 29, 2012, the parties gave summations and the jury began deliberations. The next day, the jury delivered a guilty verdict. On appeal from that conviction, the United States Court of Appeals for the Second Circuit held that there was no per se violation of the defendant's right to effective assistance of counsel and that "[u]nder these unusual circumstances, the [trial court] properly exercised its discretion in deciding to appoint substitute counsel, given [the defendant's] refusal to consent to a feasible alternative." Griffiths, 750 F.3d at 243. The appellate court noted that "[h]ad the [trial court] immediately pressed ahead with trial following Scharf's strokes, without regard for [the defendant's] constitutional rights, his argument might well have force." Id.

In the present case, like the situation in Griffiths, a continuance was required. The trial court itself stated on

the record that it might have granted a continuance into the following week if it had appeared that Darby would return by then to complete the trial. By denying new counsel's motion to continue and quickly pressing ahead with trial after the defendant's trial attorney became incapacitated, the trial court unconstitutionally limited Jarmon's right to counsel, especially in consideration of the voluminous mental-health evidence presented at trial. As with trying to speculate about what Darby might have argued in her closing, there is no way to speculate how substitute counsel might have approached the issue of closing argument had they had time to review the evidence, view the record, and/or talk to the defendant if the trial court had continued the case even for a short period.

This Court acknowledges that the trial court had to make difficult decisions in the face of very unusual circumstances. As the trial court stated, "this is an extraordinary set of circumstances [for which] very little guidance is provided." (R. 622.) Nevertheless, the trial court exceeded its discretion when it denied the motion to stay in recess for the weekend so new counsel could familiarize themselves with the case and participate fully in Jarmon's defense. As a result,

Jarmon was denied the effective assistance of counsel. Therefore, the judgment of the trial court is reversed and the case is remanded for a new trial.

REVERSED AND REMANDED.

Windom, P.J., and McCool, J., concur. Cole, J., concurs specially, with opinion, joined by Minor, J.; Minor, J., concurs specially, with opinion, joined by Cole, J.; Kellum, J., dissents, with opinion.

COLE, Judge, concurring specially.

The main opinion correctly recognizes that, under the circumstances in this case, the trial court exceeded its discretion when it denied Alfonzo Ramon Jarmon's newly appointed counsel's request for a continuance. In so concluding, I recognize that "'[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process,'" and that this Court looks for our answer to this question "'in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'" Glass v. State, 557 So. 2d 845, 848 (Ala. Crim. App. 1990) (quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964)). Without belaboring the circumstances giving rise to the necessity of a recess here, we have before us one of those unique circumstances in which a trial court's refusal to grant a recess was reversible error.[2] Thus, I concur.

[2]Given that this Court finds reversible error in the trial court's failure to grant a recess, I also agree with this Court's silence as to Jarmon's remaining issues on appeal because they need not be addressed.

I write specially, however, to address the trial court's failure to allow Jarmon's newly appointed counsel a recess in light of the trial court's erroneous jury instruction that Jarmon's possession of a pistol without a license created a rebuttable presumption that he intended to commit murder.

At the time Jarmon's newly appointed counsel was thrust into this case, the trial court, the State, and Jarmon's original counsel had apparently engaged in an off-the-record jury-charge conference. (R. 612.) During that off-the-record discussion, Jarmon's original counsel made several objections to the trial court's proposed instructions, including her objection to an instruction based on § 13A-11-71, Ala. Code 1975, which explained that, "in a trial of a crime of violence, the fact that the defendant is armed with a pistol and had no license to carry same shall be prima facie evidence of his intention to commit said crime of violence." (R. 617.)

After learning that Jarmon's original counsel had objected to this instruction (and others), Jarmon's newly appointed counsel argued:

> "Judge, if I may, just to put this all within a framework for the record and for purposes of continuing we object, of course, to anything and everything on both the grounds that [Jarmon's

> original counsel] did but at the same time adding a new layer of objection which is the fact that [new counsel] were given less than twenty-four hours to not have the time--appropriate time in which to discuss all this with our client, to review the facts, and to make an informed and logical argument in regards to these various charges."

(R. 620-21 (emphasis added).) Thereafter, and without giving Jarmon's newly appointed counsel any apparent recess, the trial court instructed the jury that,

> "[i]n a trial of a crime of violence, the fact that the defendant is armed with a pistol and had no license to carry the same shall be a rebuttable presumption of evidence of his intention to commit said crime of violence."

(R. 656.) After deliberations began, the jury sought clarification on this point, and the trial court recharged the jury using the same instruction. (R. 669.) That instruction was impermissible as a matter of law.

In Manuel v. State, 711 So. 2d 507 (Ala. Crim. App. 1997), this Court rejected the use of a virtually identical jury instruction in a self-defense case. In doing so, this Court explained that "the practical effect [of this instruction] in a self-defense case, at the very least, is to lighten the prosecution's burden of proof as to the criminal intent of the defendant (i.e., that the killing was not

justified)." Manuel, 711 So. 2d at 512. This Court further explained that,

> "[i]n examining the contested instruction, we find that it creates a mandatory presumption because a reasonable juror could have understood it to require a finding that Manuel had the specific criminal intent to commit murder if the prosecution proved that he was carrying a pistol without a license. In other words, a reasonable juror could have understood it to create a presumption that relieved the prosecution of its burden of proving the required elements of the offense of murder once it proved that he was not licensed to carry the pistol used in the slaying."

Id. at 511. This Court continued:

> "The defendant in this scenario would already have admitted to killing the victim by asserting self-defense and the defendant's criminal intent would be presumed by any juror who followed the trial court's instructions. The practical effect of this presumption would be to compel the defendant to present evidence to prove that the killing was justified."

Id. at 512. Thus, this Court concluded that the instruction was "impermissible as a matter of law," reversed the judgment of the trial court, and remanded the case for a new trial.

Likewise, the trial court's identical instruction in this case was impermissible as a matter of law. Had the trial court given Jarmon's newly appointed counsel the recess they had requested, perhaps they would have investigated Jarmon's

original counsel's reasons for objecting to that impermissible instruction and discovered this Court's decision in Manuel. In any event, Jarmon's newly appointed counsel should have been given a recess to review this and other matters.

For the reasons stated above and for the reasons outlined in the main opinion, I concur.

Minor, J., concurs.

MINOR, Judge, concurring specially.

I concur in the Court's decision; I also join Judge Cole's special writing. I write separately to note certain decisions from this Court that support the conclusion that the circuit court's denial of the motion to continue resulted in an unconstitutional infringement of Alfonzo Ramon Jarmon's right to counsel under the Sixth Amendment to the United States Constitution.[3]

The purpose of the Sixth Amendment's right to counsel is to protect the adversarial process of a criminal trial. As the main opinion notes, in Herring v. New York, 422 U.S. 853, 862 (1975), the United States Supreme Court stated:

> "It can hardly be questioned that closing argument serves to sharpen and clarify the issues

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[3]The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S. Const. amend VI.

> for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. See In re Winship, 397 U.S. 358 [(1970)].
>
> "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment."

In Herring, the Supreme Court held that prohibiting closing argument in a bench trial denied "the basic right of the accused to make his defense." 422 U.S. at 859. Here, Jarmon was not prohibited from presenting a closing argument; his counsel completed at least part of a closing argument before she collapsed and was unable to continue. But the circuit court's denial of the motion to continue clearly limited Jarmon's right to make his defense--and it did so to such an extent that it violated Jarmon's constitutional right to counsel.

Several decisions of this Court support that conclusion.

In Marler v. State, 382 So. 2d 644 (Ala. Crim. App. 1980), this Court reversed a defendant's conviction where his counsel was not appointed until after the jury had been impaneled and sworn. Newly appointed counsel moved for a "short continuance" to become familiar with the case. This Court stated:

> "This does not appear to be a situation where the request for appointment of counsel is used as a vehicle for achieving delay. Fisher v. State, 346 So. 2d 4 (Ala. Cr. App.) cert. denied, 346 So. 2d 8 (Ala. 1977). The State has not alleged such and in fact admits error.
>
> > "'The State respectfully declines to file a brief in the above named cause. The record discloses that counsel was appointed for the defendant on the morning of the trial after the jury had been struck with the help of another attorney. When newly appointed counsel reported to the courtroom and requested "a little bit of time" to confer with his new client this was refused by the trial court. The Office of the Attorney General is unable to justify the trial court's action.'"
>
> "Without question the trial judge abused his discretion in not granting defense counsel's request. Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); Mars v. State, 339 So. 2d 104 (Ala. Cr. App.), cert. denied, 339 So. 2d 110 (Ala. 1976); Browning v. State, 57 Ala. App. 217, 326 So. 2d 778, cert. denied, 295 Ala. 392, 326 So.

> 2d 783 (1975); Kearley v. State, 52 Ala. App. 405, 293 So. 2d 322 (1974)."

382 So. 2d at 644-45.

In Brown v. State, 395 So. 2d 121 (Ala. Crim. App. 1980), this Court, in addressing the claim of a defendant whose appointed counsel had only "thirty minutes to an hour" for preparation, stated:

> "The trial court denied the motion for new trial on the basis that the appellant had a week's notice of the trial date and had opportunity to retain counsel or notify the court of his inability to do so, and that on trial date adequate counsel was appointed for the appellant and with from 'thirty minutes to an hour' for preparation 'did an outstanding job in representing the defendant.' The trial court also observed that the evidence against the appellant was 'overwhelming.'
>
> "The Supreme Court of Alabama in Davis v. State, 292 Ala. 210, 291 So. 2d 346 (1974), rejected the trial court's reasoning that inadequate preparation time was overcome by 'overwhelming evidence of the defendant's guilt' and the 'competent manner' in which appointed counsel had conducted the trial where the trial court's initial ruling had deprived the accused of a fundamental constitutional right.
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> "As stated in Mars v. State, Ala. Cr. App., 339 So. 2d 104, cert. denied, Ala., 339 So. 2d 110 (1976):
>
> > "'We are not unmindful of the needs of the trial courts to expedite their dockets and proceed in an orderly manner, unabated by unnecessary continuances.'

"We likewise are not unmindful of the actions of the appellant in appearing on trial date without an attorney. An educated and intelligent defendant would have notified the court of his inability to retain counsel and would have requested appointed counsel prior to trial date in all likelihood. However, all citizens, much less criminal defendants, are not schooled in law or courtroom procedures. The record in the instant case reveals that when the appellant was unable to retain counsel he appeared in court without one, resigned to the consequences of pleading guilty even though he contended that he did not commit the crime. The trial court rightly refused to accept the guilty plea under such circumstances and rightly reprimanded the appellant for not notifying the court prior to trial date that he could not obtain an attorney. Nevertheless, the trial judge appointed counsel and put the appellant to trial, over objection, with only a few minutes' time for preparation. It is this latter conduct of the trial court that we are called upon to assess.

"In Kearley v. State, 52 Ala. App. 405, 293 So. 2d 322 (1974), this court reversed the Circuit Court of Randolph County for putting a defendant to trial after appointment of counsel on the same day. In that case this court stated:

> "'It appears that the trial court gave the defendant a speedy trial. In fact, too speedy to satisfy the constitutional rights of the defendant to the assistance of counsel.
>
> "'We think that such a hurried trial after appointment of counsel (on the same day) converted the appointment of counsel into a sham, and was nothing more than a formal compliance with the constitutional requirement that the indigent defendant be given the assistance of counsel. Gideon v.

> Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 [(1963)]. This guarantee of assistance of counsel as mandated by Wainwright and the constitution cannot be satisfied by a mere formal appointment. The appointment of counsel on the same date of the trial did not give them reasonable time to plan and prepare the defense of their client and to see if they could obtain the defendant's witnesses in person or their evidence as provided by law. Powell v. Alabama, 287 U.S. 45(4)(5), 53 S. Ct. 55, 77 L. Ed. 158.'
>
> "In Browning v. State, 57 Ala. App. 217, 326 So. 2d 778, cert. denied, 295 Ala. 392, 326 So. 2d 783 (1975-76), we held that where counsel was appointed on the day of trial and only had fifteen minutes for preparation the defendant was denied effective assistance of counsel by the trial court's refusal to grant a continuance. See also Mars v. State, supra.
>
> "Pursuant to the above cited authorities, it appears that the failure to grant a continuance in order to allow trial counsel adequate time for preparation of his case amounts to an abuse of discretion on the part of the trial court in this instance and an unconstitutional deprivation of effective assistance of counsel for which the appellant should be entitled to a new trial."

395 So. 2d at 123-24.

Here, the circuit court's denial of the motion to continue forced Jarmon to proceed with counsel who, through no fault of their own and through no fault of Jarmon's, simply did not have adequate time to prepare. Given the circuit

court's statement that it would have considered continuing the matter until the next week if Jarmon's initial counsel would have been able to return, the circuit court, at a minimum, should have granted newly appointed counsel's request that the matter be continued for the weekend.

Under the unique circumstances of this case, Jarmon is entitled to a new trial.

Cole, J., concurs.

KELLUM, Judge, dissenting.

The majority opinion holds that Alfonzo Ramon Jarmon was denied his fundamental right to the assistance of counsel under the Sixth Amendment to the United States Constitution when Jean Darby, defense counsel, was unable to complete her closing argument and when the trial court denied newly appointed counsel's motion to remain in recess. Because I believe that Jarmon was not denied his constitutional right to counsel and that the circuit court did not abuse its discretion in denying counsel's motion to remain in recess, I respectfully dissent.

> "A court exceeds its discretion when its ruling is based on an erroneous conclusion of law or when it has acted arbitrarily without employing conscientious judgment, has exceeded the bounds of reason in view of all circumstances, or has so far ignored recognized principles of law or practice as to cause substantial injustice."

Edwards v. Allied Home Mortg. Capital Corp., 962 So. 2d 194, 213 (Ala. 2007).

I acknowledge that "the importance of a closing argument cannot be understated." Ex parte Whited, 180 So. 3d 69, 78 (Ala. 2015). The constitutional right of a criminal defendant "to be heard through counsel necessarily includes his right to

have his counsel make a proper argument on the evidence and the applicable law in his favor." Herring v. New York, 422 U.S. 853, 860 (1975). However, this is not a case, as were Herring and Ex parte Whited, where the defendant was deprived entirely of a closing argument. Darby made a closing argument on behalf of Jarmon, albeit an incomplete one. An incomplete closing argument, however, is not the equivalent of no closing argument at all. Cf., Glebe v. Frost, ___ U.S. ___, ___, 135 S.Ct. 429, 431 (2014) (recognizing, in a case in which the trial court forced defense counsel to choose which of two inconsistent theories of the defense he would argue during closing arguments, that there is a difference between the complete denial of closing argument and the restriction of closing argument and noting that "[a] court could reasonably conclude ... that prohibiting all argument differs from prohibiting argument in the alternative").

The record reflects that Jarmon never disputed that he shot and killed the victim. Rather, Darby pursued two defense theories on Jarmon's behalf at trial -- mental disease or defect and self-defense. Self-defense was by far the stronger defense under the facts in this case. The victim was found

with a gun in his pocket, and an eyewitness had seen the victim reach for his pocket just before he was shot. Darby also presented evidence of prior disputes between Jarmon and the victim.

Mental disease or defect was the weaker defense and, in fact, was unsupported by the evidence. Darby presented testimony from Jarmon's mother that Jarmon suffered from psychiatric problems most of his life and by stipulation introduced into evidence Jarmon's medical records. Those records indicate that Jarmon had been diagnosed, at different times in his life, with bipolar disorder with psychotic features; impulse-control disorder; oppositional-defiant disorder; attention-deficit disorder; depression; anxiety; and borderline intellectual functioning. However, those records contain no indication that Jarmon was, at the time of the crime or at any other time in his life, unable to appreciate the nature and quality or wrongfulness of his acts so as to rise to the level of insanity under § 13A-3-1(a), Ala. Code 1975. To the contrary, those records reflect a history of violent outbursts and assaults and an inability to cope with stressful situations; in other words, they reflect "an

abnormality manifested only by repeated criminal or otherwise antisocial conduct," which does not rise to the level of mental disease or defect under Alabama law. § 13A-3-1(b), Ala. Code 1975. In addition, the State presented testimony, through a videotaped deposition, from the clinical and forensic psychologist who had evaluated Jarmon before trial; he testified that Jarmon was greatly exaggerating his psychiatric symptoms and did not suffer from a mental disease or defect rendering him unable to appreciate the nature and quality or wrongfulness of his acts.

The trial court noted during the proceedings that Darby had completed her argument on self-defense and was transitioning into her argument on mental disease or defect when she collapsed.[4] In other words, Darby completed her argument on the more viable defense and, indeed, the only defense that was supported by the evidence, but was not able to complete her argument on the unsupported defense of mental

[4]The record does not contain a transcript of closing arguments. Therefore, the only information before this Court as to the extent of Darby's closing argument is what the trial court and parties stated on the record the next day.

disease or defect.[5] Although the majority is correct that this Court has no way of knowing exactly what additional arguments Darby would have made had she not collapsed, it is apparent to me that Darby would have presented an argument on the mental-disease-or-defect defense. When the only two defenses pursued during trial required Jarmon to admit the elements of the crime, I cannot envision a scenario in which Darby would have tried to "'persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.'" Ex parte Whited, 180 So. 3d at 78 (quoting Herring, 422 U.S. at 862). Therefore, I cannot conclude, as the majority of this Court does, that Darby's inability to present a complete argument on the mental-disease-or-defect defense resulted in a violation of Jarmon's fundamental right to the assistance of counsel given that that defense was unsupported by the evidence.

Moreover, I am not persuaded from the record that the trial court's denial of Jarmon's motion to remain in recess and his request for a continuance resulted in a violation of

[5]By recognizing that the mental-disease-or-defect defense was unsupported, I do not intend to suggest that Darby was ineffective for pursuing that defense. Oftentimes, defense counsel has little to work with when defending a client and must pursue defenses that have little or no support.

Jarmon's fundamental right to the assistance of counsel. "'The decision of whether to grant a continuance in a criminal action is addressed to the sound discretion of the trial court, the exercise of which will not be disturbed on appeal unless clearly abused.' Briggs v. State, 549 So. 2d 155, 159 (Ala. Cr. App. 1989)." Morris v. State, 591 So. 2d 157, 158 (Ala. Crim. App. 1991). "A motion for continuance due to lack of time for adequate preparation is a matter entirely and exclusively within the sound discretion of the trial court and its ruling will not be reversed on appeal absent a plain and palpable showing of abuse." Reynolds v. State, 539 So. 2d 428, 429 (Ala. Crim. App. 1988)(citing Dawkins v. State, 455 So. 2d 220, 221 (Ala. Crim. App. 1984)).

The record indicates that the circuit court appointed new defense counsel on October 19, 2017. Before trial proceedings commenced on Friday, October 20, 2017, defense counsel informed the circuit court that they had met with Jarmon. After meeting with Jarmon, defense counsel requested a recess for the weekend in order "to have a proper opportunity to review the procedural history and procedural position of this case so that [counsel] may render proper, fit and

constitutionally sufficient guidance to defendant." (R. 628.) In response, the State expressed concerns regarding logistical issues created with keeping a paneled jury in recess over a weekend and argued that the facts were in evidence and all that remained was to charge the jury. The circuit court subsequently denied the motion to recess and instructed the jury.

At the time defense counsel requested a recess for the weekend, the jury had received all the evidence in the case, both parties had rested, the circuit court had conducted a charge conference with the parties, and the jury had heard closing arguments. Given the point in the case at which new defense counsel was appointed, the length of continuance requested, and the basis given for the requested continuance, I conclude that the trial court did not abuse its discretion when it declined to continue the case.

I believe the trial judge did an admirable job handling a difficult and shocking turn of events and took appropriate actions to ensure that Jarmon's constitutional rights were not violated. I would give the judge due deference and I would

affirm Jarmon's conviction and sentence. Therefore, I respectfully dissent.