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## I Know Exactly What You Mean: Recognizing the Danger of Coded Appeals to Religious Prejudices in Capital Cases

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**I KNOW EXACTLY WHAT YOU MEAN: RECOGNIZING THE DANGER OF  
CODED APPEALS TO RELIGIOUS PREJUDICE IN CAPITAL CASES**

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I. INTRODUCTION

Angle Vasquez, a devout Muslim,<sup>1</sup> was charged with killing two of his former coworkers.<sup>2</sup> Both victims were found dead inside a Burger King in Myrtle Beach, South Carolina, just hours after Vasquez had been fired from his job there as a cashier.<sup>3</sup> At trial, the State sought the death penalty.<sup>4</sup> By coincidence, Vasquez’s trial was scheduled to overlap with the second

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1. See Vasquez v. State, 388 S.C. 447, 452–53, 698 S.E.2d 561, 563 (2010).  
2. *Id.* at 451, 698 S.E.2d at 563.  
3. *Id.* at 451, 698 S.E.2d at 562–63.  
4. See *id.* at 451–53, 698 S.E.2d at 563–64.

anniversary of the September 11, 2001 terrorist attacks.<sup>5</sup> Although the case had no connection with the events of 9/11—aside from an unfortunate trial schedule—the solicitor argued in the penalty phase of the case that Vasquez should be sentenced to death because he was a “domestic terrorist”<sup>6</sup> whose actions had affected his victims’ families in the same way as those who lost relatives on 9/11.<sup>7</sup> The jury then voted to recommend a death sentence.<sup>8</sup>

On appeal, the South Carolina Supreme Court overturned Vasquez’s capital sentence, concluding that the solicitor had “intentionally and unnecessarily injected religious prejudice”<sup>9</sup> into the sentencing phase of Vasquez’s trial by using comments that “appealed to the jurors’ sense of passion and prejudice involving anti-Muslim sentiment.”<sup>10</sup> The court’s decision reflected an awareness of an intense cultural bias towards Muslims operating at the time of his trial and continuing today.<sup>11</sup>

Although courts have imposed a number of constitutional constraints on the prosecution’s use of overt religious arguments in capital cases, this jurisprudence has largely failed to recognize that coded religious appeals can have the same practical effects of improperly inflaming religious biases and generating emotional responses from jurors. Moreover, the prejudicial impact of coded, and even explicit, religious arguments must be informed by an understanding of the broader cultural context that gives religious arguments meaning. This is particularly true in a state like South Carolina where Christianity is by far the majority religion,<sup>12</sup> and where it has been common to invoke privately held religious beliefs in order to justify civic actions. This Note argues that courts are more likely to reach accurate and reliable results in their prejudice analyses when they consider the potential impact of coded religious appeals (in addition to overt religious arguments) and give appropriate weight to the cultural context in which improper religious arguments are made.

Part II of this Note provides a brief background of *Vasquez v. State*<sup>13</sup> and summarizes the South Carolina Supreme Court’s analysis in that case. Part III discusses the constitutional restrictions on improper religious arguments in capital cases and summarizes South Carolina’s approach in evaluating these arguments. Next, Part IV describes how coded appeals are used to communicate with juries by activating subconscious prejudice, why they are used, and how the

5. *Id.* at 453, 698 S.E.2d at 564.

6. *Id.* at 457, 698 S.E.2d at 565 (internal quotation marks omitted).

7. *See id.* at 457–58, 698 S.E.2d at 565–66.

8. *Id.* at 453, 698 S.E.2d at 563.

9. *Id.* at 464, 698 S.E.2d at 569.

10. *Id.* at 463, 698 S.E.2d at 569.

11. *See id.* at 456–64, 698 S.E.2d at 565–69.

12. *See* Frank Newport, *Religious Identity: States Differ Widely*, GALLUP (Aug. 7, 2009), <http://www.gallup.com/poll/122075/Religious-Identity-States-Differ-Widely.aspx> (reporting results of a nationwide survey of individual religious preference “based on telephone interviews with 178,543 adults, aged 18 and older”).

13. 388 S.C. 447, 698 S.E.2d 561 (2010).

concept of coded appeals applies in *Vasquez*. Part V explores the religious composition of South Carolina, and offers the lens through which coded appeals in this state should be viewed. Part VI then provides several additional examples of religious coded appeals that South Carolina courts hear more frequently—those drawn from the Judeo-Christian ethic. Finally, Part VII concludes that the court's analysis in *Vasquez* was correct and argues that the principles on which the *Vasquez* court drew should guide future prejudice analyses in capital cases.

## II. BACKGROUND

Vasquez was charged and convicted of two counts of murder, four counts of kidnapping, one count of armed robbery, and one count of criminal conspiracy for holding up his former coworkers and shooting his former manager and a coworker on March 26, 2002.<sup>14</sup> Earlier that day, Vasquez had been fired from his job at Burger King after a customer complained that he had used profanity toward a coworker in front of her and her children.<sup>15</sup> Just before closing time at the restaurant, Vasquez returned with his cousin (who had also previously worked at the Burger King), pulled out a gun, and ordered two of the four workers on duty into a freezer.<sup>16</sup> The two workers locked in the freezer were quickly able to escape and flee the scene.<sup>17</sup> One of the escaped workers later returned with his mother to find that the manager and the fourth coworker had been shot dead.<sup>18</sup> At the scene, police discovered over \$700 missing from the restaurant and found shell casings from a nine-millimeter caliber firearm and unfired ammunition.<sup>19</sup> Eyewitnesses put Vasquez at the scene, and police later traced the recovered bullets to a gun owned by Vasquez.<sup>20</sup>

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14. *Id.* at 451, 698 S.E.2d at 562–63. After a jury found Vasquez guilty of each count in his indictment, the trial judge sentenced him to death for the murders, thirty years for the armed robbery, and five years for criminal conspiracy; subsequently, Vasquez filed a direct appeal, and in *State v. Vasquez*, 364 S.C. 293, 613 S.E.2d 359 (2005), the South Carolina Supreme Court issued its first decision concerning Vasquez's trial, which affirmed his murder conviction and death sentence. *See id.* at 303, 613 S.E.2d at 364. Later, Vasquez's petition for post-conviction relief from the capital sentence was denied by the circuit court, and in *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010), the supreme court again granted his petition for review. *Id.* at 450, 698 S.E.2d at 562.

15. *State v. Vasquez*, 364 S.C. at 296, 613 S.E.2d at 360. Apparently, Vasquez had cursed at his coworker for attempting to feed french fries to a customer's dog. *Id.*

16. *Id.* at 297, 613 S.E.2d at 361. Before returning to the Burger King, Vasquez and his cousin had been at a strip club located near the restaurant. *Id.*

17. *Id.*

18. *Id.*

19. *Vasquez v. State*, 388 S.C. at 451, 698 S.E.2d at 563.

20. *State v. Vasquez*, 364 S.C. at 298, 613 S.E.2d at 361. The police were able to trace the bullets at the crime scene to Vasquez after the two workers who escaped admitted that they had seen Vasquez and his cousin rob the store. *See id.* During a search of Vasquez's home, the police found the same type of ammunition used in the killings and—after Vasquez's cousin turned over the nine-millimeter pistol he had removed from the house before the search—a ballistic analysis confirmed the bullets at the crime scene had been fired from Vasquez's nine-millimeter. *See id.*

Vasquez's Muslim faith was freely acknowledged throughout the trial. As early as voir dire, this fact was discussed with potential jurors as Vasquez's defense attorneys attempted to screen out anyone who would be biased against Muslims.<sup>21</sup> Additionally, throughout the proceedings Vasquez wore a *kufi*, "a traditional Muslim headdress."<sup>22</sup> During the penalty phase mitigation presentation after he was convicted of murder, Vasquez offered the testimony of Rasheed Kaleem Solom Mohammed, the imam for all incarcerated Muslims in South Carolina, who testified at length about Islam and the differences among various groups of Muslims.<sup>23</sup> Mohammed noted that Vasquez is a Sunni Muslim, which he described as a "humble" and "peaceful" group.<sup>24</sup> Additionally, Mohammed testified that he had such confidence in the sincerity of Vasquez's faith and in his depth of knowledge of Islam that he appointed Vasquez as the imam to the J. Reuben Long Correctional Facility to teach and serve other Muslim inmates.<sup>25</sup> Finally, Vasquez himself offered a statement to the jury, denying his guilt<sup>26</sup> and chronicling his troubled childhood—he had run away from home at age nine to escape his father's physical abuse, later went to live with his mother, and eventually became involved in selling drugs.<sup>27</sup> Vasquez attempted to neutralize the solicitor's reference to 9/11 and the characterization of him as a terrorist by explaining that Islam teaches "peace, unity and the fear of the law,"<sup>28</sup> and by arguing that the State's ignorance of Islam should not be used to prejudice the jury's view of him.<sup>29</sup>

The solicitor did not explicitly comment on Vasquez's Muslim faith; however, during his opening statement in the sentencing phase, he twice referred to Vasquez as a "domestic terrorist."<sup>30</sup> Also, during his closing argument the solicitor gave a lengthy narrative about 9/11, which ended with a comparison of the life-changing impact 9/11 had on its victims' families and the impact that the two murders at issue had on those victims' families:

It was in September. It was right before the 11th. I was watching a news show and former New York mayor, Rudy Giuliani, was being interviewed and they were talking to him about—9/11 was coming up,

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21. Vasquez v. State, 388 S.C. at 461, 698 S.E.2d at 568.

22. *Id.* (internal quotation marks omitted).

23. See Record on Appeal at 2248–60, Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010) (No. 26852). Mohammed explained that an imam is "a teacher of Islam," *id.* at 2248, and that his role involves teaching Arabic to "the brothers" so that they can read the Koran. *Id.* at 2248–49.

24. *Id.* at 2252–53.

25. See *id.* at 2250–51.

26. *Id.* at 2416.

27. *Id.* at 2405–08.

28. *Id.* at 2415.

29. See *id.* at 2415–16.

30. Vasquez v. State, 388 S.C. 447, 457, 698 S.E.2d 561, 565–66 (2010) (internal quotation marks omitted).

the second anniversary of 9/11 was coming up—and they’re talking to him about his experiences . . . [H]e talked about so many of his friends, personal friends and acquaintances and co-workers with the City of New York that were killed in the attack . . . and he concluded his discussion and his interview about this, he said, you know, “Now I have . . . my life before September 11th of 2001, and I have my life after September 11th, 2001.”

In this case, folks, the friends and family of [the victims] have two lives. They have their life before March 26th, 2002. They have their life after March 26th, 2002.<sup>31</sup>

In his state post-conviction relief (PCR) proceeding, Vasquez claimed that his trial attorneys were ineffective in failing to object to the solicitor’s comments,<sup>32</sup> but the PCR judge denied his claim for relief.<sup>33</sup> The South Carolina Supreme Court granted a writ of certiorari and agreed with Vasquez, reversing the lower court’s decision to deny his claim.<sup>34</sup> As a result, the court granted Vasquez a new sentencing hearing.<sup>35</sup> To reach this decision, the court began with the general principle that “[a] solicitor’s closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. . . . [It] must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.”<sup>36</sup> A reviewing court must determine whether a solicitor’s comments were improper, and if so, whether they “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”<sup>37</sup> Comments are improper if they “appeal to the personal bias of the juror [or are] calculated to arouse his passion or prejudice.”<sup>38</sup>

The *Vasquez* court began its prejudice review by focusing on the solicitor’s characterization of the defendant as a “domestic terrorist.”<sup>39</sup> Recognizing that

31. *Id.* at 457–58, 698 S.E.2d at 566 (alteration in original).

32. *Id.* at 453, 698 S.E.2d at 564.

33. *Id.* at 455, 698 S.E.2d at 564–64. Even though the PCR judge found that Vasquez’s trial counsel had been “deficient” by failing to object, the judge dismissed the PCR request because he concluded that Vasquez had not been prejudiced by trial counsel’s “deficient performance.” *Id.*

34. *See id.* at 450, 698 S.E.2d at 562.

35. *Id.* at 464–65, 698 S.E.2d at 570.

36. *Id.* at 458, 698 S.E.2d at 566 (citing *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)).

37. *Id.* (quoting *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)) (internal quotation marks omitted). The United States Supreme Court established this constitutional standard for death penalty cases in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

38. *Id.* (quoting *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007)); *see also* S.C. CODE ANN. § 16-3-25(C)(1) (2003) (mandating that the supreme court review all death sentences to determine “[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor”).

39. *See id.* at 457, 698 S.E.2d at 565.

Vasquez's conduct did not fall within the legal definition of "terrorism,"<sup>40</sup> the court concluded, "[I]t is indisputable that the term 'terrorist,' even in the general sense, can only conjure negative connotations. Thus, the solicitor's use of the term was clearly improper because there was no evidentiary basis to support this characterization."<sup>41</sup> Ultimately, the court concluded:

[T]he inflammatory term characterizing [Vasquez], a Sunni Muslim, as a "domestic terrorist" was intentionally used in conjunction with the solicitor's extensive reference to the events of September 11, 2001. We find the solicitor's statements improperly evoked religious prejudice and, thus, served only to inflame the passions and prejudice of the jury.<sup>42</sup>

After concluding that the solicitor's comments were improper, the court turned to a determination of whether trial counsel's failure to object to the improper comments prejudiced Vasquez during the penalty phase.<sup>43</sup> The court noted that the combination of a Muslim defendant and a reference to 9/11 presented a novel issue in South Carolina.<sup>44</sup> For support, the court looked to a 2005 North Carolina Court of Appeals case granting a new trial after determining that the prosecutor's comparison of the defendant's acts to those of the 9/11 terrorist attacks were improper and prejudicial.<sup>45</sup> The supreme court also distinguished *Vasquez* from *United States v. Hakim*,<sup>46</sup> where the Court of Appeals for the Third Circuit found the State reference to the defendant's Muslim faith "disturbing," but refused to grant relief under plain error review because the government had offered a plausible explanation for its comments and never drew a direct link between the defendant's faith and the 9/11 attacks.<sup>47</sup> The *Vasquez* court also credited the PCR testimony of Dr. Nick DePhillips, an expert in clinical neuropsychology, who had assessed the likely impact of the solicitor's argument on members of the jury:

[T]he solicitor's use of the word "domestic terrorist" would have inferred to the jury that "this is a person who . . . had a plan to . . . hurt society in the same way as the people who . . . planned and took out the

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40. *Id.* at 459 & n.4, 698 S.E.2d at 567 & n.4 (citing S.C. CODE ANN § 16-23-710(18) (Supp. 2010) (defining "terrorism" to include dangerous illegal acts affecting or aimed at a broad group of people or government)).

41. *Id.* at 459, 698 S.E.2d at 567.

42. *Id.* at 460, 698 S.E.2d at 567.

43. *Id.*

44. *Id.*

45. *Id.* at 461, 698 S.E.2d at 568 (citing *State v. Millsaps*, 610 S.E.2d 437, 443 (N.C. Ct. App. 2005)).

46. 344 F.3d 324 (3d Cir. 2003).

47. *Vasquez*, 388 S.C. at 461–62, 698 S.E.2d at 568 (citing *Hakim*, 344 F.3d at 333).

9/11 attacks.” . . . [O]nce the solicitor used the term “terrorist,” the negative connotations associated with that term could not be removed.<sup>48</sup>

Further, the court found support in an analogous case decided by the North Carolina Supreme Court, which determined that a prosecutor’s reference to the Columbine school shootings and the Oklahoma City bombing was prejudicial.<sup>49</sup> The South Carolina Supreme Court noted that, in the North Carolina case, the prosecutor’s argument was held to be improper because “(1) it referred to events and circumstances outside the record; (2) by implication, it urged jurors to compare defendant’s acts with the infamous acts of others; and (3) it attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice.”<sup>50</sup>

While the *Vasquez* court recognized the “overwhelming evidence” of Vasquez’s guilt, it emphasized that “the overwhelming evidence of [a] petitioner’s guilt does not eliminate the reasonable probability that the result of the trial would have been different had trial counsel objected to portions of the solicitor’s closing argument.”<sup>51</sup> Ultimately, the court saw a “reasonable probability” that the solicitor’s appeal to “anti-Muslim” sentiment had affected the jury’s decision to impose a death sentence.<sup>52</sup> Thus, defense counsel’s failure to object to these comments was unreasonable and prejudicial.<sup>53</sup>

The *Vasquez* decision presents several interesting observations. First, the court implicitly acknowledged the use of coded appeals and their potential impact in capital cases by characterizing the solicitor’s improper comments as communicating “religious prejudice,”<sup>54</sup> even though nothing in the comments was explicitly religious and the solicitor made no direct references to Vasquez’s Muslim faith.<sup>55</sup> The prejudicial comments were not directed at the teachings or tenets of the Muslim faith, but rather at Muslims in general.<sup>56</sup> Even so, the court appeared to recognize that in South Carolina merely saying “Muslim” or making

48. *Id.* at 454, 698 S.E.2d at 564 (first three omissions in original).

49. *Id.* at 462, 698 S.E.2d at 568–69 (quoting *State v. Jones*, 558 S.E.2d 97, 107 (N.C. 2002)).

50. *Id.* (quoting *Jones*, 558 S.E.2d at 107) (internal quotation marks omitted).

51. *Id.* at 464, 698 S.E.2d at 569 (quoting *Simmons v. State*, 331 S.C. 333, 340, 503 S.E.2d 164, 167 (1998)) (internal quotation marks omitted).

52. *Id.* at 463, 698 S.E.2d 569.

53. *See id.* at 464, 698 S.E.2d at 569–70. *See generally* *Strickland v. Washington*, 466 U.S. 668 (1984) (“A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.”).

54. *Vasquez v. State*, 388 S.C. at 464, 698 S.E.2d at 569.

55. *See id.* at 456–64, 698 S.E.2d at 565–69.

56. *See id.*



tangential reference to Muslims in certain contexts has the potential to communicate a wealth of bias and prejudice among parties.<sup>57</sup>

Second, in its prejudice analysis, the court incorporated an awareness of the broader cultural context in which the solicitor made his argument. For example, the court credited the statement of Mohammed, Vasquez's spiritual leader, that life has been hard for Muslims since 9/11.<sup>58</sup> It also noted as well the expert testimony of Dr. DePhilips, where he stated that merely using the word "terrorist" has an inherently prejudicial impact and discussed the negative connotations associated with Muslims in the United States today.<sup>59</sup> Unfortunately, Muslims in South Carolina have not escaped the prejudice that is prevalent throughout the country—for instance, in a discrimination complaint reported to the Council on American-Islamic Relations in April 2007, a sixty-year-old employee at the BMW plant near Spartanburg, South Carolina filed a complaint stating that:

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57. See *id.* at 463–64, 698 S.E.2d at 569. Finding prejudice absent explicit religious reference suggests a possible cultural phenomenon in which the Muslim faith is treated as a race, identified by its stereotypical characteristics. See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1, 12 (2001) ("Just as Asian Americans have been 'raced' as foreign, and from there as presumptively disloyal [during World War II], Arab Americans and Muslims have been 'raced' as 'terrorists': foreign, disloyal, and imminently threatening." (footnote omitted)).

58. Vasquez v. State, 388 S.C. at 422, 698 S.E.2d at 563; see also *Muslim Americans: Middle Class and Mostly Mainstream*, PEW RES. CENTER FOR THE PEOPLE & THE PRESS (May 22, 2007), <http://people-press.org/report/329/muslim-americans-middle-class-and-mostly-mainstream> ("A majority of Muslim Americans (53%) say it has become more difficult to be a Muslim in the U.S. since the Sept. 11 terrorist attacks."). The 2009 Civil Rights Report of the Council on American-Islamic Relations shows a continued increase in civil rights complaints filed by American Muslims in 2008—up 3% from 2007 and 11% from 2006. COUNCIL ON AMERICAN-ISLAMIC RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2009: SEEKING FULL INCLUSION, 7 (2009), available at <http://www.cair.com/portals/0/pdf/cair-2009-civil-rights-report.pdf>. After 9/11, civil rights complaints rose rapidly and have remained high; however, the reported number of hate crimes appears to be decreasing. See *id.* at 8 fig.1, 9 fig.2.

59. See Vasquez v. State, 388 S.C. at 454, 698 S.E.2d at 574. The news media continues to show examples of prejudice against Muslims. For example, the proposed building of a new mosque near the site of the former World Trade Center in New York City has been met with significant opposition. See *Public Remains Conflicted Over Islam*, PEW RES. CENTER, 3 & fig. (Aug 24, 2010), <http://people-press.org/reports/pdf/647.pdf> (finding that 62% of Americans support the right of Muslims to build houses of worship, but 51% object to the building of a mosque near the World Trade Center). Frustrations over the proposed mosque recently culminated when a small church in Florida gained worldwide attention with its plan to burn copies of the Koran on the ninth anniversary of 9/11. See Damien Cave & Anne Barnard, *Florida Minister Wavers on Plans to Burn the Koran*, N.Y. TIMES, Sept. 10, 2010, at A3. Faced with international criticism, the church's pastor ultimately cancelled the planned demonstration, but only after the imam of the proposed mosque supposedly promised to choose a different location. *Id.* Additionally, the use of the term "terrorist" continues to plague Muslims, as shown by a recent bullying incident in New York City where, over a period of several months, four teenagers called one of their Muslim classmates a "terrorist" and physically abused him. See *NYC Teens Charged with Anti-Muslim Hate Crime*, USATODAY.COM, Oct. 11, 2010, [http://www.usatoday.com/news/religion/2010-10-11-muslim-hate-nyc\\_N.htm](http://www.usatoday.com/news/religion/2010-10-11-muslim-hate-nyc_N.htm).

[F]ellow co-workers . . . repeatedly made comments to him such as, “Muslims are no good. They should all be killed,” and, “We will f\*\*k up your family, we’ll kill you all.” This situation escalated when one of the co-workers confronted the Muslim in a restroom at work, put a boxcutter to his throat, and said: “I’ll slice your throat and kill you.”<sup>60</sup>

The remainder of this Note focuses on how religious arguments in capital cases are presented through coded appeals, explores why an understanding of the cultural context in which these coded appeals are made is a necessary part of a court’s prejudice analysis, and concludes with a discussion of why South Carolina’s culture heightens susceptibility to coded religious appeals.

### III. RESTRICTIONS ON RELIGIOUS ARGUMENTS IN CAPITAL CASES

There are four well-established areas of constitutional law that the United States Supreme Court has applied to religious arguments in capital cases: (1) the First Amendment’s Establishment Clause; (2) the Eighth Amendment’s protections against cruel and unusual punishment; (3) the Due Process Clause of the Fourteenth Amendment; and (4) the First Amendment’s protections of free speech, association, and religion. This Part briefly discusses these four areas of constitutional law, evaluates how the South Carolina Supreme Court has applied these constitutional principles when considering improper closing arguments in death penalty cases, and discusses how the *Vasquez* decision aligns with precedent.

#### A. *Constitutional Limits on Religious Comments in Closing Arguments*

##### 1. *Establishment Clause*

The United States Supreme Court has interpreted the Establishment Clause to prevent the State (including state actors such as prosecutors), from placing “its power or prestige behind religion.”<sup>61</sup> The Court reviews state actions to determine whether they were made “either for the purpose, or with the primary effect, of endorsing religion.”<sup>62</sup> In the context of capital cases, rather than proselytizing or endorsing religion, prosecutors use religious arguments to secure

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60. Amany R. Hacking, *A New Dawn for Muslims: Asserting Their Civil Rights in Post-9/11 America*, 54 ST. LOUIS U. L.J. 917, 923–24 (2010) (footnote omitted) (quoting COUNCIL ON AMERICAN-ISLAMIC RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2008: WITHOUT FEAR OF DISCRIMINATION 23 (2008), available at <http://www.cair.com/Portals/0/pdf/civilrights2008.pdf>).

61. See, e.g., John H. Blume & Sheri Lynn Johnson, *Don’t Take His Eye, Don’t Take His Tooth, and Don’t Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 WM. & MARY BILL RTS. J. 61, 87 (2000) (“Most religious arguments made by prosecutors are improper and should be precluded because they infringe upon one or more constitutional rights.”).

62. *Id.*

a death sentence, which leaves to a reviewing court the task of evaluating whether the probable effect of a statement was to give the underlying religion power or prestige in the minds of the jury.<sup>63</sup> The majority of religious references in capital cases that have been deemed to run afoul of the Establishment Clause had their origins in various commands, stories, or verses of the Bible.<sup>64</sup> For example, a Biblical reference used by prosecutors suggests that the State, or the prosecutor himself, “is the servant of God to execute his wrath on the wrongdoer.”<sup>65</sup> This reference tends to place the State’s power and prestige behind the Christian religion because it refers to a well-known biblical verse,<sup>66</sup> which has been used by prominent Christian organizations to claim that the State has been given divine authority to impose capital punishment.<sup>67</sup>

## 2. *Cruel and Unusual Punishment*

Under the Eighth Amendment’s prohibition against cruel and unusual punishment, the Court has recognized two principles that are relevant to a prosecutor’s religious arguments.<sup>68</sup> Such comments cannot (1) have the effect of reducing the jury’s perception of its responsibility for returning a death sentence or (2) draw the jury away from an individualized assessment of the defendant.<sup>69</sup> For example, in *Sandoval v. Calderson*,<sup>70</sup> the prosecutor’s penalty phase closing argument violated both of these principles:

Don’t once think that you have to feel burdened and depressed because I voted for death. . . .  
 . . . .

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63. *See id.*

64. *See id.* at 64.

65. *Id.* at 67 (quoting *Buttrum v. Black*, 721 F. Supp. 1268, 1316 (N.D. Ga. 1989)) (internal quotation marks omitted).

66. *See generally* *Romans* 13:4 (New American Standard) (“For [the governing authority] is a minister of God to you for good. But if you do what is evil, be afraid; for it does not bear the sword for nothing; for it is a minister of God, an avenger who brings wrath upon the one who practices evil.”).

67. For example, the Southern Baptist Convention adopted a resolution expressing its opinion on the death penalty that states:

WHEREAS, God . . . has established capital punishment as a just and appropriate means by which the civil magistrate may punish those guilty of capital crimes . . . . Therefore, be it RESOLVED, That the messengers to the Southern Baptist Convention . . . support the fair and equitable use of capital punishment by civil magistrates as a legitimate form of punishment for those guilty of murder or treasonous acts that result in death . . . .

*SBC Resolutions: On Capital Punishment*, S. BAPTIST CONVENTION (June 2000), <http://www.sbc.net/resolutions/amResolution.asp?ID=299> [hereinafter *SBC Resolutions*].

68. *See* Blume & Johnson, *supra* note 61, at 89.

69. *See id.* at 89–90 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985); *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (plurality opinion)).

70. 241 F.3d 765 (9th Cir. 2001).

*[Defense counsel] says don't play God. Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.*

*You are not playing God. You are doing what God says. This might be the only opportunity to wake [the defendant] up. God will destroy the body to save the soul. Make him get himself right.<sup>71</sup>*

In *Sandoval*, the Ninth Circuit Court of Appeals held that the prosecutor's argument, suggesting that the ultimate responsibility for judgment rests with God and the jurors were simply carrying out "what God says," violated the Eighth Amendment by reducing the jury's perception of its weighty responsibility and potentially causing the jury to "give less weight to, or perhaps even disregard, the legal instructions given it by the trial judge in favor of the asserted higher law."<sup>72</sup> The Ninth Circuit also concluded that the invocation of a "higher law" violated the Eighth Amendment by allowing the jury to disregard its legal responsibility to assess the applicability of the death penalty to the individual defendant on trial.<sup>73</sup> The court underscored that "[t]he Biblical concepts of vengeance invoked by the prosecution . . . do not recognize . . . a refined [individualized] approach."<sup>74</sup>

### 3. Due Process

Due process places additional limits on religious arguments; under a due process analysis, courts evaluate "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"<sup>75</sup> As Professors John H. Blume and Sheri Lynn Johnson explain, "This is a high standard, and unlike [analysis rooted in the Establishment Clause and the Eighth Amendment's cruel and unusual punishment clause], [it] takes

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71. *Id.* at 775 n.1 (first alteration in original).

72. *Id.* at 776.

73. *See id.*

74. *Id.*

75. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

into account whether the objectionable comment was invited by defense counsel, at least to the extent that the defense counsel's comments limited the damage done by the prosecutor's remarks."<sup>76</sup> Under the concept of "invited response," if a reviewing court determines that the improper comments were invited by or made in response to defense counsel's argument, it is less likely to find that the comments resulted in an unfair trial.<sup>77</sup>

To determine whether due process is satisfied, courts have formulated a two-prong approach<sup>78</sup> that analyzes (1) whether the challenged comments are improper, and (2) if improper, whether they prejudiced the defendant, denying him a fair trial before an impartial jury.<sup>79</sup> Under the second prong, courts employ a broad set of factors to evaluate prejudice, including "the extent of the improper conduct, the issuance of curative instructions from the court, any defense conduct inviting the response, and the weight of the evidence."<sup>80</sup>

#### 4. First Amendment Rights

Finally, the United States Supreme Court has held that the First Amendment's guarantees of free speech, freedom of association, and freedom of religion restrict a prosecutor's ability to use the defendant's exercise of any of these rights in arguing for a death sentence<sup>81</sup> unless the defendant's exercise relates to the crime, relates to the defendant's future dangerousness, or is used to rebut mitigating evidence offered by the defendant.<sup>82</sup> For example, in *Davis v.*

76. Blume & Johnson, *supra* note 61, at 92.

77. See, e.g., *Darden*, 477 U.S. at 182 ("Much of the objectionable content was invited by or was responsive to the opening summation of the defense. . . . [T]he idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole." (citing *United States v. Young*, 470 U.S. 1, 12–13 (1985))).

78. E.g., *Ellison v. Acevedo*, 593 F.3d 625, 635–36 (7th Cir. 2010) ("*Darden* established a two-prong test for determining whether a prosecutor's comments in closing argument constitute a denial of due process." (citing *Darden*, 477 U.S. at 181; *Barlett v. Battaglia*, 453 F.3d 796, 800 (7th Cir. 2006))).

79. *Id.* at 636 (citing *Ruvalcaba v. Chandler*, 416 F.3d 555, 565 (7th Cir. 2005)).

80. *Humphries v. Ozmint*, 397 F.3d 206, 218 (4th Cir. 2005) (en banc) (citations omitted) (citing *Darden*, 477 U.S. at 181–82; *DeChristoforo*, 416 U.S. at 645); see also *Middlebrooks v. Bell*, 619 F.3d 526, 543 (6th Cir. 2010) ("To determine flagrancy, we consider four factors: '(1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the defendant.'" (quoting *Bates v. Bell*, 402 F.3d 635, 641 (6th Cir. 2005))); *Ellison*, 593 F.3d at 636 ("Among the factors to be considered by the court in deciding whether the defendant was prejudiced by the comments are: '(1) whether the prosecutor misstated the evidence, (2) whether the remarks implicate specific rights of the accused, (3) whether the defense invited the response, (4) the trial court's instructions, (5) the weight of the evidence against the defendant, and (6) the defendant's opportunity to rebut.'" (quoting *Howard v. Gramley*, 225 F.3d 784, 793 (7th Cir. 2000))).

81. See Blume & Johnson, *supra* note 61, at 93 (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)).

82. See *id.* (citing *Dawson v. Delaware*, 503 U.S. 159, 166–67 (1992)).

*State*,<sup>83</sup> the Texas Court of Criminal Appeals held that a defendant's conversion to Satanism while on death row could legitimately be used as evidence of his future dangerousness. The court saw no error where the prosecutor had requested during the penalty phase that the defendant stand up in court, lift his shirt, and show the jury his Satanic tattoo.<sup>84</sup> The constitutional protection of the First Amendment is likely to be invoked by a defendant if he is a member of an unpopular religious group, such as Muslims today, or if he maintains an association with a group that holds a socially or politically unpopular viewpoint, such as the Aryan Nation.<sup>85</sup>

### *B. Survey of South Carolina Precedent*

When evaluating claims of improper and prejudicial arguments in capital cases, the South Carolina Supreme Court uses a two-prong test: (1) whether the argument was improper,<sup>86</sup> and (2) if so, whether the argument was so prejudicial that it had the effect of denying the defendant a fair trial.<sup>87</sup> Even where comments are adjudged to be proper, the court will analyze their prejudicial impact under section 16-3-25(C) of the South Carolina Code,<sup>88</sup> which broadly asks whether the death sentence was imposed under influence of passion or prejudice and whether the comments inserted an arbitrary factor into the jury's deliberation.<sup>89</sup>

Precedent is clear that arguments that tend to reduce the weight of a juror's responsibility,<sup>90</sup> that refer to the solicitor's personal opinion regarding the sentence,<sup>91</sup> or that use a "golden rule argument," which asks the jurors to place themselves in the shoes of the victim, are improper.<sup>92</sup> However, precedent also suggests that prejudice analysis of penalty phase arguments can be murky, and often includes a number of variable factors such as whether the improper

83. No. AP-74,393, 2010 WL 3766661 (Tex. Crim. App. Sept. 29, 2010).

84. *See id.* at \*1–2.

85. *See, e.g., Dawson*, 503 U.S. at 166–68 (holding that the prosecution's introduction of evidence of defendant's membership in the Aryan Brotherhood during the penalty phase violated his First and Fourteenth Amendment rights where it did not relate to the crime, was general in nature, was not probative of future dangerousness, and was not offered to rebut relevant mitigating evidence offered by the defense).

86. *See Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) (quoting *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007)) (citing *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)).

87. *See id.* (quoting *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)).

88. S.C. CODE ANN. § 16-3-25(C) (2003).

89. *See id.*

90. *See Williams v. Ozmint*, 380 S.C. 473, 479, 671 S.E.2d 600, 602 (2008) (quoting *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981)).

91. *See Northcutt*, 372 S.C. at 223, 641 S.E.2d at 881. However, as a standalone factor, the prejudicial impact of a solicitor's personal opinion may be limited. *See Williams*, 380 S.C. at 479, 671 S.E.2d at 602 (citing *Woomer*, 277 S.C. at 175, 284 S.E.2d at 359).

92. *See Van Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 743–44 (2004).

comments were consistent with evidence in “the record and reasonable inferences from it”;<sup>93</sup> whether the judge offered a curative instruction;<sup>94</sup> “the nature of the [comments] and the circumstances under which they were made”;<sup>95</sup> whether the comments were an invited response;<sup>96</sup> and how clearly the defendant’s guilt was established.<sup>97</sup> These factors closely track those used by the United States Supreme Court in *Darden v. Wainwright*,<sup>98</sup> which instructed that an evaluation of prejudicial impact of a prosecutor’s improper comments should consider (1) whether the comments manipulated or misstated the evidence, improperly implicated specific rights of the accused, were an invited response by the defense (thereby lessening their effect), or were addressed with a curative instruction by the judge; (2) whether the weight of the evidence is “heavy”; and (3) whether defense counsel rebutted the improper comments.<sup>99</sup> The South Carolina Supreme Court has stressed the difficulty in evaluating the prejudicial impact of improper comments during the penalty phase, commenting that “the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all.”<sup>100</sup>

The South Carolina Supreme Court has not previously indicated that cultural understanding is relevant to its analysis, even in cases challenging comments that likely would be understood by the culture at large as derogatory racial remarks.<sup>101</sup> Thus, the court’s opinion in *Vasquez* departs from its historical

93. *Northcutt*, 372 S.C. at 222 n.6, 641 S.E.2d at 881 n.6; see also *State v. Copeland*, 321 S.C. 318, 326, 468 S.E.2d 620, 625 (1996) (“We take this opportunity to caution counsel to confine their comments to the facts presented and reasonable inferences from such facts.”).

94. See *State v. Shuler*, 353 S.C. 176, 187–88, 577 S.E.2d 438, 444 (2003) (citing *Johnson v. State*, 325 S.C. 182, 188, 480 S.E.2d 733, 735–36 (1997); *State v. Irvin*, 270 S.C. 539, 544, 243 S.E.2d 195, 197 (1978)).

95. *State v. Bennett*, 369 S.C. 219, 231, 632 S.E.2d 281, 288 (2006) (quoting *S.C. State Highway Dep’t v. Nasim*, 255 S.C. 406, 411, 179 S.E.2d 211, 213 (1971)) (internal quotation marks omitted).

96. See, e.g., *id.* at 232, 632 S.E.2d at 289 (“[T]he trial court correctly found that ‘King Kong’ was an invited response to [the defendant’s] mitigation evidence.”); *Humphries v. State*, 351 S.C. 362, 376, 570 S.E.2d 160, 168 (2002) (determining that the defendant’s introduction of “his own difficult childhood and background” invited comparison between the defendant’s and the victim’s “respective characters even before the solicitor gave his closing remarks”).

97. See, e.g., *Bennett*, 369 S.C. at 232, 632 S.E.2d at 288 (“[T]his case involved a brutal murder, where guilt was clearly established. Accordingly, we find no evidence of prejudice from the ‘blond lady’ remark.”); *State v. Tucker*, 324 S.C. 155, 169, 478 S.E.2d 260, 268 (1996) (“[T]here was such overwhelming evidence of [the defendant]’s guilt, no prejudice could possibly have resulted. We find no error.”).

98. 477 U.S. 168 (1986).

99. See *id.* at 181–82 (citing *United States v. Young*, 470 U.S. 1, 12–13 (1985)).

100. *State v. McClure*, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000) (citing *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998); *State v. Atkins*, 303 S.C. 214, 221, 399 S.E.2d 760, 764 (1990); *State v. Tyner*, 273 S.C. 646, 660, 258 S.E.2d 559, 566 (1979)).

101. See *Bennett*, 369 S.C. at 231–32, 632 S.E.2d at 288–89. There, the court recognized “that the terms ‘blond lady’ and ‘King Kong’ could have racial connotations,” *id.* at 231, 632 S.E.2d at

approach when analyzing improper comments for prejudice. Unlike the court in *State v. Bennett*,<sup>102</sup>—which recognized racial connotations in the terms “King Kong” and “blond lady” when referring to an African-American defendant and a white witness, but stopped short of evaluating historical and current racial tensions to determine their prejudicial impact<sup>103</sup>—the court in *Vasquez* was willing to give significant weight to testimony about broader cultural conditions. For instance, it relied on Vasquez’s expert witness’s testimony that “domestic terrorist” connoted to the jury someone who “had a plan to . . . hurt society in the same way as the people who . . . planned and took out the 9/11 attacks,” and that this negative connotation “could not be removed.”<sup>104</sup> Further, the court was willing to hold that the solicitor injected “religious prejudice” into the case, despite the lack of any explicit reference to Vasquez’s Muslim faith.<sup>105</sup> Given the court’s historical hesitancy to find comments improper in the context of the record—and its propensity to find improper comments not prejudicial—the court’s decision in *Vasquez* is all the more striking. In fact, the dissent echoes the court’s traditional posture, arguing that the solicitor’s comments were proper as “an acceptable introduction to the victim impact evidence,” and concluding that “in light of the overwhelming evidence of guilt established at trial and the statutory aggravating factors, there is no reasonable probability that the jury would not have recommended the death penalty but for the solicitor’s comments.”<sup>106</sup>

The fact that the *Vasquez* court specifically determined that there was “religious prejudice” despite any explicit references to religion shows its awareness of the use of a coded appeal. The language of coded appeals must be interpreted within the context of the culture in which they are expressed if their prejudicial impact is to be evaluated accurately.<sup>107</sup> Logically, a coded appeal only has a prejudicial impact when the listener understands its biased meaning and applies that meaning to the decision at hand. The difficulty in determining whether a jury is influenced by prejudicial comments, particularly given its discretion for mercy in the penalty phase, is compounded when coded appeals

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288, but found that the use of these terms was not improper, *see id.* Because the defendant’s “size and strength were probative of the aggravating circumstance of physical torture,” the court reasoned that the “use of the term ‘King Kong’ was not suggestive of a giant black gorilla who abducts a white woman, but rather, descriptive of [the defendant’s] size and strength as they related to his past crimes.” *Id.* at 232, 632 S.E.2d at 288.

102. 369 S.C. 219, 632 S.E.2d 281 (2006).

103. *See id.* at 231–32, 632 S.E.2d at 288–89.

104. *Vasquez v. State*, 388 S.C. 447, 454, 698 S.E.2d 561, 564 (2010) (omissions in original) (internal quotation marks omitted).

105. *Id.* at 464, 698 S.E.2d at 569.

106. *Id.* at 465, 468, 698 S.E.2d at 570, 571 (Toal, C.J., dissenting).

107. *See generally* George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 364 (1995) (“[W]ords are not self-defining; their meaning depends on both *culture* and *context*.” (alteration in original) (quoting CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 114 (1990))).



must first be decoded by the court.<sup>108</sup> In *Vasquez*, the court found enough support in the culture at large to infer a prejudicial impact in the sentencing phase.<sup>109</sup>

#### IV. CODED APPEALS AND SUBCONSCIOUS PREJUDICE

The solicitor's use of the phrase "domestic terrorist" exemplifies a coded appeal—words used to "activate latent, subconscious prejudice"<sup>110</sup> and elicit a sympathetic response. Rejecting the explanation offered by the solicitor at the PCR hearing that "the jury could have interpreted the term 'terrorist' in the general sense that [Vasquez] 'struck fear in the hearts of innocent people,'" the *Vasquez* court instead concluded that the solicitor "intentionally used [the term] in conjunction with the solicitor's extensive reference to the events of September 11, 2001."<sup>111</sup>

Coded appeals have been discussed primarily in the context of race. In her 1993 article, *Racial Imagery in Criminal Cases*, Professor Johnson discusses how prosecutors have used racial imagery in closing arguments to identify white with good and black with evil;<sup>112</sup> to convey an "image of African Americans as more violent and more criminal than whites";<sup>113</sup> to portray defendants "as animal-like or subhuman in some other way";<sup>114</sup> to convey black men as a "sexual threat" to white women;<sup>115</sup> to argue "[b]lack dishonesty";<sup>116</sup> and to convey an "us-them" mentality by "portray[ing] black-on-white violence as more horrible than other violence" or by drawing on differences to destroy any empathy for the defendant.<sup>117</sup> Another commentator, Ryan Patrick Alford, notes that "[t]here is a great incentive for the government to incite racism from jurors to secure convictions; however, no countervailing disincentive has emerged as yet, since the appellate courts are either unwilling or unable to recognize

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108. See, e.g., *State v. White*, 246 S.C. 502, 507, 144 S.E.2d 481, 483 (1965) ("In view of the absolute discretion of the jury with regard to the issue of mercy, it is impossible to determine whether the argument actually had a prejudicial effect upon the verdict. . . . While we seriously doubt that the argument of the Solicitor had the claimed prejudicial effect and reach our result with reluctance, the probabilities of prejudice to the rights of the defendant are such that we would not be justified in assuming in a death case that it did not result.").

109. See *Vasquez*, 388 S.C. at 463–64, 698 S.E.2d at 569.

110. Brook K. Baker, *Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice*, 23 WM. MITCHELL L. REV. 491, 540 (1997).

111. *Vasquez*, 388 S.C. at 454–55, 460, 698 S.E.2d at 564, 567.

112. Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1751 (1993).

113. *Id.*

114. *Id.* at 1753.

115. *Id.* at 1754.

116. *Id.* at 1755.

117. *Id.* at 1756; see *id.* at 1757.

implicitly racist argumentation.”<sup>118</sup> Alford suggests that racial rhetoric is used most frequently by prosecutors in closing arguments because it is both the climax of the trial and the point at which prosecutors have the greatest latitude with their arguments.<sup>119</sup>

Within the framework of traditional rhetoric theory, the speaker seeks to establish a connection with his audience, convince them that what he is telling them is correct, and then move them to action.<sup>120</sup> Examining closing arguments in criminal trials, Alford posits:

First is the importance of forming a personal connection between yourself and the jury based on shared beliefs and attitudes, thus creating a positive *ethos* that will predispose the jurors to be persuaded by your arguments. Second is appealing to the emotions of the jurors, so that they are not only inclined to believe that your arguments are correct, but to be moved to action through an emotional reaction.<sup>121</sup>

A former prosecutor explains this strategy:

I knew that from the start of a trial to the end, emotion had very much to do with the outcome. In choosing jurors, we would look for those whose experiences would, through the emotion of empathy, pull to our side. In our opening statements, we were taught to tell the story of the case in a whole and real way so that it would engage the emotions of the jurors from the outset. When I put a victim on the stand as a witness, I would not stop or comfort her if she started to cry because I knew the effect that her tears were having on the jury. When cross-examining defense witnesses, I was trying to manipulate their emotions, too, by making them angry and frustrated so that their stories would break

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118. Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 363 (2006).

119. *See id.* at 329. Closing arguments typically conjure up images of stately lawyers orating to an edge-of-their-seat attentive jury, but in the modern era technology has changed the way that jurors process information and has enhanced the ability of lawyers to communicate with jurors through visual images. *See* Gregory J. Morse, *Techno-Jury: Techniques in Verbal and Visual Persuasion*, 54 N.Y.L. SCH. L. REV. 241, 242–43 (2010) (“Lawyers must keep in mind that people today have access to information twenty-four hours a day, seven days a week. . . . [They] must convey information to the jury quickly and concisely with clarifying visual support and verbal cues.”). South Carolina courts are no strangers to the use of visual persuasion in death penalty cases. *See, e.g.,* State v. Bixby, 388 S.C. 528, 554–57, 698 S.E.2d 572, 586–87 (2010) (finding no prejudice where the solicitor played a seven-minute film during sentencing that showed footage of a slain deputy’s funeral, including the folding of an American flag over the coffin and a mock 911 call telling him to return home from duty); State v. Northcutt, 372 S.C. 207, 222–23, 641 S.E.2d 873, 881 (2007) (finding prejudice where the solicitor “concluded his argument by producing a large black shroud and draping it over the baby [victim]’s crib. . . . in a staged funeral procession”).

120. Alford, *supra* note 118, at 334.

121. *Id.*

down. Finally the closing would come, and I would try to create a whole range of emotions: empathy for the victim, anger at the defendant, admiration for the police officers who investigated the case, and frustration that nothing had been done about the defendant sooner. While the law professors and courts may wring the law dry of emotion, those who tell the stories of the case know better about what is the heart of justice.<sup>122</sup>

In line with Johnson's concept of creating an "us-them" mentality,<sup>123</sup> Alford outlines one of the most effective ways for a prosecutor to appeal to jurors:

[D]efine the defendant as a member of the "other." In that way, the speaker can draw a line around the defendant, locating both herself and her audience on the same opposite of that line—thereby defining the attorney as a trustworthy member of the jurors' community. Defining the defendant as someone outside of the moral community can also induce a negative emotional response towards the defendant.<sup>124</sup>

Another technique used to "other-ize" the defendant, which was used in *Vasquez*, is to define him in terms of a larger community or by reference to the person's "classification within a group."<sup>125</sup> The most effective persuader understands the background and biases of the jury and appeals to the same.<sup>126</sup>

Professor Brook K. Baker suggests that cultural stereotypes begin to form at an early age, and by adulthood they typically reside in the "habitual, and therefore unconscious, parts of our mental processes."<sup>127</sup> These stereotypes can be activated not only by "direct appeals to pejorative terms and ideologies of superiority [but also with] code words, associated secondary attributes, and other metonymic devices."<sup>128</sup> Baker explains that "metonymy—the part evokes the whole—is particularly powerful in elucidating the cognitive processes of bias,"<sup>129</sup> and describes two metonymic devices:

122. MARK WILLIAM OSLER, JESUS ON DEATH ROW: THE TRIAL OF JESUS AND AMERICAN CAPITAL PUNISHMENT 83–84 (2009). Before becoming a law school professor in 2001, Mark Osler was a career federal prosecutor in Detroit, Michigan. *Id.* at 1.

123. Johnson, *supra* note 112, at 1756–59.

124. Alford, *supra* note 118, at 335 (footnote omitted).

125. *Id.*

126. *Id.* at 336; *see also* Morse, *supra* note 119, at 246 ("Keeping the background of each juror in mind will better enable lawyers to choose words, concepts, and ideas that have a greater impact on them." (citing G. Marc Whitehead, *Juror Persuasion: New Ideas, New Techniques*, LITIG., Winter 2000, at 34, 35)).

127. Baker, *supra* note 110, at 540.

128. *Id.*

129. *Id.*

First, metonymy describes how the whole group can be tarnished by the negative behavioral and attitudinal features of particular group members. In essence, the negative feature of an individual is considered to be representative—it is generalized to be characteristic of the entire, now despised social group. Thus, the first form of metonymy, the negative exemplar (e.g., a youth gang member), comes to epitomize the whole outsider group (youth of color).

. . . [Second,] a single element or symbolic representation of a stereotype can elicit the entire negative schema and aversive reaction. [For example,] describing Rodney King as “uncontrollable” conjures the aggregating stereotype of dangerous Black men.<sup>130</sup>

Baker argues that the legal requirement for relevancy only excludes the most egregious appeals to bias.<sup>131</sup> In fact, he asserts that:

[T]he relevance barrier is permeable with respect to the corrosive effect of indirect appeals to stereotypes and master stories of race, gender, class, sexual orientation, and disability. By code words, connotation, and metaphor, the “skilled” advocate can construct his or her party opponent around the cultural icons of race and gender . . . . The lawyers who are subtlest in fashioning their appeals to bias, those who seduce the decision-maker without raising suspicion, are credited with being the most skilled.<sup>132</sup>

Turning back to *Vasquez*, one can easily recognize the concepts that these commentators discuss. Some of the same categorizations that Professor Johnson describes as applying to black defendants (evil, violent, dishonest, “us-them” mentality) could easily apply to Vasquez once the solicitor labeled him a “domestic terrorist” and connected him to the Muslims that perpetrated the 9/11 attacks. The solicitor’s 9/11 narrative is also a clear example of Professor Alford’s description of the rhetorical theory. First, it drew a connection between the solicitor and the jury, who all witnessed the 9/11 attacks, and then it pricked the listeners’ emotions by evoking the painful loss of life on 9/11. Labeling Vasquez a “domestic terrorist” had the effect of drawing a circle around the solicitor and the jury, thus placing the defendant, a Muslim, outside of that circle. Finally, the 9/11 narrative is an example of Baker’s first metonymy, suggesting that the character of the small group of extreme Muslims who carried

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130. *Id.* at 540–42 (footnotes omitted).

131. *Id.* at 544.

132. *Id.*

out the 9/11 attacks now exemplifies the entire population of Muslims. The use of “domestic terrorist” also exemplifies Baker’s second metonymy—one word or phrase that has come to characterize all Muslims as part of a larger plot to terrorize the people of the United States. The *Vasquez* court correctly concluded that the solicitor’s comments were religious prejudice and improper as such.<sup>133</sup>

## V. CULTURAL CONTEXT

### A. Introduction

Coded appeals have their intended effect when the listener hears the coded language and draws on his cultural environment to decode what the communicator intends to convey.<sup>134</sup> In holding that the solicitor’s comments were improper as religious prejudice, absent an express reference to Vasquez’s religion, the court necessarily had to draw on the cultural environment outside the record at the time and place the comments were made. Reaching outside of the record to evaluate prejudice is a new step for the court in evaluating improper closing arguments in capital cases. If the court is charting a new course in its prejudice analysis by taking into consideration the cultural environment, then South Carolina’s culture presents some interesting hurdles for solicitors to overcome in order for religious arguments in capital cases to withstand judicial scrutiny.

### B. Religious Culture

#### 1. General Background

Polls show that Christianity is the largest religion in the United States, comprising nearly 78% of the population (approximately 54% Protestant and 24% Catholic).<sup>135</sup> The “traditional Bible-Belt states” in the South have the highest concentration of Protestants and other non-Catholic Christians and the lowest concentration of Catholics.<sup>136</sup> In South Carolina, one poll reveals that 75% of the state identifies itself as “Protestant/Other Christian,” and 8.8%

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133. *But cf.* United States v. Hakim, 344 F.3d 324, 333 (3d Cir. 2003) (“While we find the government’s mention of [defendant] Hakim’s religion disturbing, we conclude that Hakim cannot demonstrate that it amounted to plain error.”); State v. Mack, 850 So. 2d 1035, 1044, 1045 (La. Ct. App. 2003) (“Considering the evidence in its entirety, we cannot say that the reference to defendant’s Muslim name [at trial shortly after 9/11] was of such an inflammatory nature as to have had a prejudicial impact on the jury. In other words, the evidence was overwhelmingly sufficient such that, even without the remarks or references to defendant’s Muslim name, the jury could have found defendant guilty.”).

134. See Alford, *supra* note 118, at 334–36; Morse, *supra* note 119, at 246.

135. See Newport, *supra* note 12.

136. *Id.*

identifies itself as Catholic, for a total of 84% Christian.<sup>137</sup> South Carolina has among the highest concentrations of Protestants (ranking sixth) and lowest concentrations of Catholics (ranking forty-sixth) in the United States.<sup>138</sup> Other states with similar concentrations include West Virginia, North Carolina, Georgia, Kentucky, Tennessee, Alabama, Mississippi, Arkansas, and Oklahoma.<sup>139</sup> In a related poll, South Carolina ranked third in the top ten states for church attendance, with 56% of residents attending weekly or almost every week.<sup>140</sup>

Recent polls also show that views about Muslims among religious groups are generally negative and support an inference of prejudice. A 2009 Pew Research Center Survey, *View of Religious Similarities and Differences: Muslims Widely Seen as Facing Discrimination*, presented the following findings—(1) 58% of adults “say that Muslims are subject to a lot of discrimination”; (2) “[a]mong conservative Republicans, 55% say Islam is more likely than other faiths to encourage violence”; and (3) “[w]hite evangelical Protestants are significantly more likely than other religious groups to say Islam is inclined toward violence, with more than half (53%) taking this view.”<sup>141</sup> This negative view of Muslims can also be seen in a more recent 2010 Pew Research Center poll exploring views on the proposed mosque near the site of the 9/11 World Trade Center attacks.<sup>142</sup> The survey shows that 51% of Americans object to building a center and mosque for Muslims near the site of the former World Trade Center, while at the same time, 62% of Americans support equal rights for Muslims to build houses of worship.<sup>143</sup> Along politically partisan lines, Republicans tend to express unfavorable opinions of Islam “[b]y more than two-to-one (54% to 21%)” compared to Democrats, among whom “favorable opinions of Islam outnumber unfavorable ones (41% to 27%)”; also, 74% of Republicans object to the building of the mosque near Ground Zero, compared to 39% of Democrats.<sup>144</sup> Taking these polls in the aggregate, they tend to suggest that a cultural environment that is highly religious and predominantly Republican contributes to a higher likelihood of bias towards Muslims.

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137. *Id.*

138. *See id.*

139. *See id.*

140. Frank Newport, *Mississippians Go to Church the Most; Vermonters, Least*, GALLUP (Feb. 17, 2010), <http://www.gallup.com/poll/125999/mississippians-go-church-most-vermonters-least.aspx>.

141. *Views of Religious Similarities and Differences: Muslims Widely Seen as Facing Discrimination*, PEW RES. CENTER, 1, 7 (2009), <http://people-press.org/reports/pdf/542.pdf>.

142. PEW RES. CENTER, *supra* note 58.

143. *Id.* at 1, 4.

144. *Id.* at 2, 3.

## 2. *South Carolina and the Death Penalty*

A national poll conducted by Gallup in 2009 shows that 65% of Americans support use of the death penalty for convicted murderers.<sup>145</sup> This level of support has remained roughly consistent over the past decade.<sup>146</sup> The poll includes several other interesting findings, including—(1) nearly 49% of Americans say that “the death penalty is not imposed often enough”; (2) 59% of Americans believe that over the past five years, “a person has been executed under the death penalty who was, in fact, innocent of the crime he or she was charged with”; and (3) 34% of Americans “believe an innocent person has been executed and at the same time support the death penalty.”<sup>147</sup> The Gallup poll also asked about partisan differences among those polled and found that 81% of Republicans support the death penalty, compared to 67% of Independents and 48% of Democrats.<sup>148</sup> National polls asking about the composition of partisan groups found that “[a]bout 9 out of 10 Republicans are non-Hispanic whites, and more than half of these are highly religious.”<sup>149</sup> This compares with 24% of Independents and 19% of Democrats who “can be classified as highly religious.”<sup>150</sup> These polls have interesting implications for the death penalty in a state such as South Carolina, where many citizens are highly religious and have historically voted Republican in major elections.<sup>151</sup>

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145. Frank Newport, *In U.S., Two-Thirds Continue to Support Death Penalty*, GALLUP (Oct. 13, 2009), <http://www.gallup.com/poll/123638/In-U.S.-Two-Thirds-Continue-Support-Death-Penalty.aspx>. Gallup has been conducting this poll for more than 70 years. *Id.*

146. *Id.*

147. *Id.* (internal quotation marks omitted).

148. *Id.* In his 2009 book, *Jesus on Death Row*, Mark Osler notes that political supporters of the death penalty who also profess allegiance to the Christian faith have reached the pinnacle of our political structure—“Presidents Bill Clinton and George W. Bush strongly supported and expanded the use of the death penalty while both proclaimed a faith whose primary public symbol, the cross, is itself the representation of an instrument of execution.” OSLER, *supra* note 122, at 3. Professor Osler draws parallels between the death penalty in today’s society and the trial and execution of Jesus Christ, finding that “[i]n a nation where 85 percent of the population identifies itself as Christian, [and where] the debate over capital punishment and other criminal issues is necessarily going to be largely among Christians,” there is a surprising lack of discussion on “the troubling account of Jesus Christ as a criminal defendant.” *Id.*

149. Frank Newport, *Republicans Remain Disproportionately White and Religious*, GALLUP (Sept. 1, 2010), <http://www.gallup.com/poll/142826/Republicans-Remain-Disproportionately-White-Religious.aspx> (“Whites classified as highly religious are those who say religion is important in their daily lives and who report attending religious services weekly or almost every week.”).

150. *Id.*

151. See, e.g., *Election Information: Election Statistics*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, [http://clerk.house.gov/member\\_info/electionInfo/index.aspx](http://clerk.house.gov/member_info/electionInfo/index.aspx) (last visited May 17, 2011) (collecting and reporting “official vote counts for federal elections” for all the states since 1920). Over the past fifty years, a majority of South Carolina’s citizens have voted for the democratic candidate in only two presidential elections—Jimmy Carter in 1976 and John F. Kennedy in 1960. See Benjamin J. Guthrie under direction of Edmund L. Henshaw, Jr., *Statistics of the Presidential and Congressional Election of November 2, 1976*, CLERK OF THE HOUSE OF REPRESENTATIVES, 44 (Apr. 15, 1977), [http://clerk.house.gov/member\\_info/electionInfo/](http://clerk.house.gov/member_info/electionInfo/)

In a 2001 article, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, the authors used data compiled by the Capital Jury Project<sup>152</sup> and interviewed “187 jurors who served on 53 capital cases tried in South Carolina between 1986 and 1997.”<sup>153</sup> They focused their inquiry on the juror’s first vote (based on the premise that the majority after the first vote tends to control the final verdict) and asked the jurors a number of questions aimed at discovering what leads a juror to vote for death.<sup>154</sup> They found that race matters in that “[b]lack jurors are substantially more likely than white jurors to vote for life on the first ballot, but not on the final one.”<sup>155</sup> This is because “[a]ll jurors tend in the end to vote with the initial majority, which for the cases in our sample means a white majority.”<sup>156</sup> They also found that religion matters in that “[j]urors who identify themselves as Southern Baptists (almost all of whom are white) are apt to cast their first vote for death.”<sup>157</sup> “Nearly 80 percent of Southern Baptists vote for death on the first vote compared to about 50 percent of jurors of other denominations.”<sup>158</sup> Finally, they found that support for the death penalty matters in that “[c]apital juries often contain members whose support for the death penalty undermines their impartiality and renders them legally ineligible to serve.”<sup>159</sup> Once seated, these jurors push the final verdict heavily toward death.”<sup>160</sup> The authors concluded:

[O]ur findings validate the instincts on which many prosecutors and defense lawyers have probably long relied. On the basis of our analysis,

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1976election.pdf; Benjamin J. Guthrie under direction of Ralph R. Roberts, *Statistics of the Presidential and Congressional Election of November 8, 1960*, CLERK OF THE HOUSE OF REPRESENTATIVES, 41 (Apr. 15, 1961), [http://clerk.house.gov/member\\_info/electionInfo/1960election.pdf](http://clerk.house.gov/member_info/electionInfo/1960election.pdf); David Leip, *United States Presidential Election Results*, DAVE LEIP’S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/> (last visited May 17, 2011).

152. Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 278 (2001). The Capital Jury Project (CJP) began in 1991 as a collaboration among a number of research institutions supported by grants from the National Science Foundation. See *What is the Capital Jury Project?*, SCH. OF CRIM. JUST. UNIV. AT ALB., <http://www.albany.edu/scj/CJPwhat.htm> (last updated Apr. 21, 2009). In its own words, “the CJP was designed to: (1) systematically describe jurors’ exercise of capital sentencing discretion; (2) assess the extent of arbitrariness in jurors’ exercise of such discretion; and (3) evaluate the efficacy of capital statutes in controlling such arbitrariness.” *Id.*

153. Eisenberg et al., *supra* note 152, at 278. The authors focused on South Carolina because in 2001 it was “the state with the largest share by far of the CJP’s total data,” and “CJP data suggest that South Carolina jurors behave much like jurors in other states.” *Id.* at 280.

154. See *id.* at 278–79.

155. *Id.* at 279.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* This Note has not focused on race; however, it is a significant factor in the application of the death penalty, and it is worth noting that the study found, “Nearly two-thirds of white jurors cast their first vote for death compared to only about one-third of black jurors. Whites are therefore roughly twice as likely to vote for death on the first ballot as are blacks.” *Id.* at 286.



rational prosecutors should try to empanel jurors who are white and Southern Baptist; rational defense lawyers should try to empanel jurors who are black and who adhere to any faith besides Southern Baptism.<sup>161</sup>

In a separate 2007 study, researchers used a “mock trial scenario” to ask similar questions about “whether religious and demographic factors were related to death penalty attitudes and sentencing verdicts.”<sup>162</sup> They hypothesized “that there are differences between those who favor the death penalty and those who have doubts about the death penalty on religious dimensions such as affiliation, devotionism, fundamentalism, evangelism, and beliefs regarding God’s attitude toward criminals and punishment.” This hypothesis “was generally supported” by the findings, and that “[i]ndividual analysis indicated that those who favor the death penalty were more likely to be males and Protestant” and were more “likely to interpret the Bible literally or believe that God supports or requires the death penalty for murderers.”<sup>163</sup> The findings also supported their second hypothesis, that “death qualification does not eliminate most group differences observed in the full sample,”<sup>164</sup> meaning that religious differences in the venire carry through to the seated jury. The researchers’ third hypothesis, that “demographics and death penalty attitudes, [when combined with] religious factors will significantly increase the amount of variance in sentencing verdict,” was also substantiated by their findings.<sup>165</sup> Specifically, they found that “fundamentalism, belief in a literal interpretation of the Bible, the perception that one’s religious group favors the death penalty, and the belief that God requires the death penalty for murderers . . . predict greater verdict preference strength in the direction of the death penalty.”<sup>166</sup> Their ultimate conclusion—that “a defense attorney should eliminate potential jurors who believe in a literal interpretation of the Bible, have fundamentalist beliefs, believe that God requires the death penalty for murderers, and believe that their religious group supports the death penalty”<sup>167</sup>—is very similar to the conclusion reached in the CJP study.<sup>168</sup>

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161. *Id.* at 309.

162. Monica K. Miller & R. David Hayward, *Religious Characteristics and the Death Penalty*, 32 LAW & HUM. BEHAV. 113, 113 (2008).

163. *Id.* at 115, 120.

164. *Id.* at 121.

165. *Id.* at 115, 121.

166. *Id.* at 121.

167. *Id.*

168. This is consonant with the Eisenberg, Garvey and Wells study’s finding that Southern Baptists show a propensity to vote for death on their first vote. *See* Eisenberg et al., *supra* note 152, at 279. The Southern Baptist Convention officially supports the death penalty, *SBC Resolutions*, *supra* note 67, and according to the Executive Committee of the Southern Baptist Convention, South Carolina has 2,074 affiliated churches and 691,426 members as of 2009, EXEC. COMM., S. BAPTIST CONVENTION, ANNUAL OF THE 2010 SOUTHERN BAPTIST CONVENTION 140 (2010), available at <http://sbccc.net/bor/2010/2010SBCAnnual.pdf>. This is a significant percentage (approximately 15%) of the 4,625,364 people living in South Carolina. *See* Paul Mackun & Steven

In sum, these studies demonstrate a long history of using the Bible to justify the imposition of the death penalty<sup>169</sup> and why appeals to religious prejudice continue to be made.

### 3. *Recent Cases Highlighting the Prominence of Religion in South Carolina*

Several fairly recent cases in South Carolina highlight the dominance of the Christian religion in the state. In *Wynne v. Town of Great Falls*,<sup>170</sup> Darla Kaye Wynne sued the town of Great Falls in federal court, seeking an injunction to stop the Town from praying in Jesus's name.<sup>171</sup> After finding that the "Town Council meetings always open with prayer," and that the "prayer frequently refers to Jesus, Jesus Christ, Christ, or Savior in the opening or closing portion,"<sup>172</sup> the district court held that this practice violated the Establishment Clause of the First Amendment and permanently enjoined the Town "from invoking the name of a specific deity associated with any one specific faith or belief in prayers given at Town Council meetings."<sup>173</sup> Prior to filing suit, Wynne, a practicing Wiccan, requested that the Council either change its prayers to replace the reference to Jesus with "God" or allow others of different faiths to offer prayers as well.<sup>174</sup> She was met with significant hostility.<sup>175</sup> The Mayor refused Wynne's request and responded that the Council would not change such a long-standing practice.<sup>176</sup> Following this exchange, "several Christian ministers drafted resolutions on behalf of their members expressing support for continuance of a 'Christian' prayer at Council meetings."<sup>177</sup> Further, "numerous citizens signed a petition urging the Council to 'not stop praying to our God in heaven.'"<sup>178</sup> Attendance at Council meetings swelled, and Christian prayers were even more celebrated.<sup>179</sup> Additionally, the Mayor "testified that ninety-nine percent of the people in the town are Christian, and that the prayers were

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Wilson, *Population Distribution and Change: 2000 to 2010*, U.S. CENSUS BUREAU, 2 tbl.1 (Mar. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

169. See generally Mark Osler, *Christ, Christians and Capital Punishment*, 59 BAYLOR L. REV. 1, 30 (2007) ("[There] are some Christians who seem to center their support for capital punishment on the words of the Old Testament. However, resting a defense of the death penalty simply on the words of the Old Testament seems inadequate for Christians as this approach cuts out the experiences and lessons of Christ. Nevertheless, this has long been the 'Christian' justification for the death penalty." (footnote omitted)).

170. 376 F.2d 292 (4th Cir. 2004).

171. *Id.* at 294.

172. *Id.* at 294 (internal quotation marks omitted).

173. *Id.* at 296 (internal quotation marks omitted).

174. See *id.* at 294–95.

175. See *id.* at 295–96.

176. See *id.* at 295.

177. *Id.*

178. *Id.*

179. See *id.*

not likely to change until someone of a different religion was elected to the Council.”<sup>180</sup> Despite the obviously strong ties to Christianity in the town, the district court enjoined the official prayer, and the Fourth Circuit upheld the decision, concluding that the Town’s practice violated the Establishment Clause because the Council sought to “advance its own religious views in preference to all others.”<sup>181</sup>

Similarly, in a 2009 case, *Summers v. Adams*,<sup>182</sup> the same district court that had decided *Wynne* held that South Carolina’s “I Believe” Act violated the Establishment Clause.<sup>183</sup> The Act authorized the creation of a license plate containing “the words ‘I Believe’ and a cross superimposed on a stained glass window.”<sup>184</sup> Former Lieutenant Governor Andre Bauer initiated the Act following an unsuccessful attempt in Florida “to gain legislative approval of a specialty plate” that promoted Christianity, the state’s majority religion.<sup>185</sup> The district court found support for its holding in both the process by which the license plate had been approved and in the public appeals by its proponents after the court had issued a preliminary injunction.<sup>186</sup> As to the approval process, the court found that the Act “(1) authorize[d] a single plate with a uniquely Christian message, (2) was sponsored and approved solely as the result of governmental action, and (3) present[ed] its message in a manner . . . not available except through the legislative approval process.”<sup>187</sup> Further, the actions of government officials following the issuance of the preliminary injunction supported the court’s conclusion that the Act was singularly aimed at promoting Christianity.<sup>188</sup> Interestingly, exhibiting the connections suggested earlier between the Republican Party and the Christian Church, Lieutenant Governor Bauer and Attorney General Henry McMaster organized two church rallies in an attempt to drum up support for the “I Believe” Act.<sup>189</sup> At the first rally in Greer, South Carolina, Lieutenant Governor Bauer referred to the variety of license plates available in the state, suggesting “that total freedom of speech was available through this venue to everybody[] but Christians,” who he said “have become a silent majority.”<sup>190</sup> At a second rally in Simpsonville, South Carolina, Joe Mack, from the Office of Public Policy of the South Carolina Baptist Convention, remarked that the “I Believe” Act was something the Baptists should stand behind and commented on the influence of Baptists within the legislature:

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180. *Id.* at 296 n.2.

181. *Id.* at 302.

182. 669 F. Supp. 2d 637 (D.S.C. 2009).

183. *Id.* at 665; *see also* S.C. CODE ANN. § 56-3-10510 (Supp. 2010).

184. *Id.* at 639 (quoting § 56-3-10510) (internal quotation marks omitted).

185. *Id.* at 640.

186. *See id.* at 644–46, 648–52.

187. *Id.* at 640.

188. *See id.* at 648–52.

189. *Id.* at 648.

190. *Id.* at 650 (alteration in original) (internal quotation marks omitted).

[W]hen I go over there and say I represent South Carolina Baptist and our 2000 plus churches, they kind of perk up and pay attention because they know that that's a lot of votes out there. And so we do have influence and we want to use it in the right way . . . . And one of the things we want to see good results on is the I Believe license plate; and we're here to hear more about that tonight.<sup>191</sup>

Lieutenant Governor Bauer echoed common rhetoric used to garner Christian support for political purposes, stating:

Judeo Christian individuals started this country, it's what's made this country what every other country wants to be like and why people still want to come here for the land of hopes and dreams and promises. And so, this is our chance to really show the public that Christians are still here to be accounted for. . . . [Polls show that] 80 something percent of the United States citizens consider themselves Christians. . . . We got to stand up. We've got to make sure not only do we fight this battle, but that we put Christians . . . in every office.<sup>192</sup>

Another speaker commented, "[Fifty] years ago, I wouldn't have to make this statement, much less explain what the statement means. But here's the statement. This nation was founded by Christians as a Christian nation."<sup>193</sup> Ultimately, the district court concluded that the evidence of the legislative purpose for the Act "suggest[ed] either a desire to promote Christianity or, at the least, to acknowledge and honor Christianity as the 'majority' religion," and that "it gives the impression that Christianity, as the majority religion, is also the preferred religion and its adherents favored citizens."<sup>194</sup>

These two cases are instructive because they demonstrate that many South Carolinians view their private religious practices and their participation in civic life as interconnected. The explicit reference to "a Christian nation" and the implicit suggestion that, as a majority, the Christian viewpoint should guide and direct government, is rhetoric commonly heard throughout evangelical Christian churches in America today.<sup>195</sup> This misconception of the proper relationship

191. *Id.* at 651 n.24 (omission in original).

192. *Id.* at 652 (third omission in original) (emphasis omitted).

193. *Id.* at 652 n.25 (alteration in original) (internal quotation marks omitted).

194. *Id.* at 658, 660.

195. See GREGORY A. BOYD, *THE MYTH OF A CHRISTIAN NATION* 87–91 (2005). Dr. Boyd's book is one of the most prominent books on this topic; in it, he succinctly explains an "oft-repeated" rally cry in American evangelical churches that Christians need to "take America back for God": The thinking is that America was founded as a Christian nation but has simply veered off track. If we can just get the power of Caesar again, however, we can take it back. If we can just get more Christians into office, pass more Christian laws, support more Christian policies, we can restore this nation to its "one nation under God" status. If we can just protect the sanctity of marriage, make it difficult, if not impossible, to live a gay lifestyle,

between the Christian church and the government is perhaps one reason why empirical studies show that fundamentalist Christian denominations favor the death penalty more than others. No doubt this is a complex question, and full treatment is beyond the scope of this Note, but members of many Christian denominations likely could be persuaded with the following chain of logic—(1) this is a Christian nation founded on Christian principles, and because this state is responsible to God for just governing, it has a responsibility to punish wrongdoers, (2) there are multiple examples where the Bible proscribes death as a punishment for murderers, (3) therefore, not only is death an acceptable punishment, it is probably the most just result. Accordingly, empirical evidence showing a greater tendency of some Christian denominations to vote for death and the continued blending of religion and politics are factors that the South Carolina Supreme Court should take note of when evaluating religiously prejudicial comments and considering their impact on a jury.

## VI. TRADITIONAL RELIGIOUS CODED APPEALS

The solicitor's improper argument in *Vasquez* effectively drew a sharp contrast between the Muslim defendant and the majority of South Carolinians who identify themselves as Christians. Not only was the defendant not a Christian, he was an adherent to a religion that, since 9/11, arguably has been branded a terrorist group and portrayed as the antithesis of American Christians. While the solicitor's argument was improper, it is not typical of the religious arguments that South Carolina courts are likely to see; exploring several examples of the more common Judeo-Christian coded appeals is instructive.

Religious coded appeals are often woven into the penalty phase through victim impact testimony and the State's closing arguments. For example, during

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and overturn *Roe vs. Wade*, we will be getting closer. If we can just get prayer (Christian prayer, of course) back into our schools along with the Ten Commandments and creationist teaching, we will be restoring our country's Christian heritage. If we can just keep "one nation under God" in our Pledge of Allegiance, protect the rights of Christians to speak their minds, get more control of the liberal media, clean up the trash that's coming out of the movie and record industry, while marginalizing, if not eradicating, liberal groups such as the ACLU, we will have won this nation back for Jesus Christ.

*Id.* at 91 (footnote omitted). Dr. Boyd goes on to explain how this kind of thinking destroys the church's ability to carry out its mission to love and serve people of every race, religion, and gender. *See id.* at 93–98. In another book discussing this issue, the authors start with the premise that

[o]ver the last several years, the Christian relation to the state has become more dubious. The most prevalent example is the Christian language coming from the State Department of the United States. Professing Christians have been at the helm of the wars in Iraq and Afghanistan, implicitly or explicitly referencing faith in God as part of their leadership. Patriotic pastors insist that America is a Christian nation without questioning the places in distant and recent history where America has not looked like Christ.

SHANE CLAIBORNE & CHRIS HAW, *JESUS FOR PRESIDENT 20* (2008). From there, the authors note their hope "to redefine what political means or looks like" and "to redefine it simply as how we relate to the world." *Id.* at 21.

the closing argument in *People v. Lewis*,<sup>196</sup> the prosecutor emphasized the location of the crime to such an extreme degree that jurors could have easily misunderstood the location of the crime to be an aggravating factor upon which the jury could rest its imposition of the death penalty:

These criminals violated the one safe haven we have in this troubled world, the place where we go to enrich and glorify what is best in us, where we reaffirm our faith in all that is good and righteous, where we renew our souls and seek solace in the spiritual from a troubled world, a house of God. . . . Who would violate the sanctity of a house of God to commit the most heinous of crimes known to Man? . . . Only the most vile, soulless coward could commit crimes so foul and so evil. In these defendants we have the very epitome of evil and cowardice. These defendants, then, are equally bereft of soul or humanity. If you spare them . . . you will sit on your hands and send the message that evil will be tolerated in the sanctity of a house of God.<sup>197</sup>

Although the prosecutor did not explicitly say, “You the jury should sentence these defendants to death because they committed a murder in a church” (which is not a legal aggravating factor in California<sup>198</sup>), any other interpretation is hard to defend and the impact of such an argument, particularly if used in a state dominated by Protestant Christians, should be viewed as prejudicial.

As another example, consider the solicitor’s penalty phase presentation in *State v. Mercer*.<sup>199</sup> The solicitor did not argue, “You the jury should sentence the defendant to death because he killed one of you, a good Christian person who was doing good Christian works in the community,” but through a series of victim impact witnesses he communicated as much.<sup>200</sup> First, the solicitor asked about the victim’s involvement in the Masons, specifically asking a witness about one photograph in which the victim was pictured at a church “re-dedication.”<sup>201</sup> The solicitor then asked a subsequent witness about a phone call he had received from the victim on the day of his death.<sup>202</sup> The witness explained that the victim discussed his next assignment in the Army and told him that “he wanted me to know that he had recently accepted Jesus Christ as his Lord and Savior because he knew that was very much an integral part of my family’s life and my life.”<sup>203</sup> In response, the solicitor immediately followed up with questions about a picture that the victim had given to the

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196. 140 P.3d 775 (Cal. 2006).

197. *Id.* at 842 n.27 (internal quotation marks omitted).

198. *See* CAL. PENAL CODE § 190.2 (West 2001).

199. 381 S.C. 149, 672 S.E.2d 556 (2009).

200. *See* Record on Appeal at 2071–118, *Mercer*, 381 S.C. 149, 672 S.E.2d 556 (No. 26582).

201. *Id.* at 2072.

202. *See id.* at 2084–85.

203. *Id.* at 2085.

witness when he left Fort Jackson. The witness described the picture as depicting “a heavenly place setting with two hands signifying the hands of the Lord and a place setting that goes on just seemingly without end.”<sup>204</sup> Shortly thereafter, another character witness testified about the victim’s participation in establishing a youth center, describing in detail a fund-raising coffee mug that said “I.M.R.N.H.” on one side (which meant “I’m reaching new heights”), and “Ask me how” with a picture of the Bible on the other side.<sup>205</sup> The witness further described how the youth center “had tickets that they were selling because they put on a gospel type of play that was held, and that also aided in raising the money to open up the youth center.”<sup>206</sup> The solicitor then introduced the coffee cup into evidence and engaged in another lengthy colloquy about its features, during which the witness repeatedly was prompted to discuss the meaning behind the message on the cup.<sup>207</sup> Additionally, the solicitor later asked this same witness about one of the participants at the victim’s memorial service program, Reverend Ogden. The witness responded:

Reverend Ogden was an instructor that worked with us. He was also a minister, and Tracy [the victim] would—he would be guest speakers at churches in the local community. And I remember speaking to [Ogden], you know, one day, and he was like you know, “O.G., everywhere—everywhere I preach, you know, I’ll be preaching and I look up and I like, you know, look in the back and Tracy be sitting there.” And I was like, “What?” I was like, “Really?” He said, “Yeah, you know.” So Tracy would follow him pretty much everywhere he preached.<sup>208</sup>

Through this series of victim impact witnesses, the solicitor cleverly wove a theme of the victim’s spiritual redemption into mitigation: (1) he was involved in community service with the Masons, including the rededication of a church; (2) he followed a reverend friend to multiple church services, which surprised his close friends; (3) he was involved in starting a center to help troubled youth and teach them about the Bible; and (4) on the day of his death, the victim called one of his close friends to relate his own personal acceptance of Jesus Christ as his Savior. While a non-Christian juror may not have given a second thought to this type of recurring religious theme, its coded meaning would not have been lost on a Christian juror.

Prosecutors also commonly present a contrast to place emphasis either on how un-Christian the defendant is, or on how Christian the victim was.<sup>209</sup> In

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204. *Id.*

205. *Id.* at 2107–08 (internal quotation marks omitted).

206. *Id.* at 2108.

207. *See id.* at 2109.

208. *Id.* at 2117–18.

209. *See* Johnson, *supra* note 112, at 1756–57.

*Mercer*, the solicitor placed heavy emphasis on the victim's conversion to Christianity, specifically his specific Christian-related work. For an example of how the characterization of a defendant as "un-Christian" can be effectively deployed, consider the government's use of a remark that a defendant had made to his uncle about turning his life around (which then led the uncle to write to a judge, asking that the defendant be given a light sentence for a prior conviction).<sup>210</sup> During the prosecutor's closing argument, he stated:

[I]n front of the Judge in Indiana, he gets his Uncle Mark, a good and solid man, Mark Fulks. A man that truly has found God. A born-again Christian. Took that witness stand, told you how [the defendant] Chad, Chad comes to him and says Uncle Mark, I am following the path of the Lord. Please write this letter. Please write this letter to the Judge so my sentence is not so bad. Uncle Mark believes him. Uncle Mark writes that letter, and the Judge accepts that letter that Chad Fulks, this man that would go on to rape, and to carjack, and to kill, was a man of God.<sup>211</sup>

Later, the government commented on the defendant's habit of showering several times a day: "There are no amount of showers that Chad Fulks could take that could wash his sins away. None."<sup>212</sup> The clear message conveyed by these types of comments is not simply that lying is bad, but that lying to a born-again Christian is horrendous, and that no amount of the jury's mercy could work redemption in the defendant's life.

Arguments such as these are common in capital cases and their potential to incite prejudice is palpable, especially in a culture dominated by specific religious groups that empirically show a higher propensity to vote for death.

## VII. CONCLUSION

In *Vasquez*, the South Carolina Supreme Court added a new dimension to its analysis of the prejudicial effects of improper comments when it credited testimony about coded appeals and cultural conditions that gave rise to an inference of religious prejudice in the jury's sentencing decision. The court properly expanded the confines of its prior prejudice analysis when it found that "religious prejudice" could exist outside of the context of an improper Biblical reference and determined that comments merely implicating the defendant's Muslim faith could be prejudicial, even without an explicit reference to his faith. The constitutional limitations on religious references in closing arguments have not deterred prosecutors from appealing to religious prejudice; many advocates

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210. *Fulks v. United States*, No. 4:08-70072-JFA, 2010 WL 3069390, at \*77–79 (D.S.C. Aug. 3, 2010).

211. *Id.* at \*78.

212. *Id.* (internal quotation marks omitted).



have resorted to coded appeals to incite negative bias in jurors. When a reviewing court evaluates coded appeals to determine whether they were improper, it must necessarily examine the cultural context in which the comments were made in order to properly understand their prejudicial impact. Specifically, studies have found that members of some religions have a higher propensity to vote in favor of imposing the death penalty.

While the South Carolina Supreme Court appropriately credited testimony regarding the surrounding culture at the time the improper comments in *Vasquez* were made, it remains to be seen if the court will continue to apply this framework in the future or whether the *Vasquez* ruling will be treated as merely an aberration, reflecting the unique salience of the 9/11 attacks. Ultimately, coded appeals in capital cases are unlikely to be reined in until courts begin to understand how cultural context drives prejudice.

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