

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

TIMOTHY RAY JONES, JR.,

APPELLANT.

APPELLATE CASE NO. 2019-001008

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 28145

PETITION FOR REHEARING

Appellant seeks rehearing pursuant to Rule 221(a), SCACR, because this Court overlooked or misapprehended the following:

I. Due Process and the Eighth Amendment require telling jurors the truth about a Not Guilty by Reason of Insanity Verdict

This Court's Opinion completely overlooked appellant's federal Due Process and Eighth Amendment arguments regarding the not guilty by reason of insanity ("NGRI") verdict. State v. Timothy Ray Jones, Jr., Op. No. 28145 (S.C. Sup. Ct. filed March 29, 2023) (Howard Adv. Sh. No. 12 at 34-36) (hereinafter, "Opinion,") This portion of the Opinion does not cite a

single federal case. Opinion at 34-36. It does not mention Due Process or the Eighth Amendment. Id. The Opinion treats the issue as if it were only raised as a matter of state law. Id. Appellant's Statement of the Issue on Appeal expressly says that the argument is based on federal law. Brief of Appellant at 29. Appellant extensively argued that the federal constitution requires telling jurors the truth about an NGRI verdict. Brief of Appellant at 1, 29-30, 41-46.

South Carolina's death penalty statute requires this Court to address all legal errors. S.C. Code Ann. § 16-3-25(F). Section 16-3-25(F) states in relevant part, "The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence." Id. In order to comply with the Legislature's directive, the Court should, at a minimum, issue an amended decision addressing appellant's Due Process and Eighth Amendment arguments.

Appellant argued that Due Process requires telling jurors the truth about an NGRI verdict, just as Due Process required telling jurors the truth about parole in Simmons v. South Carolina, 512 U.S. 154 (1994), Shafer v. South Carolina, 532 U.S. 36 (2001), and Kelly v. South Carolina, 534 U.S. 246 (2002). It took three reversals from the United States Supreme Court for the state to abandon its efforts to get this Court to ignore the Due Process ramifications of hiding the truth about sentencing outcomes from a capital jury.

Appellant argued that the heightened reliability requirement from the Eighth Amendment requires telling jurors the truth about an NGRI verdict. See Eddings v. Oklahoma, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). The Eighth Amendment particularly requires greater care when a capital defendant is mentally ill or is less culpable because of his mental state. See Ford v. Wainwright, 477 U.S. 399, 410 (1986)

(prohibiting states from executing prisoners who are insane); Roper v. Simmons, 543 U.S. 551, 573 (2005) (prohibiting the execution of juveniles because their lack of maturity reduces their culpability); Atkins v. Virginia, 536 U.S. 304, 320-21 (2002) (prohibiting the execution of intellectually disabled defendants); Hall v. Florida, 572 U.S. 701, 709 (2014) (“A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process.”). The Eighth Amendment’s concerns about the reliability of the death penalty for defendants with a compromised mental state require a properly vetted and instructed jury that can meaningfully consider an NGRI verdict.

Unlike any other criminal case, jurors in a capital trial know from the beginning of voir dire that they are responsible for sentencing. A death penalty jury’s unique role in South Carolina is the reason why prior state cases left open the possibility of telling potential capital jurors the truth about an NGRI verdict. See State v. Poindexter, 314 S.C. 490, 492, 431 S.E.2d 254, 255 (1993) (“[t]he consequences need not be brought to the jury’s attention unless the jury has a statutory right to fix or recommend punishment.”). The United States Supreme Court made the same distinction when it considered the issue in a non-capital case. See Shannon v. United States, 512 U.S. 577, 579 n.4 (1994) (stating, “Particularly in capital trials, juries may be given sentencing responsibilities,” and citing Simmons).

This Court said that if a jury renders an NGRI verdict, it “has no sentencing responsibilities.” Opinion at 35. This reasoning ignores the jury’s knowledge that it is responsible for sentencing unless it renders an NGRI verdict. Before it considers an NGRI verdict, the jury knows that the state considers the defendant so dangerous and despicable that he deserves the death penalty. They know they can ensure that he will be executed or live his life in prison if they render a guilty verdict. They know that the community will hold them responsible if they are “tricked”

into rendering an NGRI verdict. As happened in the infamous O.J. Simpson trial, no juror wants to be blamed for being tricked by the defense. Keeping the truth from the jury allows the state to capitalize on jurors' fears that a dangerous defendant will go free if they render an NGRI verdict. The arbitrary and imaginary line drawn by this Court between sentencing and guilt in a capital case violates Due Process and the Eighth Amendment. This false line improperly coerces a jury into disregarding an NGRI verdict. It gives the state an unearned and unfair advantage over those defendants who are the most mentally ill.

Appellant had no defense other than insanity. Because of the trial court's rulings, appellant could not discover during voir dire whether his jurors could impartially consider his defense. Nor did appellant's jury know that he would not be set free if they rendered an NGRI verdict. During voir dire and the guilt phase, the jury knew that they could sentence appellant to death or life imprisonment if they rendered a guilty verdict, but they were left to speculate about what would happen if they rendered an NGRI verdict. Such speculation violates Due Process and the Eighth Amendment. It leaves the integrity of the trial process in great doubt. This Court should grant rehearing to address these important federal constitutional questions.

II. Juror #338 was improperly disqualified

Had this Court addressed and accepted appellant's federal arguments concerning an NGRI verdict, it would have found that Juror #338 was improperly disqualified. Juror #338 succinctly expressed why jurors need this information. This Court quoted her elegant reasoning in the Opinion. Opinion at 32-33. When she was told she could know the results for a death and a life verdict, but not an NGRI verdict, she said, "I don't understand." Opinion at 32.

The reason she did not understand is because the arbitrary line between guilt and sentencing with respect to this issue makes no sense. Should the Court conclude on rehearing that

jurors should be told the truth about an NGRI verdict, then the disqualification of Juror #338 was error.

III. The Mississippi roadblock violated the Fourth Amendment

Defense counsel succinctly captured the essence of the United States Supreme Court's reasoning in City of Indianapolis v. Edmond, 531 U.S. 32 (2000), when he said of the Mississippi roadblock in appellant's case, "So if this was legal, they're all legal." R. 6746, ll. 16-19. In Edmond, the Court addressed the potential danger of pretextual roadblocks, stating "[i]f this were the case, however, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they include a license or sobriety check." Id. at 46.

This Court erred in describing the bored officers' roadblock as "precisely the type of checkpoint suggested by the Supreme Court in Prouse and Edmond." Opinion at 38. Instead, this roadblock was precisely the type of pretextual excuse to seize motorists warned against by the Supreme Court in Edmond. Because "[t]hings were quiet" on the night of appellant's arrest, Deputy Johnson and Deputy Thompson spontaneously decided to set up a roadblock. The officers conducted this roadblock under the pretext of general safety on the roadway. However, once the officers executed the roadblock, its real purpose became evident: to generally prevent crime and to apprehend those who may have violated the law.

Respectfully, this Court misapprehended Delaware v. Prouse, 440 U.S. 648 (1979) and Edmond. In Prouse, after denouncing the use of spot checks, the Supreme Court suggested that a roadblock "with the purpose of verifying drivers' licenses and vehicle registrations would be permissible." Edmond, 531 U.S. at 38 (citing Prouse, 440 U.S. at 663). However, the Court did not authorize the state to conduct a roadblock for general crime prevention under the guise of a regulatory purpose. The general crime prevention roadblock designed in Edmond could not be

constitutionally defensible by its secondary purpose of keeping impaired motorists off the road and verifying licenses and registrations. Id. at 33. And Edmond cannot be read to permit the inverse: a roadblock with the purpose of verifying registrations and licenses does not thereafter permit officers to transform the roadblock into one which—in practice—seeks to detect ordinary criminal activity. In other words, law enforcement may not circumvent the dictates of the Fourth Amendment by using a constitutional purpose as a foundation for the initiation of a roadblock to then later pursue an unconstitutional purpose. A contrary conclusion would render any roadblock constitutional—eroding the protection afforded by the United States Constitution.

Even assuming the proffered primary purpose is accepted, it does not rise to the level of specificity required to survive constitutional scrutiny. In rejecting the general crime prevention roadblock in Edmond, the Supreme Court noted that the “high level of generality” posed constitutional concerns. Id. at 32. Specifically, allowing such a broad purpose to warrant a suspicionless seizure would inflate law enforcement’s ability to conduct such seizures for “any conceivable law enforcement purpose.” Id. The sheriff of Smith County, Mississippi testified that the roadblock in this case was a “safety checkpoint.” Safety is as broad of a category as crime prevention. Explaining the many different violations and regulatory requirements for which the officers checked to ensure the safety of citizens did not sanitize this purpose of its unconstitutionality—just as the government in Edmond could not explain what violations or requirements it checked for to ensure citizens adhered to the law.

In concluding that the state presented sufficient evidence to verify Smith County’s purported primary purpose, this Court found, “Four officers testified the checkpoint was intended to check for driver’s licenses, vehicle registrations, and proof of insurance. At no point did any witness suggest a contrary purpose.” Opinion at 38. However, the state’s expert witness, Molly

Miller, testified that the officers “could also be looking for impaired drivers” in addition to license checks. R. 6599, ll. 15-23; R. 6600, ll. 1-4. Miller also admitted that drug smugglers can be caught at roadblocks as well. R. 6599, ll. 4-9. Further, Deputy Johnson explained he would shine his flashlight inside the car “to make sure no safety issues [existed] and stuff like that.” R. 6652, ll. 6-14. This testimony illustrates that the proffered primary purpose of the roadblock was merely pretextual.

Moreover, respectfully, this Court overlooked a necessary step in evaluating the permissibility of this roadblock: balancing the interests at stake and the effectiveness of the program. See Brown v. Texas, 443 U.S. 47, 50–51 (1979) (“The constitutionality of a seizure turns upon “a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”); see also Edmond, 531 U.S. at 47 (“The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program.”). These factors were not even considered, let alone balanced. Supreme Court precedent illuminates public concerns sufficiently grave to warrant a roadblock. For example, in United States v. Martinez-Fuerte, in reviewing the constitutionality of checkpoints aimed at detecting illegal immigrants, the Court noted the national imperative to limit illegal immigration and the great need of law enforcement to execute these checkpoints to achieve that goal. 428 U.S. 543, 552 (1976). Additionally, in Michigan Dep’t of State Police v. Sitz, the Court looked, in part, to the “[t]he magnitude of the drunken driving problem [and] the States’ interest in eradicating it[]” to determine that the suspiciousness seizure was constitutional. 496 U.S. 444, 451 (1990).

The purported purpose in this case, even if accepted as sincere, pales in comparison to the unique needs posed in Sitz and Martinez-Fuerte. Although the state has an interest in ensuring

only safe motorists are on its roadways, the state failed to provide evidence establishing the need for this particular “safety checkpoint” to check for licenses, registrations, proof of insurance, and the use of car seats. Driving without a license was not a major problem in Smith County. The county sheriff described it as a “very minor” safety issue. R. 6634, ll. 5-14. An officer under the sheriff’s authority reiterated those statistics. R. 6678, ll. 2-22. He indicated that at most roadblocks, no tickets were issued. R. 6678, ll. 2-22. The record lacks any evidence establishing a particular or acute need for the state to conduct this roadblock. Indeed, a quiet night—not an imminent or grave concern—prompted the roadblock. This pretextual, unnecessary, and ineffective roadblock cannot serve as a basis upon which law enforcement may infringe on Americans’ privacy interests.

Martinez-Fuerte and Sitz also show that the efficacy of challenged roadblocks is constitutionally relevant. Not only did the roadblocks in those cases aim to address imminent or grave law enforcement concerns but they also yielded results to establish their efficacy. The record in both cases provided the Court with a “complete picture” of the effectiveness of each roadblock. 428 U.S. at 554; 496 U.S. at 455. And in Prouse, in reviewing a roadblock aimed at apprehending unlicensed drivers and unsafe vehicles, the Court “[o]bserved that no empirical evidence indicated that such stops would be an effective means of promoting roadway safety” and opined, “[i]t seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed.” 440 U.S. at 659–60. Likewise, the record is devoid of evidence suggesting this roadblock yielded a meaningful number of drivers without licenses, registration, proof of insurance, or required car seats. Instead, the roadblock was only effective in detecting general criminal activity.

The inquiry does not end after determining a constitutionally permissible purpose. But respectfully, that is where this Court ended its analysis.

The analysis set forth in Brown serves to ensure that “[a]n individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.” 443 U.S. at 50–51. In reaching its decision regarding the execution of the roadblock, this Court stated,

As in Sitz, the Smith County Sheriff’s Department had a policy requiring that all vehicles passing through checkpoints be stopped in a safe, structured manner. Officers did not have unbridled discretion as was the case in Prouse; instead, stops were brief and minimally intrusive.

Opinion at 38. Curtailing an officer’s discretion so as to render a roadblock constitutional is not sufficiently achieved by a roadblock that requires all passing vehicles to stop in a safe and structured manner alone. Rather, the Fourth Amendment commands that roadblocks are executed pursuant to a plan that limits the discretion of the officers conducting the stops. See Sitz, 496 U.S. 444; see also Martinez-Fuerte, 428 U.S. 543. Absent from the analysis is a consideration of any “plan” that limited the discretion of the officers conducting the stops. Rather, the roadblock was spontaneously initiated as a result of two officers’ boredom on a quiet evening. What is more, the officers executed the stop pursuant to a verbal policy solely requiring the presence of two officers and the receipt of verbal approval from their supervisor. This can be hardly described as a plan—let alone one that sufficiently curtails an officer’s otherwise unfettered discretion in the decision and mechanism by which to conduct a roadblock. This verbal policy with such minimal threshold requirements to conduct a roadblock does not provide constitutionally sufficient guidelines tailored to effectuate the roadblock’s purported purpose without undue discretion. Without such, nothing prevents officers from executing a roadblock, under the guise of a permissible purpose, for

alternative—unconstitutional—purposes. The roadblock here is indistinguishable from the suspicionless spot check condemned in Prouse.

Pursuant to the precedents of Edmond, Sitz, Martinez-Fuerte, Brown, and Prouse, appellant respectfully maintains that this roadblock violated his Fourth Amendment protection against unreasonable seizures. Americans should not be subject to random stops and demands to “show their papers.” Allowing this Mississippi roadblock to stand defeats the Fourth Amendment’s original purpose of putting an end to the hated “general warrant.” See Carpenter v. United States, ___ U.S. ___, 138 S. Ct. 2206, 2243, 201 L. Ed. 2d 507 (2018) (Thomas, J., dissenting and discussing the general warrant and the Founders’ intent). Accordingly, appellant respectfully requests rehearing.

IV. The Unquestionably Horrific Autopsy Photographs and This Court’s “Harmless Error” Analysis

This Court respectfully may have overlooked the application of State v. McClure, 342 S.C. 403, 409, 537 S.E.2d. 273, 275 (2000), as explained below, when conducting a harmless error analysis to a penalty stage error – here the autopsy photographs. This Court noted that “[d]uring the sentencing phase, the trial court admitted – over Jones’s objection – ten autopsy photographs (two per child). The issue before us is whether the probative value, if any, of the photographs was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE.” Opinion at 58.

This Court cited Kornahrens,¹ Torres², and Collins³, and held “the autopsy photographs in this case were of no probative value.” Opinion at 58 . “The photographs here do not depict the children’s bodies in substantially the same condition in which Jones left them. The photographs depict the children’s bodies in the advanced stages of decomposition occurring in the three days between the time Jones dumped the bodies to the time law enforcement discovered them. The bodies were so severely decomposed that with the exception of one photograph, neither strangulation nor ligature marks were visible to corroborate Dr. Ross’s testimony. The state does not claim Jones altered his children’s faces or limbs, yet several photographs showed extensive tissue loss appearing as though an animal had eaten their faces and limbs.” Opinion at 57.

The photographs were so horrific and sickening that the solicitor chose not to publish them in open Court because he feared the jury’s reaction to them since a juror earlier in the trial had burst into tears and was emotionally taken from the courtroom after viewing a much less prejudicial photograph. The solicitor admitted to this Court during oral argument that he could not remember ever having declined to publish photographs in open court after they were admitted over objection. The autopsy photographs in this case were truly unique given their prejudicial and passionate effect on the jury.

Further, this Court held that, even if it was assumed the photographs had some probative value, “because they purport to show Jones’s character through the method and manner in which he bagged and disposed of the bodies, we hold as a matter of law that under Rule 403, such probative value—even in its ‘much broader’ form as noted in Kornahrens—was substantially

¹ State v. Korahrens, 290 S.C. 281, 350 S.E.2d. 180 (1986)

² State v. Torres, 390 S.C. 618, 703 S.E.2d. 226 (2010).

³ State v. Collins, 409 S.C. 524, 763 S.E.2d. 22 (2014).

outweighed by the danger of undue prejudice to Jones. The photographs showed the children's bodies in a state of complete discoloration; they were engulfed in maggots and contorted beyond recognition. Some of the children's faces were missing, a number of their limbs had been eaten by animals, and one child's head had decomposed to skeletal remains." Opinion at 57.

Having concluded that the autopsy photographs were unquestionably horrific and had no probative value, and having concluded even if they had any probative value, they were nonetheless inadmissible under Rule 403 because their probative value was substantially outweighed by the danger of unfair prejudice to appellant, this Court concluded that the photographs were harmless because they "did not contribute to the jury's sentence of death." Opinion at 58.

In support of this holding, this Court cited Skipper v. South Carolina, 476 U.S. 1, 8 (1986), in which the Supreme Court rejected the state's argument that the exclusion of otherwise admissible evidence for the exclusive purpose of convincing the jury that he [Skipper] should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment was harmless error because it was cumulative to the testimony of Skipper and his former wife that Skipper's behavior in jail awaiting trial was satisfactory.

This Court also cited Chaffee v. State, 294 S.C. 88, 91, 362 S.E.2d. 875, 877 (1987), in which Chaffee and co-defendant Ferrell were prevented from offering expert testimony related to their adaptability in prison pursuant to Skipper v. South Carolina. This Court held that the error was not harmless because this Court could not say its exclusion did not affect the jury's decision to impose the death penalty.

Finally, this Court cited State v. Key, 256 S.C. 90, 93-94, 180 S.E.2d. 888, 890 (1971), where this Court held that the admission of evidence and argument by the prosecutor that the

defendant said he would not give a “plug nickel” for a witness’s life if the defendants were “turned loose” was error but not prejudicial error where there was conclusive proof of the defendant’s guilt of armed robbery.

This is a most unusual case where this Court found that the “horrific” autopsy photographs had no probative value. Further, even if it was assumed they had any probative value, it was substantially outweighed by the danger of unfair prejudice to appellant. Yet, this Court held the autopsy photographs were nonetheless harmless error. Most respectfully, this case is much more analogous to Skipper v. South Carolina and Chaffe v. State where the sentencing phase errors were found not to be harmless error than it is to State v. Key where the error was found to be harmless in that non-capital case.

More recently, this Court noted in State v. McClure, 342 S.C. 403, 409, 537 S.E.2d. 273, 275, that the consequences of an error during the sentencing phase of a capital trial are much more difficult to evaluate for harmless error because of the extremely broad discretion that is given to the sentencing jury. “A capital jury can recommend a life sentence for any reason or no reason at all.” State v. Atkins, 303 S.C. 214, 399 S.E.2d. 760 (1990); State v. Tyner, 273 S.C. 646, 258 S.E.2d. 559 (1979); State v. Hicks, 330 S.C. 207, 499 S.E.2d. 209 (1998).” Consequently, it respectfully cannot be stated with any confidence—much less beyond a reasonable doubt—that one juror would not have voted for a life sentence instead of death if these horrific autopsy photographs had not been admitted.

This Court correctly and in admirable detail described the horrific nature of the autopsy photographs the solicitor strategically chose not to publish in open court because he feared another emotional outburst by the jury in view of everyone. Pursuant to State v. McClure, this Court should respectfully reconsider its holding that these horrific autopsy photographs which this Court,

4-1, found had no probative value—and even if they did have probative value it was substantially outweighed by their unfair prejudice to appellant under Rule 403—was harmless error. Rehearing should be granted on this issue.

V. Dr. Flores’ Expert Testimony and This Court’s Harmless Error Analysis

Appellant also submits that this Court should reconsider its holding that Dr. Flores’ testimony was unfairly prejudicial to the state because appellant “obtained Dr. Kruse’s report before trial and could have secured a qualified individual to review the raw data before Dr. Kruse entered the fray in the eleventh hour.” Opinion at 43. Notably, defense counsel repeatedly objected to the neuropsychological testing based on grounds it was not relevant to an assessment of criminal responsibility nor responsive to any testing conducted by the defense. R. 6470, l. 23; R. 8258. However, Judge Griffith overruled the objection and ordered appellant must submit to the testing. R. 6469, l. 4 – 6470, l. 22. When appellant was transported for the testing a few weeks later, defense counsel was under the mistaken impression appellant was there merely to meet with Dr. Frierson. Consequently, the testing was conducted without the advice of counsel. R. 4903, ll. 10-23.

Notably, although there was considerable debate regarding whether Dr. Kruse was listed on the witness list that was provided to the jurors, ultimately, the judge agreed the jury was not aware that Dr. Kruse was a potential witness in the case. R. 180, l. 22 – 183, l. 2; R. 237, l. 21 – 238, l. 7; R. 5645, l. 9 – 5647, l. 17; Court’s Exhibit #63, R. 7628. Because the defense was of the reasonable belief that the state would not call Dr. Kruse as a witness given she was not on its witness list, it was unprepared to rebut her surprising testimony.

Further, and most significantly, Dr. Kruse did not diagnose appellant with malingering in her report. It was only after Dr. Dorney testified during the guilt phase that appellant was insane

that Dr. Dorney became aware there were allusions to malingering during the testimony of the state's experts. R. 5609, ll. 15-25. As a result, Dr. Dorney asked Dr. Flores to review the testing conducted by Dr. Kruse. R. 5609, l. 15 – 5610, l. 4. The defense informed the state about Dr. Flores' testimony as soon as it became aware of her. Consequently, the prejudice to the state was anything but unfair.

Appellant also requests this Court reconsider its holding that while it was error to exclude Dr. Flores' testimony, the error was harmless. This Court noted that appellant presented seven expert witnesses during the guilt phase to testify in support of his NGRI defense and that this testimony was incorporated into the sentencing phase as mitigation evidence. Additionally, appellant called Dr. Donna Schwartz Maddox as a mitigation witness during the sentencing phase. The Court concluded the error in excluding Dr. Flores' testimony was harmless because "each defense witness who gave an opinion as to whether Jones [appellant] was malingering stated quite unequivocally he was not." Opinion at 42 (emphasis in original).

In so holding, this Court fails to appreciate that the excluded evidence went to whether Dr. Kruse's testimony that appellant was malingering psychosis was based on sound science, *not* whether appellant was insane or mentally ill at the time he killed his children. According to Dr. Kruse, there were "research studies and articles" concerning the "subjectivity" of psychiatry. R. 4935, ll. 6-12. She alleged that "because of the subjectivity involved," the error rate in psychiatry "can be up to a rate of about 50 percent." R. 4935, ll. 9-13. She gloated that "one strength of [her] field" was its ability "to provide objective testing data to help support or not support diagnoses." R. 4935, ll. 14-16. Dr. Kruse also delved into the importance of the specific tests she used and how the tests provided impartial and objective data on which to base opinions. R. 4933, ll. 24-25. Not only were the tests "scientific," they were also "very objective." R. 4934, ll. 23-25.

Dr. Kruse conducted validity testing to determine if she had valid information based on appellant's self-report. R. 4926, ll. 12-24. The testing was to help her determine if appellant was "able" or "willing to give a straightforward account of symptoms and if those are consistent with known psychiatric populations." R. 4927, ll. 2-5. She claimed to be the *only* person who administered these tests or these types of tests to appellant, stating she was the "*only one* that has done any personality assessment or any testing of psychosis, any validity of how he's reporting symptoms, *any testing to rule out malingering, rule in malingering.*" R. 4927, ll. 11-19 (emphasis added).

In order for an error to be deemed harmless, the erroneously excluded evidence must be the equivalent of or cumulative to the evidence presented. See Fields v. Regional Medical Center Orangeburg, 363 S.C. 19, 31, 609 S.E.2d 506, 512 (2005) (discussing harmless error and equating cumulative with equivalent). Here, the excluded evidence was Dr. Flores' assessment of Dr. Kruse's testing and interpretations. No other witness provided the jurors with the information that Dr. Flores would have if the judge had not erroneously excluded her testimony. As this Court emphasized, other experts opined that appellant was not malingering, but *none* of those doctors had performed the "objective" and "scientific" testing to determine if appellant were malingering like Kruse. Moreover, none of those doctors were appointed by the court to conduct the evaluation, as was Dr. Kruse. Thus, Dr. Kruse's opinion appeared less biased and more impartial because she was considered a witness for the court, instead of a witness paid tens of thousands of dollars by the defense.

Dr. Kruse left the jury with the false impression that appellant faked his mental illness. The solicitor seized upon Dr. Kruse's "scientific" and "objective" testing first to argue that the jury should reject appellant's insanity defense, and second to argue the jury should discount

appellant's mitigation evidence in order to impose the death penalty. Presenting the testimony of Dr. Flores, which would have destroyed the "scientific" and "objective" basis of Dr. Kruse's belated opinion that appellant was malingering, was critical to enabling appellant to overcome the false stain left by Dr. Kruse's flawed testimony.

The solicitor's closing arguments demonstrated the exact harm caused to appellant by the exclusion of Dr. Flores' testimony. This Court often considers closing arguments in determining whether a defendant suffered harm from a trial error. See e.g., Rutland v. State, 415 S.C. 570, 578, 785 S.E.2d 350, 354 (2016) (stating "[a]ny question as to whether petitioner was prejudiced may be answered by looking to the solicitor's reliance on [the witness's unimpeached] trial testimony"). In his closing argument at the conclusion of the guilt phase, the solicitor reminded the jurors that Dr. Kruse was the *only person* to test appellant for psychosis and that her tests were "scientific" and "objective" in contrast to the subjective testimony from the defense's expensive hired guns. R. 4998, ll. 13-19 (emphasis added). The solicitor urged the jurors to reject Dr. Dorney's opinion that appellant was not guilty by reason of insanity because she failed to rely upon Dr. Kruse's "objective" and "scientific" testing. R. 5004, ll. 16-22. Then, in closing at the conclusion of the penalty phase, the solicitor encouraged the jurors to ignore mental illness as a mitigating circumstance because appellant was faking, as Dr. Kruse testified. R. 5910, ll. 17-25; R. 5912, ll. 10-13.

Perhaps the best judge of the impact Dr. Flores' testimony would have had on the case was the solicitor himself. He "strenuously" objected to Dr. Flores' testimony because it would build a record "geared at destroying [the] professional credibility and personal integrity of Dr. Kimberly Kruse." R. 5598, l. 24 – 5599, l. 2. According to the solicitor, Dr. Flores' testimony was "geared as an attack on Dr. Kruse." R. 5483, ll. 21-22. The solicitor acknowledged that Dr. Flores would

“pick apart Dr. Kruse.” R. 5599, ll. 21-24. Dr. Flores’ testimony would “professionally and personally destroy” Dr. Kruse. R. 5599, l. 25. The devastation would be so great that Dr. Kruse would “never step[] into a criminal courtroom again.” R. 5600, ll. 1-3. In conclusion, the exclusion of Dr. Flores was not harmless beyond a reasonable doubt because she would have destroyed the “scientific” and “objective” basis of Dr. Kruse’s belated opinion that appellant was malingering mental illness, a critical issue during the penalty phase. Respectfully, this Court should grant rehearing and hold the error in excluding Dr. Flores’ testimony was not harmless.

VI. The videotaped testimony of Jones’s mother, Cynthia Turner, in which she expressed her love and concern for her son was uniquely mitigating evidence that should not have been excluded during the penalty phase of the trial.

As this Court will recall, the defense was forced to videotape Cynthia Turner’s testimony because the mental health authorities in New York where Turner was institutionalized refused to let her travel to Lexington, South Carolina to testify in person at her son’s trial. Casey Secor was present for the defense in New York. The state declined to send an assistant solicitor to cross-examine Turner even though three solicitors (Solicitor Richard Hubbard, Deputy Solicitor Shawn Graham, and Assistant Solicitor Susanne Mayes) were directly involved in trying this case, and many assistant solicitors in the Eleventh Circuit Solicitors Office could have easily gone to New York to participate just as defense counsel Secor did in this case. Consequently, part of the judge’s reasoning that “the video was done late, it was done during jury selection” was respectfully irrelevant since the defense had no control over the mental health officials in New York state not allowing Turner to travel to South Carolina to testify live. Opinion at 52.

This Court affirmed the trial judge’s ruling that “[T]urner’s testimony had no probative value and risked confusing the issues to be decided—Jones’s mental state—with the issue that was demonstrated by the testimony—Turner’s own mental state.”

However, this Court may have overlooked the fact that a mother’s love and concern for her child—who is on trial for his life—being conveyed to his sentencing jury was uniquely mitigating. Every person has in common that they only have one biological mother. Here, the videotaped testimony conveyed to the sentencing jury that appellant’s mother loved “Timmy,” and she said “he’s a nice kid. But I don’t understand how he did that about his kids...” Tape at 24:00-24:20.

Further, her testimony concluded as follows:

Interviewer: So, you know that your son, Timmy, is charged with the murder of his five children, your grandchildren?

Cynthia: Right, mhm.

Interviewer: How does that make you feel?

Cynthia: Sad. Yeah, that’s bad to murder all five of his children. What were they? Boys? Girls?

Interviewer: Boys and girls.

Cynthia: What?

Interviewer: Two girls, three boys. Do we have your permission to show this video to the jury during Timmy’s trial?

Cynthia: Sure, sure. Is Timmy gonna see it?

Interviewer: Yes.

Cynthia: Oh okay. Yeah.

Interviewer: Is there anything else you want to say?

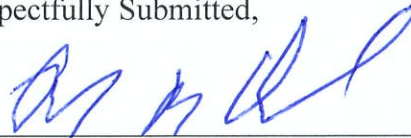
Cynthia: No.

Tape at 27:51.

Appellant respectfully submits this Court may have overlooked the fact that the jury must not be precluded from considering mitigating evidence, and evidence that appellant's mother still loved him and was concerned for his life did reflect "on an aspect of appellant's character" the jury had a right to consider. See Lockett v. Ohio, 438 U.S. 586, 604 (1978); Eddings v. Oklahoma, 455 U.S. 104, 112; Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Skipper v. South Carolina, 476 U.S. 1, 4 (1986).

The fact that the state did not challenge "[w]hatsoever that she [Turner] has severe mental challenges, issues [and] is institutionalized," was not the issue before the trial court. Opinion at 52. Further, the judge's finding that the videotaped testimony was inflammatory and had no probative value was erroneous, and this Court respectfully should reconsider its decision affirming that ruling which excluded this uniquely mitigating evidence.

Respectfully Submitted,



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This 13th day of April, 2023.