

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

RECEIVED

JUL 02 2013

S.C. Supreme Court

STEPHEN CHRISTOPHER STANKO,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

ROBERT M. DUDEK
Attorney at Law

Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

QUESTIONS PRESENTED

1.

Was Petitioner denied his Sixth Amendment right to an impartial jury where the Court refused to excuse a death prone juror who also knew Petitioner had killed two people, including the decedent herein, and received the death penalty for the prior murder since the juror's knowledge Petitioner was under a death sentence likely infected the entire jury, and seriously jeopardized its sense of responsibility?

2.

Would executing Petitioner, a man whom experts testified was brain damaged, mentally ill or insane violate the Eighth Amendment to the United States Constitution, since the evolving standards of decency should not allow a defendant with significant diminished capacity to be executed?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS	ii
APPENDIX INDEX.....	iii
TABLE OF AUTHORITIES.....	iv
CITATION TO OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
Procedural History.....	
WHY THE WRIT SHOULD BE GRANTED	
1. Petitioner was denied his Sixth Amendment right to an impartial jury where the Court refused to excuse a death prone juror who also knew Petitioner had killed two people and received the death penalty for the prior murder since the juror's knowledge Petitioner was under a death sentence likely infected the entire jury, and seriously jeopardized its sense of responsibility.....	3
Relevant Facts.....	3
The juror's prior knowledge disqualified her.....	7
2. Executing Petitioner, a man whom experts testified was brain damaged, mentally ill or insane would violate the Eighth Amendment to the United States Constitution, since the evolving standards of decency should not allow a defendant with significant diminished capacity to be executed.....	12
Discussion.....	19
Other jurisdictions	22
CONCLUSION	

APPENDIX

1. OPINION OF SOUTH CAROLINA SUPREME COURT A1
2. ORDER DENYING REHEARING A30

TABLE OF AUTHORITIES

CASES

<u>Adams v. Texas</u> , 448 U.S. 38 (1980)	10
<u>Atkins v. Virginia</u> , 536 U.S. 304 (2002)	12, 19, 21, 24
<u>Cooper v. State</u> , 739 So.2d 82 (Fla 1999).....	24
<u>Corcoran v. State</u> , 774 N.E.2d 495 (Ind. 2002)	23
<u>Crook v. State</u> , 908 So.2d 350 (Fla. 2005).....	23, 24
<u>Enmund v. Florida</u> , 458 U.S. 782 (1982).....	19
<u>Green v. State</u> , 975 So.2d 1081 (Fla. 2008).....	23
<u>Gregg v. Georgia</u> , 428 U.S. 153 (1976)	22
<u>Haynes v. State</u> , 739 P.2d 497 (1987).....	24
<u>Jurek v. Texas</u> , 428 U.S. 262 (1976).....	11
<u>Larkins v. State</u> , 739 So.2d 90 (Fla. 1999)	24
<u>Lockett v. Ohio</u> 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)	7
<u>Mills v. Maryland</u> , 486 U.S. 367 (1988)	11
<u>Morgan v. Illinois</u> , 504 U.S. 719 (1992)	7, 10, 11
<u>Offord v. State</u> , 959 So.2d 187 (Fla. 2007).....	23, 24
<u>Ohio v. Scott</u> , 92 Ohio St.3d 1, 748 N.E.2d 11 (2001).....	24
<u>People v. Davis</u> , 97 Ill. 2d 1, 452 N.E.2d 525, 72 Ill. Dec. 272 (1983).....	8
<u>People v. Walker</u> , 91 Ill.2d 502, 64 Ill.Dec. 531, 440 N.E.2d 83 (1982)	7, 8
<u>Roper v. Simmons</u> , 543 U.S. 551 (2005)	12, 20, 24
<u>Rosemond v. Catoe</u> , 383 S.C. 320, 680 S.E.2d 5 (2009).....	22
<u>Ross v. Oklahoma</u> , 487 U.S. 81 (1988).....	10

<u>State v. Atkins</u> , 303 S.C. 214, 399 S.E.2d 760 (1990).....	7
<u>State v. Bell</u> , 302 S.C. 18, 393 S.E.2d 364 (1990).....	7
<u>State v. Bennett</u> , 328 S.C. 251, 493 S.E.2d. 845 (1997).....	10
<u>State v. Nelson</u> , 173 N.J. 417, 803 A.2d 1 (2002)	23
<u>State v. Stephen Christopher Stanko</u> , 402 S.C. 252, 741 S.E.2d 708 (2013)	1
<u>Wainwright v. Witt</u> , 469 U.S. 412 (1985)	10, 11
<u>West v. State of Mississippi</u> , 463 S.E.2d 1048 (1985)	9
<u>Witherspoon v. Illinois</u> , 391 U.S. 510 (1968).....	10, 11
<u>Woodson v. North Carolina</u> , 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).....	7

STATUTES

S.C. Code Ann. § 16-3-20(C)(b)(2)(6) & (7).....	12
---	----

OTHER AUTHORITIES

Ill. Rev. Stat. 1979, ch. 38, par 9-1(c)	7
<u>The Supreme Court’s Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier</u> , 50 B.C.L. Rev. 785 (May 2009).....	20

CONSTITUTIONAL PROVISIONS

United States Constitution 28 U.S.C §1257(a).....	2
United States Constitutional Amendment VI	2, 10, 11
United States Constitutional Amendment VIII	passim
United States Constitutional Amendment XIV	2, 10, 11

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

STEPHEN CHRISTOPHER STANKO,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

Counsel for Stephen Christopher Stanko petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court affirming his conviction for murder, and his death sentence.

CITATION TO OPINION BELOW

The South Carolina Supreme Court's opinion is reported as State v. Stephen Christopher Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). The opinion is reproduced in the appendix at pages App.1–29. Petitioner filed for rehearing on March 14, 2013. The South Carolina Supreme Court denied the petition for rehearing on April 3, 2013. The order denying rehearing is reproduced in the appendix at pages App. 30-31.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C §1257(a), since Petitioner is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

This case also involves the Eighth Amendment to the United States Constitution, which provides in pertinent part, "Excessive bails shall not be required . . . nor cruel and unusual punishments inflicted."

In addition, this case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, "[N]or shall any state deprive any person of life, liberty . . . without due process of law"

STATEMENT OF THE CASE

Procedural history

Petitioner was indicted by the Horry County grand jury for the murder and armed robbery of Henry Turner. R. 3506. Petitioner's case came to trial on November 14, 2009 before the Honorable Steven H. John, and a jury. R. 1. Petitioner had already been found guilty of the murder of Deborah Ling in neighboring Georgetown County and been sentenced to death. Petitioner's motion for a change of venue was denied although many potential jurors were aware of these crimes. The defense used all ten of its peremptory challenges. The motion to disqualify death prone Juror #480 for cause was denied. Juror #480 strongly supported the death penalty if an

aggravating circumstance was proven, and she was well aware Petitioner had already been sentenced to death for murdering Deborah Ling.

The jury found Petitioner guilty of murder and armed robbery. R. 2482 ll. 2-25. The defense complained that Juror #480 likely infected the entire jury panel. After a twenty-four hour waiting period, the sentencing hearing commenced. The jury recommended a sentence of death, and that sentence was imposed by the trial judge. R. 2896 ll. 14-23; R. 2905 l. 12 – 2906 l. 19.

WHY CERTIORARI SHOULD BE GRANTED

1.

Petitioner was denied his Sixth Amendment right to an impartial jury where the Court refused to excuse a death prone juror who also knew Petitioner had killed two people and received the death penalty for the prior murder since the juror's knowledge Petitioner was under a death sentence likely infected the entire jury, and seriously jeopardized its sense of responsibility

Relevant facts

Defense counsel had used all ten of his peremptory challenges and, therefore, could not keep Juror # 480 off of the jury. During jury qualification, defense counsel unsuccessfully sought to disqualify for cause ten prospective jurors because they had knowledge of Petitioner's prior murder trial and/or this present case. He eventually struck the first nine during jury selection. These ten prospective jurors were

612; R. 30, l. 4 – R, l. 10, # 281 R. 54, l. 24 – 79, l. 19, # 446 R. 144, l. 11 – 164, l. 25, # 67, R. 229, l. 23 – 246, l. 8, # 298 R. 296, l. 22 – 316, l. 4, # 466 R. 316, l. 11 – 330, l. 13, # 330 R. 454, l. 6 – 480, l. 23, # 510 R. 494, l. 9 – 511, l. 24, # 103 R. 558, l. 4 – 574, l. 3, and # 236 R. 624, l. 24 – 646, l. 13.

Juror # 612 explained during voir dire that she read about Stanko in newspaper reports and on the internet and learned that “he went to trial for the murder of the girlfriend, and that he was convicted and waiting for a date [to be executed].” R. 47, l. 24 – 48, l. 8. She candidly offered: “It’s difficult not to have an opinion when somebody has been convicted once” and that when someone is “waiting for the date” it “kind of seems redundant” to spend government funds to try them for a different charge. R. 33, l. 20 – 35, l. 5.

When Juror # 281 was questioned during voir dire regarding her knowledge of Stanko she stated, “I know Mr. Stanko took Henry Turner’s life, and then went down to Georgetown, I think to a girlfriend’s house, and took either the girlfriend or the daughter’s life as well, and there was some other foul play involved.” R. 59, ll. 4-17. This prospective juror also explained that she worked for five years with victim Henry Turner’s son, Roger, at Dick’s Pawn Shop. R. 60, l. 22 – 61, l. 16. When defense counsel questioned her she stated that she knows “he’s already been tried and convicted,” but she could not recall the sentence Stanko received. R. 71, ll. 11-25.

Juror # 446 had heard about Stanko’s case on T.V. and read about it in the newspaper and learned “that he killed his girlfriend and he raped her daughter, and he killed Mr. Turner.” She did not know anything “more particular than that.” R. 150, ll. 14-24.

Juror # 67 admitted that his knowledge of Stanko’s conviction for the other crime had led him to believe that Stanko was guilty of the current charges as well. R. 235, ll. 5-22. After further discussion with the court, the prospective juror stated that he could put this opinion aside and decide the case solely on information received in the courtroom. R. 236, ll. 2-7. When asked by defense counsel to elaborate on his knowledge of Stanko, Juror # 67 explained that he knew “that he was charged and found guilty of . . . [the] murder of his girlfriend” and that the sentence Stanko received “was the death penalty.” R. 241, ll. 3-14.

Prospective Juror # 298 remembered the headlines in the news regarding Stanko's previous case and knew that Stanko was charged with "the murder of his girlfriend, I guess, and the rape of somebody." R. 301, l. 22 – 302, l. 24.

Juror # 466 likewise had previous knowledge of Stanko. She stated, "I knew that there was – let me recall – a death of a woman, and assault on a juvenile, and possibility a subsequent death of another individual." R. 320, l. 17 – 321, l. 2.

When questioned by the court, Juror # 330 explained, "I remember the Defendant being accused of taking the lives of two individuals, and I believe he had already been tried for one of those, and that she was a librarian, I believe." R. 458, ll. 1-17. When prodded further by defense counsel, this prospective juror admitted that she knew Stanko "was found guilty" in the first murder trial and that "I believe it was death," referring to the sentence he received. R. 468, ll. 2-16.

Prospective Juror # 510 remembered hearing about Stanko. She stated, "I know there was another trial . . . I don't know a lot of the facts about it though." When questioned by the court if she remembered the result of that trial, the juror responded, "I think they imposed the death penalty." R. 500, ll. 3-16.

Prospective Juror # 103 also admitted that she had heard about Stanko's previous case. When asked by the court what she remembered, she testified, "Well, that he was convicted for the one in Georgetown, and that, you know, they thought that he killed a man in Horry County." She remembered the sentence Stanko received in the Georgetown trial: "Death." R. 562, l. 22 – 563, l. 9.

Juror # 480 is the subject of this argument. Petitioner had exhausted peremptory strikes when she was presented. She remembered that Petitioner "had murdered his girlfriend, and left the

daughter for dead.” He “then came into Conway (in Horry County – the instant case) and murdered a man in Conway.” R. 630, ll. 12-16. She knew Petitioner in the former matter, had been sentenced to death. R. 635, ll. 14-20.

Juror #480 would be predisposed to vote for the death penalty as opposed to life imprisonment if the State presented evidence of an aggravating circumstance. She would do so in every case. After this, the trial court was able to get the juror to say she could “consider” life or the death penalty. R. 639, l. 18 – 681, l. 23.

Defense counsel argued that the juror was not qualified because of her prior knowledge of Petitioner, his death sentence, and her position on imposing the death penalty. The trial court found her qualified. R. 644, l. 7 – 646, l. 13.

Juror # 480 was seated because counsel had used all ten of his strikes by then.¹ R. 1296, l. 18 – 1315, l. 11. Before Juror # 480 was seated defense counsel noted on the record that he had exhausted his strikes. R. 1313, ll. 16-21. The jury was empanelled, and withdrawn from the courtroom. Defense counsel renewed his objections to the jurors. R. 1322, l. 20 – 1324, l. 10.

After a change of venue motion was heard and denied, defense counsel put on the record that if he had not been out of strikes, he would have used a peremptory strike to excuse Juror # 480. He said she had prior knowledge of the case and she knew of Petitioner’s death sentence. R. 1386, l. 6 – 1387, l. 15. Prior knowledge that Petitioner was under a death sentence would jeopardize the juror’s sense of responsibility. R. 1388, ll. 7-24. In addition, knowledge that another jury

¹ Juror # 236 was also struck before Juror # 480 to complete defense counsel’s ten strikes. R. 1300, ll. 3-15. Juror #236 had heard Petitioner’s name and knew his name was connected to a murder. R. 1413, l. 23 – 1414, l. 12. The juror also stated that Solicitor Hembree, who prosecuted the case went to the same church, and her husband was in Bible study with him. In addition, Juror #236’s son had been murdered and she acknowledged it impacted her daily. R. 1408, l. 25 – 1410, l. 5.

sentenced Petitioner to death and of the prior charges put Petitioner's character into issue. R. 1388, l. 25 – 1389, l. 20. There was no presumption of innocence in Petitioner's case because he had an imposed death sentence. R. 1412, l. 22 – 1413, l. 20.

The juror's prior knowledge disqualified her

The South Carolina Supreme Court because it had held in State v. Atkins, 303 S.C. 214, 222, 399 S.E.2d 760, 764-765 (1990) and State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), that the trial judge could seat a juror who know of the defendant's prior murder conviction and death sentence. Petitioner here argued on appeal that after Morgan v. Illinois, 504 U.S. 719 (1992) such a practice can no longer be permitted. "It was now apparent following Morgan that Petitioner's right to an impartial jury included the right to identify and have removed death prone jurors such as Juror # 480." Final Brief at 39. The opinion of the South Carolina Supreme Court does not mention Morgan. App. 13-19.

The Illinois Supreme Court sees the Constitutional dilemma much differently. People v. Walker, 91 Ill.2d 502, 517, 64 Ill.Dec. 531, 440 N.E.2d 83 (1982), dealt with the issue of the jury's knowledge of a prior death sentence as follows:

The State argues that evidence of defendant's prior death sentence was properly before the jury since, in a capital case, the focus should be on both the character and record of the accused. (Lockett v. Ohio 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Ill. Rev. Stat. 1979, ch. 38, par 9-1(c).) This argument ignores the significant fact that the evidence in question was introduced during the first phase of the sentencing hearing. At this time the question for the jury to determine is whether, on the basis of a statutory aggravating factory, defendant is eligible to receive the death sentence; not whether, in light of his character or record, he should receive this penalty. That defendant received the death sentence for a prior murder has absolutely no relevance to the issue of whether he is eligible to receive that penalty for the instant offense.

More importantly, as noted by defendant, introduction of this evidence may well have improperly influenced the jury's decision in two respects. In determining his eligibility for the death penalty, the jury was aware that another jury had previously resolved the identical issue adversely to defendant. If a juror was uncertain as to whether defendant was qualified for the death sentence, the knowledge that 12 other people determined he was could have swayed the juror's verdict in favor of death.

Further, the jury's awareness of defendant's prior death sentence would diminish its sense of responsibility and mitigate the serious consequences of its decision. Assuming that defendant was already going to be executed, the jurors may consider their own decision considerably less significant than they otherwise would. In a capital case, a "high standard of procedural accuracy" is required in determining whether or not [the death] penalty will be imposed."

People v. Walker, 91 Ill.2d 502, 517, 64 Ill.Dec. 531, 440 N.E.2d 83 (1982).

The possibility that the jury may have found defendant eligible for this penalty on the basis of an irrelevant and prejudicial non-statutory aggravating factor should not be tolerated. People v. Davis, 97 Ill. 2d 1, 26-27, 452 N.E.2d 525, 537, 72 Ill. Dec. 272, 284 (1983).

The South Carolina Supreme Court ignored Petitioner's reliance on People v. Walker, 91 Ill.2d 502, 517, 64 Ill.Dec. 531, 440 N.E.2d 83 (1982), and its attempt to distinguish People v. Davis, 97 Ill. 2d 1, 26-27, 452 N.E.2d 525, 537, 72 Ill. Dec. 272, 284 (1983) chose to ignore the applicable concept of the lessened sense of responsibility that applied with equal force here::

Petitioner relies on People v. Davis, 452 N.E.2d 525 (Ill. 1983), in support of his argument. However, Davis is inapplicable. In that case, an Illinois jury found Davis guilty of murder. Id. at 527. In a separate, bifurcated sentencing hearing, the jury unanimously determined that the necessary aggravating factors existed, and that there were no mitigating circumstances sufficient to preclude imposition of the death penalty. Id. Davis argued that the trial court erred in allowing the prosecution to inform the jury that he had received the death penalty for an unrelated murder. Id. at 536. To establish the aggravating factor that defendant had murdered two or more individuals, the State introduced certified copies of Davis's prior murder convictions. Id.

The Illinois Supreme Court reversed Davis's conviction. The court found that introduction of this evidence may have improperly influenced the jury in two respects. Id. at 537. First, if a juror had any uncertainty as to whether Davis qualified for the death sentence, the knowledge that twelve other people previously determined that he did could have swayed that decision. Id. Second, the jury's awareness of Davis's prior death sentence could diminish its sense of responsibility and mitigate the serious consequences of its decision. Id. Put another way, the jurors may have considered their own decision much less significant than they otherwise would. Id.

The facts of the instant case are markedly different from those of Davis. The State did not present evidence of Petitioner's prior death penalty conviction to the jury. Although the juror in this case admitted that she had prior knowledge of the conviction, the court established that Juror #480 could place that prior knowledge aside and decide the case based solely on the evidence presented at trial.

App. 15.

Although the South Carolina Supreme Court acknowledged Petitioner's submission that there was not any reason to think the other jurors were not infected or tainted by Juror #480's knowledge of Petitioner's prior death sentence it chose not to address it. App. 15. In West v. State of Mississippi, 463 S.E.2d 1048, 1052-1053 (1985) the state supreme court held that it was reversible error for the solicitor to bring up during the guilt phase of the defendant's trial evidence of other murders which were not related to the murder for which the defendant was on trial. If the solicitor in the present case brought up evidence of Petitioner's prior crimes and death sentence or during the guilt phase of this trial, it would have been grounds for a mistrial. There is no difference in seating a juror who knows this information from the outset. To believe the juror in this case did not convey this information to the other jurors, especially when she was not instructed otherwise, denies the frailty of human nature.

The prejudice of the juror's prior knowledge of Petitioner's other case and this case was again raised by defense counsel after the jury returned their guilty verdict. He noted the jury only

deliberated for thirty (30) minutes and *that Juror #480 probably told the eleven other jurors of Petitioner's death sentence in the other case.* R. 2487, l. 17 – 2488, l. 11. The trial court never instructed the juror not to tell the other jurors of Petitioner's prior death sentence. And these jurors were never qualified in respect to whether they could set aside knowledge of Petitioner's death sentence.

Juror # 480's knowledge of Petitioner's character evidence and prior bad acts along with his sentence of death was compounded by her willingness to sentence a defendant to death in every instance of an aggravating circumstance being presented. Due process under the Fourteenth Amendment and the Sixth Amendment to the United States Constitution demands that a defendant be given a fair trial by a panel of impartial, indifferent jurors. Witherspoon v. Illinois, 391 U.S. 510 (1968); Adams v. Texas, 448 U.S. 38 (1980); Wainwright v. Witt, 469 U.S. 412 (1985); Ross v. Oklahoma, 487 U.S. 81 (1988). It only takes one juror who believes a death sentence should be imposed in every instance to invalidate a death sentence. Ross v. Oklahoma, *supra*.

The juror's unequivocal response that she would vote for death in every case when an aggravating circumstance was coupled with murder disqualified her. In such an instance, the prospective juror may be challenged for cause. Morgan v. Illinois, 504 U.S. 719 (1992); State v. Bennett, 328 S.C. 251, 493 S.E.2d. 845 (1997).

“Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is sufficient to preclude imposition of the death sentence” Morgan v. Illinois, 504 U.S. at 738, 112 S.Ct. at 2234.

Jurek v. Texas, 428 U.S. 262, 271 (1976); Mills v. Maryland, 486 U.S. 367 (1988).

In Witherspoon v. Illinois, 391 U.S. 510 (1968) this Court held that prospective jurors

could not be excused from jury service if they were opposed to the death penalty unless those jurors make it “unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision to the defendant’s guilt.” 391 U.S. at 522-23 n. 21 (emphasis in original). Later, in Wainwright v. Witt, 469 U.S. 412 (1985) this Court held that the test for excluding a prospective juror is whether that juror’s attitude concerning capital punishment would “substantially impair” his or her ability to render a fair and impartial verdict.

In the present case, Juror # 480 was unequivocal in stating she would impose death in every instance when an aggravating circumstance was present. The fact that the trial judge got her to say she would consider either a life sentence or death sentence does not mean she would impose a life sentence. Her ability to render a fair and impartial verdict was substantially impaired. She should have been excluded as a juror based upon her knowledge of applicant’s prior crimes and sentence of death and her views in favor of the death penalty. Seating this juror called into question the reliability of a sentence of death under the Sixth and Eighth Amendment to the United States Constitution and the due process clause of the Fourteenth Amendment.

This Court should grant certiorari and Petitioner’s death sentence must be vacated.

Executing Petitioner, a man whom experts testified was brain damaged, mentally ill or insane would violate the Eighth Amendment to the United States Constitution, since the evolving standards of decency should not allow a defendant with significant diminished capacity to be executed.

Introduction

Mental illness has long been statutorily recognized as a mitigating circumstance in South Carolina, just as mental retardation was prior to Atkins v. Virginia, 536 U.S. 304 (2002). See S.C. Code §16-3-20(C)(b)(2)(6) & (7). App. 34-35. Likewise, the youth of the offender was similarly a statutory mitigating circumstance. See S.C. Code §16-3-20(C)(b) (7). App. 34-35.

Mental illness or brain damage that causes a defendant to be unable to exercise judgment and control his impulses would surely also be a non-statutory mitigating circumstance. However, just as the mentally retarded and minors who commit murder can no longer be executed under the Eighth Amendment's "evolving standards of decency," Petitioner argued to the South Carolina Supreme Court that the same conclusion should be reached for a brain damaged defendant such as Petitioner whose brain damage or brain defects severely lessened his ability to control his impulses. Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, *supra*. Final brief at 57-64..

Trial facts

At the October 8, 2009 pre-trial hearing defense counsel moved to declare S.C. Code §16-3-20 – the death penalty statute -- unconstitutional as it applied to Petitioner who had structural and functional brain defects. App. 32. "We've got experts in this case both who will testify one as to the structure and one as to the function. It's been measured scientifically." R. 3082, ll. 7-19. Defense counsel told the judge that the defense would offer scientific evidence comparing

Petitioner's brain to:

[P]eople with good mental health, a big database which has been put together to show . . . the healthy brain . . . the mentally healthy individual should look like in terms of structure and how it should function under certain situations. What this case is going to show is that Mr. Stanko has this condition of hypofrontality. Its not something he chooses to have. Its something that he just has. We can speculate a little bit about how it got there and what causes it, and there will be evidence about that, but the fact of the matter is its something that exists in this case, again just like a missing limb might be existing from someone born with an obvious physical defect. We can see that. We are learning how to see those types of defects when they exist inside the brain, and that's what we've got in this case.

R. 3082, l. 16- 60, l. 11.

Defense counsel noted that the current status of the law was that Petitioner could be executed notwithstanding his brain defects. Counsel reminded the judge that in the United States we no longer execute the mentally retarded or minors: "We don't execute them because we know through maybe more obvious observable evidence that there's a problem with these people; their brains aren't working properly, and so we're going to cut them some slack and we, as an evolving society, we don't execute these people, because the Eighth Amendment would protect them. We are better than that." R. 3083, ll. 12-23.

Defense counsel argued that, when it came to a bar on the death penalty, that Petitioner's brain defects should not be treated any differently than mental retardation or young people whose brains had not yet fully developed: "If someone's brain is not functioning properly because of their young age or because of mental retardation, then it's a proper thing that we do not execute, my argument is that in this case the same rationale should apply. We shouldn't execute people who have brain defects and that's what we have in this case..." R. 3084, ll. 4-24.

Solicitor Hembree disagreed: "This is not a condition that has been recognized by our Supreme Court like mental retardation or like that of a juvenile." The solicitor said that if there was evidence Petitioner had the requisite brain defects "the appropriate place and time for that issue to be argued and determined would be at the appellate level and we'd request that this issue—I mean excuse me, this motion be denied at this time." R. 3086, l. 5- 3087, l. 4. The judge denied the motion. R. 3087, ll. 5-23.

The defense presented expert testimony that Petitioner's crimes, the murder of his girlfriend, and then shortly thereafter his friend, Henry Turner, were done without any foresight, caution, or thinking of the consequences. For example, Petitioner took his girlfriend's (the first murder victim's) credit card to an ATM where he knew he would be photographed. Similarly, Petitioner went to church with a woman in Augusta, Georgia a couple of days after the (Henry Turner) murder where the church service was televised. Any rational person would have known he was the subject of a giant manhunt and he would have been taking precautions not to be apprehended. R. 1845 l. 1 - 1871 l. 25.

Psychiatrist, Dr. Thomas Sachy testified, in camera, as the defense laid the foundation for its insanity defense that Petitioner did not know legal and moral right from wrong at the time he committed the crimes. R. 1898, l. 1- 1902, l. 25. Dr. Sachy is a neuropsychologist in private practice in Georgia. R. 2176, ll. 20-21. After completing his undergraduate degree at the University of Calgary, Sachy earned a Master of Science in Biology from Georgia State University and a medical degree from the Medical College of Georgia in Augusta. R. 2176, l. 24 – 2177 l. 4. Sachy completed a Psychiatry residency and a Behavioral Neurology Fellowship at the Medical University of South Carolina. R. 2177, ll. 8-11. He then completed a Fellowship in Forensic Psychiatry at Emory University. R. 2177, ll. 11-12

Following Dr. Sachy's in camera testimony defense counsel asked the judge to conclude the defense had made out a *prima facie* showing that Petitioner was insane. The trial judge ruled Petitioner could pursue his insanity defense assuming Dr. Sachy's testimony was consistent before the jury, which it was. R. 1909 l. 1- 1910, l. 4.

Petitioner presented an abundance of evidence showing Petitioner had an abnormal brain, particularly in the frontal lobes which control a person's judgment, his impulses, and his ability to feel empathy for others. Dr. Bernard Albiniak had a Master's of Science in Physiological and Developmental Psychology. R. 1913, ll. 3-4. He was a professor of psychology at Coastal Carolina University, and he specialized in physiological and developmental psychology. Dr. Albiniak testified that physiological psychology was a study of relating "brain function and brain structure to human behavior." R. 1912 l. 12- 1913 l. 9.

Dr. Albiniak attributed Petitioner's brain problems to several sources. One was that his mother had a complicated pregnancy when Petitioner was born in Guantanamo Bay, Cuba. The physicians were concerned about the reduced oxygen supply to Petitioner's brain during "the birthing process, and feared for his survival, the way I read the record." Dr. Albiniak also testified:

The second incident occurred when he was about sixteen years old. He got hit in the back of the head with a beer bottle, the rear of the head, and the bad part about that is, the brain floats in the skull. It's not solid. It floats in your skull. If you get hit in the rear of the head it drives the brain forward, and it hits his frontal bone, and that would mean the damage won't necessarily be at the rear—the skull will be—but the damage will be on the frontal lobes of the brain, when it drives forward, and he lost consciousness during that episode, which is never a good thing.

R. 1951 l. 10- 1952 l. 1

Dr. Albiniak explained that Petitioner's abnormal brain in the frontal lobes could not repair

itself: "Its simply lost, and that's lost forever." R. 1943 ll. 13-24. Where the frontal lobe was missing tissue "there is some loss of function in the frontal lobes, and primarily impulse control, decision-making, those important functions..." Dr. Albinia testified that if there was a real or perceived provocation: "[T]his individual is more likely to act out than you or I would be." R. 1943 l. 23- 1944, l. 1. Dr. Albinia's findings were based on P.E.T. scan done by Dr. Joseph Chon-Sang Wu, who would later testify as a defense witness. R. 1944 ll. 3-6; R. 1954 l. 21- 1956 l. 13.

Brent Turvey, an expert in crime scene analysis and reconstruction testified that the decedent's girlfriend received a telephone call from the decedent shortly after Petitioner arrived telling her Petitioner was there, and Petitioner was telling him about his allegedly dead father. They talked about it all night. R. 1860, 21 – 1861, l. 4.

Turvey opined that the decedent was an alcoholic, and a photograph of the crime scene, his house, showed a Yuengling beer on the table along with two cigarette butts in an ashtray. R. 1589, ll. 2-23; R. 1860, ll. 13-16. The decedent's son had already seen the news about Petitioner and the murder of his girlfriend on the 11:00 news. R. 1534, l. 9 – 1535, l. 23. Dr. Albinia testified "all kinds of things" could have been perceived as a threat to Petitioner when he shot the decedent. R. 1955, l. 5 – 1957, l. 2. Dr. Albinia told the solicitor on recross-examination that it was "unlikely, but its possible" that the "stimulus" that caused Petitioner to shoot the decedent may not have been the decedent himself. R. 1956, l. 24 – 1957, l. 2.

Dr. Ruben Gur is a psychiatrist with secondary appointments in Neurology and in Radiology. He also worked at the Philadelphia V.A. Hospital in the Behavioral Services section. I direct the Brain Behavior laboratory at the University of Pennsylvania, and head the Center for Neuroimaging in Psychiatry. R. 2012 ll. 17-22. Dr. Gur had a degree from the Hebrew University of Jerusalem in Israel and he did his post-doctoral fellowships at Stanford University and the

University of Pennsylvania. R. 2012 l. 23- 2013 l. 11.

Dr. Gur concluded Petitioner had two types of problems, “the frontal lobe problem, and the medial gray matter, limbic system problem.” R. 2061 ll. 5-9. Dr. Gur said “the damage in the medial gray matter, and especially at four standard deviations below normal, we don’t see it in normal people. It just doesn’t happen ... its extreme.” R. 2061 l. 24- 2062 l. 9. Regarding Petitioner’s frontal lobes Dr. Gur stated that “[L]ess than one percent, or maybe a quarter of a percent of healthy people may have those kind of values.” R. 2062 ll. 10-15.

Defense counsel asked Dr. Gur:

Q. Based on your results, with the results that you found in Defendant Stanko’s brain, do you think the – is it consistent to say, or can you say that you think that it would be natural that he would pre-plan things, or be very active?

A. It’s a difficult question to answer. *The reduced volume in the amygdala will increase his vulnerability to react to a perceived threat.* The frontal lobe reduction will reduce his ability to control it, but there are – most of the damage is in the inferior orbital frontal part, so the more intellectual part of planning is still intact.

Q. Okay. And with the perceived threat, the frontal lobe being more damaged, would that – does that mean that it can’t do as good a job to determine whether perceived threat is or is not?

A. Yes. It would—

Q. If it’s real or if it’s not. That’s what I meant to say.

A. Yes. *If the frontal lobe is damaged it will diminish its ability to distinguish real from perceived threat that is really not real.*

R. 2070 l. 9- 2071 l. 3. (emphasis added).

Dr. Joseph Chon-Sang Wu was a professor of the Department of Psychiatry and Human Behavior at the University of California at Irvine, College of Medicine. Dr. Wu completed a two-year fellowship in P.E.T. Scan Imaging of the brain and he was the Clinical Director of the

University of California at Irvine Brain Imaging Center. R. 2105 l. 15- 2106 l. 13. Dr. Wu explained to the jury on the P.E.T. Scan video that the base of the frontal lobe of Petitioner's brain was abnormal. R. 2136, l. 11- 2137 l. 19.

Dr. Wu also testified that: "[T]his is the primary lesion or injury that Mr. Stanko's brain shows, the floor of the frontal lobe defect or injury ... this part of the frontal lobe is a very important part of the frontal lobe which involves things such as impulse control and judgment." R. 2138 ll. 7-25. Dr. Wu also said an injury to this part of the brain impaired "[a]n individual's ability to exercise judgment, [and] impulse control. " Dr. Wu analogized this type of brain defect to a computer in a Lexus or Toyota going "haywire" where you "[h]ave an out-of-control brain, the way this Lexus went out of control and ended up killing the C.H.P. California Highway Patrol officer and his family." R. 2140 l. 13- 2141 l. 13.

Dr. Wu explained that the inner shell of Petitioner's brain: "[I]s more than four standard deviations below normal, which is probably less than one in – so that means nine hundred ninety-nine out of a thousand people, maybe even more, would have a brain bigger than Mr. Stanko's in this part of the brain." Dr. Wu repeated that this part of the brain controls "moral judgment, impulsivity, and aggression." R. 2153 l. 15- 2154 l. 8.

Dr. Thomas Sachy, a neuropsychiatrist, then testified, consistently with his in camera testimony that Petitioner was legally insane at the time he committed the crimes. R. 2204 l. 13- 2206 l. 24; R. 2208 l. 6- 2212 l. 5; R. 2219 ll. 6-16; R. 2254 l. 10- 2255 l. 1. Dr. Sachy noted "you don't have any choice on how your brain works." R. 2205 ll. 3-12. "[W]hen someone's brain is damaged, and it effects their behavior or cognition, they have no choice. That's happened to them. Its done, and an act of God has happened." R. 2205 ll. 3-12.

Dr. Pamela Crawford testified for the state that her initial involvement in this case was as a

consultant for the State Law Enforcement Division. R. 2280 l. 14- 2281 l. 12. Dr. Crawford said that Petitioner had a severe personality disorder with anti-social and narcissistic features. R. 2292 ll. 12-16. Dr. William Brannon. Dr. Brannon disagreed with Dr. Sachy's findings and he opined Petitioner's MRI was a normal image. R. 2326 l. 25- 2327 l. 9.

Dr. Kenneth Spicer also testified as a state's witness and disputed findings that Petitioner's PET scans were abnormal. R. 2353 ll. 9-18. Dr. Spicer also questioned the manner in which the PET scanning on Petitioner was done and he opined that experts had to be careful of "overcalling" their findings. R. 2402 l. 20- 2410 l. 20.

The South Carolina Supreme Court held that Petitioner's:

[A]lleged mental abnormalities do not demonstrate an inability to communicate or care for himself adequately, or sub-average intellectual functioning. Instead, his above average intelligence, and behavior before and after the Victim's murder, demonstrate an ability to formulate and execute deliberate plans. See *Enmund v. Florida*, 458 U.S. 782, 799 (1982) (holding that capital punishment can only serve as deterrent when murder is the result of premeditation and deliberation). Thus, his behavior in this case stands at the opposite end of the spectrum from the behavior of an intellectually disabled person. See *Atkins*, 536 U.S. at 319-20 (analyzing the mental capabilities of intellectually disabled offenders). There is simply no justification for finding Appellant's alleged condition similar to those individuals who may not be executed lawfully.

App. 28.

Discussion

The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the

Next Frontier, 50 B.C.L. Rev. 785, 785 (May 2009), Professor Bruce Winick wrote:

The U.S. Supreme Court's recent death penalty jurisprudence displays the Court's willingness to invalidate the death penalty for certain offenses or classes of offenders, including those with

mental retardation and those who were under eighteen at the time of the offense. The Court has noted that the death penalty in these cases constitutes a disproportionate punishment because it fails to adequately serve the two primary goals of the Cruel and Unusual Punishments Clause: retribution and deterrence. Because the cognitive and volitional impairments caused by severe mental illness result in a parallel diminution in culpability and deferability, severe mental illness is an appropriate next frontier at which to apply the Court's emerging concept of proportionality. Social attitudes have only recently begun to shift toward opposing the death penalty for those with severe mental illness at the time of the offense. Nonetheless, the Court's recent death penalty cases teach that the Court may independently determine that execution of these offenders is a disproportionate punishment if it concludes that executing such offenders does not adequately serve the goals of retribution and deterrence.

In Roper v. Simmons, supra this Court concluded the death penalty is a disproportionate punishment for juveniles, and hence cruel and unusual punishment. This Court noted that juveniles are more susceptible to immature and irresponsible behavior, so their conduct is not as morally reprehensible as that of adults because they are still developing mentally and as human beings. Second, juveniles are more vulnerable to the influence of others and lack control over their immediate surroundings. Finally, since a juvenile's personality and sense of identity are still developing, it makes even the commission of a heinous crime insufficient evidence of an "irretrievably depraved behavior" or person.

Mentally retarded individuals also lack the capacity to appreciate the full consequences of their behavior. In Atkins v. Virginia, 536 U.S. 304, 321 (2002) this Court therefore found a "per se" finding of diminished responsibility that exempts mentally retarded individuals from the death penalty.

Defense counsel here correctly argued that Petitioner's brain defects, which were discussed at length above exempted him from the death penalty under the Eighth Amendment's

“evolving sense of decency” standard. Petitioner’s brain defects began with his mother’s complicated pregnancy when Petitioner was born in Guantanamo Bay, Cuba when he received reduced oxygen to his brain. The evidence demonstrated that Petitioner was hit in the back of the head when he was about sixteen years old with a beer bottle, which damaged his frontal lobes. There was testimony Petitioner’s frontal lobes could not repair themselves. R. 1543, l. 10- 1544, l. 1.

Dr. Wu testified that Petitioner’s damaged frontal lobes diminished his ability to distinguish between real and perceived threats. Dr. Gur also opined that Petitioner’s brain abnormalities were extreme. R. 1653, l. 6- 1663, l. 3. Dr. Wu analogized Petitioner’s brain defects to a computer in a Lexus or Toyota going “haywire” where you have “an out of control brain...” R. 1732, l. 13- 1733, l. 13.

Further, neuropsychiatrist Dr. Thomas Sacy testified that Petitioner was legally insane at the time he committed the crimes. R. 2204 l. 13- 2206 l. 24; R. 2208 l. 6- 2212 l. 5; R. 2219 ll. 6- 16; R. 2254 l. 10- 2255 l. 1. Dr. Sacy opined Petitioner had a damaged brain which effected his behavior. It was a matter beyond Petitioner’s control. R. 2205 ll. 3-12.

Dr. Gur stated Petitioner had brain deficits that were found in less than “[o]ne percent, or maybe a quarter of a percent of healthy people may have those kind of values.” R. 2062 ll. 10-15. Dr. Gur also opined that frontal lobe damage diminishes the ability “*to distinguish real from perceived threat [from the victim Henry Turner] that is really not real.*” R. 2070 l. 9- 2071 l. 3. (emphasis added).

In Gregg v. Georgia, 428 U.S. 153, 173 (1976), the plurality of the Court fashioned a three pronged analysis for determining whether a punishment constitutes cruel and unusual punishment under the Eighth Amendment. The first question is whether the punishment

conforms to contemporary standards of decency. The second is whether the punishment is disproportionate to the offense, and the third is whether the punishment goes beyond what is necessary to accomplish any legitimate penological objective.

As stated, South Carolina's death penalty statute considers mental or emotional distress, capacity to appreciate, and age and mentality of the defendant as mitigating circumstances. South Carolina is not a weighing state and the legislature has deemed that any one juror can prevent a defendant from being sentenced to death. It is elementary that a jury may sentence a defendant to life imprisonment for "any reason or no reason at all, simply as an act of mercy." Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5, 10 (2009).

As to penological objectives -- retribution and deterrence -- the execution of the brain damaged and the severely mentally ill does not contribute to either goal. People who commit crimes because they are brain damaged or severely mentally ill are not going to be deterred by the fear of execution since they are unable to control their impulses in the manner a normal person is able to do so. Further, to execute the brain damaged and severely mentally ill therefore also constitutes the unnecessary infliction of pain and suffering that goes beyond any legitimate consideration of retribution.

Executing this brain damaged Petitioner, where there is strong evidence his brain defects prevented him from controlling his impulses would violate our contemporary standards of decency and therefore the Eighth Amendment to the United States Constitution.

Other jurisdictions

While Florida's proportionality analysis differs from this Court's in some respects, Florida has held that evidence of the respective defendant's severe mental illness made the death sentence a disproportionate punishment. See Offord v. State, 959 So.2d 187 (Fla. 2007), Crook v.

State, 908 So.2d 350 (Fla. 2005), Green v. State, 975 So.2d 1081 (Fla. 2008).

In State v. Nelson, 173 N.J. 417, 483, 803 A.2d 1, 41 (2002) where the defendant's sentence was vacated on other grounds, the concurring Justice Zazzali, joined by Justice Long wrote that there were additional and compelling justifications for not executing the defendant: "I agree with defendant that her execution for crimes that are inextricably bound to her mental illness violates our State Constitution. The State's legitimate penological interests that purportedly are served by the death penalty are unconstitutionally diminished if the State executes such a mentally ill and psychologically disturbed person. In defendant's case, it is constitutionally inadequate for a jury to consider her severe mental illness as merely a mitigating factor to be weighed among other aggravating and mitigating factors."

In Corcoran v. State, 774 N.E.2d 495, 502-03 (Ind. 2002), Justice Rucker wrote in dissent:

"[I] do not believe a sentence of death is appropriate for a person suffering a severe mental illness. Recently the Supreme Court held that the executions of mentally retarded criminals are 'cruel and unusual punishments' prohibited by the Eighth Amendment of the United States Constitution. Atkins v. Virginia, 536 U.S. 304 (2002). There has been no argument in this case that Corcoran is mentally retarded. However, the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency. In that regard I associate myself with the dissenting opinion of Justice Pfeifer of the Ohio Supreme Court who noted:

"Mental illness is a medical disease. Every year we learn more about it and the way it manifests itself in the mind of the sufferer. At this time, we do not and cannot know what is going on in the mind of a person with mental illness. As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so.... I

believe that executing a convict with a severe mental illness is a cruel and unusual punishment.”

Ohio v. Scott, 92 Ohio St.3d 1, 748 N.E.2d 11, 20 (2001) (Pfeifer, J., dissenting).

Some state courts have found a death sentence for a mentally ill person was disproportionate punishment. See Reddix v. State, 547 So.2d 792, 794-795 (Miss. 1989); Haynes v. State, 739 P.2d 497, 503-04 (Nev. 1987); Cooper v. State, 739 So.2d 82, 85-86 (Fla 1999); Crook v. State, 908 So.2d 350, 358-359 (Fla. 2005); Larkins v. State, 739 So.2d 90, 95 (Fla. 1999); Offord v. State, 959 So.2d 187, 193 (Fla. 2007).

Petitioner strongly and respectfully submits that just as mentally retarded people and juveniles can no suffer the death penalty for the crime of murder, so to Petitioner, with his extreme brain defects should not, under our “evolving sense of decency,” be eligible for execution under the Eighth Amendment to the United States Constitution. Atkins v. Virginia, Roper v. Simmons, *supra*.

CONCLUSION

By reason of the foregoing arguments this Court should grant a writ of certiorari.

Respectfully submitted,



ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

July 2, 2013.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

STEPHEN CHRISTOPHER STANKO,

Petitioner,

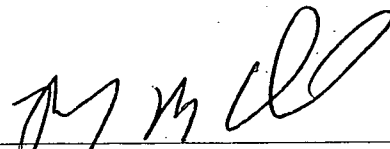
v.

STATE OF SOUTH CAROLINA,

Respondent

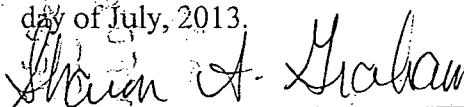
CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel, J. Anthony Mabry, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 2nd day of July, 2013. Counsel is also today, July 2, 2013 sending a copy of the of the petition for writ of certiorari and appendix to opposing counsel by facsimile to: amabry@ag.state.sc.us.



ROBERT M. DUDEK
Counsel of Record

SWORN TO BEFORE me this 2nd
day of July, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: April 27, 2022.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

STEPHEN CHRISTOPHER STANKO,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

A P P E N D I X

ROBERT M. DUDEK
Attorney at Law

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Stephen Christopher Stanko, Appellant.

Appellate Case No. 2010-154746

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 27224
Heard October 4, 2012 – Filed February 27, 2013

AFFIRMED

Chief Appellate Defender Robert M. Dudek and
Appellate Defender Robert M. Pachak, both of
Columbia, SC for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, Assistant
Attorney General J. Anthony Mabry, all of Columbia,
SC, and Solicitor John Gregory Hembree of Conway, SC
for Respondent.

CHIEF JUSTICE TOAL: Stephen Christopher Stanko (Appellant), appeals his conviction and death sentence for murder and armed robbery. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On April 8, 2005, at approximately 3:30 a.m., Appellant called his friend, seventy-four year old Henry Turner (the Victim), and falsely informed him that Appellant's father had died. Appellant arrived at the Victim's residence around 4:00 a.m. Later that morning, the Victim drove to a nearby McDonald's restaurant for breakfast. After returning with breakfast, sometime later that morning, the Victim was shaving in front of his bathroom mirror. Appellant approached the Victim from behind with a gun and a pillow as a silencer, and shot him in the back. Appellant then struck the Victim in the head, and fatally shot him in the chest.

Appellant stole the Victim's gray Mazda truck and fled the scene. On the evening of April 8, Appellant visited Columbia's Vista district. Appellant held himself out as a resident of New York City, visiting South Carolina to close a "big deal." Appellant proceeded to spend large amounts of cash and buy drinks for several people he met that night.

On April 9, Appellant travelled to Augusta, Georgia and visited Surrey Tavern. There, Appellant met a woman, and convinced her that he was a businessman in town for The Master's Golf Tournament. Appellant and the woman spent the next several days together, and Appellant stayed at her apartment. The two attended church services together on Sunday, April 10, and she introduced Appellant to her co-workers on Monday, April 11. Appellant left the woman's apartment at approximately 1:00 a.m. on Tuesday, April 12. Later that day, the woman recognized Appellant's picture in the newspaper with a headline alerting her to his alleged involvement in the Victim's murder. She notified police and assisted in Appellant's arrest. Appellant possessed the Victim's vehicle at the time of his arrest. Police searched the vehicle and recovered a bag containing a .357 Magnum caliber double-action revolver, .38 caliber bullets, and a checkbook belonging to the Victim. Testing later revealed that the .357 Magnum fired the bullets recovered from the Victim's body.

On August 25, 2005, the Horry County Grand Jury indicted Appellant for the Victim's murder and armed robbery. The case proceeded to trial, and Appellant relied on an insanity defense. Specifically, Appellant averred that he suffered from central nervous system dysfunction, and at the time of the Victim's murder he did not understand "legal right from wrong." On November 16, 2009, a jury found Appellant guilty of murder and armed robbery. Three days later, following the conclusion of the trial's penalty phase, the jury found beyond a reasonable doubt

the existence of the requisite statutory aggravating circumstance and recommended the trial court sentence Appellant to death. Consequently, the trial court sentenced Appellant to the maximum twenty years' imprisonment for armed robbery and to death by lethal injection for the Victim's murder.

ISSUES PRESENTED

- I. Whether the trial court erred by instructing the jury that malice could be inferred from the use of a deadly weapon where Appellant presented an insanity defense.
- II. Whether the trial court erred in accepting Appellant's waiver of his trial counsel's conflict of interest where that counsel was subject to a pending accusation of ineffective assistance of counsel for his representation of Appellant in a prior capital murder case.
- III. Whether the trial court erred in refusing to disqualify a juror who acknowledged she knew that Appellant received the death penalty for a prior capital murder, and stated unequivocally that she would vote to impose death in every instance where the State proved an aggravating circumstance beyond a reasonable doubt.
- IV. Whether the trial court abused its discretion by refusing to grant a change of venue.
- V. Whether the trial court erred by allowing all jurors over sixty-five to opt out of jury service.
- VI. Whether the trial court erred by ruling that Appellant's execution did not violate the Eighth Amendment to the United States Constitution.

LAW/ANALYSIS

I. Jury Instruction on Inferred Malice

Appellant argues that the trial court erred by instructing the jury that it could infer malice from the use of a deadly weapon where Appellant presented an insanity defense. We agree.

A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803–04 (2009). In *Belcher*, the jury convicted the defendant of murder and possession of a firearm during the commission of a violent crime. *Id.* at 600, 685 S.E.2d at 803. During a gathering of family and friends, the victim and another man began arguing. The defendant intervened, and later shot and killed the victim. *Id.* at 601, 685 S.E.2d at 805.

Testimony at trial demonstrated conflicting versions of the event. *Id.* The State's evidence tended to show that after the defendant confronted the victim, the defendant retrieved a gun and without justification, fatally shot the victim. *Id.* The defendant presented evidence that the victim confronted him without provocation, and with a gun, following the apparent resolution of the argument. *Id.* The defendant claimed he subsequently retrieved a gun and fired on the victim as he approached. *Id.* In accordance with long-standing practice, the trial court instructed the jury that "malice may be inferred by the use of a deadly weapon," and the jury convicted the defendant of murder. *Id.*

This Court reversed, and rejected the traditional jury instruction as inconsistent with our policy-making role in the common law:

The use of the term "intentional" is instructive. Say for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because "if one intentionally kills another with a deadly weapon, the implication of malice may arise."

Id. at 610, 685 S.E.2d at 809 (citing *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 809 (1983), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991)). The Court also held that the error in *Belcher* could not be considered harmless:

Evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge. It is entirely conceivable that the only evidence of malice was [the defendant]'s use of a handgun. We need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt.

Id. at 611–12, 685 S.E.2d at 809–10 ("In many, if not most, murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption . . . Obviously[,] when a defendant walks into a store [and] shoots and robs the clerk, a charge that the jury may infer malice is not prejudicial to the defendant." (alterations in original)).

In the instant case, Appellant presented evidence he had a brain abnormality. A psychiatric expert testified that he performed a psychiatric evaluation and neurological exam on Appellant, and that Appellant demonstrated mild signs consistent with brain dysfunction, including central nervous system dysfunction. According to this expert, Appellant also demonstrated the typical signs of anti-social personality disorder or psychopathy, and at the time of the crime, "you could argue" Appellant did not understand moral or legal right from wrong, as his brain could not process the events. In other words:

Based on the interview, the review of the records, the neurological evaluation, the brain-imaging evaluation, and the fact that he has received diagnoses of anti-social personality disorder . . . and the—limitations or impairments that anti-socials or psychopaths have, one of the major ones they have is an appreciation for the wrongfulness, or the moral wrongfulness and legal wrongfulness of their actions at the time.

An expert in physiological psychology testified that Appellant suffered damage to the frontal lobe of his brain from two separate incidents. The first incident occurred during Appellant's birth when his brain received a reduced oxygen supply. The second incident occurred during Appellant's teen-age years when he received a blow to the back of his head from a beer bottle, driving his brain forward. Appellant presented psychiatric testimony that he had diminished or lowered function of his brain in the frontal lobe areas, and that there "could" be a causal connection between diminished function in the frontal lobe and mental illness. An expert in neuropsychology and neuroimaging testified that scans of the right hemisphere of Appellant's brain exhibited damage. According to this expert, the damage occurred in the medial gray matter of Appellant's brain at four standard deviations below normal, and an individual with this type of "extreme" damage would have some type of temporal lobe epilepsy. A medical doctor with expertise in Positron Imaging Tomography (P.E.T.) scans and neuropsychiatric disorder testified regarding the actual injury to Appellant's frontal lobe. This expert testified that the damaged lobe of Appellant's brain played an important role in impulse control, judgment, and empathy. In fact, he stated, "This abnormally low

function or abnormality or injury would significantly compromise and impair an individual's ability to exercise judgment, impulse control, control of aggression."

The trial court in this case issued a jury instruction regarding both express and implied malice:

Malice aforethought could either be express or implied. Express malice is shown when a person speaks words which express hatred or ill-will for another, or when the person prepared beforehand to do the act which was later accomplished. Malice can be inferred from a conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.

Appellant's trial counsel took exception to the trial court's instruction, and argued that *Belcher* prevented an inferred malice charge, "[W]e would assert that, in this case, that insanity too is a self-defense, and we would think that the same rationale would apply to this case, and we would ask that charge be deleted, and they be so instructed, and that portion of that be deleted." The trial court overruled trial counsel's objection, and decided to include the objected-to portion of the charge:

I have read thoroughly *State [v.] Belcher*, [385 S.C. 597, 685 S.E.2d 802 (2009)] decided by the South Carolina Supreme Court in October—on October 12, 2009. I find nothing, absolutely nothing in the Supreme Court opinion that would so indicate—certainly doesn't direct, but even indicate, in any way, that it would be proper under these circumstances for the [c]ourt to charge—or delete that as far as the inference of malice. The Supreme Court didn't indicate that in the slightest. Now—so I respectfully decline to do that.

It is unclear what this Court could have included in *Belcher* to better indicate to the trial court the impropriety of an instruction that malice could be inferred from the use of a deadly weapon in this case. Appellant certainly presented evidence which could have reduced, mitigated, or excused the Victim's murder. The language of *Belcher* is clear, that when this type of evidence is submitted, an instruction regarding inferred malice from the use of a deadly weapon is improper. See *Belcher*, 385 S.C. at 612 n.10, 685 S.E.2d at 810 n.10 ("We overrule all cases involving a homicide or charge of assault and battery with intent to kill where two factors co-exist: (1) approval of the jury instruction that malice may be inferred from the use of a deadly weapon; and (2) evidence was presented that, if believed, would have reduced, mitigated, excused, or justified the homicide or the charged

[assault and battery with intent to kill.]") Thus, the trial court erred. However, we must determine whether that error requires reversal.

Harmless Error

Errors, including erroneous jury instructions, are subject to a harmless error analysis. *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error. *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000).

In *Belcher*, we observed that often in murder cases there will be overwhelming evidence of malice, apart from the use of a deadly weapon. *Id.* at n.8 ("In many, if not most, murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption . . . Obviously[,] when a defendant walks into a store [and] shoots and robs the clerk, a charge that the jury may infer malice is not prejudicial to the defendant." (alteration in original)). The instant case is similar.

The State presented uncontested evidence that Appellant shot the Victim, his elderly and unarmed friend, in the back using a pillow as a silencer. Appellant then robbed the Victim, and for the next several days used his automobile to travel across the state, where he engaged in social activities and drinking. Authorities apprehended Appellant in possession of the Victim's vehicle and the gun used in the murder. Thus, the evidence of malice in this case is not limited to Appellant's use of a deadly weapon. *See Belcher*, 385 S.C. at 612, 685 S.E.2d at 810 ("It is entirely conceivable that the only evidence of malice was Belcher's use of a handgun.").

Additionally, we must consider the jury instruction as a whole, and if as a whole the instruction is free from error, any isolated portions which may be misleading do not constitute reversible error. *Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251. This Court will not reverse a trial court's decision regarding a jury instruction absent an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

In the instant case, the trial court issued a jury instruction consistent with evidence presented by both the State and Appellant. The trial court charged the jury that they could return verdicts of not guilty, not guilty by reason of insanity, guilty but mentally ill, and guilty. Therefore, if the jury believed that Appellant could not distinguish moral or legal right from wrong, they could have found him

not guilty by reason of insanity. In addition, the jury could have found that Appellant's mental disease or defect prevented him from conforming his conduct to the requirements of the law, regardless of whether he could make the necessary moral or legal distinctions. Nothing in the trial court's inferred malice charge would have prevented the jury from reaching either of these conclusions.

The trial court instructed the jury that inferred malice may arise when the "deed is done with a deadly weapon." The trial court also stated that malice "can be inferred from conduct showing total disregard for human life." Appellant only contests the "deadly weapon" language. However, if the jury rejected Appellant's insanity defense, which it did, the jury could also find that Appellant's conduct showed a total disregard for human life. Thus, Appellant could not have suffered prejudice from any separate inference that his use of a deadly weapon also gave rise to an inference of malice.

Therefore, although the trial court's charge in this case failed to comply with *Belcher*, this does not constitute reversible error.

II. Trial Counsel's Conflict of Interest

Prior to this trial, a jury found Appellant guilty of a separate murder and recommended a sentence of death. *State v. Stanko*, 376 S.C. 571, 573, 658 S.E.2d 94, 95 (2008). William Diggs represented Appellant at that trial, and Appellant requested that Diggs represent him in the instant case, as well. However, Appellant also filed a post-conviction relief (PCR) application collaterally attacking Diggs's prior representation on the ground that he provided ineffective assistance of counsel. Appellant argues that this gave rise to a conflict of interest, and that the trial court erred in accepting Appellant's "inadequate" waiver of this conflict. We disagree.

On November 15, 2006, the trial court held a hearing to determine Appellant's representation in this case. Diggs stated at that hearing that he did not know of any reason that would preclude his availability for appointment. Appellant spoke at that hearing, expressing his satisfaction with Diggs's efforts in the prior trial and requesting Diggs represent him a second time:

So, what I'm saying to you is if you choose to appoint [Diggs] as counsel I have no problem with that and would greatly appreciate it actually I'm familiar with the law. I'm not an idiot to the law and

I don't and would not raise any kind of argument concerning . . . his representation.

On December 8, 2008, the PCR court held a hearing regarding Appellant's PCR application. At that hearing, Appellant explained his desire to proceed with a PCR application against Diggs, but at the same time retain his representation in the instant case:

The conundrum that I have is that: In the same sense, this [PCR] may have allegations of ineffective assistance of counsel against him. My argument is . . . just because I feel he may have been ineffective in the first case does not mean that he'll make those same ineffective mistakes in the second; because he's learned from them, or may see them differently. So my conundrum is I don't want to lose him; because I believe in him. He knows my case. He's the one who had the test ordered and found out everything that was wrong with my medial frontal lobe. I don't want to lose him.

The trial court next conducted a hearing on March 4, 2009, to discuss the potential conflict arising from the PCR application and trial counsel's continued representation. The trial judge noted that the continued representation could be a "downright" disqualification of Diggs as trial counsel. However, Appellant explained that he filed the PCR application to "stop the death watch" after this Court turned down his direct appeal. Appellant insisted that the court allow him to retain Diggs as trial counsel:

I can't say, Your Honor, this is what I'm going to file, but if we play worst case scenario and I did file ineffective assistance of counsel against [Diggs] on any issues, understanding the *Strickland* [*Strickland v. Washington*, 466 U.S. 668, 687–89 (1984)] two-prong test, but that's still prerequisite that I wouldn't trust or believe in him to handle this case, (A) if he did commit errors that, let's say, he even determined as being errors, by looking at that case, I believe that [Diggs] would say, "Maybe I should have done this differently," and in this particular case, which is going use a very similar defense, wouldn't he have learned from that? (B) Even if I did file them, is it not a situation where it would have no effect on this case as long as I do trust and believe in him and his efforts toward this case?

The trial court responded by explicitly asking Appellant whether he wanted to retain Diggs:

The Court: If I understand you correctly that you want [Diggs] to remain as lead counsel and remain as one of your attorneys in this particular case?

Appellant: Yes.

Appellant continued an unprompted monologue requesting that Diggs represent him regardless of the pending PCR application:

[B]efore I jump away, I'm going to use an analogy. (A) There's a Solicitor that was in this case and that has been sanctioned by the State for previous misconducts [sic], but he is still a Solicitor. (B) I'm going to use a baseball analogy. If you have Derek Jeter, and in the ninth inning of the final game of the World Series he commits an error that costs the Yankees the game, that doesn't mean that you don't want him back starting next season, and I do. One thing about [Diggs] is he does believe in my case and he understands it's a very in-depth case concerning the defect in my brain, and I would ask—what I don't want to do is say, "Well, Your Honor, is the only way that I can keep [Diggs] is to say that I'm going to waive any [claim]?"

To this the trial court responded: "No sir. I'm not asking you to do that." The trial court then asked Diggs whether he found any conflict in his continued representation of Appellant. Diggs responded that he did not, but that the trial court may want to revisit the issue if it appeared later that the PCR theories and the theories used in the instant trial worked to undermine Appellant's case:

Based upon the—your statements to the Court, and the Court's questioning of [Appellant], [Appellant]'s statements to me, that I will keep [Diggs] as counsel here in this particular matter with the ability for the Court to re-visit in the future should there be any issues in the amended application that either gives the Court any concern, or [Appellant], or [Diggs] concerns as to [Diggs] continued representation in this matter.

On June 5, 2009, the trial court heard the State's Motion to Review Status of Counsel. The State took issue with what it believed to be an "apparent direct

conflict of interest," based on the filing of Appellant's PCR application against Diggs. Diggs stated that he did not feel the PCR application had impacted his relationship with Appellant, his ability to communicate with him, or his ability to effectively represent him in any way. Appellant stated that he had the opportunity to confer with his PCR attorneys, but that nothing had changed regarding his desire to retain Diggs.

The trial court then engaged in a detailed colloquy with Appellant regarding the potential conflict:

The Court: Do you continue to want to have [Diggs] represent you in this action?

Appellant: Yes sir, I do.

The Court: All right sir, and do you feel that there is a free and open communication between you and [Diggs] despite the fact that the [PCR] application has been filed?

Appellant: Yes, sir, there is.

The Court: And you are able to fully discuss all issues that you deem necessary with him?

Appellant: Yes, sir.

The Court: All right sir, and have you found in any way that he is unresponsive to you or in any way . . . harboring any ill feelings to you because of the filing of the [PCR] application?

Appellant: Not only is he not now, but I do not believe that when we file the supplemental . . . there will be any problems at that time.

....

Appellant: The issues that we're going to raise that have him in it have nothing to do with any issues that would create a conflict or any argument or I feel cause any communicative problems between [Diggs] and myself. They're more at

trial situations that should have been objected to, things of that nature, and there is, there are two issues. But sir, I do not believe that [Diggs] and I are going to have any problems presenting the second trial.

Thus, the trial court concluded that Appellant "more than expressed" full and complete confidence in Diggs's abilities, and permitted Diggs to continue his representation of Appellant.

A. Preservation

Appellant's argument that the trial court erred regarding an apparent conflict by his trial counsel is unpreserved. This Court has explained the rationale underlying issue preservation as follows:

The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those arguments.

....

Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724–25 (2000) (citing *Roche v. S.C. Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E.2d 243 (1975)). This explanation is especially pertinent to this case.

Appellant did not object to the appointment of Diggs as counsel, but instead emphatically requested that Diggs continue to represent him. Additionally, both the trial court and the PCR court questioned Appellant as to the wisdom of continuing with Diggs as trial counsel, and verified that Appellant had no objections to this arrangement. Appellant never raised a single objection. Thus, he avoided the critical first step of preservation: convincing the trial court that it ruled incorrectly. Appellant cannot argue now on direct appeal that the trial court erred in acquiescing to his express and informed desire.

B. Waiver

Even if Appellant had somehow preserved his arguments for our review, the trial court did not err. To the extent that this situation gave rise to a conflict of interest, implicating any constitutional right, Appellant was fully informed of that conflict. Appellant's extensive endorsement of Diggs's continued representation constituted a valid waiver. *See Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). Appellant cannot now complain of an error which his own conduct induced. *See State v. Babb*, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) ("The record in this case clearly establishes that any shortage of time to prepare a defense was not the fault of the trial judge or the State, but rather the fault of [the defendant] in failing to act.").

Appellant's argument regarding trial counsel's alleged conflict is unpreserved. The lack of preservation notwithstanding, the Record demonstrates a knowing and intelligent waiver of any possible conflict.

III. Juror Disqualification

Appellant argues that the trial court erred in refusing to disqualify a juror with prior knowledge of Appellant's unrelated crimes who stated unequivocally that she would vote to impose the death penalty in every instance in which the State proved an aggravating circumstance beyond a reasonable doubt. We disagree.

A prospective juror may be excluded for cause when his views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with instructions and his oath. *State v. Sapp*, 366 S.C. 283, 290–91, 621 S.E.2d 883, 886 (2005). When reviewing the trial court's qualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire voir dire. *Id.* at 291, 621 S.E.2d at 886. The determination of whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. *Id.* A juror's disqualification will not be disturbed on appeal if there is a reasonable basis from which the trial court could have

concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. *Id.* at 291, 621 S.E.2d at 887.

A. Prior knowledge

Juror #480 stated during voir dire that she remembered that Appellant "murdered his girlfriend, and left the daughter for dead." She also stated she heard that following these crimes, Appellant "murdered a man in Conway." The trial court then asked Juror #480 if she could leave her prior knowledge "outside the courtroom," and Juror #480 indicated that she could:

The Court: You are coming into the courtroom, you listen to all of the facts and evidence presented in this case, make your decision based on the facts and evidence in this case, the law the Court would give to you, and don't let anything that you think you might know about it in the past affect your decision in any way. You understand that?

Juror #480: Yes sir.

The Court: Can you do that?

Juror #480: Yes sir.

The Court: All right, Ma'am. Can you follow the law that the Court would give to you? Even if for some reason you didn't agree with it could you follow the law that the Court would give to you in this case?

Juror #480: Yes sir.

The Court: All right, Ma'am. When you heard about this matter in the past do you remember forming any kind of opinion or belief at that point in time when you heard about it in the past?

Juror #480: No sir. I really don't remember much about it, and just kind of wiped it out.

According to Appellant, Juror #480's prior knowledge was the equivalent of placing improper character evidence and evidence of Appellant's prior death sentence before the jury. Appellant asserts, "If the solicitor in the present case brought up evidence of [Appellant's] prior crimes and death sentence [] during the guilt phase of this trial, it would have been grounds for a mistrial. There is no difference in seating a juror who knows this information from the outset. To believe the juror in this case did not convey this information to the other jurors, especially when she was not instructed otherwise, denies the frailty of human nature."

Appellant relies on *People v. Davis*, 452 N.E.2d 525 (Ill. 1983), in support of his argument. However, *Davis* is inapplicable. In that case, an Illinois jury found Davis guilty of murder. *Id.* at 527. In a separate, bifurcated sentencing hearing, the jury unanimously determined that the necessary aggravating factors existed, and that there were no mitigating circumstances sufficient to preclude imposition of the death penalty. *Id.* Davis argued that the trial court erred in allowing the prosecution to inform the jury that he had received the death penalty for an unrelated murder. *Id.* at 536. To establish the aggravating factor that defendant had murdered two or more individuals, the State introduced certified copies of Davis's prior murder convictions. *Id.*

The Illinois Supreme Court reversed Davis's conviction. The court found that introduction of this evidence may have improperly influenced the jury in two respects. *Id.* at 537. First, if a juror had any uncertainty as to whether Davis qualified for the death sentence, the knowledge that twelve other people previously determined that he did could have swayed that decision. *Id.* Second, the jury's awareness of Davis's prior death sentence could diminish its sense of responsibility and mitigate the serious consequences of its decision. *Id.* Put another way, the jurors may have considered their own decision much less significant than they otherwise would. *Id.*

The facts of the instant case are markedly different from those of *Davis*. The State did not present evidence of Appellant's prior death penalty conviction to the jury. Although the juror in this case admitted that she had prior knowledge of the conviction, the court established that Juror #480 could place that prior knowledge aside and decide the case based solely on the evidence presented at trial.

Appellant's trial counsel also questioned Juror #480 concerning her prior knowledge:

Diggs: Okay. And let's assume that's correct for a moment and you are selected to serve on this jury, would having knowledge about a prior death sentence undermine your ability to be responsible in terms of the—filling the juror responsibilities in this case, in other words, would you feel like we are just kind of going through the motions here for no good reason.

Juror #480: No sir, because I think this is, what, an entirely different matter.

Juror #480's unequivocal answers to the trial court's and trial counsel's questions prevent us from finding that the trial court's qualification of the juror was "wholly" unsupported by the evidence. The court in *Davis* reversed over concerns about the impact the introduction of a prior death sentence might have had on the jury. But here, Juror #480's statements show a lack of clarity regarding Appellant's prior crimes, and there is nothing to suggest that knowledge of those crimes would have any bearing on her jury service. Thus, Appellant fails to demonstrate that Juror #480's prior knowledge improperly affected the verdict, or that the trial court erred in concluding that Juror #480 could faithfully discharge her responsibilities as a juror.

B. Predisposition

Appellant argues that the trial court erred in qualifying Juror #480 because of the juror's unequivocal response that she would vote for death in every case where the State proved murder beyond a reasonable doubt, coupled with an aggravating circumstance proved beyond a reasonable doubt. Juror #480's initial statements demonstrate a troubling likelihood that her view on this issue would have substantially impaired her performance as a juror. However, we find that the trial court sufficiently rehabilitated Juror #480.

In *State v. Lindsay*, 372 S.C. 185, 642 S.E.2d 557 (2007), the Court analyzed the trial court's decision to disqualify a juror who expressed an equivocal view regarding the death penalty. In that case, the trial court asked Juror K if he could impose the death penalty. *Id.* at 190, 642 S.E.2d at 560. Juror K responded that he "didn't really know" if he could or not. *Id.* During subsequent voir dire by trial counsel, Juror K stated that he could listen to both sides in the penalty phase and render the most appropriate penalty, be that life imprisonment or death. *Id.* However, when questioned by the State, Juror K equivocated, and admitted that, in his view, life without parole was a more serious punishment than the death penalty.

Id. at 190–91, 642 S.E.2d at 560. Juror K stated that regardless of the facts of a particular case, he would most likely choose life imprisonment as a punishment rather than death. *Id.* at 191, 641 S.E.2d at 560. The trial court found that Juror K's views on the death penalty would substantially impair his ability to follow the law as instructed. *Id.* at 192, 642 S.E.2d at 561 ("He further noted that when asked about giving the death penalty, Juror K 'took a very big deep [breath] and exhaled as if he were very uncertain as to whether or not he could do that.'"). This Court found that Juror K's equivocal views and noted hesitation provided a reasonable basis for the trial court's conclusion. *Id.* at 193, 642 S.E.2d at 561 ("Considering the voir dire as a whole, we find the trial judge did not abuse his discretion in excusing the juror.")

In *State v. Green*, 301 S.C. 347, 392 S.E.2d 157 (1990), the defendant argued that two jurors should have been disqualified because their responses during voir dire indicated a predisposition towards the death penalty. This Court held that the "ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as it is explained to him." *Id.* at 354, 392 S.E.2d at 161. Despite one juror's disconcerting responses, the juror indicated she would wait until she had been presented with the "entire picture." *Id.* In addition, the juror expressed a willingness to "follow the law," and a respect for mitigating circumstances. *Id.* Thus, the Court concluded that the trial court did not abuse its discretion in qualifying the juror. *Id.* (finding that the other juror was an alternate and any error in seating that juror would be harmless beyond a reasonable doubt).

Appellant's trial counsel questioned Juror #480 regarding her ability to consider life imprisonment without parole even if the State proved murder and an aggravating circumstance beyond a reasonable doubt:

Diggs: I want you to tell me, once you are on the jury, and you have concluded that there was guilt beyond a reasonable doubt, and then we move into the sentencing phase, and the State begins to present evidence of an aggravating circumstance, which is what the Judge is going to tell you they are required to do in order to ask for a death sentence, okay, and then we get to the end of that hearing and you believe the State did, indeed, present evidence in this case of an aggravating circumstance, coupled with murder, would you be predisposed in that situation to vote death as opposed to life imprisonment?

Juror #480: Yes sir.

Diggs: Okay. And would you do that—without knowing specific facts would it be fair to say you would be in that position in every case?

Juror #480: Well, that's where you said specific facts.

Diggs: Yes Ma'am. Without any specific facts, just that foundation, that two-tiered foundation, so to speak, murder you found beyond a reasonable doubt, and then on top of that an aggravating circumstance beyond a reasonable doubt, you would—in every case where those two factors were combined, would vote death?

Juror #480: Yes sir.

Following this exchange the trial court questioned Juror #480. The trial court explained to Juror #480 that just because an aggravating circumstance is found, this does not mean that the jury automatically recommends a sentence of death. Juror #480 answered that she could vote to impose life imprisonment or death if the State proved an aggravating circumstance beyond a reasonable doubt. Juror #480 also stated that she understood that the jury could not even consider the death penalty if the State failed to prove an aggravating circumstance. Juror #480 answered affirmatively that she could follow the trial court's instruction and apply the law to facts of the case.

This Court's decisions in *Green* and *Lindsay* lead us to the conclusion that the trial court did not err in this case. During trial counsel's voir dire, Juror #480 stated that she would always vote to impose the death penalty when murder and a statutory aggravating circumstance were proven beyond a reasonable doubt. However, within that same colloquy she stated that she could consider all of the evidence in the case and render any one of the four verdicts she felt was best supported by the evidence. Moreover, Juror #480 responded to the trial court's methodical questioning with an affirmative response that she could in fact consider life imprisonment and the death penalty equally only if the State proved the requisite statutory aggravating circumstance. Ultimately, there is evidence in the Record to support the trial court's decision to qualify Juror #480. Her answers on the whole demonstrate an ability and willingness to be impartial and carry out the law as explained to her. Although Juror #480 gave two contradictory answers

during voir dire, the overall balance of her answers does not demonstrate the type of equivocation evident in *Lindsay*.

IV. Refusal to Grant Change of Venue

As referenced in Issue II, a jury in neighboring Georgetown County convicted Appellant of murder, and recommended death, prior to the trial of the instant case. Of the one hundred and twelve potential jurors questioned by the trial court, fifty-six knew about Appellant through pretrial publicity. According to Appellant, of the forty-five qualified jurors, twenty-seven knew about Appellant's previous trial, conviction, and death sentence. Of the seated jurors, at least eight knew the Appellant by name, and as discussed previously, Juror #480 knew of his prior conviction and sentence. Based on these facts, Appellant argues that the trial court erred in refusing to grant a change of venue. We disagree.

A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. *Sheppard v. State*, 357 S.C. 646, 654, 594 S.E.2d 462, 467 (2004). When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate voir dire examination of the jurors, his decision will not be disturbed absent extraordinary circumstances. *State v. Caldwell*, 300 S.C. 494, 502, 388 S.E.2d 816, 821 (1990), *overruled on other grounds by State v. Evans*, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006). A denial of a change of venue is not error if the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. *State v. Tucker*, 334 S.C. 1, 14, 512 S.E.2d 99, 106 (1999). It is the defendant's burden to demonstrate actual juror prejudice as a result of pretrial publicity. *Caldwell*, 300 S.C. at 494, 388 S.E.2d at 816.

In *State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007), the defendant requested a change of venue due to pre-trial publicity regarding his connection to two murders. In September 2002, the body of a woman was found in Spartanburg. *Id.* at 411, 645 S.E.2d at 907. The victim had been strangled, and the crime went unsolved until the defendant's arrest for a February 2003 murder. *Id.* Subsequently, an investigation revealed that semen found on the victim's body matched the defendant's DNA. *Id.*

Trial counsel moved for a change of venue, noting that thirty-nine members of the sixty-eight person jury pool had heard something about the case, and seven of the twelve jurors seated had some knowledge of the case. *Id.* at 412, 645 S.E.2d at 907-08. The trial court concluded that all jurors who had any prior knowledge of the case indicated they could set aside any information, and denied trial counsel's motion. *Id.* at 412, 645 S.E.2d at 908.

In reviewing Evins's appeal, this Court found the United States Supreme Court's decision in *Rideau v. Louisiana*, 373 U.S. 723 (1963), instructive. In that case, the people of Calcasieu Parish in Lake Charles, Louisiana, were "exposed repeatedly and in depth to the spectacle of the defendant personally confessing in detail to the crimes for which he was later charged." *Id.* at 726. In addition, three members of the jury had watched the defendant's televised "interview" in which he confessed to the sheriff, and two members of the jury were "honorary" deputy sheriffs themselves. *Id.* at 725. The failure to change venue in that case compromised the defendant's due process rights. *Id.* at 727.

Clearly the facts of the instant case are more similar to those of *Evins* than of *Rideau*. In denying Appellant's change of venue motion, the trial court concluded that the vast majority of the jurors knew nothing about the case:

A few of them know [Appellant's] name. That's on the questionnaire they were given It's no kind of pretrial publicity of any kind. And the one person that said they had some kind of information, again, without equivocation of any kind, indicated that they could set it aside.

This finding is similar to the trial court's conclusion in *Evins* that all members of the jury with any knowledge of the murder due to pretrial publicity indicated they could set that knowledge aside. *Evins*, 373 S.C. at 413, 645 S.E.2d at 908. Interestingly, the defendant in *Evins*, as here, seized on statements by one juror that she had read about his prior crimes, and overstated the juror's knowledge:

The juror testified on voir dire that the only thing she heard was that the crime had taken place; she specifically testified that she knew no details, did not know the location, she had formed no opinion, could put aside what she had heard, and could be fair and impartial.

Id.

In the instant case, Appellant fails to present even one juror who stated he or she could not ignore exposure to pretrial publicity prior to serving as a juror. In the case of Juror #480, she did not claim to know specific details of the instant case or Appellant's prior conviction, and stated that she could be fair and impartial. Appellant advances broad and unsupported arguments regarding the publicity of this case, but fails to meet his burden of demonstrating actual juror prejudice as a result of that publicity. *See Sheppard*, 357 S.C. at 655, 594 S.E.2d at 468 ("Mere exposure to pretrial publicity does not automatically disqualify a prospective juror. Instead the relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant."). The Record does not support a finding that the trial court ignored actual juror prejudice related to pretrial publicity, and thus, the trial court did not abuse its discretion in denying Appellant's motion to change venue.

V. Juror Opt Out

Appellant asserts that the trial court erred in excusing eighty-five perspective jurors pursuant to section 14-7-840 of the South Carolina Code. Section 14-7-840 allows any person age sixty-five or over to avoid jury service. S.C. Code Ann. § 14-7-840 (Supp. 2011). Appellant argues that allowing these individuals an exemption from jury service violates the "fair cross-section" requirement of the Sixth Amendment to the United States Constitution. We disagree.

The Sixth Amendment requires that a person charged with a crime be able to draw from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). To establish a prima facie violation of the fair cross-section requirement, a defendant must show that (1) the group alleged to be excluded is a distinctive group in the community; (2) the representation of this group in the venire from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). A "distinctive" group has been defined as one that: (1) shows a quality or attribute that defines or limits membership in the group; (2) possesses a cohesiveness of ideas, attitudes, or experiences that distinguishes the purported group from the rest of society; and (3) shares a community of interest that may not be represented in other segments of the population. *State v. Price*, 272 S.E.2d 103, 109 (N.C. 1980).

Section 14-7-840 of the South Carolina Code provides:

No person is exempt from service as a juror in any court of this State **except** men and women sixty-five years of age or over. Notaries public are not considered state officers and are not exempt under this section. A person exempt under this section may be excused upon telephone confirmation of date of birth and age to the clerk of court or the chief magistrate. The jury commissioners shall not excuse or disqualify a juror under this section. The clerk of court shall maintain a list of persons excused by the court and the reasons the juror was determined to be excused.

S.C. Code Ann. § 14-7-840 (Supp. 2011) (emphasis added).

In the instant case, the trial court excused eighty-five prospective jurors who chose to take advantage of their statutory exemption. Trial counsel objected on the grounds that "sixty-five is not what sixty-five used to be," and that section 14-7-840 was unconstitutional. The trial court rejected trial counsel's argument, and excused the jurors.

In *Duren*, the United States Supreme Court explained the test that must be performed in analyzing an alleged violation of the fair cross-section requirement. In that case, a jury convicted Duren of first degree murder and armed robbery. *Duren*, 439 U.S. at 360. At the time of trial, Missouri law granted women, who so requested, an automatic exemption from jury service. *Id.* (citing M.Rev.Stat. § 494.031(2) (Supp. 1978)). Duren contended that this law violated his right to a trial by a jury chosen from a cross-section of his community. *Id.* The Supreme Court agreed.

First, the Supreme Court held that (1) women were sufficiently numerous and distinct from men, and if they were systematically eliminated from jury panels, the Sixth Amendment's cross-section requirement could not be satisfied. *Id.* at 364 (citing *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975)). Second, the Court noted Duren's statistical evidence that women constituted fifty-four percent of the community, but jury venires contained approximately fifteen percent women. *Id.* at 365-66. The Supreme Court found that these venires were not "reasonably representative" of the community, and such a gross discrepancy between the percentages of women in the community and those participating in jury service mandated the conclusion that women were not fairly represented in the source from which juries were drawn in the community. *Id.* at 366. Finally, Duren demonstrated that this large discrepancy occurred in every weekly venire for nearly

a year. *Id.* The Supreme Court agreed that this indicated that the cause of the underrepresentation was systematic. *Id.* at 367.

Appellant cannot establish a prima facie case under the *Duren* test. There is no evidence before this Court that persons age sixty-five or over are "distinctive." Appellant states that a community of persons aged sixty-five or older are significantly different than a community comprised of all citizens, and that this particular group of citizens holds the same generational values and experiences, and lived through some of the same major world and national events. However, Appellant fails to cite any authority for the proposition that having lived through the same major events would yield monolithic values and experiences. Persons aged sixty-five or older obviously share a quality that limits membership in the group, but Appellant cannot demonstrate that this group as a whole possesses a cohesiveness of ideas, attitudes, or experiences that distinguishes them from the rest of society, or that these persons share a community of interest not represented in other segments of the population. See *Price*, 272 S.E.2d at 109 (outlining the definition of a distinctive group).

Additionally, Appellant fails to present any statistical evidence that the percentage of persons aged sixty-five years or older who participate in jury selection is not a reasonable representation of the community, or that any alleged underrepresentation is due to systematic exclusion of the group in the jury selection process. Thus, there is no basis for a conclusion that the trial court's excusal of potential jurors pursuant to section 14-7-840 of the South Carolina Code violated his constitutional right to a jury constituting a fair cross-section of the community.

In addition, based on the preceding analysis, we take this opportunity to hold that, for the purposes of section 14-7-480, persons age sixty-five or older are not a distinctive group. See, e.g., *Brewer v. Nix*, 963 F.2d 1111, 1112-13 (8th Cir. 1992) ("We conclude that this falls far short of proving the type of distinctive group required for a prima facie case under *Duren*. The age parameters of the group are too arbitrary, and its supposed distinctive characteristics are too general and ill-defined, to satisfy the *Duren* standards.") (holding that Iowa law exempting persons sixty-five or older from jury service did not violate the Sixth Amendment); *Silagy v. Peters*, 905 F.2d 986, 1010-11 (7th Cir. 1990) (holding that persons seventy years of age or older did not constitute a "distinctive" group for purposes of the Sixth Amendment); *United States v. Lynch*, 792 F.2d 269, 271-72 (1st Cir. 1986) ("None of this evidence, however, undercuts our decision in *Barber*, [*Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985)] that persons age 18 to 34 do not sufficiently

blend into one 'cognizable group' so as to permit the making of a prima facie case of juror discrimination simply by showing that the venire underrepresents persons falling within the broad spectrum of those ages."); *State v. Rodgers*, 562 S.E.2d 859, 876–78 (N.C. 2002) (holding that citizens aged sixty-five or over do not constitute a distinctive group for purposes of the Sixth Amendment); *Commonwealth v. Bastarache*, 414 N.E.2d 984, 992 n.10 (Mass. 1980) ("Classifications based on age have been rejected as an 'identifiable group' (for equal protection purposes) or as a 'distinctive' group (for Sixth Amendment purposes) in virtually every Federal case that has dealt with the question.").

VI. Cruel and Unusual Punishment

Appellant argues that the trial court erred in ruling that his execution would not violate the Eighth Amendment to the Constitution. We disagree.

Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (citation omitted). There are a number of crimes that beyond question are severe, yet the death penalty may not be imposed for their commission. *See, e.g., Coker v. Georgia*, 433 U.S. 584, 598 (1977) ("We have the abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life.") (citation omitted); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding that the death penalty may not be applied to a defendant who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed). The Eighth Amendment's prohibition against cruel and unusual punishment is viewed through the "evolving standards of decency that mark the progress of a maturing society." *Roper*, 543 U.S. at 560–61 (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)). These evolving standards prohibit the execution of the juvenile defendants and the intellectually disabled.¹ *See Atkins v.*

¹ *See* Act of October 5, 2010 (Rosa's Law), Pub. L. No. 111-256, 124 Stat 2643 (2010), codified at 20 U.S.C. § 1400 *et seq* ("(1) a reference to 'an intellectual disability' shall mean a condition previously referred to as 'mental retardation,' or a variation of this term, and shall have the same meaning with respect to programs, or qualifications for programs, for individuals with such a condition; and (2) a reference to individuals with intellectual disabilities shall mean individuals who were previously referred to as individuals who are 'individuals with mental retardation' or 'the mentally retarded,' or variations of those terms."); *see also* S.C.

Virginia, 536 U.S. 304, 321 ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a [intellectually disabled] offender."); *Roper*, 543 U.S. at 575 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."). Section 44-20-30 of the South Carolina Code defines an intellectual disability as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code Ann. § 44-20-30 (Supp. 2011). In *Franklin v. Maynard*, 356 S.C. 276, 278–79, 588 S.E.2d 604, 605 (2003), this Court approved this statutory definition as applicable to the death penalty context.

The threshold determination in this analysis is whether Appellant's alleged mental condition places him within the class of offender that may not be executed. As discussed in Issue I, *supra*, Appellant presented expert testimony, as part of an insanity defense, that he suffered from central nervous system dysfunction and diminished or lowered function of his brain in the frontal lobe area. In addition, one of Appellant's experts testified that scans of the right hemisphere of Appellant's brain exhibited damage in the medial gray matter of Appellant's brain at four standard deviations below normal. The expert testified that this type of damage is not seen in "normal" people, and an individual with this type of "extreme" damage would have some type of temporal lobe epilepsy.

However, the State presented compelling counter testimony. An expert in Forensic Psychology testified that she conducted a detailed review of Appellant's personal and criminal history and interviewed Appellant for approximately seventeen hours. The expert diagnosed Appellant as having a severe personality disorder. She pointed out in her testimony that evidence of mental disease or defect manifested only by repeated criminal or other anti-social conduct is not sufficient to establish the defense of insanity. The expert's description of Appellant does not depict an intellectually disabled individual:

Code Ann. § 44-20-30 (Supp. 2011), *amended by* 2011 Act No. 47, § 13 (2011) ("SECTION 13. In Sections 1 through 6 of this act, the terms 'intellectual disability' and 'person with intellectual disability' have replaced and have the same meanings as the former terms 'mental retardation' and 'mentally retarded.'").

I think he's a highly narcissistic, entitled person, who really feels special. I think he, throughout his life, has not really wanted to work very hard, so he's done a lot of illegal activities for quick gain. He's a very, very smart person, but I would say that, rather than applying himself . . . he would look for the fast deal Why he doesn't have a conscience, I don't know. I don't think anybody can tell you why he doesn't have a conscience.

An expert in neurology and neuropsychiatry testified that the white matter damage and prefrontal atrophy claimed by Appellant's experts was simply "not there." Moreover, the expert testified directly to the possible occurrence of brain damage during Appellant's birth. According to that expert's review of Appellant's medical records, Appellant received the maximum ten points in the Apgar test given to newborns almost immediately following birth. A diagnostic imager provided expert testimony that the images of Appellant's brain demonstrated no abnormalities and were "perfectly normal." This expert's testimony regarding Appellant's brain scan is illuminating. The expert explained the usual procedure of a P.E.T. scan, and how Appellant's scan differed from that procedure. According to this expert's testimony, patients are normally placed in a controlled environment for approximately one hour prior to the scan. This sequestration ensures a standard brain scan by preventing, as much as possible, exposure to external stimuli. However, in Appellant's case, his trial counsel altered the standard pre-scan routine. Appellant's trial counsel arranged for a psychologist to administer a computer-generated test to Appellant both before and during the pre-scan routine. This test required Appellant to sit in front of a computer screen and click a mouse in response to "yes" or "no" questions. This caused certain areas of Appellant's brain to appear irregular. However, when the expert accounted for the disruption to the pre-scan routine, Appellant's scan appeared normal.

Appellant has an intelligence quotient of 143, and a history of criminal behavior consistent with that of a confidence man. Moreover, Appellant's trial counsel admitted there was no definitive evidence of an intellectual disability, stating, "Your honor, hypofrontality is what *some* experts say is the condition this defendant has." While expert testimony in this case may demonstrate Appellant's inability to adapt, the Record does not show that he is of significant sub-average intellectual functioning.

However, Appellant's trial counsel argued that preventing the State from executing individuals with Appellant's alleged brain dysfunction simply represented a logical step in Eighth Amendment jurisprudence:

It should be declared unconstitutional and say, "Look, we've taken the step in terms of [intellectual disability]. We've taken the step in terms of age, recognizing that the brain has got to function properly, and in those two cases, the [intellectual disability] and the young age, it doesn't, so we're not going to execute those people," and we shouldn't.

Appellant renews that argument in asking this Court to expand the United States Supreme Court's rationale in prohibiting execution as a punishment for certain offenders. However, trial counsel's argument oversimplifies the underlying reasoning for the Eighth Amendment prohibition on executing juveniles and the intellectually disabled.

In *Roper*, the Supreme Court articulated three differences between juveniles and adults which demonstrate that juveniles cannot reliably be classified as among the worst offenders. *Id.* at 569. First, scientific and sociological evidence demonstrates that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young." *Id.* (citation omitted). This often results in impetuous and ill-considered actions and decisions. *Id.* ("[A]dolescents are overrepresented statistically in virtually every category of reckless behavior." (citation omitted)). Second, juveniles are more vulnerable to negative influences and outside pressures. *Id.* ("This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." (citation omitted)). Third, the character of a juvenile is not as well informed as that of an adult. *Id.* at 570 ("The personality traits of juveniles are more transitory, less fixed." (citation omitted)). In addition, according to the Supreme Court, the two distinct social purposes served by the death penalty, retribution and deterrence, are not served by a minor's execution. *Id.* at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."). The Court also cited the glaring fact that at the time of the decision, the United States stood alone as the only country in the world that continued to officially sanction the juvenile death penalty. *Id.* at 575.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court relied on a clinical definition of intellectual disability which required not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that manifested before age eighteen. *Id.* at 318. Contrary to trial counsel's assertion in the instant case, the Supreme

Court's decision did not rely on a *simple* finding that an intellectually disabled defendant's brain did not function properly. The Supreme Court found that these persons frequently know the difference between right and wrong and are competent to stand trial. *Id.* However, their diminished capacity frustrated the retributive and deterrent goals of capital punishment. *Id.*

Following the resumption of the death penalty, the Supreme Court maintained that the punishment applied only to the most serious crimes. *Id.* at 319. Thus, the Court reasoned that if the "culpability of the average murderer is often insufficient to justify the most extreme sanction available to the State[,] the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution." *Id.* ("Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the [intellectually disabled] is appropriate."). With respect to deterrence, the Court had previously held that capital punishment could only serve as a deterrent when murder "is the result of premeditation and deliberation." *Id.* (citation omitted). The Court held that this sort of calculation stood at the opposite end of the spectrum from the behavior of the intellectually disabled. *Id.* at 319–20. In addition, this disability was also found to increase the risk that the death penalty would be imposed in spite of factors which may call for a less severe penalty. *Id.* at 320. More specifically, these defendants are more susceptible to false confessions, are less able to provide meaningful assistance to their counsel, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. *Id.* at 320–21.

Appellant's alleged mental abnormalities do not demonstrate an inability to communicate or care for himself adequately, or sub-average intellectual functioning. Instead, his above average intelligence, and behavior before and after the Victim's murder, demonstrate an ability to formulate and execute deliberate plans. *See Enmund v. Florida*, 458 U.S. 782, 799 (1982) (holding that capital punishment can only serve as deterrent when murder is the result of premeditation and deliberation). Thus, his behavior in this case stands at the opposite end of the spectrum from the behavior of an intellectually disabled person. *See Atkins*, 536 U.S. at 319–20 (analyzing the mental capabilities of intellectually disabled offenders). There is simply no justification for finding Appellant's alleged condition similar to those individuals who may not be executed lawfully.²

² The decisions by other jurisdictions cited by Appellant are not persuasive. For example, the Florida Supreme Court has reversed death penalty convictions based on mental illnesses whose symptoms do not align closely with our state's definition

The trial court properly denied Appellant's motion pursuant to existing law, and did not err in refusing to find that Appellant's death sentence violates the Eighth Amendment.

CONCLUSION

For the foregoing reasons, we affirm Appellant's conviction and sentence.

BEATTY, KITTREDGE, and HEARN, JJ., concur. PLEICONES, J. concurs in result only.

of intellectual disability. However, even those cases involve debilitating mental illnesses of the type inapposite that of Appellant.

The Supreme Court of South Carolina

The State, Respondent,

v.

Stephen Christopher Stanko, Appellant.

Appellate Case No. 2010-154746

APR -3 2013

ORDER

The petition for rehearing filed in the above entitled matter is denied.

s/Jean H. Toal C.J.

s/Costa M. Pleicones J.

s/Donald W. Beatty J.

s/John W. Kittredge J.

s/Kaye G. Hearn J.

Columbia, South Carolina

April 3, 2013

cc:

Robert M. Pachak, Esquire
J. Anthony Mabry, Esquire
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire
John Gregory Hembree, Esquire

Effective: June 11, 2010

Code of Laws of South Carolina 1976 Annotated Currentness

Title 16. Crimes and Offenses

Chapter 3. Offenses Against the Person

Article 1. Homicide

⇒⇒ § 16-3-20. Punishment for murder; separate sentencing proceeding when death penalty sought.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life" or "life imprisonment" means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. In cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years to life pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years to life required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14, Article IV of the Constitution of South Carolina, 1895, the commuttee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years to life. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the

State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) trafficking in persons;

(d) burglary in any degree;

(e) robbery while armed with a deadly weapon;

(f) larceny with use of a deadly weapon;

(g) killing by poison;

(h) drug trafficking as defined in Section 44-53-370(c), 44-53-375(B), 44-53-440, or 44-53-445;

(i) physical torture;

(j) dismemberment of a person; or

(k) arson in the first degree as defined in Section 16-11-110(A).

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county or municipal detention facility employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(12) The murder was committed by a person deemed a sexually violent predator pursuant to the provisions of Chapter 48, Title 44, or a person deemed a sexually violent predator who is released pursuant to Section 44-48-120.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence

against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In non-jury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of

death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

CREDIT(S)

HISTORY: 1962 Code § 16-52; 1952 Code § 16-52; 1942 Code § 1102; 1932 Code § 1102; Cr. C. '22 § 2; Cr. C. '12 § 136; Cr. C. '02 § 109; G. S. 2454; R. S. 109; 1868 (14) 175; 1894 (21) 785; 1974 (58) 2361; 1977 Act No. 177 § 1; 1978 Act No. 555 § 1; 1985 Act No. 104, § 1; 1986 Act No. 462, § 27; 1990 Act No. 604, § 15; 1992 Act No. 488, § 1; 1995 Act No. 83, § 10; 1996 Act No. 317, § 1; 2002 Act No. 224, § 1, eff May 1, 2002 (applicable to offenses committed on or after that date); 2002 Act No. 278, § 1, eff May 28, 2002; 2006 Act No. 342, § 2, eff July 1, 2006; 2007 Act No. 101, § 1, eff June 18, 2007; 2010 Act No. 273, § 21, eff June 2, 2010; 2010 Act No. 289, § 4, eff June 11, 2010.

CODE COMMISSIONER'S NOTE

2011 Act No. 47, § 14(B), provided for the substitution of "intellectual disability" for "mental retardation" in the 1976 Code of Laws. At the Code Commissioner's discretion, the phrase "mental retardation" has been retained, as this phrase is specifically defined in this section.