

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Sumter County
Thomas A. Russo, Circuit Court Judge

2004-GS-40-10096 (Richland County)
2006-GS-43-696, 2006-GS-43-699 thru 702

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

STEPHEN COREY BRYANT,

Appellant.

INITIAL BRIEF OF RESPONDENT

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S.C. SUPREME COURT

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES ii

APPELLANT’S STATEMENT OF ISSUE ON APPEAL 1

RESPONDENTS STATEMENT OF THE CASE 2

 The Guilty Plea 3

 The Sentencing Proceeding 4

 The Crimes of Stephen Bryant 6

ARGUMENT 15

Where testimony was admitted in mitigation that Appellant Bryant had recently claimed to have been sexually abused by his grandfather when he was a child, the trial court did not err in excluding collateral testimony from his aunt that she had problems with the same person as not relevant mitigation evidence. 15

CONCLUSION 36

RESPONDENTS DESIGNATION OF MATTER

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

FEDERAL CASES

Alley v. Bell, 307 F.3d 380, 392, 399 (6th Cir.2002)	21
Blystone v. Pennsylvania, 494 U.S. 299 (1990)	21
Boyd v. French, 147 F.3d 319, 326 (4th Cir.1998)	20
Eddings v. Oklahoma, 455 U.S. 104 (1982)	16,17, 18
Franklin v. Lynaugh, 487 U.S. 164, 174, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)	21
Green v. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979)	18-20
Hutchins v. Garrison, 724 F.2d 1425, 1437 (4th Cir.1983)	22
Johnson v. Texas, 509 U.S. 350, 362, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993)	18
Lockett v. Ohio, 438 U.S. 586 (1978)	16, 17, 20, 22
McGehee v. Norris, 588 F.3d 1185, 1197 (8th Cir. 2009)	23
McKoy v. North Carolina, 494 U.S. 433,(1990)	19
Mills v. Maryland, 486 U.S. 367, at 374-375, 108 S.Ct. 1860 (1988)	16
Oregon v. Guzek, 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006)	21
Owens v. Guida ,549 F.3d 399, 419 (6th Cir. 2008)	21
Rompilla v. Beard, 545 U.S. 374, 391-92, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) ...	23
Skipper v. S.C., 476 U.S. 1 (1986)	16,18
Smith v. Spisak , 130 S.Ct. 676, 681 -682 (2010)	16
Sweet v. Delo, 125 F.3d 1144, 1158 (8th Cir.1997)	19, 23
Tennard v. Dretke, 542 U.S. 274, 284, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) ...	19, 33
United States v. Purkey, 428 F.3d 738, 756 (8th Cir.2005)	20

Wiggins v. Smith, 539 U.S. 510, 517, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) . . . 16, 23

Williams (Terry) v. Taylor, 529 U.S. 362, 395-96, 120 S.Ct. 1495, 146 L.Ed.2d 389
(2000) 23

STATE CASES

Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) 16, 33

State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) 16

State v. Mercer, 381 S.C. 149, 161, 672 S.E.2d 556, 562 (2009) 16

State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct.App.2007) 16

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

The sentencing judge committed reversible error by excluding testimony that Bryant's aunt had been sexually abused by her father (Bryant's paternal grandfather), who the defense alleged also began abusing Bryant at the age of seven, as this evidence was both relevant under Rules 401 and 404, SCRE, and mitigating under the Eighth and Fourteenth Amendments to the United States Constitution.

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Stephen Corey Bryant, was indicted at the July 20, 2006 term of the Court of General Sessions for burglary in the second degree (2006-GS-43-696) [Oct. 5, 2004 incident involving Robert T. Dennis]; burglary in the first degree (2006-GS-43-697) [Oct. 8, 2004 incident involving James Ammons]; murder; burglary in the first degree; arson in the second degree; possession of a stolen handgun (2006-GS-43-698)[Oct. 9, 2004 incident resulting in homicide of Clifton Dale Gainey]; murder; armed robbery; possession of stolen handgun (2006-GS-43-599) [Oct. 11, 2004 incident involving death of Willard Tietjen]; murder and possession of stolen handgun (2006-GS-43-700) [Oct. 13, 2004 incident involving death of Clarence Burgess]; assault and battery with intent to kill (2006-GS-43-701 [involving Oct. 26, 2005 incident against Correctional Officer Larry Justice at Sumter-Lee Detention Center]; threatening life of public employee (2006-GS-43-702) [involving March 9, 2005 incident toward Correctional Officer Thornwell Jones of the Sumter-Lee Regional Detention Center]. ROA ___. On December 14, 2004, the Appellant was indicted at the Court of General Sessions for Richland County for Assault and battery with intent to kill (2004-GS-40-10096)[October 8, 2004 incident upon Clifton Brown]. ROA ___.

The State made written notice of intent to seek the death penalty which was served on arraignment before the Honorable Clifton Newman on April 27, 2007 on the Tietjen incident, 2006-GS-43-699. April 27, 2007 Tr. p. 4-8. The Appellant was initially represented by Jack D. Howle, Jr., Esquire, of the Sumter County Bar. He was subsequently appointed James H. Babb to represent him as second counsel. On July 8, 2008, counsel Babb was removed upon motion and replaced by John D. Clarke of the Sumter County Bar. The

notice of intent to seek the death penalty was served upon counsel Clarke at the July 18, 2008 proceeding. July 18, 2008 Tr. 7.

Motion hearings were held December 14, 2004, December 13, 2005, April 27, 2007, May 14, 2007, April 3, 2008, April 18, 2008, and July 18, 2008.

On April 11, 2008, the Appellant made a petition for writ of certiorari in the original jurisdiction of the South Carolina Supreme Court. On April 23, 2008, the Supreme Court of South Carolina issued an Order staying the trial, scheduled to begin April 28, 2008, pending decision on the petition for writ of certiorari. On May 1, 2008, the State opposed the petition. On May 30, 2008, the Supreme Court of South Carolina entered its Order, that “petition for writ of certiorari in the original jurisdiction is denied.” Subsequently, on July 10, 2008, the Court denied a “motion for order reinstating a stay of trial.”

a. The Guilty Plea

On August 18, 2008, the Appellant appeared before the Honorable Thomas A. Russo for a guilty plea. The Appellant was represented by court-appointed counsel, Jack Howle and John Clarke. The State was represented by Third Circuit Solicitor C. Kelly Jackson and Assistant Solicitor Dudley Saleeby. Counsel James H. Babb was also present. Plea Tr. p. 26. The record revealed that there were no plea negotiations as to sentence in the case. Plea Tr. 17, 23-24, 56-57. The Appellant entered guilty pleas to the following crimes:

1. burglary in the second degree [2006-GS-43-696].
2. burglary in the first degree [2006-GS-43-697].
3. assault and battery with intent to kill [2004-GS-40-10096] [Richland County].

4. murder [2006-GS-43-698].
5. murder [2006-GS-43-699].
6. murder [2006-GS-43-700].
7. assault and battery with intent to kill [2006-GS-43-701].
8. threatening the life of a public employee [2006-GS-43-702].
9. armed robbery [2006-GS-43-699].
10. possession of stolen handgun [2006-GS-43-699].
11. burglary first degree [2006.GS-43-698].

Plea Tr. 12-16. The plea court determined that there was a sufficient factual basis for each of the guilty pleas. Plea Tr. 26-59. The Appellant affirmed the State's factual basis as correct as to each crime. Plea Tr. p. 31, p. 35, l. 23; p. 38, l. 17; p. 43, l. 23; p. 46, l. 15; p. 52, l. 14; p. 54, ll. 16-18; p. 55, l. 25. Judge Russo deferred sentencing.

b. Sentencing Proceedings - September 2-5, 8, 9, 11, 2008

On September 2, 2008 the sentencing proceeding began before Judge Russo pursuant to Sect. 16-3 20(c)(a)(d) on indictment 2006-GS-43-699 involving the murder of Willard Tietjen. The State had filed and served the Notice of Intent to seek the death penalty asserting the condition precedent of the statutory aggravating circumstances "murder was committed while in the commission of a robbery while armed with a deadly weapon." The State presented its evidence in aggravation through September 8, 2008. Sentencing Tr. pp. 1-730.

The defense presented its evidence in mitigation. Sentencing Tr. pp. 734-1000. The

Appellant waived his right to testify.¹ Tr. pp. 1002-1004. The State and defense made closing arguments to the Court. Tr. pp. 1005-1035.

Judge Russo sentenced the Appellant on September 11, 2005. He sentenced Bryant to thirty (30) days on 2006-GS-43-702 (threatening life of a public employee); twenty (20) years on 2004-GS- 40-10096 (assault and battery with intent to kill); twenty (20) years on 2006-GS-43-701 (assault and battery with intent to kill); life imprisonment on 2006-GS-43-700 (murder); life imprisonment on 2006-GS-43-697 (burglary in the first degree); fifteen (15) years on 2006-GS-43-696 (burglary in the second degree); twenty-five (25) years on 2006-GS-43-698 (arson in the second degree); and life ((burglary in the first degree); and life (murder).

On 2006-GS-43-699, five (5) years (possession of stolen handgun); thirty (30) years (armed robbery); and life (murder). Judge Russo found beyond a reasonable doubt the existence of the statutory aggravating circumstance of “the defendant committed the murder while in the commission of a robbery while armed with a deadly weapon.” Tr. p. 1049, l. 22 - p. 1050, l. 8. On the incident involving the death of Willard Tietjen, Judge Russo sentenced Bryant to “death by electrocution or lethal injection.” Tr. p. 1051, l. 4-7.

The Appellant, through counsel served and filed a timely Notice of Appeal on September 19, 2008.

¹ The Appellant did make a spontaneous interruption of the State’s closing argument. Tr. p. 1006, l. 12.

The Crimes of Stephen Corey Bryant

1. **The Burglary of the Residence of Robert Dennis on October 5, 2004 [Tuesday].**

It began on October 4, 2004. Bryant comes upon the home of Robert Dennis. It has an iron gate, no trespassing signs, and dirt road access to his property which rests in an isolated, remote area. Tr. pp. 186-189, 196. Bryant walks down the half mile dirt road to the Dennis home and tells Dennis that his truck was stuck at the top of his driveway. Dennis offers help and although uneasy takes him to the area and extracts the truck out of the bog. Tr. pp. 189-190. Dennis gets his name "Carlos Bryan" and a false address. Dennis also writes down a description of the truck - a 1990 GMC two-tone blue truck. Plea Tr. pp. 29-30; Tr. p. 191, ll. 1-12.

On October 5, 2004, Dennis leaves his home and returns later that day and finds his home office burglarized. Tr. pp. 192-194. There was entry through a window, with computer items and checkbook stolen from his office. Tr. pp. 192-193. Although no fingerprints were found, with the exception of glove prints, a shoeprint was raised outside the window which was sent to SLED.

A subsequent search warrant of Bryant's home found a right shoe that matched the shoeprint. In addition, Dennis identified Bryant as the visitor from October 4th which his photograph was on television and newspaper and contacted the police. Plea Tr. pp. 30-31; Tr. p. 195, l. 18 - p. 196, l. 9.

2. The Burglary of James Ammons on October 8, 2004 [Friday].

James Ammons, like Dennis lived in an isolated and remote area outside of Sumter. Tr. pp. 199-200. The morning of October 8th, Ammons takes his daughter to school and then travels into Sumter for errands. Tr. p. 204. At that time, Ammons had allowed a friend, T. J. Hansen, to go deer-hunting on his property, but he got his truck stuck in the mud.

His friend goes to Ammons' home around 11:30 a.m., notices the sliding door open and enters to seek help or use the telephone. However, he finds the telephone is dead. He walks to another neighbors house and calls Ammons on his cell phone. Tr. pp. 204-205, 211-216.

Ammons and his friend then returned to Ammons' home around 1:30 p.m. Tr. p. 205. The sliding door is open, the television is off rather than on as he left it, and Ammons goes into his bedroom and finds the mattress moved, a .40 caliber Smith and Wesson pistol stolen along with ammunition and registration papers. Ammons then calls 9-1-1. Plea Tr. pp. 32-33; Tr. pp. 205-209.

Subsequently, as a result of the search on October 13th, the gun, case, ownership papers and the box of ammunition are recovered from Bryant's house. Plea Tr. pp. 33-34; Tr. pp. 207-210. Bryant gave a series of statements just claiming the gun was found in a dumpster and then asserted he found it at a home in Pinewood where he stopped when he was low on gas, slid open the door, and took the gun. Plea Tr. pp. 33-34; Tr. pp. 216-217. In a third statement, he admitted to cutting the telephone wires before he

entered the home. Plea Tr. p. 35; Tr. p. 217.

3. Assault on Clinton Brown in Richland County [October 8, 2004].

Clinton Brown was fishing with an acquaintance at the Billy Tolar Boating Landing off the Wateree River, Tr. pp. 247-248. Brown saw Bryant come up and speak to them and then leave. The other fisherman leaves. Tr. pp. 250-253. At one point Bryant returns, comes from behind Brown and shoots him in the back. Bryant then leaves, offering no assistance. Tr. pp. 254-255.

Brown, bleeding, initially passes out. He comes to and struggles up to his truck and drives to Tuomey Hospital where he remains for over one week. Plea Tr. pp. 35-38; Tr. pp. 254-256, 259-262.

The bullet recovered from Brown ultimately matches the stolen Smith and Wesson. Bryant admits the shooting to a Third-Party [Roy Lee Lambert], the next day. Tr. pp. 273-276. Law enforcement was then contacted by that person. Plea Tr. p. 38. Lambert buys a knife from Bryant and sees a Smith and Wesson that Lambert offers to find a buyer, but Bryant says "its got blood on it." Tr. p. 275.²

4. The murder of Cliff Gainey on October 9, 2004.

Unlike the others, Appellant and Cliff Gainey knew each other. They were co-workers in construction, went fishing together and spent weekends with each other's family. Plea Tr. p. 40. On October 9, 2004, Bryant picked up Gainey from the mobile home he rented from his boss. They end up at a convenience store buying beer. [This is

² Bryant gave statements asserting that he pulled the trigger and the bullet hit him in the back. Tr. pp. 280-281. He stated the victim charged him so he fired back with a second shot, but claimed he did not know if it hit him. Tr. p. 281.

seen on store's camera.] They drive off arriving on Bells Mill Road. Bryant shoots Gainey three (3) times, leaves body and drives off. A passerby, William Morton sees a truck with its lights initially off speed away and then sees the body. After checking vitals he calls 9-1-1. Tr. pp. 285-286. There is no identification on the body and he remains unidentified for nearly two days. Tr. pp. 290-291, 301.

After shooting Gainey, Bryant then returns to Gainey's mobile home. He steals a television, VCR, sound system and aquarium. Tr. p. 317. Upon leaving, he sets fire to the couch. Plea Tr. pp. 40-41.

At 8:30, Gainey's ex-wife Linda Coker arrives with son and calls the fire department. They determine it is not accidental and determine it began prior to 8:25 due to the damage of a clock. Tr. pp. 323-330. The family had been by previously at 7:30. Tr. pp. 307-311.

Connecting Bryant to the murder was the positive comparison of the shell casings at the scene, the video of the convenience store with Gainey, and the results of the search warrant of Bryant's home where television, DVD, VCR, sound system and aquarium were found. Tr. pp. 336-337. Further, Bryant's girlfriend Judy Justice, had been given a key from Bryant that was the key to Gainey's mobile home. Tr. pp. 337-338.

Bryant also gave a statement claiming he threw the wallet into a dumpster, showed weapon to the victim, and took the items from Gainey's home. Guilty Plea Tr. pp. 42-43; Tr. pp. 340-344. In his last statement, he admitted shooting Gainey after he took a leak and then turned toward him when "I started freaking out." Tr. p. 344.

5. The murder of Willard Tietjen on October 11, 2004 [Monday].

Between 11:00 a.m. and 5:30 p.m., Willard Tietjen, a disabled 62 year old, was murdered in his home. He lived with his wife, Mildred in a remote and isolated ranch house. Plea Tr. pp. 44-45.

Tietjen, suffering from a bad heart condition and early onset of Alzheimer's, was a man of habit who stayed around his home due to his conditions. Tr. pp. 426-427, 473. His wife after leaving for work after breakfast, would begin calling on him around 4:30 p.m. Plea Tr. p. 45; Tr. p. 432.

On October 11th, Tietjen spoke around 11:00 a.m. with a friend, Robert Summers. Plea Tr. 46; Tr. pp. 433-434, 484-486. Subsequently, without apparent forced entry, Stephen Bryant entered Tietjen's home. [In Bryant's statement, he says he knocked on Tietjen's door, asked for help because his truck had broken down and that Tietjen invited him inside]. Plea Tr. p. 46.

Tietjen is shot nine (9) times by Bryant in the dining room. Plea Tr. p. 46.

Bryant proceeds to go through Tietjen's wallet and takes cash and some cards. Plea Tr. p. 46. He throws cards around the living room floor. Bryant pull's Tietjen's masonic ring off his finger. Bryant methodically goes through each room in the house looking for items to steal. Plea Tr. pp. 46-47.

He takes power tools, a knife, a medallion, a jug of change, hand tools, a bag to carry them in, walkie-talkies, cell-phone, silver certificates, jewelry, an ammo box, and other items. Plea Tr. p. 47, ll. 3-10.

Bryant then takes a drink from the refrigerator, smokes cigarettes, and a cigar.

Plea Tr. p. 47. In addition, Bryant writes a note,³ goes on the computer. Plea Tr. p. 47.

Bryant is still in the home when Mrs. Tietjen makes her daily call to the land line to check on her husband. Tr. p. 435. She then calls Tietjen's cell phone and Bryant answers and says "T.J. is dead" and admits killing her husband. Plea Tr. p. 47; Tr. p. 436, l. 20 - p. 437. She hangs up and calls 9-1-1. She calls again and Bryant repeats "I told you T.J. is dead, and don't call again." Tr. p. 438; also Tr. pp. 659-660, 698. Tietjen's daughter Kimberly Dees calls the cell phone also and Bryant again admits killing her father. Tr. pp. 477-668. Kimberly's husband [Robert Dees] calls, and the same sad inculpatory statement is given. Plea Tr. p. 47; Tr. pp. 481-482. These calls occur between 5:15 and 5:30. Law enforcement was called after.

Forensic testing connects the shell casings and bullets from the Tietjen scene with the stolen handgun. Plea Tr. p. 48. Bryant's DNA is found on cigarette material within the house. One was a partially smoked cigarette retrieved from the right eye of the victim. Tr. pp. 594-595. It is also found on a pair of socks. Tr. p. 595. Handwriting analysis finds the note consistent with Bryant's writing. Plea Tr. p. 48; Tr. p. 583. A videotape of the Bi-Lo store shows Bryant using the change machine. *Id.* Tr. pp. 562-563, 569.

Items of stolen property were recovered and connected to Bryant. Tr. pp. 546-552. Bryant sells the stolen knife to Roy Lambert who Bryant had admitted shooting Brown who turns it into police. Tr. pp. 274-276, 572-573.

³ The contents of the note/letter stated: "no more sick computer porn for this sick f____r. By the way, just keeping my promise to all. Good luck finding me. LMFAO." The note also stated "I find it funny, victim number five in two weeks." Tr. pp. 516-518.

Bryant also gives inculpatory statements Tr. pp. 607-615. He admitted the Tietjen robbery and taking items while still armed. He described acts done within the house and laid claim as the sole perpetrator. He then carried law enforcement to locations where he had deposited items. He admitted conversations with Tietjen's family. Plea Tr. p. 49, ll. 2-10.

Mrs. Tietjen testified that her husband told her Friday, October 8th, a man came by the house looking for Kimberly Smith. She said her husband tried to assist the person with the use of the telephone book. Tr. pp. 430-431. When she had returned home on the 8th, she saw a truck in the driveway that she had assumed was a deer-hunter's truck. She recalled it to be a GMC and similar color to a photograph of the truck identified as Bryant's. Tr. pp. 430-431.

Dr. Joel Sexton, the forensic pathologist, testified about the extensive injuries to Mr. Tietjen. Tr. p. 109. The victim had nine (9) gunshot wounds and burns to the eyes and his beard. Tr. pp. 108-113. Two of the shots to the head were fatal. Tr. p. 112, ll. 1-21.

6. The murder of Christopher Burgess two days later [October 13, 2004] [Wednesday].

Thirty-five (35) year old Christopher Burgess rode a bicycle at 1:30 a.m. to the Foxville Road area in Manchester Forest. Guilty Plea Tr. p. 50. He comes upon an Officer Benjamin Stiles and then continues on toward the mall. Tr. pp. 345-348.

Around 4:20 a.m., Burgess ends up at a convenience store, the Kangaroo Market Express [where he is seen on video with Bryant]. [Tr. p. 353, Exhibit 103]. Towanda

Govan, an employee, knew both Burgess and Bryant by their coming into the store. Tr. p. 351. On that date, Govan recalled Chris coming in first and Bryant came in later and she saw them shake hands. Tr. p. 352. She said it was around 4:20 a.m. Tr. pp. 354-355.

After some conversation, Burgess leaves with Bryant after his bike is put into Bryant's truck. Guilty Plea Tr. p. 50. They eventually end up in the Foxville Road area. Similar to the Gainey incident, Bryant shoots Burgess and leaves the unconcealed body in the road bed.

Around 6:15 a.m., a deer hunter, Tony Jackson, sees the body in the roadway and calls 9-1-1. Tr. pp. 358-360, p. 365.

Burgess had two (2) gunshot wounds - one through his left cheek that entered his brain and a second through his back that went through his heart and exited. Plea Tr. p. 51.

The removed bullet and shell casing matched the stolen handgun. Plea. Tr. p. 51. The videotape of the convenience store show Bryant and Burgess together. Items that had been previously seen by law enforcement in Bryant's truck during an interview before this incident are found at the scene. Guilty Plea Tr. pp. 51-52. Burgess' bicycle is recovered from the truck when the warrant is served. Guilty Plea Tr. p. 51.

In Bryant's statements, he admits shooting Burgess with the Smith and Wesson, knew the location and described the body. Guilty Plea Tr. p. 52; Tr. pp. 376-379. Bryant declared in his statements that Burgess started making demands where he wanted him to take him which "pissed me off" and he feared he would take his truck from him, so he reached under the seat, grabbed the gun and shot him. Tr. p. 378, ll. 4-9, p. 379, ll. 5-12.

7. Threatening the life of Correctional Officer Thornwell Joe Jones at the Sumter-Lee Regional Detention Center on March 9, 2005.

Subsequent to his arrest, Bryant became a pre-trial detainee at the Sumter-Lee Regional Detention Center. On March 9, 2005, Correctional Officer Cpl. Thornwell Jones and a nurse were passing out food trays and medication to the inmates. Guilty Plea Tr. p. 53. When they arrived at Bryant's cell, Bryant declares: "I's coming out of my cell when you open the door and I'm going to F ____ you up." Guilty Plea Tr. p. 53; Tr. p. 383.⁴ They open the door and Bryant appears - hands balled up and ready to fight. Tr. pp. 383-384. The officers took it seriously and Bryant finally stood down without striking the officer. Guilty Plea. Tr. pp. 53-54; Tr. pp. 383-384.

Jones testified that he did not have problems with him after that date. Tr. p. 387.

8. The assault with intent to kill Correctional Officer Larry Justice on October 26, 2005.

On October 26, 2005, Officer Larry Justice is retrieving dinner trays at the Sumter-Lee Regional Detention Center maximum security area. Tr. pp. 392-93. He approaches Bryant's single cell and Bryant places his tray in the bag. Tr. p. 392. At that point Bryant sucker punches Justice multiple times whose head is knocked against a wall and falls to the ground. Tr. pp. 393, 413. While in a fetal position, Bryant is kicking and beating Officer Justice on the face and chest. Guilty Plea Tr. p. 55; Tr. pp. 413-414. An officer witnesses this and calls for assistance. Tr. pp. 413-416. Bryant then withdraws

⁴ During the hearing, he testified that Appellant stated when I open his door he was "going to come out and go to my f ____g ass because he ain't got nothing to lose." Tr. p. 383, ll. 14-16.

and goes into this cell. Tr. pp. 416-417.

Officer Justice suffers a broken eye socket, broken nose, crushed sinus bones and a brain aneurysm. Guilty Plea Tr. p. 55; Tr. pp. 394-396. He has not worked since the incident. Tr. p. 401, l. 19. He suffers headaches, nosebleeds, and he is required to walk with a cane to control his balance. Guilty Plea Tr. p. 55; Tr. pp. 395-396.

ARGUMENT

Where testimony was admitted in mitigation that Appellant Bryant had recently claimed to have been sexually abused by his grandfather when he was a child, the trial court did not err in excluding collateral testimony from his aunt that she had problems with the same person as not relevant mitigation evidence.

In his brief, Appellant asserts the sentencing judge committed error in excluding testimony from Appellant's aunt that she had problems of molestation from her father (the Appellant's grandfather) because the Appellant had claimed in 2004 that he had been sexually abused by his grandfather and this similar alleged act added credibility to the Appellant's assertion to her. The trial court rejected the proffer upon objection, concluding the evidence had no relevance to the Petitioner. As the court stated: "its not relevant to Bryant's case as to what abuse this grandfather may have inflicted on others. Its not a question of how extensive his abuse, but is relevancy to others". Tr. pp. 790-791. Respondent submits the trial court did not abuse its discretion in excluding this limited evidence from Appellant's aunt as to whether she had been abused by the grandfather, but allowed evidence of Appellant's claim that he had been abused by him and her own knowledge of whether he had been abused.

STANDARD OF REVIEW

In criminal cases an appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Evidentiary rulings are within the sound discretion of the trial court, and such rulings will not be reversed absent an abuse of discretion or the commission of legal error that prejudices the defendant. *State v. Rice*, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct.App.2007). The trial court abuses its discretion when the ruling is based on an error of law or factual conclusion that is without evidentiary support. *Id.* at 315, 652 S.E.2d at 415.

First, the Constitution forbids imposition of the death penalty if the sentencing judge or jury is “ “precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” ’ ’ 486 U.S., at 374, 108 S.Ct. 1860 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), in turn quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion)). Second, the sentencing judge or jury “ ‘may not refuse to consider *or be precluded from considering* “any relevant mitigating evidence.” ’ ’ *Mills v. Maryland*, 486 U.S. 367, at 374-375, 108 S.Ct. 1860 (1988) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), in turn quoting *Eddings*, *supra*, at 114, 102 S.Ct. 869). Accord *Smith v. Spisak*, 130 S.Ct. 676, 681 -682 (2010).⁵

⁵ Recently, this Court in *State v. Mercer*, 381 S.C. 149, 161, 672 S.E.2d 556, 562 (2009) reminded the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence. See *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (relying in large part upon *Wiggins v. Smith*, 539

In *Lockett*, the trial judge sentenced the defendant to death under a statute that provided for imposition of the death penalty unless the sentencer found, by a preponderance of the evidence, the existence of at least one of three enumerated mitigating factors. *Lockett*, 438 U.S. at 593-94, 98 S.Ct. 2954. Lockett argued her sentence was unconstitutional because the state statute prohibited the sentencer from considering other relevant mitigating factors. *Id.* at 602, 98 S.Ct. 2954. The Supreme Court agreed, holding that, in capital cases, “the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Id.* at 604, 98 S.Ct. 2954.

In *Eddings*, the Supreme Court reaffirmed and extended this rule. The trial judge had refused to consider mitigating evidence of a convicted murderer's unhappy and violent upbringing. The Court held, “Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.” *Eddings*, 455 U.S. at 113-14, 102 S.Ct. 869. Indeed, the Court likened the situation to one, similar to that at hand, in which “the trial judge had instructed a jury to disregard the mitigating evidence ...

U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (counsel's failure to adequately investigate and present mitigating evidence resulted in the ineffective assistance of counsel requiring a new sentencing hearing). The Court declared that the trial courts, vested with considerable discretion in evidentiary matters, must not neglect the due process implications involved in a capital defendant's right to present mitigation evidence.

proffered on [the defendant's] behalf,” emphasizing that the sentencer may not give relevant mitigating evidence “no weight by excluding [it] from ... consideration.” *Id.* at 114-15, 102 S.Ct. 869.

In *Skipper*, the trial court permitted the defendant to introduce evidence at his capital sentencing hearing of mitigating factors, such as his difficult upbringing, but excluded as irrelevant evidence of the defendant's good behavior during the seven-and-one-half months he was in jail awaiting trial. *Skipper*, 476 U.S. at 2-3, 106 S.Ct. 1669. Determining that the evidence of good behavior was, indeed, relevant, the Supreme Court held that the exclusion “impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender,” and required reversal of the death sentence. *Id.* at 8-9, 106 S.Ct. 1669.

The “central requirement” of *Lockett* and its ensuing line of cases is that “a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.” *Johnson v. Texas*, 509 U.S. 350, 362, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (internal quotation marks and citation omitted). Nor may a court apply hearsay rules “mechanistically to defeat the ends of justice” at a capital sentencing. *Green v. Georgia*, 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (internal quotation marks and citation omitted).

The Supreme Court has used broad language to describe the relevance standard, observing that the meaning of relevance in the mitigation context is not unlike the

meaning of relevance in other contexts; it is “evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” *Tennard v. Dretke*, 542 U.S. 274, 284, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)).⁶ The precise application of that broad language, however, is not always clear, and courts have acknowledged that there is “little guidance on what constitutes relevance for *Lockett* purposes.” *Sweet v. Delo*, 125 F.3d 1144, 1158 (8th Cir.1997).

In *Green v. Georgia*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment may require the admission of mitigating evidence even if state law rules of evidence would exclude it. There, the Court reversed the death sentence based upon the trial court's application of Georgia's hearsay rule to prohibit a witness's testimony that the defendant's accomplice in the capital murder had confessed to shooting and killing the victim *after* ordering the defendant to run an errand. *See Green*, 442 U.S. at 96-97, 99 S.Ct. 2150. In doing so, the Court held that “[t]he excluded testimony was

⁶ In *Tennard*, the Supreme Court held that “a State cannot preclude the sentencer from considering ‘any relevant mitigating evidence’ that the defendant proffers in support of a sentence less than death [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Tennard*, 124 S.Ct. at 2570 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)). The Court defined relevant mitigating evidence as “evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” *Id.* (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) (defining relevant mitigating evidence in the most expansive terms)). Furthermore, the Court added that “a State cannot bar ‘the consideration of ... evidence if the sentencer could reasonably find it warrants a sentence less than death.’ ” *Id.* (quoting *McKoy*, 494 U.S. at 440, 110 S.Ct. 1227).

highly relevant to a critical issue in the punishment phase of the trial” *and* that “substantial reasons existed to assume its reliability.” *Id.* at 97, 99 S.Ct. 2150 (citing *Lockett*, 438 U.S. at 604-05, 98 S.Ct. 2954). In particular, the Court noted that:

[the accomplice] made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of [the accomplice] and a capital sentence. The statement was against interest, and there was no reason to believe that [the accomplice] had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against [the accomplice], and to base a sentence of death upon it.

Id. at 97, 99 S.Ct. 2150. In light of “these unique circumstances,” the Court held, “the hearsay rule may not be applied mechanistically to defeat the ends of justice.” *Id.* (internal quotation marks omitted); *see also Fullwood*, 290 F.3d at 693 (noting that “under certain circumstances, ‘the Due Process Clause of the Fourteenth Amendment *may* require the admission of mitigating evidence even if state-law rules of evidence (*e.g.*, hearsay) would exclude it’ ”) (alteration omitted) (quoting *Boyd v. French*, 147 F.3d 319, 326 (4th Cir.1998)).

1. Consider **Relevant Mitigating Evidence, Not All Evidence.**

Although Appellant is right that these cases permit defendants to introduce any *relevant* mitigating evidence, he is wrong to assume that they make all evidence automatically relevant because *Lockett* “does not mean that the defense has *carte blanche* to introduce any and all evidence that it wishes.” *United States v. Purkey*, 428 F.3d 738, 756 (8th Cir.2005). Footnote 12 in *Lockett* explicitly stated that lower courts could continue to exclude as irrelevant evidence not bearing on the defendant's character, prior record, or the circumstances of the offense. *Lockett*, 438 U.S. at 604 n. 12, 98 S.Ct. 2954.

The Supreme Court confirmed that *Lockett* did not make all evidence automatically relevant when it relied on this footnote to hold that courts may exclude certain evidence from capital sentencing hearings as irrelevant. For example, in *Oregon v. Guzek*, 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006), the Court unanimously held that a defendant has no right to present new evidence of his innocence at the sentencing hearing even though the defendant claimed that the evidence related to the “circumstances of his offense.” *Id.* at 523-24, 126 S.Ct. 1226; *see also Blystone v. Pennsylvania*, 494 U.S. 299, 306-07, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) (no right to jury instruction encouraging jury to weigh lack of severity of aggravating factors as a mitigating circumstance); *Franklin v. Lynaugh*, 487 U.S. 164, 174, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion) (“residual doubt” as to defendant's guilt not a circumstance of the offense). Our circuit recognized that *Lockett* permits courts to exclude irrelevant evidence at capital sentencing hearings and quoted footnote 12 when it affirmed a Tennessee court's decision to exclude from a capital sentencing hearing videotaped interviews in which psychologists discussed the defendant's alleged multiple personality disorder. *Alley v. Bell*, 307 F.3d 380, 392, 399 (6th Cir.2002); *Owens v. Guida*, 549 F.3d 399, 419 (6th Cir. 2008).

As the Fourth Circuit has held, however, neither *Lockett* and its progeny nor *Green* compel the conclusion that a state court is required to present a capital jury (or sentencer) with *any* evidence the defendant proffers as mitigating, no matter how irrelevant, unreliable, or cumulative, or that a state's normal evidentiary rules must always yield to allow the introduction of such evidence:

[T]he principles developed in *Lockett* and *Eddings* do not eviscerate all state evidentiary rules with respect to mitigating evidence offered in capital sentencing proceedings. For example, the application of the hearsay rule to exclude evidence offered in mitigation of the death penalty is clearly not a *per se* constitutional violation. It is permissible to exclude on hearsay grounds mitigating evidence which is “only [of] cumulative probative value.”

Fullwood, 290 F.3d at 693 (citations and alteration omitted) (quoting *Buchanan v. Angelone*, 103 F.3d 344, 348-49 (4th Cir.1996)); *see also Hutchins v. Garrison*, 724 F.2d 1425, 1437 (4th Cir.1983) (“We find no indication that *Eddings* and *Lockett* preempt all state rules of evidence. Both cases speak about *types* of evidence, not evidentiary rules.”); *cf. Lockett*, 438 U.S. at 604 n. 12, 98 S.Ct. 2954 (noting that the opinion did not “limit[] the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense”). In *Buchanan*, the 4th Circuit explicitly rejected a defendant's claim that the trial court impermissibly excluded hearsay testimony offered by his expert mental health witness for the purpose of providing additional support for the conclusion that the defendant had acted under extreme emotional stress, because the expert's “testimony provided ample evidence to explain his opinion” and “the statements would have had only cumulative probative value.” 103 F.3d at 349. The Court also noted that the excluded testimony “lack[ed] the inherent reliability of the statement excluded in *Green*,” which had been “against the declarant's penal interest, made spontaneously to a close friend, and ... relied [upon by the state] to convict the declarant of capital murder.” *Id. Cf., Sears v. Upton*,

2. *Lockett Error Can Be Harmless.*

Further, *Lockett* errors may be harmless. See *Sweet v. Delo*, 125 F.3d 1144, at 1158-59 (8th Cir. 1997) (concluding that *Lockett* errors may be held harmless). The excluded evidence - limited to his aunt's personal testimony of sexual abuse by Appellant's grandfather during her childhood [not Appellant's alleged abuse] - does not begin to approach the significance of the evidence in other notable cases in which the absence of mitigation testimony has been held prejudicial. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 391-92, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (petitioner's parents were violent alcoholics, and he was beaten regularly, locked inside an excrement-filled dog pen, and not allowed to visit other children); *Wiggins v. Smith*, 539 U.S. 510, 517, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (petitioner was left home alone for days, forcing him to beg for food and eat paint chips and garbage, and he was physically and sexually abused by his mother and foster parents); *Williams (Terry) v. Taylor*, 529 U.S. 362, 395-96, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (petitioner had a "nightmarish childhood," during which he was forced to live in unimaginable squalor and severely and repeatedly beaten by his father). *McGehee v. Norris*, 588 F.3d 1185, 1197 (8th Cir. 2009). Any error in the limited exclusion is harmless.

ANALYSIS

Against the backdrop of Bryant's serial spree of murders and assaults, the Appellant introduced evidence related to his character, his dysfunctional family and his expert testimony concerning his adaptability to prison. As revealed, the relevant mitigating evidence concerned Stephen Corey Bryant's character and his personal family history. The mere fact that direct evidence from his aunt that she had problems with his

grandfather - presumably molested according to the contemporaneous argument - was not directly relevant to Bryant's character.

However, Dr. Schwartz-Watts, the defense forensic psychiatrist, testified as an expert that Petitioner suffered from Post-Traumatic Stress Disorder as a result partially of his claimed sexual abuse as a child. Tr.p. 814-815, 822-823, 828-829.832-33. [Dr. Watts also testified on cross-examination, as a sexual abuse expert, that she relied in her opinion on the information she received from the aunt that she was abused by the grandfather. Tr.p. 853, l. 8-19, p. 854, l. 24-p. 855, l. 12. She found that his report, his behavior, his lack of reporting the abuse until 2004 was consistent with someone who had suffered with the abuse. However, she conceded that while the accounts may not be reliable, his behavior and symptoms were consistent with someone that was abused. Tr.p. 855, l. 6-12. Similarly, the judge heard testimony from Dr. Marty Loring, a social psychologist and expert in trauma and stress and its effect on adults that have been traumatized as children. Tr.p. 919-940. She testified about the reports of sexual abuse related to a genogram of the family history and the sexual abuse against Bryant by various family members, including anal rape. Tr.p. 942-944, 947-951. Dr. Loring also testified about the aunt's sexual abuse from the grandfather. Tr.p. 954, l. 15-23.

Therefore, the sentencing judge was not deprived of the relevant mitigating evidence related to the character of Stephen Bryant as it relates to his claimed mental health mitigation of post-traumatic stress disorder. The claim lacks merit for relief.

WHAT MITIGATION THE JUDGE HEARD

Former Probation Agent Gina Creech testified that Bryant came to her office in August 2004 seeking counseling because he had been unable to sleep due to some problems as a child. Tr. p. 736. She referred him to Healthy Minds. Id.

The Appellant's grandmother, Shirley Freeman, testified in mitigation. Tr. p. 770. She testified that her former husband, William Edward Bryant, physically abused her and the children. Tr. p. 771. She described the Appellant's relationship with his parents - Wayne Edward Bryant, Jr. And Katherine - as cold. Tr. p. 773.

She stated the Appellant came and talked to her on August 19, 2004 about being molested by his grandfather, her ex-husband, his mother's brother (uncle) and an older half-brother. Tr. p. 774, ll. 21-25. As a result, she stated they called the sexual abuse hotline. Tr. p. 776. This was the last time they saw him until his arrest. Tr. p. 776.

The Appellant's aunt testified Bryant talked to her on August 19, 2004 when her mother called her over. Bryant testified that he wanted to talk about him being sexually abused by his grandfather. Tr. p. 790, l. 2. She stated that she was unaware of the sexual abuse until then. Tr. p. 790, ll. 5-8. She described Bryant as upset and tortured which was unlike his prior demeanor. Tr. p. 791, also, Tr. p. 795. The aunt stated she made a series of calls, including a sexual abuse hotline. Bryant told her that he needed help and was trying to get help. Tr. p. 796.

The aunt also described Bryant's relationship with his mother as full of animosity and hatred. Tr. p. 793.

Dr. Donna Schwartz-Watts, a defense forensic psychiatrist, testified about her evaluation of the Appellant. She stated that she had prepared a developmental history based upon a series of interviews and information. She stated that she found significance that there were substance abuse issues within the parents. Tr. p. 814. Dr. Watts described that Bryant had Attention Deficit Disorder (ADD) as a child.

She also stated that Bryant had reported he was sexually abused as a child by four people: his paternal grandfather, his half-brother, his paternal uncle, and his mother. Tr. p. 814, l. 22 - p. 815, l. 1. She also found significant his involvement in the juvenile justice system at an early age beginning at age 11. Tr. p. 815. She noted his school records showed repeating first grade, many absences, and involvement with school counselors by 4th grade. Tr. p. 815. The records reported he was in emotionally handicapped classes and low average intelligence, along with A.D.D. Tr. pp. 815-816.

She stated that in her own discussion with family members, the aunt and grandmother, she learned that one of Bryant's perpetrators had also sexually abused other family members. Tr. p. 817, ll. 5-7.

In reviewing his medical history, she stated that shortly before the crimes, he was at the hospital and reported two men had assaulted him. Tr. pp. 817-818.

In reviewing his juvenile records, she found that he had been physically assaulted and also had been placed on anti-depressants. He was determined to have A.D.D. and dysthymia (chronic depression) at the Department of Juvenile Justice. Tr. p. 819.

Dr. Watts opined concerning the effect of the sexual and substance abuse on his

psychiatric past. She noted his history of receiving anti-depressants. She confirmed that prior to the crimes, that his aunt and grandmother, had sought out treatment for his sexual abuse resulting in a referral on September 1, 2004 at Healthy Minds. Within that report, Bryant had reported he was subject to sexual abuse where restraints and threats were made and involved intercourse and penetration. At that time, Bryant also reported abuse by his grandfather began at age 7, but did not state what age his sexual abuse by his mother began. Follow-up was also done by the agency on September 3, 7, and 10 and he reported symptoms of anger, shame and flashbacks. Tr. p. 823. Dr. Watts noted after his arrest, Bryant was evaluated and determined to have anti-social personality disorder with depressed mood by a doctor employed by the jail. Tr. p. 824.

Dr. Watts noted that Bryant had sought treatment before the crimes, had mood disorders going to 1996, been on medication since then, and reported improvement when on the stabilizers. Tr. p. 824.

Dr. Watts opined that she found Bryant “was under the influence of mental or emotional disturbance at the time of the crimes” and “his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired.” Tr. p. 824, ll. 17-23. Dr. Watts diagnosed Bryant with “Post-Traumatic Stress Disorder.” Tr. pp. 826-828. She opined that this was based upon his reports of childhood sexual abuse, documented through SCDC records in 1999 and the YMCA - Healthy Minds report, including the flashbacks. Tr. p. 826. It included his irritability and outbursts of anger. Tr. p. 827, ll. 3-6.

She also opined that he suffered from a number of substance abuse disorder, as well as A.D.D. and dysthymia by history. Tr. p. 828.

Dr. Watts noted that recent treatment with medications had caused improvement in his mood and makes him much calmer. Tr. p. 831.

She opined that the murders were related to his P.T.S.D. She noted that in the videos and cases he reports feeling threatened by the victims. Tr. pp. 833-835. She stated that they were all related because he was paranoid and misjudged people's perceptions, feeling sexually threatened by the victims. Tr. p. 835, ll. 14-25.

On cross-examination, Dr. Watts admitted that P.T.S.D. is a diagnosis where a lot of the symptoms have to be self-reported. Tr. p. 847, ll. 22-25. She acknowledged that he had reported the sexual assaults to the YWCA shortly before the crimes and he had reported his uncle had abused him in August 2002 in the S.C.D.C. records. Tr. p. 852. Dr. Watts asserted that when he reported his grandfather had abused him to Dr. Crawford, it was corroborated by his aunt's admission to her that he was similarly abused. She stated: "its very seldom that if you have an incest perpetrator within the family that they confine their activity to one individual in the family." Tr. p. 853. She admitted that other than the aunt, there was not other corroboration. Tr. p. 853. She admitted that the other claims by him of his mother molesting him, his father beating him, and his uncle assaulting him were self-reports only. However, in light of his symptoms, she opined his aunt's history was sufficient for her to diagnose the P.T.S.D. Tr. pp. 854-855, l. 9.

On re-direct, Dr. Watts noted that he had reported the abuse prior to the crime to

the YWCA and his probation officer. Tr. p. 867. She noted that his behavior was consistent with a victim of incest. Tr. pp. 867-868.

Dr. Alexander Morton, an expert in psycho-pharmacology, addictions and psycho-pharmacy practice testified about Bryant's past drug-history and the affects of the drugs. Tr. pp. 875-901. Within his slide presentation, Dr. Morton additionally noted the history of P.T.S.D. and sexual abuse. Tr. p. 886, ll. 11-12. He noted that P.T.S.D. often leads to drug abuse for an attempt to self-medicate. Tr. pp. 887-888. He stated that Bryant was sexually abused by four different people, corroborated by other records. He included that his grandfather started out sexually abusing him and then there was inappropriate sexual behavior from his mother. Tr. p. 890, l. 21 - p. 891, l. 9. He described abuse by an uncle and half-brother. He stated the family had a genetic predisposition to not be able to control their drug abuse. Tr. p. 891, ll. 10-17. He also noted that he had attempted to get treatment for the abuse. Tr. p. 900, ll. 13-18.

Dr. Morton had opined that Bryant abused RAID, insecticide, Benadryl, methamphetamine, marijuana, and LSD. Tr. pp. 881-889, 916.

Dr. Marty Loring, a social worker and social psychologist, testified about her social history of Bryant. She declared that she spoke with numerous family members, including the aunt and grandmother. Tr. p. 930. She also reviewed a series of records, including the "YWCA records of sexual abuse counseling." Tr. p. 931. Dr. Loring prepared a genogram of the family members, identifying various factors. She reported that it designated the sexual abuse reported the Appellant by the various family members.

Tr. p. 941, ll. 10-18. She noted the abuse to Appellant by his older brother and grandfather (Tr. p. 941, l. 22 - p. 942, l. 4), the beatings by his father (Tr. p. 924, ll. 11-16). Particularly, she stated the abuse from his mother was profound and included sexual, emotional, and physical abuse. Tr. p. 942, ll. 21-25. Also, she related the sexual abuse of the uncle. Tr. p. 943, ll. 24-25.

Dr. Loring described the childhood as happy and fearless. Tr. pp. 946-947. However, she opined that in 1987, when he is 7, sexual abuse occurs by his grandfather and stepmother. Tr. p. 947, ll. 11-14. She states this creates a change.

She describes his description of anal rape. Later within the year, sexual abuse by his mother begins. This was followed by arson; explosive school behavior and lack of concentration which are signs of abuse. Tr. p. 948.

Dr. Loring describes the developmental path of Appellant's conduct which she described as a "psychologically battered child." Tr. p. 948 - p. 953, l. 20. She describes the difference between Appellant and his aunt who had "done so well, able to bounce back from her sexual abuse by grandfather..." because she had people in her life who took care of her. Tr. p. 954, l. 19 - p. 955, l. 7.

Dr. Loring described that counseling for sexual abuse that Appellant sought from Healthy Minds and the YWCA. Tr. p. 956-957.

Dr. Loring concluded that he had expressed grief and sorrow for his crimes. Tr. pp. 960-961.

Dr. Loring stated on cross-examination that when he has told pieces of sex abuse

is "something to be believed." Tr.p. 971, l. 9-15. She confirmed that the allegation about the grandfather had been denied by the grandfather. Tr.p. 971, l. 16-21. She noted that there was conflicting evidence from the mother who stated that rather than the grandfather and grandmother being at the hospital at that alleged time of the sexual assault, Stephen and his grandfather were left alone at the house. Tr.p. 972, l. 1-18. As to the mother's abuse of the Appellant, Dr. Loring claimed that she, in part, denied molesting him. Tr.p. 972, l. 19-973, l. 9. She noted that Sgt. Jordan had confirmed that the aunt had called and told about the family member who had been sexually abused and asked for counseling. Tr.p. 978.

James Aiken, former Warden at the South Carolina Department of Corrections and prison administrator, testified as an expert in the field of adaptability to prison life. Tr.p. 989. He opined, despite the prior fact of Appellant's assaultive behavior in a jail setting, that "we can confine him for an extended period of time in a high security setting." Tr.p. 992, l. 3-16. He stated that he was not a predator and can be managed in a prison setting. Tr.p. 994-995.

On cross-examination, it was developed, that in addition to his prior criminal record and the crimes against jail personnel that he had pled guilty, he had 40 prior prison infractions when he was incarcerated between 1999-2--2. He stated that 13 were minor, but 27 were major infractions. Tr.p. 995-996. He noted that while he was a safekeeper from October 2004, he had 17 infractions, including striking an inmate, assault and battery on an inmate, threatening the life of a public official, assault and battery on a corrections officer. Tr.p. 997-998.

In the defense closing statement, Jack Howle addressed the existence of the sexual assault and reporting by the Petitioner. Tr.p. 1029-30. He states that it was reported, prior to the crimes, to the aunt and grandmother. He notes that the reporting was confirmed by Gina Creech, the probation officer who referred him to Healthy Minds. He spoke about Dr. Watts testimony related to the reporting and confirmation of the sexual assault. Tr. p. 1030, l. 7-13.

Summary

Judge Russo was not “precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death” in excluding testimony by the aunt that she had been abused by the grandfather. Judge Russo did not abuse his discretion in assessing the mitigation evidence presented. He was able to consider evidence that Appellant was sexually abused by his grandfather - albeit disputed - through the hearsay presentation in mitigation by his self-reporting of the event to his aunt and grandmother, Dr. Watts, Dr. Loring, the YWCA, and Dr. Morton. The sexual abuse also formed the basis of the diagnosis of post-traumatic stress disorder by Dr. Watts.

The only evidence excluded was the personal testimony of the aunt that she was assaulted by the grandfather. The opinion of Dr. Watts which was formed partially based upon similar information from the aunt was not excluded. Nether was any information related to the Appellant’s own reporting of the alleged abuse.

The sentencing judge “ may not refuse to consider *or be precluded from* considering “any relevant mitigating evidence.” *Mills v. Maryland , supra. See Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008). Judge Russo did not refuse to consider any mitigating evidence concerning Appellant’s character, *only collateral evidence concerning the grandfather’s character*. At the sentencing, he contended that the aunt’s evidence concerning the grandfather’s behavior to her would “add to the *credibility* to what Mr. Bryant said about the same type of molestation.” Tr.p. 790, l. 23-24. In that setting, Judge Russo found it to not be relevant. In the appeal, the Appellant additionally asserts that it should be considered under SCRE Rule 404 (b) as proof of a common scheme or plan. However, the Appellant never sought to present it as a common scheme or plan toward the grandfather - he was attempting only to show that the crime in fact happened at all. This was not presented as a Rule 404(b), but evidence solely to bolster the hearsay of the belated self-report by Appellant.

In *Tennard v. Dretke*, 542 U.S. 274, 284, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), the Court noted that relevant mitigating evidence was “evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” As Judge Russo concluded there was no relevant mitigating value to whether the aunt was abused by the grandfather concerning Petitioner’s character. Rather, the sentencing judge was free to consider whether the Appellant was abused by the grandfather and the existence of the opinion of Dr. Watts concerning the existence of post-traumatic stress disorder. He was free to consider the quality of the diagnosis based upon her reliance that the aunt corroborated the self-reporting by

Appellant due to her own claim of similar abuse to Dr. Watts. Her professional reliance upon the evidence did not mandate the admission of the aunt's earlier testimony. Rather, Dr. Watts' reliance explained the testimony.

No Error Where Similar Evidence Was Admitted

Further, it must be conceded by the Appellant that similar evidence was introduced through Dr. Watts, Dr. Loring and Dr. Morton in their testimony without objection by the state or exclusion by the court. Any alleged error in failing to admit the personal testimony of the aunt could be considered cured by the subsequent testimony presented that the aunt was molested by the grandfather. The state did not object to the testimony.

Any Error In Exclusion is Harmless

This is an extraordinary case involving serial murders and assaults. The crime spree evidence by Bryant's actions are disturbing and uniquely heinous and brutal. His inability to conform to correctional rules and assaultive behavior in a structured environment placed Bryant in an appropriate case for the highest penalty. Cast against this aggravating evidence, the defense presented a mitigation presentation consisting of a uniquely dysfunctional family, a mental health history of the Appellant revealing problems dating back to 1988, including Attention Deficit Disorder, low functioning performance in school, an early history of juvenile detention and needs for medication to control and conform behavior. Importantly, evidence of the Petitioner's claim of sexual abuse at the hands of four family members was not excluded and additionally formed the

basis for an opinion of Post Traumatic Stress Disorder. Assuming arguendo a right to present personal testimony from the aunt concerning assault against her by the grandfather - *a fact never presented as known by the Petitioner* - , the limited exclusion was harmless error because it could not have effected the verdict by Judge Russo.

The simple fact is that he had the information through the professional witnesses when they gave their opinions. Further, it was the assessment whether Appellant was molested and/or suffered from post-traumatic stress disorder which was the issue. There was additional trauma alleged by the defense - the three other family members and other assaults that he had been an alleged victim. The result would and could not have been different has the personal testimony of the aunt been admitted. The assertions otherwise are without merit on the basis of this record.

CONCLUSION

For all the foregoing reasons the appeal must be dismissed and judgment of conviction affirmed.

Respectfully submitted,

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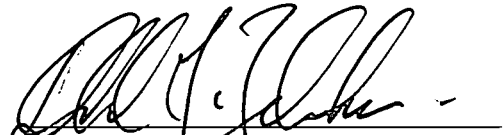
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August 6, 2010

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Sumter and Richland County
Thomas Russo, Circuit Court Judge**

THE STATE,

Respondent,

V.

STEPHEN COREY BRYANT,

Appellant

**DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Respondent proposes the following to be included in the Record on Appeal:

1. Motion hearing transcripts - December 21, 2004, December 13, 2005, April 27, 2007, May 14, 2007, April 3, 2008, April 18, 2008, July 18, 2008.

I certify that this Designation contains no matter which is irrelevant to this appeal.



DONALD J. ZELENKA

Assistant Deputy Attorney General

August 6, 2010