

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

RECEIVED

Case No. 09-CP-23-0741

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FREDDIE EUGENE OWENS **S.C. Supreme Court** Petitioner,

v.

STATE OF SOUTH CAROLINA Respondent.

APPENDIX
VOLUME IV OF VIII

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1 identify a student in those situations, what type of
2 learning, what type of instructional strategies do you use
3 to work with kids who are very, very diverse, what social
4 skills and how do you help them in that area. And this all
5 became a gift to me, because I could help more than just
6 Freddie, hopefully.

7 Q. And have you continued to keep up with Freddie over the
8 years?

9 A. I have. My husband and I visited him when he was -- I
10 can't think of the name of the prison down in Summerville.
11 I'm sorry, I can't think of name of it. We did visit him.
12 And then after my husband died in 2002, I did not correspond
13 with Freddie any more.

14 Q. Well, in your visit did you learn of Freddie's current
15 love of learning and reading?

16 A.. I have heard about that. I do not know the details,
17 but if that's -- I'm anxiously awaiting hearing what he has
18 done in the area of reading, because that's a powerful tool
19 to give him. And I can already tell you that he could
20 express through his writings, his poetry, he could express
21 himself beautifully. So I'm awaiting that, because I would
22 be very, very proud of him to hear that he had worked hard
23 at the things he lacked and had built up those skills.

24 Q. Thank you. Please answer any questions that the
25 prosecution may have.

1 MR. ARIAIL: No questions, Your Honor.

2 THE COURT: Thank you, Ms. Maag.

3 THE WITNESS: Yes, sir.

4 MR. GIBSON: Your Honor, may we break for about
5 five or ten minutes? I got a sense we are moving so fast
6 along, I have got another witness who I might need to try to
7 get here and I need to just check something else with the
8 witness coming up next.

9 THE COURT: Okay. Keep y'all moving as a result
10 of all that chocolate pie some of y'all had for lunch.

11 (The following takes place outside the presence of
12 the jury panel)

13 THE COURT: Okay. We will be at ease.

14 (Whereupon, proceedings were recessed)

15 (Whereupon, proceedings were reconvened)

16 THE COURT: Ready, Mr. Gibson?

17 MR. GIBSON: I am, Your Honor. Thank you.

18 (The following takes place in the presence of the
19 jury panel)

20 THE COURT: All right, Mr. Gibson.

21 MR. GIBSON: Thank you, Your Honor.

22 The defense will call Dr. Tora Brawley.

23 DR. TORA BRAWLEY, having been first duly sworn,
24 testified as follows:

25 THE CLERK: State your name for record, please,

1 ma'am.

2 THE WITNESS: Tora Brawley.

3 THE CLERK: Thank you. Be seated.

4 DIRECT EXAMINATION BY MR. GIBSON:

5 Q. Good afternoon, Dr. Brawley.

6 A. Good afternoon.

7 Q. I want to try to submit you as an expert in
8 neuropsychology, but before I do that I want to get some
9 information about your qualifications for that role, okay?

10 A. Certainly.

11 Q. So would you please tell me your educational
12 background?

13 A. I have a Bachelors Degree in psychology from the
14 University of Texas, at Austin.

15 I obtained my Master's Degree and my Ph.D. in clinical
16 psychology and neuropsychology at California School for
17 Professional Psychology.

18 I did my internship at Baylor College of Medicine in
19 Houston, Texas, and I did a fellowship at Duke University
20 Medical Center in Durham, North Carolina.

21 Q. Did you have any academic honors during those time
22 frames?

23 A. The deans list in graduate school.

24 Q. Are you licensed in any way?

25 A. I'm licensed in the State of South Carolina as a

1 clinical psychologist.

2 Q. All right. Now, can you tell me something about your
3 professional experience or work history?

4 A. I started my work history at Baylor College of Medicine
5 in the Department of Neurology, performing
6 neuropsychological evaluations. While there -- I was there
7 for approximately nine years, and I was also co-director of
8 the post-concussion behavioral clinic there.

9 I got married and moved to the Carolinas and worked at
10 Duke University. I also worked at Wake Med Rehab Hospital,
11 both as a neuropsychologist.

12 Then we moved to Columbia, South Carolina. My husband
13 is an F-16 pilot in the military and his base was in
14 Columbia, South Carolina, so we moved to Columbia, and I
15 took a job with the Department of Mental Health. I was
16 hired by Dr. Pam Crawford to come and perform forensic
17 evaluations and specifically where a neuropsychologist was
18 needed, where there was a question of brain function,
19 although I did some general forensic evaluations there too
20 with the psychiatrists.

21 After the birth of my son in 2002 -- at the same time I
22 was at DMH, I was also doing some private practice work
23 through the University of South Carolina Medical School.

24 After the birth of my son in 2002, I did not go back to
25 full-time work at DMH. I wanted to focus on being a mom

1 too, but I kept my part-time private practice, which is what
2 I'm still doing now, performing neuropsychological
3 evaluations on clinical patients, on legal cases.

4 I'm also an evaluator for the Federal Aviation
5 Administration for pilots who are trying to get back in the
6 cockpit after treatment for drug and alcohol, or after they
7 have had something happen to their brain and they need to be
8 certified to get back in the cockpit.

9 Q. Now, would you explain to the jury exactly what
10 neuropsychology is?

11 A. Right. A neuropsychologist looks at brain behavior
12 relationships, and the neuropsychological evaluations
13 consists of a battery of testing. I test. I come in and I
14 perform a clinical interview with the patient and I get
15 background history from them, and then perform various
16 tests. I look at memory, attention, concentration, language
17 skills, motor skills.

18 Basically where an MRI gives you a picture of the
19 brain, this battery of tests that I do tell you how the
20 different areas of the brain are functioning, how they are
21 working. So I get referrals from neurologists or
22 psychiatrists, because, you know, they have got a picture of
23 the brain, but they want to see quantitatively and
24 qualitatively where the patient is. I see a lot of dementia
25 cases, Alzheimer's, Parkinson's, MS, a variety of

1 neurological. I see quite a bit of head injury as well.

2 Q. Dr. Brawley, have you ever done this, this neurological
3 assessment evaluation context of a court case?

4 A. Yes, sir.

5 Q. And have you ever been qualified as an expert as a
6 neuropsychologist?

7 A. Yes, sir.

8 Q. How many times?

9 A. Between state and federal court in South Carolina,
10 maybe 20 times.

11 MR. GIBSON: Your Honor, at this point I would
12 offer Dr. Brawley as an expert in neuropsychology.

13 MR. ARIAIL: We don't have any voir dire.

14 THE COURT: All right. She can express her
15 opinion in that field.

16 BY MR. GIBSON:

17 Q. Now, Dr. Brawley, how did you become involved in the
18 evaluation of Mr. Owens?

19 A. Well, my evaluations all start from a referral, and the
20 referral for me to see Mr. Owens came from Dr.
21 Schwartz-Watts, who is a forensic psychiatrist, who has seen
22 him, noted that he had a history of head injury and some
23 learning problems. And so she wanted a full assessment of
24 how he was doing from a cognitive standpoint.

25 Q. And what did your evaluations consist of with respect

1 to Mr. Owens?

2 A. As mentioned before, I did a clinical interview and I
3 do a full battery of tests. With Mr. Owens I gave --

4 Do you want me to list the tests? I don't want to bore
5 you all, but I basically the repeatable battery for the
6 assessment, the neuropsychological status. I gave him a
7 reading -- Wechsler test of adult reading. I gave him the
8 Weschler Adult Intelligence Scale. Some motor testing,
9 Trail Making Part A, Trail Making Part B, a test of verbal
10 fluency. Group peg board, which is a motor test that looks
11 at the motor strip in the brain.

12 And I also assess effort. Any time we do a battery of
13 tests like this, you need to ascertain that the patient is
14 giving you their best itself. And so there is some tests
15 that you put in there to look and see how hard they are
16 trying, because you want to be able to say that your results
17 are valid.

18 Q. What kind of tests did you use to assess him?

19 A. I did the test of memory malingering.

20 Q. What, for the jury's understanding, is that test?

21 A. Again, it's presented as a test that's very hard, but
22 it's actually very easy. It's been normed or standardized
23 on a variety of clinical populations - dementias, head
24 injuries. And so you know where the patient should perform.
25 And Mr. Owens got a perfect score. He put forth an

1 excellent effort. He got a perfect score on the test.

2 Q. Now, after you did all these tests, did you have any
3 what you would consider to be clinically significant
4 findings?

5 A. I did. The areas that fall below where we would
6 expect, given his history, were primarily with verbal memory
7 and verbal learning.

8 Q. All right. And did you find anything else noteworthy
9 about your testing?

10 A. It was interesting to me, because I also asked for any
11 records from any previous cognitive evaluation that had been
12 done on Mr. Owens, and what I noted was his IQ's in school
13 and DJJ and the IQ's that had been done on him in the past
14 were, you know, eighties, high eighties, somewhere around
15 there. And with me he received a full scale IQ of one
16 hundred. So that tells me his IQ is improved.

17 So then I go back and look and see what were the
18 individual subtests that actually brought his scores up, and
19 they were things that he has been self-teaching, you know,
20 the vocabulary, general knowledge. He's been doing a lot of
21 reading and bettering himself and it actually shows on his
22 IQ scores.

23 Q. So basically through his own effort he has improved his
24 intellect?

25 A. His scores on IQ tests, yes.

1 Q. Now, you mentioned that you reviewed a number of
2 records. Would you please tell us what records that you
3 reviewed?

4 A. I basically asked for any previous testing, so I looked
5 at school records, because he had been diagnosed with a
6 learning disability, and, you know, various other problems
7 in the classroom. He has a couple of evaluations in the
8 school system. He also had an evaluation at DJJ and then by
9 some other psychologists. I believe Dr. Horne and Dr. Evans
10 had seen him, so I asked for records pertaining to that.

11 Q. Okay.

12 A. Previous psychological evaluations.

13 Q. And based on those records, did you find any other
14 things that you would deem noteworthy?

15 A. Basically just, you know, what I have talked about
16 already, that he did, you know, show some improvement when
17 you look at the school records compared to where he is now.

18 Q. Did you find a history of any learning disability?

19 A. Well, that's clearly documented in the school records.
20 He has a problem -- he had a documented learning disability,
21 problems with impulsivity, poor attention.

22 I also did -- I forgot to mention, I interviewed Ms.
23 Maag, who you all heard here earlier, over the phone,
24 because sometimes there is only so much that you can get
25 from school records. You know, maybe put down a one

1 sentence description. And so I called and spoke with her on
2 the phone to get more information about what she had known
3 about his learning ability, about his cognitive functioning,
4 and she told me that he just -- he really had trouble
5 focusing, that he couldn't put his attention where it needed
6 to be. And she noted significant difficulties with that,
7 and that is documented throughout teacher ratings and a
8 variety of things like that in the records, the problems in
9 those areas.

10 Q. So a lot of those problems were documented as early as
11 elementary school?

12 A. Right, particularly the learning problems. The
13 problems with depression, things like that, came a little
14 bit later.

15 Q. Okay. Now, you mentioned depression. I don't think
16 you had mentioned that before. Would you tell us what your
17 record review or whatever you found about depression with
18 Mr. Owens?

19 A. There were -- and we always need to look for
20 depression, because depression can affect your brain
21 function. If you are depressed or anxious, you are not
22 going to think as clearly. You are not going to think as
23 quickly. And in my interview with Mr. Owens, there were
24 some indicators that he's had some lifelong problems with
25 that. And I went back and looked in the records and he had

1 been diagnosed with dysthymia, which I'm sure you will hear
2 more about later when the psychiatrist testifies, which is a
3 form of depression. He's been diagnosed with major
4 depression.

5 And so I asked Ms. Magg. I mean, I'm not a child
6 expert. I'll tell that you right now. Until I had my
7 child, I seen them in the malls. That's about as much as I
8 knew about children, but in the limited training that I did
9 with kids, what I noticed is that sometimes those children
10 who were depressed showed it as aggression. Kids didn't
11 know how to say I'm sad, I'm depressed, but they would get
12 angry. My four year old does that, you know, will get
13 frustrated and gets angry. And so I had asked Ms. Maag did
14 you see any indication of, you know, that he may have been
15 having some depression early on, and she -- yeah, she says
16 well, there's certainly a possibility, given what she knew
17 about him and his situation. But those -- those were the
18 type of things that I look at.

19 So I know that it was at least diagnosed in '97, the
20 problems with depression, and it may certainly may have been
21 present before that.

22 Q. Now, you just talked -- I want to touch on one thing.
23 You talked about how depression sometimes manifests itself
24 in children, and I think you said it could manifest in
25 children as irritability?

1 A. Yes.

2 Q. Impulsivity?

3 A. Yes.

4 Q. Resistance?

5 A. Yes.

6 Q. Now, do you have any overall impressions that you think
7 would be helpful for the jury, based on all the tests and
8 the research and evaluation that you conducted with Mr.
9 Owens?

10 MR. ARIAIL: Well, I will object to the form of
11 that question. She's here as an expert to testify as to her
12 opinion based on her analysis, not overall information she
13 might provide the jury.

14 THE COURT: Repeat your question, Mr. Gibson.

15 MR. GIBSON: Thank you, Your Honor.

16 BY MR. GIBSON:

17 Q. Do you have an overall opinion that you have come to,
18 based on your evaluation or review and everything else that
19 you have done with Mr. Owens?

20 A. And I think Mr. Ariail and I were thinking along the
21 same line. What I was about to say is my scope was very
22 limited. In this proceeding, in this evaluation, I was
23 asked to look at his brain function, you know, present and
24 past too. And so from that standpoint, from the
25 neuropsychological standpoint on what I have documented is,

1 yeah, there are some select areas of deficit in Mr. Owens
2 brain and he does have a history of lifelong problems with
3 brain function and also psychiatric issues.

4 Q. Thank you Dr. Brawley. Would you please answer any
5 questions that the State may have?

6 CROSS EXAMINATION BY MR. ARIAIL:

7 Q. Going back to that last statement, the
8 neuropsychological, I'm assuming that as part of that,
9 although -- you don't have a report?

10 A. I certainly do.

11 Q. Oh, do you?

12 A. Yes, sir.

13 Q. Do you have one written?

14 A. I do.

15 Q. Oh, good. Could I have a copy?

16 A. Sure.

17 Q. Oh, great. Thanks. It will help me from wandering.

18 We've heard from Dr. Brunetti earlier who testified.

19 Are you familiar with his report?

20 A. I did read his report, yes, sir.

21 Q. So you are aware of what his findings were back in
22 1999?

23 A. Yes, sir.

24 Q. Did you also concur that the evidence there was no
25 evidence of head injury as a result of -- I think it was a

1 bus wreck, or something, that he was looking at?

2 A. Yeah, well, he had -- he has had a previous head
3 injury. You know, I only found select deficits. There were
4 not big things wrong with Mr. Owens brain when I saw him, so
5 I don't put a whole lot of clinical significance on that.
6 You know, everybody's brain is different. You can have a
7 head injury and really not have any residual -- significant
8 resilient problems from it.

9 Q. Right.

10 A. You know, I can't say, you know, did that wreck,
11 however many years ago, cause the problems with verbal
12 memory or attention. I wish I could, but, you know, it's
13 something that you need to consider, but it's not something
14 that I'm putting a lot of significance on.

15 Q. All right. So the things that you did find going on,
16 you said they are not significant?

17 A. It doesn't rise to the level of me diagnosing him with
18 a dementia or, you know, any kind of brain syndrome.

19 Q. And what he does have is some verbal memory?

20 A. And learning.

21 Q. And learning?

22 A. Yes, sir.

23 Q. And then also you said hyperactivity or attention
24 deficit?

25 A. Right.

1 Q. But nothing that rises to the level of any mental
2 illness or brain malfunction?

3 A. Not from a neuropsychological standpoint. Like I'm
4 just a small part, and Dr. Watts takes my results and
5 everything else and puts it together and goes from there.

6 Q. Thank you.

7 MR. GIBSON: Thank you Dr. Brawley.

8 THE COURT: Thank you, ma'am.

9 MR. GODFREY: Call Dr. Thomas Cobb.

10 DR. THOMAS COBB, having been first duly sworn,
11 testified as follows:

12 THE CLERK: State your name for the record,
13 please.

14 THE WITNESS: Thomas Cobb.

15 THE CLERK: Thank you. Be seated.

16 DIRECT EXAMINATION BY MR. GODFREY:

17 Q. What is your name?

18 A. It's Thomas Cobb.

19 Q. And what is your occupation?

20 A. I'm a forensic psychiatrist and an assistant professor
21 at the Medical University of South Carolina, where I teach
22 forensic psychiatry to fellows, as well as general
23 residents.

24 Q. Do you have any other job?

25 A. Yes, I do. I also do treatment of folks that are

1 incarcerated and also that are in the legal system. Some of
2 these are folks that are on an outpatient basis that may be
3 part of their probation and they have to have mental health
4 treatment.

5 In particular, in this particular area, I have treated
6 folks in maximum security units at the Leiber prison.

7 Q. Please tell us about your education and training.

8 A. I received my undergraduate degree in psychology at the
9 University of South Carolina honors college.

10 I went to medical school at the Medical University of
11 South Carolina, where I received my medical doctor.

12 I then went to the University of Michigan, where I
13 received my general psychiatric training and did a
14 subspecialty year in forensic psychiatry at the Case Western
15 Reserve.

16 Q. Are you board certified?

17 A. Yes, I am, in both general and forensic psychiatry.

18 MR. GODFREY: Your Honor, at this time we would
19 offer Dr. Cobb as an expert in forensic psychiatry.

20 THE COURT: Anything from the State on
21 qualifications?

22 MR. ARIAIL: Have you testified in the courts of
23 South Carolina as an expert witness in the area of
24 psychiatry before?

25 THE WITNESS: Yes.

1 MR. ARIAIL: And you have been qualified as an
2 expert previously?

3 THE WITNESS: Yes.

4 MR. ARIAIL: That's all I have.

5 THE COURT: I'll qualify him to express opinions
6 in that field.

7 BY MR. GODFREY:

8 Q. Dr. Cobb, how long have you been providing services,
9 psychiatric services, for the prison?

10 A. For approximately two years. One to two years.
11 Currently right now what I'm doing is supervising my
12 trainees who are now going out there to provide care.

13 Q. And that's an association with your job at the medical
14 school?

15 A. Yes, it is.

16 Q. And at the medical school you are a professor. What
17 are you professor of? What do you teach?

18 A. Forensic psychiatry, which is basically anywhere the
19 law and mental health cross. If somebody has a mental
20 disorder and they happen to be in the legal realm and that
21 disorder may have some impact on whatever legal decision is
22 asked of by the court, then they would ask an expert to come
23 in and evaluate them and answer their specific question, and
24 that's what I do.

25 Q. How did you come to see Freddie Owens as a patient?

1 A. I was working in the maximum security unit at the
2 Leiber, which was sort of a regular assignment for me, and
3 was actually talking to an inmate that was next to him when
4 he asked to speak to me and basically asked me for some
5 help, that he had been getting in a lot of trouble and
6 wanted some help to stay out of trouble.

7 Q. And when did you first see him?

8 A. I believe August of '05, around that time.

9 Q. How do you usually come to have patients at the prison?

10 A. Usually what happens is that a social worker will go by
11 and do assessments. People that have psychiatric illnesses
12 a lot of times don't volunteer them, so when there is some
13 suspicion that somebody does have an illness, they are
14 screened by a social worker or a psychologist and then
15 referred to me for an evaluation. Unfortunately that
16 doesn't always catch the folks that are mentally ill that
17 are incarcerated, but that is the general process in which
18 they are referred to me for treatment.

19 Q. How often would you -- how often do you go to Leiber to
20 provide the psychiatric services?

21 A. Currently I'm not going to Leiber. But when I was
22 going to Leiber, it would be anywhere between 20 percent of
23 my time to 50 percent of my time, depending on the needs of
24 the prison and the staffing. Sometimes it was many days out
25 of the week, and the month of July I believe I spent 50

1 percent of my time out at Leiber providing psychiatric care
2 for the inmates.

3 Q. And you are doing this at the same time that you are a
4 professor at the medical school?

5 A. Yes, that's correct.

6 Q. Was it unusual for someone to ask you for help?

7 A. It's not so much unusual for somebody to ask for help,
8 but to ask for help to keep them out of trouble is kind of
9 an unusual question that somebody would come to me and ask
10 for help for.

11 Q. Well, in your job with the South Carolina Department of
12 Corrections, at the time that you were seeing Freddie, how
13 often would you see inmates at Leiber?

14 A. I would see -- every Tuesday I basically had a clinic
15 and would see maximum security every week. And usually the
16 inmates in the maximum security I might see every other
17 week. Sometimes it might be a month. Sometimes it might be
18 several weeks in a row, depending upon what's going on
19 clinically and what problem I'm addressing with them.

20 Q. On an average week when you went to prison, how many
21 patients would you normally see?

22 A. Anywhere between 15, 25 patients.

23 Q. And how much time would you be spending with those
24 patients?

25 A. Most patients around fifteen minutes. Sometimes if it

1 was a more of an intense issue that they were dealing with,
2 like the folks at maximum security, a lot of times, you
3 know, needed more time. So I would spend anywhere up to 30
4 minutes sometimes talking to inmates, counseling them and
5 helping them deal with whatever psychiatric issues were
6 going on at the time.

7 Q. Do you remember about when it was that you first
8 started seeing Freddie?

9 A. I believe it was around August of '05.

10 Q. What were your first impressions?

11 A. I thought that Freddie was a likeable person. It's --
12 sometimes it's hard to do what I do when you go into a
13 prison and provide care for folks, but Freddie came off to
14 me as somebody that I enjoy talking to. He was very
15 intellectual, very philosophical, and I actually learned a
16 lot from him, so I liked him, and thought it was interesting
17 that he could recognize that he had some difficulties and
18 wanted to have those treated.

19 Q. Did you look at his prior record before you started
20 talking with him?

21 A. No, I did not.

22 Q. Is there any reason for that?

23 A. Typically when I work out at the prisons, I don't look
24 at anybody's prior record. When I go to work, as soon as I
25 walk through the gates, it's kind of under the assumption

1 that everybody in there had done something bad, and my job
2 is to provide them care as a psychiatrist. And if I'm
3 looking at all of this information, it may bias me too much
4 as far as whatever feelings I get, you know, from whatever
5 may have been committed, that may hinder me in providing
6 treatment for somebody. So I tried to be as objective as
7 possible and leave that information aside and do the job
8 that I am assigned to do.

9 Q. Well, do you feel that you formed a good rapport with
10 Freddie?

11 A. Yes, I do.

12 Q. Did Freddie seem to respond to you when you talked with
13 him?

14 A. Yes, I certainly would like to think so. He seemed to
15 enjoy my counseling and talking about his difficulties that
16 he was having, as well as other things that were of interest
17 in his life; his situation in the maximum security unit; how
18 he was being treated there and what sort of problems that
19 caused for him.

20 Q. Well, what seemed to be Freddie's favorite topics of
21 conversation with you?

22 A. Freddie liked to talk about religion, which I enjoyed.
23 He also -- we talked a lot about existential issues of life.
24 You know, being in a place that's a maximum security unit
25 where you know what your outcome may be and the

1 ramifications of how you were treated by the correctional
2 staff there.

3 Q. Did you ever witness any treatment by the correctional
4 staff?

5 A. I'm sorry, could you clarify the question?

6 Q. Did you ever witness any incidents or treatment of
7 Freddie by the correctional staff?

8 A. Not other than transporting him to the recreation yard.

9 Q. When you usually -- when you talked with Freddie, what
10 was the physical location of the prison?

11 A. Freddie was in a cell, which was also inside of a cage,
12 which is a little bit different than all the other cells on
13 the cell block.

14 Q. And where would you actually sit down and talk with
15 him?

16 A. I would sit right in front of his window, so I would
17 actually physically go in the cage and talk with him.

18 Q. About how many weeks after you first met Freddie did
19 you begin to form an opinion or a diagnosis of his
20 condition?

21 A. Probably about one or two weeks. Maybe a little bit
22 more than that, because I like to collect as much
23 information before I start using any medications or
24 developing some sort of treatment plan. I need to get to
25 know the person and figure out what I want to do clinically,

1 which may help them the best.

2 Q. Did you talk with him about how he grew up?

3 A. I did. He many times kind of glossed over it, but, you
4 know, he let me know that he had a very rough childhood. He
5 let me know that -- he would just say frankly" most of my
6 family is in jail." He said "all my family. I'm serious,
7 doc, all my family is in jail."

8 Q. Does child development or theory of child development
9 have an impact on where Freddie is now how you look at him?

10 A. It does. As I had mentioned before, it's hard to do
11 the work that I do, because a lot of times you see folks
12 that sometimes they don't want to see you. Sometimes -- you
13 know that they have done something, so you have to withhold
14 judgment. And many of -- many times you see folks out in
15 prisons that are diagnosed -- that are diagnosed with what's
16 called Antisocial Personality Disorder, which is sort of
17 lifelong pattern of behavior. And it's in a group of
18 disorders where these people kind of know how to get under
19 your skin. They know how to push your buttons and how to
20 irritate you.

21 What I came to understand and my sort of
22 conceptualization of these individuals was that having a two
23 and a half year old daughter and seeing her interactions
24 with me where she would throw a tantrum because she didn't
25 have the coping skills emotionally to deal with her feelings

1 and not express her feelings, I was looking at and seeing in
2 a lot of the inmates that I was treating. So I'm sitting
3 here thinking, trying to figure out as part of my job how do
4 I treat these folks, how do I help them, and how do I also
5 keep them from being a danger to society if let out. And my
6 conceptualization of that was that in some ways the inmates
7 that were diagnosed with those personality disorders have
8 sort of stopped somewhere along the developmental line,
9 because a lot of it was just sort of mirrored in my child.
10 So they have not developed those skills to deal with those
11 emotions.

12 You know, my daughter is very impulsive and can't wait
13 very long. You know, she blows a gasket at every little
14 thing and takes a while to figure out what's going on. And
15 I'm sure anybody who has had children has experienced that.
16 So after I kind of conceptualized it that way, it didn't get
17 under my skin as much, because you realized that these
18 people are working with what they have. They are working
19 with the coping skills that they have. Sometimes you don't
20 like them and sometimes they are trying to push your
21 buttons, but if you can figure out why, then it doesn't
22 bother you as much. And that's the way I kind of
23 conceptualized my treatment of many individuals.

24 Q. What was your impression or diagnosis of Freddie?

25 A. I diagnosed Freddie with impulse control disorder, not

1 otherwise specified; and anxiety disorder, not otherwise
2 specified.

3 Q. What does impulse control disorder mean?

4 A. An impulse control disorder is an inability to not
5 react to something that may cause yourself harm or may cause
6 harm to somebody else. Sometimes there are specific impulse
7 controlled disorders, like kleptomania, which may lead to
8 criminal behavior, such as shoplifting, but the not
9 otherwise specified part is that -- well, we haven't figured
10 out exactly what it is, but what I'm seeing is that this
11 person is acting before they are able to think. Sort of on
12 a more instinctual level. You know, the impulse is there,
13 the thought is there, and the act happens. There is not
14 enough time to process those thoughts appropriately.

15 Q. And what was the second part -- the other diagnoses
16 impulse control disorder, NOS, and --

17 A. Anxiety disorder not otherwise specified.

18 Q. And please explain that to the jury.

19 A. Again, it's an anxiety disorder in which somebody says,
20 you know, I'm worried -- you know, certainly being in a
21 maximum security setting and being in that situation and
22 under those conditions, I actually treat a lot of inmates
23 for anxiety because of the issues that they are dealing with
24 and their day-to-day living.

25 Q. Did you decide to prescribe medication for him?

1 A. Yes, I did.

2 Q. And what were your reasons for providing him with
3 medication?

4 A. A lot of times there are inmates on the cell block that
5 will request meds for other reasons to abuse meds, but after
6 seeing Freddie and talking to him, we developed a plan and
7 he agreed with it that we need to do something to give you
8 maybe five seconds, ten seconds, a little bit longer to
9 think before you act out, and this may cut down on the
10 number of incidents that are happening and allow you to
11 process things and also not be so keyed up and anxious.

12 Q. Well, what particular medications did you give him and
13 why did you choose the medications that you gave him?

14 A. Initially I gave him Vistaril, which is a medication
15 that's commonly used for allergies, but it also has a side
16 effect of making somebody a little bit calm. It can also
17 help somebody sleep. That medication was chosen because the
18 fomulary in the SCDC system is very limited and we have to
19 kind of work with what we have.

20 I also prescribed to him Risperdal, which is generally
21 used for -- is an anti-psychotic, somebody that has a
22 psychotic disorder, such as schizophrenia, but it is also
23 used to help control aggression and to slow people down.

24 And I prescribed to him Depakote, which is a mood
25 stabilizer, so it helps somebody with their mood swinging up

1 and down. And I used that combination to -- my plan was to
2 give him that time to think.

3 Q. Well, did the medications help slow Freddie's brain
4 down and give him time to think?

5 A. Yes, they did.

6 Q. Has Freddie been compliant with your treatment plan?

7 A. Yes, he has.

8 Q. Has Freddie been frank with you in his counseling
9 sessions?

10 A. As far as I know, Freddie has always been very frank
11 with me and any questions that I have for him he would
12 answer. For instance, there was one time we were talking
13 about anger in him, and he was talking about how he has
14 anger towards, you know, all of the correctional officers
15 because of the way he's treated. He just said he had a lot
16 of anger. I asked him frankly, you know, being in that
17 situation, "well, do you have any anger towards me?" And he
18 said "no, doc, I don't have any anger towards you. I would
19 never do anything to you because my anger is directed at
20 folks that are doing something to me. If I feel threatened,
21 then I will react." So that was pretty frank.

22 Q. Do you believe that his behavior has improved since
23 taking the medications?

24 A. I believe so. I think he has been able to calm down
25 and has not had -- to my knowledge, has had a reduced number

1 of incidents. I don't have those exact numbers. There were
2 some records that were not released by the South Carolina
3 Department of Corrections.

4 Q. Do you believe that if Freddie is properly maintained,
5 managed with medication, that he will continue to have less
6 problems with the Department of Corrections?

7 A. Well, I think -- I think so, because that's already
8 happened. If you put together the fact that he is in the
9 environment that in and has also improved with medications
10 being in that very extreme environment, and then he's placed
11 in a less restrictive, less -- well, actually punitive
12 environment sometimes, that I don't see why that progression
13 would not continue, and he would continue to benefit from
14 medications, as well as having interaction, having some type
15 of person to bond with and discuss these issues of temper,
16 anger, things of that nature.

17 Q. If Freddie were to continue on medications, would his
18 prognosis improve?

19 A. I believe so, yes.

20 Q. The impulse control disorder, NOS, that you were
21 talking about, is there any relationship between that
22 disorder and a person's age? In other words, would the
23 prognosis -- would the prognosis improve with age?

24 A. Certainly. I think as somebody gets older, and I have
25 seen this in the inmates at Leiber, they sort of transition

1 from dorm to dorm at Leiber. In particular, you have the
2 Ashley Dorm, where all of the young gentleman are that are
3 very impulsive and nobody wants to be placed in Ashley, and
4 then there is another dorm, which the name -- I can't
5 remember the name, but it's where some of the older inmates
6 reside. They have figured out that, you know, it doesn't do
7 them any good to do types of behaviors. They have calmed of
8 calm down, and, for lack of a better word, burnt out.

9 Q. Now, Dr. Cobb, even though you are not going to Leiber
10 presently, is there a psychiatrist going to Leiber?

11 A. Yes, there is.

12 Q. And is that psychiatrist actually working under your
13 control?

14 A. Yes, he is.

15 Q. Please answer any questions that the prosecution may
16 have.

17 A. Okay.

18 CROSS EXAMINATION BY MR. ARIAIL:

19 Q. Dr. Cobb, do you have a report?

20 A. No, I do not.

21 Q. All right. And you -- I believe you said that you
22 didn't -- before dealing with Freddie, you didn't look into
23 his background, or what he was in for, or what his
24 disciplinary record may be, or how many incidents he may
25 have? You just began a conversation with him?

1 A. That's correct.

2 Q. And how many conversations did you have with him?

3 A. I would approximate maybe 20 to 25.

4 Q. And as you would have these conversations, these are
5 these 15 minutes as you would go to the institution?

6 A. Some of them would be longer, yes.

7 Q. Yeah, right, but the ones that you were talking about
8 when you would go and you would have certain days set aside.

9 Now, when you had these conversations over that period
10 of time, did you go back and review any records?

11 A. No, I did not.

12 Q. Have you reviewed, like Dr. Brawley was talking about,
13 Dr. Brunetti, have you gone back to look at any of his past?

14 A. Since being asked to testify, I was sent his Department
15 of Juvenile Justice records and some older correctional
16 records, so I -- now I have seen some of that history.

17 Q. Okay. Well, I'm not -- I'm more interested in what you
18 had -- what you had reviewed at the time that you prescribed
19 him medication.

20 A. I had -- I'm sorry.

21 Q. Go ahead.

22 A. Basically I had done a clinical interview with him to
23 ask him what his systems were. And as many times what
24 psychiatrists do, as much as we would like to say we are
25 treating a specific disorder, sometimes it comes down to

1 treating symptoms, and we may not be able to call it
2 anything in particular. That's why we might say impulse
3 control disorder, not otherwise specified, but basically I
4 was going on my clinical interview.

5 Q. All right. And the clinical interview was the ones
6 that you have talked about that you had the meetings.

7 How many meetings did you have before -- starting in
8 August, did you have before you prescribed medication?

9 A. Approximately two or three. I think it was probably
10 three.

11 Q. So sometime in August, late August of 2005, you put him
12 on medication?

13 A. Yes, that's correct.

14 Q. And has he stayed on the same medication regimen?

15 A. I believe there was a change in the Vistaril. I think
16 that that was discontinued. I don't have the records right
17 in front of me, but for the most part that particular
18 regimen stayed the same, with the Risperdal and the
19 Depakote.

20 Q. And did you look at his records --

21 Well, when was the last time that you saw him?

22 A. The last time that I saw him was in July of this year.

23 Q. July of '06?

24 A. Actually -- let me correct that. Actually that's -- it
25 would be in August.

1 Q. August of '06?

2 A. Yes.

3 Q. Did you check his record between August of '05 and
4 August of '06, to actually see what his disciplinary
5 infractions were?

6 A. No, I did not.

7 Q. Then what is the basis of your testimony that you said
8 that you believed that his disciplinary infractions or
9 acting out had, I believe what you told us was that had
10 improved?

11 A. As Major Nettles had mentioned, that Freddie had been a
12 very problematic inmate on the maximum security unit. So
13 basically, one, I asked Freddie; and two, the correctional
14 officers there I got to know very well, because I saw them
15 all the time and basically told me that he's doing better,
16 he's not getting in as much trouble.

17 Q. But you didn't look at his record?

18 A. No.

19 Q. So that correctional officer may not know everything
20 that was going on?

21 A. Right, there are many correctional officers.

22 Q. And if you saw those records, do you think -- and they
23 indicated that there were numerous infractions between
24 August of '05 and August of '06, would that change your
25 opinion that Mr. Owens' behavior has improved?

1 A. Not necessarily just the number, but, you know, the
2 nature of the incident, you know, the details, those things,
3 because there are many different things that you can receive
4 an infraction for.

5 Q. Okay. Would you think that the possession of a 12 inch
6 weapon hidden between the mattresses would be an indication
7 of improved behavior?

8 A. I asked Freddie about that, because there was one day I
9 went to his cell to see him, as I usually do, and he had the
10 lights turned off and said "no, I didn't feel like talking."
11 I came back and they had searched his room and found the
12 shank. And I asked him point blank, you know, "why are you
13 doing this sort of thing?" And he said "well, you know,
14 from time to time I make things, but I only do it for
15 protection. If anybody comes in the cell to hurt me, I'm
16 going to defend myself."

17 I think that that in itself may not show improvement,
18 but, for one, I mean, he didn't use that shank.

19 Q. He did what?

20 A. He did not use that shank.

21 Q. So that's an indication of improvement, that he didn't
22 use it?

23 A. No, that's -- not exactly, but the overall sense. And
24 I admit I heavily rely on the correctional officers there,
25 as well as my frankly asking Freddie, because I didn't have

1 a list of all the disciplinary actions, "how are things
2 going? Are you feeling better? Are you getting into less
3 trouble? Are you sleeping better?" And all the indications
4 that I received were that they were not having as much
5 trouble with Freddie.

6 Q. All right. And after the February incident with the 12
7 inch shank, the April incident he had an eight and a half
8 inch shank. Did you ask him about that?

9 A. No, sir, I did not.

10 Q. Would that be an indication that it wasn't used, that
11 that would be a -- that his behavior was improving?

12 A. What was the time period between these two incidents?

13 Q. The 12 inch shank was February 28, '06.

14 The next shank, eight and a half inch, was April 4,
15 2006, about six weeks later.

16 A. The fact that he didn't use the shank is not
17 particularly an indicator that there is an improvement, but
18 there has always been this -- and, again, he's spoke freely
19 with me. In this environment it's very rough. He felt that
20 many times he was mistreated by the correctional officers
21 and he made things for protection. So it's an infraction to
22 have a weapon, but the reason for having that weapon maybe
23 in question.

24 Q. Thank you, sir.

25 MR. ARIAIL: That's all I have.

1 MR. GODFREY: Nothing further.

2 THE COURT: Thank you, doctor.

3 MR. GODFREY: May this witness be excused, judge.

4 THE COURT: Does the prosecution have any problem
5 with him being excused?

6 MR. ARIAIL: No, sir. No, sir.

7 THE COURT: Thank you, sir.

8 MR. GIBSON: I need to check to see if that
9 witness I told you about has arrived yet.

10 (Off the record)

11 (Back on the record)

12 DR. DONNA SCHWARTZ-WATTS, having been first duly
13 sworn, testified as follows:

14 THE CLERK: State your name for the record,
15 please.

16 THE WITNESS: Sure. Donna Marie Schwartz-Watts,
17 S-C-H-W-A-R-T-Z W-A-T-T-S.

18 DIRECT EXAMINATION BY MR. GODFREY:

19 Q. What is your name?

20 A. Donna Marie Schwartz-Watts.

21 Q. And how are you employed?

22 A. I work at the University of South Carolina School of
23 Medicine. I'm a professor of psychiatry there, and I'm
24 Director of Forensic Services.

25 Q. Please tell us about your education and training.

1 A. Sure. I graduated from Furman University in 1985, with
2 a Bachelor of Arts in psychology, and then I went on to
3 medical school in Columbia.

4 I graduated from the University of South Carolina
5 School of Medicine in 1989.

6 I completed a residency in general psychiatry at the
7 Department of Mental Health facility in Columbia, the
8 William S. Hall Institute. And I completed that training in
9 1993.

10 Then I also took an additional year of study in
11 forensic psychiatry, which is a subspecialty of psychiatry,
12 just like cardiology is a subspecialty of internal medicine,
13 and I completed that extra year of training in 1994.

14 I was employed by the Department of Mental Health for a
15 number of years. I was performing evaluations that were
16 court ordered. I also worked for a period of time providing
17 treatment for the chronically mentally ill, and I went over
18 to the university around 1995, and have been there since.

19 Q. Okay. Do you have any board certifications?

20 A. Yes.

21 Q. And what are they in?

22 A. I'm board certified in general psychiatry, and then
23 we -- technically it's called added qualifications in
24 forensic psychiatry.

25 Q. Have you ever been qualified as an expert before in

1 this state?

2 A. Yes.

3 Q. Do you have any idea how many times?

4 A. It's over five hundred.

5 MR. GODFREY: Your Honor, at this time we would
6 offer Dr. Schwartz-Watts as an expert in forensic
7 psychiatry.

8 MR. ARIAIL: We would so stipulate.

9 THE COURT: Okay. Without objection, she's
10 qualified.

11 BY MR. GODFREY:

12 Q. Dr. Schwartz-Watts, as Director of Forensic Services
13 and a professor of psychiatry, what are your present
14 teaching duties?

15 A. A good bit. Of course, because it's a university we
16 have to teach, so we have to -- we have to see patients. We
17 have to write papers and we have to teach, so that's part of
18 my duties there.

19 I teach presently -- and the University of South
20 Carolina, we have a medical school there, so there is all
21 different specialties, but in psychiatry, in our department,
22 we have a child psychiatry fellowship, and that's a two year
23 training program, where the residents finish their general
24 training in psychiatry and then they spend an additional two
25 years to be licensed to treat children in this state. So

1 the child residents -- each one of the child residents has
2 to spend two months with me as part of their rotations to
3 look at legal issues that affect children.

4 I also teach -- we have a forensic psychiatry training
5 program, which is the year of additional study. And the
6 forensic residents spend six months with me out of the year
7 to special -- to have further educational experiences in
8 legal issues that have to deal with mental health.

9 I also teach medical students that come and rotate with
10 me. High school students. We are -- pretty much anyone
11 that wants to learn, as long as they are in college or
12 above, they will spend time with me. I have mentored a
13 number of students from Furman University. They have come
14 and spent -- volunteered and spent some summers with me as
15 well.

16 Q. And do you have any contracts, employment contracts,
17 outside of the university at the medical school?

18 A. Yes. None of them are outside the walls then. I'm a
19 salaried employee at the university, but at USC we have a
20 number of contracts.

21 The Department of Juvenile Justice, I have been out
22 there providing treatment for about 12 years, or so.
23 Presently I'm taking a break from that, but I have a number
24 of doctors that I supervise that go to the Department of
25 Juvenile Justice and actually provide treatment to the

1 juveniles.

2 I am presently -- we have a contract with the South
3 Carolina Department of Corrections, and that's me and a few
4 other doctors, so I go -- I have been going out to the
5 prison now for about three years one day a week also,
6 similarly to Dr. Cobb, and I treat the inmates there.

7 I also have a contract with the Department of Mental
8 Health, where I perform forensic evaluations. There is a
9 group of individuals that are confined secondary to a law
10 that when it's determined if they are safe to be at large,
11 the Department of Mental Health consults with me to see if
12 they are safe to be released.

13 Q. Have you ever published anything?

14 A. Yes.

15 Q. And what was that?

16 A. Oh, a number of things. This year I published a
17 correctional handbook for people that work in the Department
18 of Corrections. I published a chapter, along with another
19 doctor at the university, on crisis intervention in
20 correctional settings. A number of articles.

21 My areas of interests are stalking. I have published
22 quite a few articles in that area.

23 I also studied in Asperger, which is a form of autism.
24 It's a developmental disorder. I've done a lot of research
25 in that area, and plenty of research about death penalty.

1 Q. Now, you indicated that previously you had done
2 evaluations at William S. Hall, court-ordered evaluations?

3 A. Yes.

4 Q. Do you have any idea how many times you have testified
5 for the State or prosecution?

6 A. A fair amount. Probably -- it's always going to depend
7 on times and years and what the contracts are and what
8 the -- what the agencies are, but overall it's pretty close
9 to even. I have testified a good bit of time for the
10 Attorney General's office.

11 It's hard to say. It's a pretty fair mix.

12 Q. And you also testify for the defense?

13 A. Certainly, and certainly in cases like this more
14 than -- I have testified for prosecution. I have been
15 retained by prosecution in death penalty cases, but usually
16 in these sorts of cases it's much more for defense.

17 Q. Okay. When you have been contacted to evaluate
18 someone, do you always testify in a court case?

19 A. No.

20 Q. And is there any reason for that?

21 A. Well, the attorney doesn't like my opinion.

22 Q. How many -- do you have any idea how many defendants
23 you have evaluated over the years in capital proceedings?

24 A. Over seventy now. I was counting the other week. Just
25 offhand probably around seventy.

1 Q. Now, turning your attention to Freddie, in a few
2 minutes I'm going to be asking you questions about your
3 opinion.

4 Would you please start out by telling us what
5 methodology you use to reach opinions?

6 A. Sure. Forensic psychiatry is a little bit different
7 than general psychiatry. In general psychiatry, if a
8 patient comes into the office, we are going to do similar --
9 when we are providing treatment, similar to what Dr. Cobb
10 has done. We will get a history from that person and try to
11 understand. There is some areas that might qualify for some
12 sort of mental disorder or diagnosis.

13 Forensic is a little bit different, because there may
14 be some legal involvement. And so for Mr. Owens case is
15 specific, because he has criminal charges, the standard
16 methodology I used is to have -- and Mr. Ariail's office was
17 very kind. I had a lot of information about Mr. Owens. I
18 looked at all of the witness statements. I had the police
19 reports, the incident report. I had the autopsy of Ms.
20 Graves. I had a lot of the police evidence that had to do
21 with this case.

22 Also through your office that also provided a lot of
23 records. I had -- Mr. Owens had a history of being treated.
24 He was committed to the Department of Juvenile Justice when
25 he was in his early teens, and I had those records. Not

1 only his treatment records, but also the disciplinaries
2 there and access to the write-ups there. So while he's been
3 confined, I had access those treatment records as well. And
4 I'm also aware of many of his disciplinaries since he's been
5 confined in the Department of Corrections.

6 I also had his medical records. I have reviewed all
7 the treatments he's had at Greenville Memorial Hospital in
8 the past.

9 I also had access to -- I have interviewed him three
10 times. I spent about ten hours with Mr. Owens. I saw him
11 on three separate occasions.

12 And then I have also talked with a number of people
13 about Mr. Owens and also consulted with Dr. Brawley. I have
14 talked with his mother. I have talked with the teacher, Ms.
15 Maag.

16 I actually also was able to talk to some of the doctors
17 that had provided him treatment in the past; the forensic
18 psychiatrists at the Department of Juvenile Justice that
19 treated Mr. Owens when he was 15 or 16 years old. I have
20 been able to speak with her.

21 And I didn't know that -- earlier on I didn't know Dr.
22 Cobb had testified, but I had also, as soon as I found out
23 he had received treatment from Dr. Cobb, I got what's called
24 a medical release. Now, we are not allowed to talk to
25 psychiatrists without permission, because they have to

1 protect their patients confidentiality, but Mr. Owens had
2 signed those releases in my office and gave me permission to
3 talk with those doctors as well.

4 Q. And could you tell us why you got a neuropsychological
5 evaluation?

6 A. Yes, a number of reasons. Mr. Owens -- and you have
7 heard the testimony. He's very impulsive. He's a very
8 impulsive individual. And if you review his psychiatric
9 notes and treatments and look at all the -- the history of
10 all the trouble he's been in while he's been confined in the
11 past, that caused me some concern.

12 Impulsivity, it's kind of like a medicine. When you
13 have abdominal pain, there can be a lot of causes for it.
14 And so what we do in psychiatry, you have to tease out what
15 the causes of that symptom are. And he has given me a
16 history of a head injury and I was concerned that it may or
17 may not have been significant. He states and he and his
18 cousin -- there was a van, and I believe it was his aunt was
19 driving off in a van when they were young children, and they
20 had got on the back of the bumper. They were holding onto
21 the back of the van, and Mr. Owens was holding onto the rim
22 that held the tire. And instead of letting go, his cousin
23 jumped off quite early, Mr. Owens held on. So by the time
24 he jumped off the van, it was he said speeding at least
25 about 30 miles per hour and he let go and fell off and hit

1 the back of his head. He described a brief period of a loss
2 of consciousness.

3 So just because of the nature of these proceedings,
4 they are so serious, he had a history of a head injury, he
5 had some impulsivity, but it rose to the level of concern,
6 but I just wanted to make sure that some of his impulsivity
7 wasn't coming from brain damage.

8 Q. Well, as part of your evaluation, did you work on a
9 developmental history for Freddie?

10 A. Yes, I did.

11 Q. What is a developmental history?

12 A. Basically when we are performing an evaluation, we will
13 look at lots of different parts of development in terms
14 of -- there is many different areas that we assess. And
15 what a developmental history is what happened to your brain
16 and what happened to your personality as you are a very
17 small child. So the developmental history focuses on the
18 first few years; for me, up to about ten years of life when
19 children's brains are developing. And you look for things
20 that maybe could have caused problems in development.

21 Q. Well, did Freddie have any significant findings in his
22 developmental history?

23 A. Yes, he did.

24 Q. And what were they?

25 A. Well, there were a number of things.

1 First of all, his mother was 18 years old when she gave
2 birth to him. And I was concerned because you will hear
3 later one of the things I diagnosed him with is Attention
4 Deficit Disorder. And it's very common in that disorder
5 that there is a history maybe with some birth abnormalities.
6 It's not a form of brain damage, although certainly part of
7 your brain doesn't work correctly, but one of the things
8 psychiatrists do is we will try to get a good history of the
9 mother's pregnancy with the child to make sure that there
10 weren't trauma to the fetus while it was developing, and
11 there were no traumas.

12 I talked with Mr. Owens' mom, and although she's been a
13 victim of physical abuse, she denies that at any time when
14 she was pregnant with Mr. Owens that she was abused in any
15 way.

16 She denied that she did any drugs, which is also one of
17 the other things when children develop Attention Deficit
18 Disorder, sometimes the mother may have been using drugs
19 while pregnant, and there was no history of that.

20 But what was significant is in looking in her,
21 comparing him to her other children, she noted that he was
22 much more hyper. He had a lot more energy than the other
23 children, and was able to tell me that by the time he was in
24 the sixth grade, that she remembered he was referred to be
25 evaluated for being hyper. And she began to go through that

1 assessment process and that it was stopped, and so he never
2 continued to have the full complete assessment by a
3 psychiatrist to see if he needed to be placed on medicines,
4 like Ritalin and/or Setera, medicines that we use to treat
5 that problem.

6 The other thing that was interesting in his development
7 is that Mr. Owens, his IQ is I think a good bit higher than
8 his brothers and sisters. In looking at schools records and
9 school records of his siblings, I think it was important to
10 note that his IQ, even when he had a learning disability,
11 was substantially higher than the siblings, and so I took
12 that into account as well.

13 The final thing that I thought was significant is that
14 his mother was able to confirm -- he was -- he experienced a
15 lot of physical abuse as a child, and she was able to
16 confirm many of those instances. He witnessed a lot of
17 physical abuse as a child. He -- actually I think Ms.
18 Hammock referred to earlier the grandmother that was in jail
19 for shooting someone. Freddie was there and reports he
20 witnessed that shooting when he was a small child. She
21 had -- the grandmother had shot a family member. So he was
22 present when that happened. So he had been exposed to some
23 abuse.

24 And what was important there is she states that a lot
25 of times Freddie did not go to school. And that the reason

1 he didn't do that is because he would go to the bus stop and
2 come back home to make sure that his mother was okay.

3 She describes one situation where the stepfather took a
4 machete to her and chased her through the house, and Mr.
5 Owens was present during that period of time, and noted that
6 after that that his school attendance did drop off some and
7 that he would often spend the days home with her. So those
8 were the significant things in his childhood.

9 Q. Did you also consider his medical history?

10 A. Yes.

11 Q. Did Freddie have any significant findings in his
12 medical history?

13 A. Some, yes. Again, we have to look at all kind of
14 medical illnesses, because they have psychiatric components
15 to them, as you can imagine.

16 And I think what's important here is that Mr. Owens is
17 pretty healthy, I think overall. He has some low back pain.
18 He was involved in a car accident and he had some chronic
19 low back pain, which has caused him some problems over time.

20 And he also has a history of kidney stones, and he's
21 been hospitalized for that on a few occasions.

22 But, overall, I think other than his low back, his
23 health is in good -- he's in good health.

24 Q. Now, what about his psychiatric history?

25 A. Yes, I did obtain psychiatric history on him.

1 Q. What is significant?

2 A. What we do when we are completing a psychiatric
3 history, we look for a history of in-patient treatment,
4 meaning that you have been put in the hospital, or
5 outpatient treatment. Mr. Owens has no history of
6 in-patient treatment. All of his psychiatric care he's
7 received has actually been while he's been institutionalized
8 in one way, shape, or form. And so I have had the luxury of
9 going back through records. And as early as 1995, Mr. Owens
10 was in the Department of Juvenile Justice. He was being
11 evaluated. And as far as back as 1995, the psychologists
12 there noted that he had some symptoms of depression.

13 In 1997 was the first record that we have that where he
14 was actually treated for depression by Dr. Lillian Tidler.
15 I actually was working at DJJ at the time that Mr. Owens was
16 there, but I was working in a different campus, so I never
17 treated him, but Dr. Tidler and I actually had clinic on the
18 same day and we would share the same office space, the same
19 office suite area.

20 Dr. Tidler is a board certified child forensic
21 psychiatrist, which is very rare. That means she had to do
22 the two years at child psychiatric training and then the
23 other year of forensic psychiatric training, so it took six
24 years for her to complete the training. And she worked at
25 the Department of Juvenile Justice for a number of years.

1 She diagnosed Mr. Owens with major depression. And what
2 that means, that's -- depression is a depression that for
3 every day for at least two weeks in a row you have a really
4 bad mood. You are really sad, and you have to have five
5 other systems: You are not sleeping well; you are feeling
6 guilty; you are ruminating; you may be suicidal; and it's
7 serious enough, it's a medical condition that it requires
8 medical treatment.

9 And the symptoms that Mr. Owens was having at the time,
10 he was very hopeless about the future of his siblings. It
11 seems that in Dr. Tidler's report that he was very concerned
12 about the well-being of his family and that he realized that
13 they didn't have a lot of resources, and he was concerned
14 about their life and was having very negative thoughts about
15 his family members. He was not sleeping. He was very
16 irritable. He was getting into trouble.

17 She started him on an antidepressant, Zoloft, which is
18 a medicine we commonly use for depression, and she gave him
19 some sleeping medicine.

20 Shortly after that she saw him and he improved. He
21 seemed to do much better on the medications.

22 While he was under her care he turned 18 and he had to
23 be transferred to the Department of Corrections.

24 I followed up in the Department of Corrections records
25 when he was transferred. He asked for psychiatric help. He

1 was put on a schedule to receive psychiatric help, but he
2 received none. There was no record that the medications
3 that he was discharged from the Department of Juvenile
4 Justice on. Those medications were not continued, once he
5 was confined.

6 He also, again, as you have heard from Dr. Cobb, he's
7 had treatment since he's been confined at Leiber. And there
8 he's had a diagnosis of Impulse Control Disorder, Antisocial
9 Personality Disorder and Anxiety Disorder, and he is
10 presently still on the medications Dr. Cobb testified to,
11 the Depakote, which is the mood stabilizer; Risperidone,
12 which is for impulse control in his case. There is no
13 evidence he doesn't have any type of thought disorder. And
14 I believe that -- I don't think he's on the Vistaril anymore
15 because the Department of Corrections, they have stopped
16 that medication right now.

17 Q. Did you also consider substance abuse history?

18 A. Yes.

19 Q. And what were your findings?

20 A. Mr. Owens consistently denies that he's used substances
21 to me, but I found a few records that I'm not sure. There
22 may be some conflicting reports, but there has certainly
23 been none since he's been confined.

24 There is some records -- when you review the Department
25 of Juvenile Justice records, there are some records that

1 allude to periods of time during teenage years where he
2 certainly used marijuana and alcohol, and there is questions
3 whether he may have experimented with cocaine or not. He
4 denies that to me, though.

5 Q. Now, you have talked a little bit about the DJJ
6 experience, or Department of Juvenile Justice, when he was
7 there?

8 A. Yes.

9 Q. Is there anything else to add to his juvenile history?

10 A. Yes, I think there is some significant things about
11 that. He received treatment very late. He had been at the
12 Department of Juvenile Justice for a few years. But even
13 though he had been there and had not seen a psychiatrist
14 yet, he still was receiving some group treatment. He was
15 seen by a psychologist. He participated in some anger
16 management training.

17 And I think two things are very significant about his
18 stay in Juvenile Justice. Number one is that despite -- and
19 I will tell you, despite his horrible behavior, he had a lot
20 of write-ups in the Department of Juvenile Justice; very
21 disruptive. Write-ups for singing in class, disrupting
22 school. Write-ups sometimes for fighting other juveniles.
23 He had a number of write-ups there.

24 But even despite his behavior, he excelled and he was
25 promoted, I believe, to the highest rank in ROTC that

1 existed on the John G. Richard campus.

2 So at the same time all his behavior continued to be
3 impulsive, it appeared that he was able to proceed with the
4 through the ROTC training, until there was a time where he
5 was essentially discharged from that, but he seemed to excel
6 and do well under that supervision.

7 Q. And while he was under that supervision, is that at the
8 end when he was receiving treatment, medication?

9 A. No, actually it would have been going on most of that
10 time probably before his treatment. He was under the
11 structure of that program. And then once he saw Dr. Tidler,
12 he was about to be discharged to the adult correctional.
13 And by that time he was no longer in the ROTC program.

14 Q. Then when he got to prison, to the regular prison,
15 there was no treatment?

16 A. No, and he asked. There was a clear record. There is
17 psychiatric record where he was seen by a mental health
18 professional. He asked for treatment. He requested to be
19 placed on his medications, stated his medications helped
20 him, and he had no treatment.

21 Q. Did you also consider his criminal history?

22 A. Yes.

23 Q. What was significant?

24 A. Mr. Owens has had a lot of charges. He was out -- once
25 he was released from the Turbeeville Correctional Institute,

1 he was out a very short period of time. And in that period
2 of time he accrued a number of charges, a number of armed
3 robbery charges. Some of those I'm not sure of the status.
4 There is some records that indicate they may have been
5 dismissed. There is others that indicate they may be
6 pending, but there is a number of armed robbery charges,
7 some assault charges, in addition to his present charges.

8 Q. Now, what about institutional history, did you look at
9 that?

10 A. Yes.

11 Q. What was significant?

12 A. I have already mentioned some of his adjustment to the
13 Juvenile Justice System. I'm very familiar with that
14 program. Again, I have been there about 15 years. And I
15 think it's fair to say Mr. Owens behavior was very
16 consistent with juveniles who are not medicated, who have
17 Attention Deficit Disorder and have not had treatment; very
18 impulsive, disruptive, and at times aggressive.

19 He was in the Burchwood Dorm, which is the one of the
20 more -- as Dr. Cobb was mentioning earlier, that was one of
21 the dorms where the juveniles were older and had more
22 serious charges. So he was certainly in an environment that
23 was more -- where the juveniles were considered maybe more
24 dangerous than others, compared to other campuses.

25 While in the Department of Corrections, I think it's

1 been very fair to say that he's had a lot of write-ups, even
2 compared to most other inmates. He's had, I believe I
3 counted, about 56 write-ups over the years. Those write-ups
4 have ranged from some things that are assaultive, to, again,
5 him still in his late twenties, now being disruptive at
6 times, being very impulsive, but it's certainly been
7 characterized he's had a long disciplinary history.

8 Q. Now, you testified that you work at the Department of
9 Corrections some?

10 A. Yes.

11 Q. And you do that presently, right?

12 A. Yes.

13 Q. Would you please tell us exactly what it is that you do
14 there?

15 A. Yes, the Department of Corrections has a psychiatric
16 hospital. There is an 89 bed unit in Columbia on the
17 Kirkland campus, so actually I treat inpatients, inpatients
18 of -- psychiatric inmates, but I also consult in a very -- a
19 lot of other areas.

20 The Department of Corrections is very short of
21 psychiatrists right now and there has been a number of
22 clinicians in the community that, I won't say volunteer.
23 Everyone gets paid, but they are certainly not -- the income
24 there is much lower than what they would be making if they
25 were billing for their services out in the public, but there

1 is a number of fine doctors that go in, but there is still a
2 shortage. So I have gone to the super max's. I have
3 provided treatment.

4 There is what's called an ICS programs, where there is
5 450 inmates with mental illness that have been identified
6 throughout the Department of Corrections and they reside on
7 the Kirkland campus. It's a treatment program. And I also
8 have a number of patients I follow there as well.

9 Q. You have heard the medications. You have reviewed the
10 records. What is your opinion about Freddie Owens treatment
11 presently?

12 A. I didn't find out Mr. Owens was being treated with
13 anything until the first time that I evaluated him back in
14 September of this year, and I think it's very fair to say
15 that he's improved. He still has -- he is still impulsive,
16 but he's not as impulsive. When I say improved, then I
17 think it's very fair to say he's not as impulsive as he has
18 been in the past, and he's -- he's on a -- the medications
19 prescribed by Dr. Cobb are certainly reasonable for his
20 conditions.

21 Q. Now, did you also consider Freddie's social history?

22 A. Yes.

23 Q. Now, you have heard the testimony of Dr. Hammock. Do
24 you have anything to add to what she said about his social
25 history?

1 A. Just a few things. I think what's important is he's
2 not had many attachments. If you look at -- one of the
3 things we do is we look at who is someone attached to
4 growing up. And I think it's very fair to say he's attached
5 to his mother. He's certainly attached to his teacher. And
6 I think he's been attached to any -- Dr. Cobb, as well, any
7 person that's provided help to him. And I think that's very
8 fair to say. He's very attached to his family members, but
9 overall he's had very little chance for a relationship.

10 Q. Now, what about his mental status examination?

11 A. What a mental status examination is, that's kind of the
12 psychiatrist's way of looking for how your brain functions.
13 We are testing things like your memory, the different lobes
14 of your brain, how they work. We are also looking for --
15 there is physical or observable kinds of mental illness that
16 patients have. So what we are looking for in that mental
17 status examination are physical tangible symptoms of mental
18 illness that can be better objective, versus just based on
19 someone reporting those symptoms.

20 Q. Did he have any significant findings?

21 A. Yes, he had some.

22 Q. What were they?

23 A. Well, one of the things that's very fair to say about
24 Mr. Owens, his speech -- I know I talk fast, but he talks
25 faster than me. Mr. Owens has periods of time where he's

1 speech is quite rapid, and that -- and he becomes quite
2 animated. He can -- he would frequently let out -- but
3 under circumstances where he might be happy about something,
4 he could let out outbursts of, you know, he might say wow
5 very loudly. My secretary next door could often hear him
6 talking, just, you know, remnants of his voice through the
7 door next door.

8 I think the most significant things about his mental
9 status exam, though, were that he admits to a depressed
10 mood, and he admits -- he has some insight. He understands
11 that he's been depressed for quite a long period of time,
12 and he was able to say that he hides his depression with a
13 smile, which was certainly very consistent. He could talk
14 about very sad things and have a smile on his face, and
15 that's just one of the ways he's learned to cope over the
16 years.

17 Q. After considering all of this information, were you
18 able to arrive at a diagnosis?

19 A. Yes.

20 Q. Let me ask you, can you explain the system of making a
21 diagnosis?

22 A. Yes. In psychiatry we have what's called a multi-axial
23 system, and there is five axis we use. And we have a grade
24 book. It's called a DSMTR, and it's been revised too many
25 times, and it's undergoing another revision. And what

1 happens is over the years they may take away criteria to
2 diagnose a mental illness. But the purpose of that book is
3 so if I call a psychiatrist in California and I say patient
4 Joe has a major depression, we all understand we are talking
5 about the same illness.

6 It's also -- that book is also what's used for the
7 insurance coding, so when you go to your doctors and they
8 write the little code on your bill, that's also -- our DSM
9 is what we use for our insurance coding when we are billing
10 for treatment.

11 And Axis I is for illnesses that are so severe that
12 they are major mental illnesses, or those are conditions
13 that could be -- where anybody could have problems. So say,
14 for example, if you lost a loved one, if you lost a spouse
15 and you came into a psychiatrist and had depression, we
16 would expect that under those circumstances. That's called
17 adjustment disorders. So they are for severe major mental
18 illnesses, or conditions that anyone experienced them, they
19 would most likely have psychiatric symptoms.

20 Q. Well, does Freddie have an Axis I diagnosis?

21 A. Yes, I gave him two Axis I diagnoses.

22 Q. And what are those?

23 A. One is called Dysthymic Disorder. And that's just the
24 psychiatric term. That means he has a chronic depression.

25 To qualify for the diagnosis of dysthymia, you have to

1 have at least a two year history of depression. And, in my
2 opinion, going back through the records, Mr. Owens has had
3 that history since 1995. There has been clear indications
4 from the records that in 1995, he presented with symptoms of
5 depression.

6 In 1997, he was treated for a severe depression, major
7 depression.

8 And even in Dr. Horne, who was a psychologist that saw
9 him back in '97, and Dr. Brunetti, who was the psychologist
10 who saw him in '99, even their psychological testing showed
11 even then that Mr. Owens, amongst other things, did have
12 symptoms of depression.

13 So going back in time, I think it's very fair to say
14 that he has a chronic depression.

15 And he's not received treatment specifically for
16 depression since he's been confined in the Department of
17 Corrections, but the Depakote that Dr. Cobb has prescribed
18 for him, that is a mood stabilizer. So most likely that's
19 probably helped with some of his symptoms of depression over
20 time.

21 Q. Does he also have an Axis II diagnosis?

22 A. Yes, but he has another Axis I diagnosis too.

23 Q. Go ahead with the other one.

24 A. I did diagnose him with Attention Deficit Disorder.

25 And I put in partial remission, and there is a reason for

1 that. Most -- if you take a hundred percent of children
2 that have Attention Deficit Disorder, only six percent of
3 them go on into adulthood to persist to have those systems.
4 Most kids will outgrow ADHD by the time they are about 16 or
5 so, but I think it's very fair to say that a lot of the
6 impulsiveness that we see in Mr. Owens is still a remnant of
7 childhood Attention Deficit Disorder. So there is many
8 parts of that illness that are remission. He can pay
9 attention now. He reads. He -- he is fluent. He has
10 taught himself Arabic. He has taught himself Swahili. He
11 is studying French. He reads. He reads scholars. He won't
12 read any books unless it's a scholar that's been published
13 for 15 years. He reports that he has taught other inmates
14 how to read. He teaches them to read using the book
15 Alexander the Great, because he doesn't want them reading
16 the books that aren't well written. So he's able to focus
17 his attention. Now, he's outgrown that symptom very
18 clearly, and I think he's able to attend to things when he
19 chooses to. He's able to read and process and learn those
20 things.

21 I also discovered that's he's fluent in sign language,
22 which I didn't know. I saw him signing in court. So he's
23 taught himself many things. He's able to attend enough
24 where he can learn new skills, but he still has the
25 impulsiveness and it's very apparent.

1 Q. Well, before we go to Axis II, let me ask you this.
2 Based on your testimony, you have reviewed a great number of
3 records?

4 A. Yes.

5 Q. Can you tell us how many times that you actually met
6 with Freddie?

7 A. Yes, I saw him three different occasions. Then, again,
8 I spent about ten hours with him. Each time, three -- three
9 hours on two occasions and three -- and three and two-thirds
10 hours on another occasion.

11 Q. And it was after those meetings and after review of the
12 records that you were able to come up with a diagnosis?

13 A. Yes, because we had to rule out that -- the problem
14 there is you have to rule out other causes.

15 Again, impulsivity is one of those symptoms, and they
16 have many different causes. It can be brain damages, drugs.
17 It could be your personality structure. Some people are
18 very impulsive because they don't care. And Mr. Owens has a
19 little -- a part of his impulsivity also comes from his
20 personality structure. I'll be glad to talk about that, but
21 his impulsivity comes from many sources. So you have to
22 review the records. You have to interview the patient,
23 understand what's going on with him, and then that's why I
24 had Dr. Brawley to consult. We were able to go through his
25 school records and look back in time. And sure enough,

1 there had been many documentations where the teachers noted
2 he was impulsive and he had difficulty paying attention.

3 Q. Now, does he have an Axis II diagnosis?

4 A. Yes.

5 Q. And what is that?

6 A. As he's carried in the past, and I agree, it's
7 Antisocial Personality Disorder. And what that means, some
8 of Mr. Owens' impulsiveness does come from his personality.
9 Not all of it comes from the Attention Deficit Disorder.
10 Not all of it comes from depression. There is also things
11 about Mr. Owens -- and if you look at his life, you have to
12 go backwards to make a Personality Disorder diagnosis, and
13 look at how he has coped. And he does, he has a long
14 history of illegal behaviors. He has a history of being
15 reckless at times and being impulsive. So in all fairness,
16 no one can look at the symptoms of impulsivity and say 20
17 percent comes from ADHD, 20 percent comes from depression.
18 His impulsivity comes from having Attention Deficit
19 Disorder, having the chronic depression and his own
20 personality structure.

21 Q. Are there medications that could make him less
22 impulsive?

23 A. Yes.

24 Q. And what are those?

25 A. There is many. He's never actually been tried on any

1 of the medicines for Attention Deficit Disorder, which are
2 very helpful in controlling impulsivity. The Department of
3 Corrections, we certainly don't have Ritalin or things
4 there, because those are drugs that are often abused, but
5 there are antidepressant medications, and I can think of one
6 called Wellbutrin, which treats both impulsivity from
7 Attention Deficit Disorder and it also treats depression.
8 So there is other medications, but the medications he's on
9 right now, the Depakote and Risperidone, certainly help with
10 impulsivity.

11 Q. And is there any question that he would be able to get
12 the medications if he was in the South Carolina Department
13 of Corrections?

14 A. Oh, yes, the Department of Corrections has a lot of
15 budget cuts right now, but they are still -- they are -- we
16 are very limited in the medications we can use, but the
17 medications they have, they are ample. They are enough.
18 They require creative thinking sometimes, because we don't
19 have quite all access to all the medications we can use if
20 we were treating patients that were on the street, but there
21 is enough meds there certainly that can treat his condition.

22 Q. Well, if Freddie were to get a life sentence, where
23 could he be housed in the Department of Corrections that
24 would take care of his mental health treatment?

25 A. Right now the Department of Corrections has what I

1 call, and they call, we all call, three levels of care. We
2 have the inpatient psychiatric unit where I work, which is a
3 Gilliam Psychiatric Hospital.

4 We have a 450 bed unit, but I think they just --
5 actually they are kind of revamping that unit and they took
6 away a number of the beds, because they are having some
7 problems with crowding right now, but they have a unit in
8 Columbia called the ICS program. And in that program
9 mentally ill offenders are housed there. There is case
10 managers assigned to them that see them every day. There is
11 a psychiatrist assigned to that unit that sees their client
12 and prescribes medications, and there is specialized staff
13 that deal with mentally disordered offenders.

14 Then we have the area mental health treatment, and
15 that's where Dr. Cobb works. There is some institutions in
16 South Carolina where there is psychiatrists that come in.
17 The institutions were Lee County. There is one in
18 Dorchester County, Leiber, and there is one here in the --
19 Perry Institute. So there is psychiatrists also throughout
20 the State that go in and do clinics at the area mental
21 health centers.

22 Q. So you believe that Freddie would be able to maintain
23 his counseling and treatment if he were in prison?

24 A. Yes. Now, that he's in the system, he's been
25 identified, he's on medications, that's much more likely

1 than compared to when he was in Turbeeville at the age of
2 18.

3 Q. Thank you. Please answer any questions that the
4 prosecution may have.

5 THE COURT: I'm going to give everybody a stretch
6 break. I'm going to let y'all walk out across the hall for
7 five or ten minutes anyway.

8 (The following takes place outside the presence of
9 the jury panel)

10 (Whereupon, proceedings were recessed)

11 (Whereupon, proceedings were reconvened)

12 THE COURT: We had reached the cross-examination.

13 MR. GODFREY: Yes, sir, Your Honor.

14 (The following takes place in the presence of the
15 jury panel)

16 THE COURT: Okay, sir, Mr. Ariail.

17 CROSS EXAMINATION BY MR. ARIAIL:

18 Q. Dr. Schwartz-Watts, it's good to see you again.

19 A. The same.

20 Q. Thank you for your report.

21 A. You are welcome.

22 Q. It helps a lot.

23 Let me just go over a couple of things to make sure.

24 First, as we will follow through the report, you were
25 questioned sort of in chronological order of what's in here,

1 and I just want to flip to the section, to start with,
2 dealing with criminal history.

3 A. Yes.

4 Q. You detailed a number of charges and things that you
5 went over, but you didn't mention that he still had a
6 pending murder charge from the events of February 16th,
7 1999.

8 A. Yes, and if I did not -- I'm very aware of that. That
9 may have been an oversight. I'm absolutely aware of that.

10 Q. Involving Mr. Lee?

11 A. That's right, his cellmate, yes.

12 Q. And I don't want to belabor this point, but in your
13 report it talks that you referred to the disciplinary
14 reports of the South Carolina Department of Corrections from
15 2001 through 2006?

16 A. Yes, sir.

17 Q. You had copies of all those infractions, incident
18 reports?

19 A. Yes, sir. I would have had a list of them and then I
20 think for probably the majority of them, there would have
21 been a narrative to describe what happened.

22 Q. Right, the internal report --

23 A. Yes.

24 Q. -- that describes all that.

25 A. Yes.

1 Q. Now, I don't want to stand up here and read or have you
2 read all those reports, but you did consider and use those
3 reports as part of your review and diagnosis?

4 A. Absolutely, yes.

5 Q. And I assume you also used the material contained in
6 the report as to who said what and who did what?

7 A. Yes, sir.

8 Q. All right. So if we needed to, we could go through
9 those with you, but I just want to summarize in the end your
10 comments were that Mr. Owens had substantial disciplinary
11 infractions during his course of incarceration?

12 A. That is very fair to say.

13 Q. In fact, I believe you said he had something more than
14 the ordinary?

15 A. I counted 56, and -- of course, in the course of my
16 career I look at -- it's very common in doing evaluations
17 I'll look at the list of assaultive disciplinaries, and it
18 was a lengthy list.

19 Q. And we have -- and you may have been in the courtroom.
20 We put in, through Mr. Nettles, a summary, a very brief
21 summary, of each one of those events, 28 of them to be exact
22 we put in, and were you in the courtroom when we --

23 A. No, sir.

24 Q. Okay. Well, there is a summary or a list of those that
25 I would like to show you, State's Exhibit 30.

1 A. Thank you.

2 Q. And just so you will understand what that is, that is a
3 summary of all of -- of 28 of those reports that -- you had
4 the whole report. That's just a summary of what the heading
5 of it was.

6 A. Yes, these all look familiar. Each one of these I have
7 some recollection of reading the reports that went with
8 them.

9 Q. Uh-huh. That's what -- I was going to ask you, are you
10 familiar with that?

11 A. Yes, sir.

12 Q. You said as part of your testimony that under his
13 medication, while he's been on medication, his impulsive
14 behavior has improved?

15 A. Yes.

16 Q. All right. Now, looking at the list of the things that
17 have occurred, I want to draw your attention specifically to
18 number 25.

19 A. Yes.

20 Q. February 28, 2006, a 12 inch weapon hidden between
21 mattresses?

22 A. Yes, sir.

23 Q. And then again on April 4, 2006, an eight and a half
24 inch shank made from flat metal, sharpened at edge, wrapped
25 with ace bandage?

1 A. Yes.

2 Q. Now, is that, in your opinion, possession of a shank
3 and those -- description of those things, and you have, of
4 course, the full report, if you need to refer to it, are
5 those impulsive acts, or are those acts of planning?

6 A. No, that would certainly be -- that -- to me that would
7 indicate some kind of plan, whether it's for self-defense or
8 to attack someone, but what would be considered impulsive is
9 if someone came into his room and he was just upset with
10 them and had bad works and brandished it.

11 But, no, certainly having those, that would indicate
12 some kind of planning. That's fair.

13 Q. Okay. And the medication that he's on doesn't impact
14 his ability to plan?

15 A. No, I don't think that's -- that's correct.

16 Q. And then May 1st, 2006, he set fire to his mattress.

17 May 20th, 2006, he threw a cup of coffee on officer
18 Smith?

19 A. Yes.

20 Q. Are those acts of impulse?

21 A. Yes, those are certainly impulsive, and it was
22 interesting, Mr. -- I asked him especially about setting
23 fire to his mattress, that's very serious to me, because
24 that could injure himself. That could injure others, but
25 that's very impulsive. I mean, he's setting fire to a

1 mattress when he lives in a cage and he can't get out, so
2 that's very impulsive.

3 Q. Now, I don't want to belabor the point, but I do have a
4 couple of others questions about all of these reports that
5 you read and your testimony that -- or your response to the
6 question by Mr. Godfrey that maybe -- or that he could be
7 housed in separate units within the Department of
8 Corrections.

9 A. Correct, if the -- what my statement is, just make sure
10 it's clear, that wherever he's housed in the Department of
11 Corrections, he will need mental health followup, and the
12 Department of Corrections has set up, no matter where he is,
13 he's going to have some access to mental health treatment.

14 Q. Correct.

15 And you mentioned some other facilities; an in-house
16 facility, and an inpatient facility, and that sort of thing?

17 A. Yes.

18 Q. Based on your knowledge of the working of the
19 Department of Corrections, and based upon your knowledge of
20 the details of the numerous infractions that you referred
21 to, do you think it is a possibility that Mr. Owens would
22 ever be housed in anyplace different than he is now?

23 A. Gosh, I don't know. I don't know. It certainly --
24 where you are housed is going to depend on behavior, how you
25 are doing, if you have assaults. I don't know.

1 Q. Then let me follow up with the next question.

2 Based on your assessment of him, your review of all of
3 the those records, your review of the nature of the crimes
4 and the pending cases that he has against him, do you
5 believe that he is a safe person to be anywhere housed other
6 than where he is presently housed, as a psychiatrist?

7 A. That's a good question. I think -- I think the answer
8 I'll give you in psychiatric terms. I think he needs a
9 level of structure and supervision. And I can't answer that
10 for the Department of Corrections, because they have
11 facilities. The Department of Corrections has a lot of
12 services and resources I don't know about. They have
13 supermax units where, of course, there is psychiatric care,
14 and they have step-downs from their supermax units. They
15 have the most secure units where no one ever gets out. You
16 don't even get out of your cell. You are within the walls
17 of the institution for 24/7. They have other step-down
18 supermax units where once your behavior is calmed down or
19 you have completed --

20 I know the supermax is in Columbia at Kirkland, and I
21 have worked there. I have consulted out there and they have
22 a wonderful captain that runs that program, but they have
23 three levels. And some inmates -- some inmates have spent
24 10 or 15 years in that level of supervision. They have a
25 level system and -- if they go through the level system,

1 they are allowed to step down to another lockup unit.

2 So in terms of how the prison operates -- I think he
3 could be -- wherever he is, he can be managed, but you are
4 asking me do I ever think he would get out of a lockup?

5 Q. No, I'm not asking you that. I'm asking you if as a
6 psychiatrist you believe that it would be safe to have him
7 anywhere other than in a cell, as Dr. Cobb testified, a cell
8 that is inside a cage?

9 A. Oh, yes, I do think he -- he will eventually -- yes,
10 with the medications he's on, he's getting more mature as he
11 ages, I think he would certainly be able at some point to be
12 housed in a less secure environment than a cage, but in
13 terms of would I ever foresee him on a yard with privileges,
14 no.

15 Q. All right. Now, go to that part of your report where
16 we talked about medications. If he's on medications, you
17 believe that he might get to the point that he could
18 actually get out of the cell inside a cage?

19 A. Yes, sir.

20 Q. Medication ingestion is always voluntary?

21 A. Absolutely.

22 Q. And, in fact, in your report you document where Mr.
23 Owens has already attempted to wean himself off of his
24 medications during Ramadan?

25 A. That's correct, for a very brief period of time he did.

1 Q. So he has indicated in the one year that he's been on
2 the medications that he can take himself off of them or
3 might take himself off of them?

4 A. Certainly. Mr. Owens has always -- he's always been a
5 volunteer patient. We have patients that -- that's why Dr.
6 Cobb said what he did. We have -- the most common situation
7 in the Department of Corrections is that you have people
8 kicking and screaming. They really need medications and
9 they won't let you, and we have to go through forced
10 medication, which is a lot of paperwork. You have to have
11 three doctors see them, get them to agree the patient needs
12 the medicine and you have to force the patient.

13 So Mr. Owens is a volunteer patient. He doesn't have
14 to be on any medications. He chooses to do that. And we
15 can monitor -- the Depakote he's on, it has a blood level,
16 so we know when Mr. Owens is taking it, and his levels --
17 you know, in the past when he reports he's compliant with
18 his medications. His levels reflect that.

19 But you are right. It's a choice. He could wake up
20 tomorrow and say he wouldn't want medications. That's not
21 been his history. If you look back since '95, he's always
22 asked for treatment. And overall he's been a pretty good
23 patient in terms of, you know, being cooperative with what
24 his doctor prescribes.

25 Q. Did you find it significant that Mr. Owens had been

1 incarcerated since 1997, and he didn't ask for the
2 medications until August of 2005?

3 A. No, actually he asked for -- in 1995, in the Department
4 of Juvenile Justice, he was seen at the reception and
5 evaluation center. And in the social worker report there it
6 was clear he was asking for counseling.

7 Also in Turbeeville in 1998, when he was at the
8 Department of Corrections, he asked for treatment.

9 Q. But after that, from 1997, when he was incarcerated
10 through 2005, August of 2005, there is no record of his
11 request for any medications?

12 A. Actually I may be mistaken, but I think he's been -- he
13 was under the care of Dr. Cusack, who is a psychiatrist
14 there for a number of years, even before Dr. Cobb came. So
15 he's had a history. He was getting some medications while
16 he was confined in that unit. It was just from a different
17 doctor. So he's had some history, but certainly I think
18 it's very fair to say he's not gotten the level of care that
19 he is receiving today, until August of 2005.

20 Q. And in 2005 -- excuse me, 1995, when he was in the
21 Department of Juvenile Justice, what was he in the
22 Department of Juvenile Justice for?

23 A. Lynching. He -- from my recollection, he, and I
24 believe it was children at a bus stop, had gotten involved
25 in a fight and I believe, and please correct me if I'm

1 wrong, that he chased after someone and may have fired a gun
2 I think towards someone.

3 Q. Okay. Let me -- I may have caught you off guard there.
4 Let me show you this. This is a record that I have from the
5 Department of Juvenile Justice. Are you familiar with that?

6 A. Yes.

7 Q. All right. And what are the charges listed? This was
8 1995, and he was how old?

9 A. He would have been -- let's see, '78, he would have
10 been --

11 Q. 17?

12 A. 17. 16. Yeah, 16. He didn't have his birthday yet.
13 16 years old.

14 Yes, he's there for burglary, second degree, two
15 counts; unlawful possession of a pistol; and assault with
16 intent to kill. And it states that he had shot a .38 in the
17 direction of some other boys.

18 Q. Okay. Thank you.

19 (Off the record)

20 (Back on the record)

21 BY MR. ARIAIL:

22 Q. Thank you.

23 MR. GODFREY: Thank you, ma'am.

24 THE WITNESS: You are welcome.

25 MR. GODFREY: Your Honor -- excuse me, Your Honor,

1 the defense rests.

2 THE COURT: Thank you, Dr. Schwartz-Watts.

3 THE WITNESS: Thank you.

4 THE COURT: I'm going to let y'all step out just
5 for a few minutes and don't talk about it.

6 (The following takes place outside the presence of
7 the jury panel)

8 THE COURT: Before you rest I need to review with
9 Mr. Owens. I thought I had asked you that a little bit
10 earlier.

11 Mr. Owens, you have a Constitutional Right to
12 either take the witness stand or not. You can testify in
13 front of this jury under oath, or you do not have to
14 testify. There is no way that you can be required to
15 testify in any way under the Constitution of the United
16 States or the State of South Carolina.

17 Mr. Owens, it is entirely your decision whether to
18 testify in your own behalf or not to testify. And I will
19 instruct the jury that that cannot be considered against you
20 in any way or in any manner. The fact that you choose to
21 remain silent, Mr. Owens, cannot even enter into the
22 discussions of the jury in the jury room. And we have told
23 frankly every juror during voir dire, and you were present,
24 that if you -- you had no burden of proof in this case, and
25 if you did not testify, they could not consider that against

1 you, and most of them understood the concept and indicated
2 that they could follow that instruction.

3 But by saying that, and you being here when we
4 went through that, I don't want that to be the basis for
5 your decision. I want you to make this decision. You have
6 to do it after you talk to your lawyers and consult with
7 your lawyers about whether you should testify or not
8 testify.

9 And I want you to understand that you have every
10 right to take this witness stand and testify under oath to
11 this jury, or you have the right not to testify. And I
12 would instruct them that that could not be considered
13 against you in any way. The failure of you to testify is
14 just embedded in our law that it cannot be held against you
15 in any way, and I would fully instruct the jury of that.

16 As to these aggravating -- statutory aggravating
17 circumstances, the State has got to prove them beyond a
18 reasonable doubt. And as I told you, there is no burden of
19 proof at all on you in any of this proceeding.

20 Mr. Owens, do you understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Have you fully discussed it with your
23 lawyers?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Okay. I don't know if you need

1 anymore time to do that or not, but do you?

2 THE DEFENDANT: No, sir.

3 THE COURT: Have you made your decision?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Okay. What is your decision, Mr.

6 Owens?

7 THE DEFENDANT: I will not.

8 THE COURT: You are not going to testify?

9 THE DEFENDANT: I will not.

10 THE COURT: Okay. Mr. Godfrey and Mr. Gibson,
11 both of y'all have discussed this I know before today, and
12 how many previous occasions we don't have to go into that,
13 but are you convinced -- and you have discussed it before
14 today, have you not?

15 MR. GODFREY: Yes, Your Honor, we have discussed
16 this with him at Perry Correctional Institution on visits
17 about a month and a half ago, and we have talked about this
18 throughout the week at various times. I talked to him again
19 this afternoon about it, and I am absolutely -- I absolutely
20 believe that he understands what the law is. He understands
21 that he has a right to testify and nobody can take it away
22 from him. He understands that if he doesn't testify, the
23 court will instruct the jury that they can't hold it against
24 him.

25 He also understands that it doesn't matter what

1 opinion Ken or I may have about whether he should testify, or
2 not testify, that the Constitutional Right belongs solely to
3 him. And he understands all that, and with that knowledge,
4 judge, he prefers not to testify.

5 THE COURT: Okay. I am going to tell them they
6 can't consider that against him in the slightest degree.

7 Normally I would explain to him about the prior
8 record that it could only come in for a limited purpose, but
9 in this particular case, under Lyle and prior convictions
10 and whatnot, other evidence of crimes of bad act has come
11 in, and it's permissible in this proceeding for sentencing
12 where it focuses on the individual characteristics of the
13 defendant, and some -- and those things -- a lot of those
14 things have already come in.

15 But I'm convinced that Mr. Owens understands his
16 right to testify or not to testify. Mr. Owens is an
17 intelligent man, and I have observed him during the trial,
18 and I would find for the record that he has freely,
19 voluntarily, knowingly, and intelligently made the decision
20 on his own, after consulting with his attorneys, not to
21 testify. Mr. Owens is -- his demeanor and everything, when
22 he answered the question, is fine, and I am just firmly
23 convinced of that.

24 Okay. We will --

25 Are you going to have anything else in evidence?

1 MR. ARIAIL: No, sir.

2 THE COURT: Okay. Then it's probably going to be
3 appropriate that we adjourn for the evening.

4 And what time in the morning, Mr. Godfrey, can you
5 get here?

6 MR. GODFREY: Well, judge, Ken and Betty and I
7 have talked about it and we would respectfully request that
8 the court consider beginning at ten o'clock.

9 We would also request, if it would be possible,
10 for you to give us some idea of what you intend to charge so
11 we can think about it tonight, but we would like to begin at
12 ten o'clock.

13 THE COURT: Okay. All right.

14 MS. STROM: We had discussed that with him, Your
15 Honor, and I'm in agreement with that.

16 THE COURT: We have been working late almost every
17 night and I know y'all need some time to get your thoughts
18 together, and I have no problem with that. So we will
19 start at ten o'clock in the morning.

20 And I would anticipate that we would -- I'm just
21 going to tell the jury that we are going to have closing
22 arguments tomorrow morning and the charge on the law.

23 Now, have you fully discussed with your client
24 whether or not he will make a statement in closing
25 arguments? Both you as a defense lawyer and Mr. Owens have

1 an opportunity to address the jury last.

2 MR. GODFREY: May it please the court, Freddie and
3 I and Ken have talked about that also, beginning at Perry,
4 and, judge, he does not wish to make a closing statement to
5 the jury.

6 THE COURT: And just like the question I asked you
7 earlier, Mr. Owens, you have every right under the law to
8 make a statement to the jury after everyone else has made
9 statements to the jury. Do you understand your right to do
10 that under the law, Mr. Owens?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And have you fully discussed that with
13 your attorneys?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Okay. And what's your decision on
16 that regard?

17 THE DEFENDANT: I will not.

18 THE COURT: Okay. And if you change your mind,
19 and you think about it tonight, I'll review the -- at least
20 the issue about whether you want to make a statement at the
21 end of the case to the jury, I'll go over that with you
22 again in the morning. Okay, sir.

23 THE DEFENDANT: Yes.

24 THE COURT: Thank you. All right. We will start
25 back tomorrow morning at ten o'clock.

1 I tell you what. I better let the jury go before
2 y'all go.

3 (Juror Note marked as Court Exhibit No. 4 for
4 identification)

5 (The following takes place in the presence of the
6 jury panel)

7 THE COURT: All right, ladies and gentlemen of the
8 jury, that's all the evidence and testimony.

9 Do not discuss the case tonight. We are going to
10 break tonight. We will come back tomorrow. Everyone has
11 worked hard and late this week, every night this week, and
12 maybe y'all -- we were here with the jury qualifications,
13 and the attorneys and everyone needs it, because they are
14 tired and they need some chance to get rest and get their
15 thoughts together before we have closing arguments and
16 before I charge you on the law. So we are going to -- we
17 are going to bring you back tomorrow morning at ten o'clock.
18 At that time -- both sides agreed to that. We fully
19 discussed it. You would hear closing arguments at that
20 time. After the closing arguments or the summations, then
21 I'll go over the law that applies to this sentencing
22 proceeding, and then you will have to go back and deliberate
23 until you reach a unanimous verdict on the issues. I will
24 present to you the issues and I will give you verdict forms
25 that you can review in the jury room. I'll cover those with

1 you in detail in my closing instructions.

2 Have a good evening tonight. There's not going to
3 be a Rutgers-Louisville football game on tonight, so suffer
4 through that, or whatever. I stayed up a little bit and
5 watched that thing too.

6 Y'all have a good evening and I'll see you back at
7 ten o'clock in the morning.

8 Do not discuss the case at all. Just talk about
9 your families, and football game, or whatever else, but do
10 not discuss this case at all. Thank you so much. See you
11 tomorrow morning at ten o'clock.

12 (The following takes place outside the presence of
13 the jury panel)

14 THE COURT: I haven't gotten my charge lined up.
15 I just got a mock charge here in this capital case book that
16 I prepared for myself.

17 I can tell you generally the way it's going to be,
18 so y'all may or may not have to work diligently on jury
19 charges, but that's up to you. You can submit to me
20 anything that you want to for the record, but I would
21 instruct them that, of course, and they know that the
22 defendant has been found guilty of murder. They have to
23 determine how we are going to sentence him.

24 And I would instruct them that they are the sole
25 judges of the facts and credibility and the believability of

1 all the witnesses. And I will talk to them a little bit
2 about the demeanor of the witnesses and how they come to
3 know the facts about which they testified, things of that
4 nature, as to fact witnesses. And they would give weight to
5 whatever -- the credibility and weight for the facts would
6 be up to them.

7 And I, of course, would tell them that I was the
8 judge of the law and I could not discuss the facts with
9 them. I would be prohibited from doing that under the
10 Constitution, and I would not do that. And that was a
11 matter for them to decide. And if I have done anything
12 during the trial, and that I don't have a feeling about one
13 way or the other about the sentencing issues. And I do not.

14 Then I would have to charge them an expert witness
15 charge. And the expert witness charge is the education,
16 training and experience of the expert witness or a person
17 qualified as an expert witness and the reasons given for
18 that opinion. They can consider that and give the expert
19 opinion. This is really a -- I can't tell. This is not
20 maybe the exact language I'm going to use, but it's pretty
21 much what -- I have a charge in every case, but they can
22 give it whatever weight that they think it deserves. And
23 they evaluate the testimony of an expert witness the same
24 way they would other witnesses.

25 Then I would go through the -- I would tell them

1 about Mr. Owens not testifying. They could not consider
2 that in the slightest degree, or that could not weigh
3 against him in any manner whatsoever, and that was his
4 Constitutional right to remain silent. They can't even
5 consider that. They would have to accept the law as I
6 explained it to them, and I would -- I think I have already
7 mentioned that.

8 And then to the extent that any issue remains
9 requires proof beyond a reasonable doubt, I would tell
10 them -- I would define reasonable doubt for them, and
11 reasonable doubt is the kind of doubt that would cause a
12 reasonable person to hesitate to act; and a reasonable doubt
13 is the kind of doubt that would leave them firmly convinced
14 of the issues presented; and a reasonable -- that nothing
15 can be proven beyond every doubt. I don't have that charge.
16 I can refer to, but they have to be firmly convinced of the
17 defendant's guilt. And if there is a real -- not the guilt.
18 I have got -- I will have that written out. And I will
19 change guilt to the issue in the case. And if there is a
20 real possibility that the issue has not been established
21 beyond a reasonable doubt, it would not be proven beyond a
22 reasonable doubt. Firmly convinced, real possibility, and
23 hesitate to act. Reasonable person hesitate to act. In
24 that order.

25 And the -- I am not sure about direct evidence and

1 circumstantial evidence under the State v. Grippon charge,
2 but my initial thinking was I probably should charge that,
3 because a lot of things are circumstantial evidence. And I
4 use just the short State v. Grippon charge.

5 Then I would tell them that -- after the
6 reasonable doubt charge, I would emphasize that -- I would
7 explain to them that about the statutory aggravating
8 circumstances.

9 And the -- in there somewhere I will at the
10 appropriate place put in a charge about the prior criminal
11 record prior bad acts and it only comes in as would it bear
12 upon his particular individual characteristics, not as any
13 evidence as to the statutory aggravating circumstance. The
14 State must prove the statutory aggravating circumstance
15 beyond a reasonable doubt. In this case they assert two. I
16 will have those written out on a -- typed out on a sheet of
17 paper, a sheet of statutory aggravating circumstances and
18 statutory mitigating circumstances. It's robbery in the
19 commission of a murder -- I have forgotten how the State has
20 got it worded, or however it's worded in the statute, but
21 it's just going to be that language while armed with deadly
22 weapon, robbery, or larceny.

23 I will define for them what robbery is and
24 larceny. As I recall it, larceny is included in robbery,
25 except robbery is the taking through force and intimidation.

1 And then they would have to prove beyond a
2 reasonable doubt deadly weapon.

3 I would explain to the jury what a deadly weapon
4 is. It's almost common knowledge, almost take judicial
5 notice, that a pistol -- I'm not saying whether it's true,
6 if you believe the evidence a .32 is a deadly weapon. I'm
7 not going to tell them a .32 is a deadly weapon, but I'll
8 tell them a pistol, or whatever. And sometimes they wonder
9 why you mention the other things when there is absolutely no
10 evidence of it being in here, like a dirk, or a slingshot,
11 or a knife, or whatever, but sometimes I just tell them a
12 pistol is a deadly weapon under our law. And I may just do
13 that, because I don't think there is any evidence of any
14 other -- well, no, on deadly weapons I would probably have
15 to charge them fully on that, because of the incident in the
16 second incident.

17 Be that as it may, after that -- and then I would
18 tell them if they proved that statutory aggravating
19 circumstance, then the jury would determine the sentence.
20 That's my understanding of the law.

21 If they do not -- if they do not find a statutory
22 aggravating circumstance beyond a reasonable doubt, then the
23 case stops. It ends there and they do not have to go any
24 further.

25 But if they find a statutory aggravating

1 circumstance beyond a reasonable doubt, then they would
2 consider the specific circumstances surrounding this offense
3 and the individual characteristics of the defendant and any
4 evidence in extenuation, aggravation, or mitigation and
5 determine a sentence of life imprisonment or death.

6 And I would tell them life imprisonment in this
7 case means life until the death of the defendant, without
8 any possibility of parole.

9 And that death means -- some judges read the
10 statute. I'm just going to tell them that death means by
11 lethal injection or electrocution.

12 And after that I will tell them that they have to
13 meaningfully and seriously consider evidence of aggravating
14 circumstances and any evidence of mitigating circumstances
15 in arriving at their decision.

16 And I will give them a list of the statutory
17 mitigating circumstances. I will define for them what an
18 aggravating circumstance is. It's the same thing that we
19 talked about in voir dire. It's something that aggravates
20 the offense of murder.

21 And I'll explain to them that a mitigating
22 circumstance is something that reduces the seriousness of
23 the crime. But I'll tell them that each one is facts,
24 incident, detail or occurrence.

25 And after I define the statutory aggravating

1 circumstances, I will list -- tell them their statutory
2 mitigating circumstances, but they can consider any evidence
3 in mitigation.

4 And I would explain to them that the statutory
5 mitigating circumstances do not have -- there is no burden
6 of proof to establish those, and they can consider the
7 statutory mitigating circumstances and any evidence of
8 mitigation in determining their sentence.

9 And, of course, I'm going to explain to them that
10 the verdict must be unanimous as to the statutory
11 aggravating circumstances and as to any sentence they
12 impose.

13 And I would have a sentence of life or death on
14 separate sheets.

15 A sentence of life in prison only needs to be
16 signed by the foreperson.

17 The sentence of death would have to be signed by
18 all twelve jurors. I would have it written out and I would
19 have each juror's name listed there. We will probably go
20 ahead and prepare that this evening and then just wait to
21 see if we have to use another alternate juror, or not. You
22 never know what happens overnight. If we do, we can just
23 hopefully do it on the computer and just work out -- change
24 one name, if we have to.

25 Of course, I will tell them that I know that their

1 sentence cannot be based on passion, prejudice or sympathy.

2 And that -- I am probably going to tell them,
3 after looking at a number of cases, that they can sentence
4 him to life imprisonment. Of course, they can do that
5 whether they find a mitigating circumstance or not. And,
6 simply stated, they could give him life imprisonment for any
7 reason or no reason at all. I think that's what y'all
8 referred to as the mercy charge. I may not use the word
9 mercy, but I know that there are a number of cases that have
10 not been reversed where the judge says for any reason, or no
11 reason at all.

12 Now, I was giving that to you as just kind of off
13 the cuff.

14 All judges tell them that their recommendation
15 will be followed by the court. And the purpose for that,
16 under the law, is not to lessen this heavy decision that
17 they have to make in any way and let them think anyone else
18 can change it. I'm convinced our courts want the jury to
19 understand. They are the only people in Greenville County,
20 or in this state, or anywhere right now in this world, that
21 can sentence Mr. Owens to death, where we are in this
22 proceeding, as far as I understand it. If they -- if those
23 twelve people don't write a sentence of death, no one can.
24 So for that reason I will tell you that I will emphasize to
25 them that their recommendation would be followed by the

1 court. That is not to say that I do not have a legal
2 obligation to find that there is evidence to support the
3 decision that's not based on passion, prejudice, or bias.
4 Okay? That's about all I can tell you right now.

5 And, again, I didn't -- I didn't -- I didn't think
6 we would get this far, but generally that's what -- that's
7 pretty much what I'm going to charge, and you can count on
8 it. And if there is anything else you want to tell me in
9 the morning, I will be glad to consider it, or anything else
10 you want to tell me tonight, I will be glad to consider.

11 Yes, ma'am.

12 MS. STROM: You may have said this. I just didn't
13 catch it, if you did. When you were talking about that they
14 could find a life sentence -- they could sentence him to
15 life even without finding a mitigating circumstance. I
16 think you also have to charge them that -- and it's what you
17 have been telling them in voir dire, that even if they find
18 a statutory aggravating circumstance, they still can impose
19 life. I think you said it, but I wasn't sure. I just
20 wanted to bring that up.

21 THE COURT: Yeah, I think I said that.

22 MS. STROM: I know you told them, you know,
23 constantly, but I just wanted to make sure of that.

24 THE COURT: Yeah. I'm not going to tell them or
25 charge them anything about if they can't reach a verdict,

1 because that would be -- if they find unanimously that there
2 is a statutory aggravating circumstance, it's life or the
3 death penalty --

4 MS. STROM: And --

5 THE COURT: -- under our law.

6 MS. STROM: Yes, sir.

7 And also as to the mitigating circumstances, you
8 said --

9 THE COURT: Oh, yeah, I have got to do statutory
10 mitigating circumstance.

11 MS. STROM: So I was just seeing which ones they
12 wanted to submit.

13 THE COURT: I have to -- first of all, the law
14 requires me to make a finding of what evidence supports a
15 statutory mitigating circumstance, and I make that
16 determination under the law. And then I tell you what my
17 determination is. And as I understand the law, you can
18 either object to me submitting a statutory mitigating
19 circumstance, and I haven't known about that being done, but
20 the case law says that you can -- you can either -- you can
21 suggest or tell me that you believe that the evidence
22 supports other statutory mitigating circumstances, or that
23 you do not want me to submit one. I understand that to be
24 the law.

25 MS. STROM: Correct.

1 THE COURT: I'm not sure it's the statutory law or
2 the case law, but I'm pretty sure that's the law, but I have
3 never known a defense lawyer to not to ask that I submit a
4 statutory mitigating circumstance, or anyone else.

5 And I'll just tell you my thinking right now is
6 statutory mitigating circumstances, I think there were four,
7 and I'm not sure that -- I haven't had a chance to sit down
8 and analyze those since I have heard all the evidence and
9 testimony. I had no idea what the mitigation testimony was
10 going to be. And I can't tell you for sure my decision on
11 that until in the morning, and I'll go ahead and get it
12 typed up and show you, but my thinking was, having reviewed
13 the statutory aggravating circumstances, I didn't see
14 what -- I got the statutory aggravating circumstances what
15 Macaulay did, but I have looked at the statutory mitigating
16 circumstances that Macaulay submitted, and I believe those
17 are the ones, statutory mitigating circumstances, that -- my
18 thinking prior to the trial was that that I might use those,
19 those four. I think it was four. It might have been three.
20 I think it was -- I'm pretty sure it was four.

21 I don't know if y'all had a chance to look at
22 those or not, but -- I don't want to keep y'all any longer.

23 Do you need any more -- do we need to discuss
24 anything else before tomorrow morning?

25 MS. STROM: Nothing from the State, Your Honor.

1 MR. GODFREY: Nothing from the defense, judge.

2 THE COURT: Okay. Well, y'all have a good evening
3 and I'll see y'all back ten o'clock in the morning.

4 MS. STROM: Your Honor, may I suggests that -- and
5 I know that --

6 THE COURT: Do not come on in -- do not be here
7 before ten. You don't have to be here before ten.

8 MS. STROM: Okay.

9 THE COURT: Because I think you need that time.

10 MS. STROM: Okay. We can look at the charge then?

11 THE COURT: Once you come in the courtroom, I'll
12 show you the verdict forms and the charge.

13 MS. STROM: Right.

14 THE COURT: Well, I'll tell you, my charge is -- I
15 don't think y'all want to read it, but I may not have it
16 all. I maybe will use a different sheet.

17 MS. STROM: Doesn't -- the charge goes back to the
18 jury in writing.

19 THE COURT: The charge?

20 MS. STROM: Yes, sir, I believe in a death penalty
21 it does.

22 MR. ARIAIL: That's required.

23 MS. STROM: Yes, sir.

24 MR. ARIAIL: You need to borrow my secretary?
25 She's coming in.

1 THE COURT: I did not the charge was required.

2 MS. STROM: I believe it.

3 THE COURT: She says they send the charge back, so
4 we will do that.

5 MS. STROM: I just didn't want you to get caught
6 off guard.

7 THE COURT: I have got half of it typed up. We
8 just got to do the rest of it.

9 MS. STROM: That's fine. I just didn't want you
10 to get caught up with that.

11 (Whereupon, proceedings were adjourned to November
12 11, 2006)

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF GREENVILLE) IN THE COURT OF GENERAL SESSIONS

3
4 THE STATE)
5 -vs-) TRANSCRIPT OF RECORD
6 FREDDIE EUGENE OWENS,) 1998-GS-23-5220
7 Defendant.) NOVEMBER 11, 2006
8) Greenville, South Carolina

9 (VOLUME VI)

10 B E F O R E:

11 THE HONORABLE LARRY R. PATTERSON, JUDGE. ; and a jury.
12

13
14 A P P E A R A N C E S:

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16 BETTY C. STROM, DEPUTY SOLICITOR
17 LETICIA VERDIN, ASSISTANT SOLICITOR
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13		AGGRAVATING CIRCUMSTANCE FORM		
14	CT-10	UNANIMOUS FINDING OF A SENTENCE	1606	
15		FOR LIFE IMPRISONMENT FORM		
16	CT-11	UNANIMOUS RECOMMENDATION OF DEATH	1606	
17		PENALTY FORM		
18	CT-12	JUROR INFORMATION PACKETS	1606	
19				
20				
21				
22				
23				
24				
25				

(1 (PROCEEDINGS, November 11, 2006)

2 THE COURT: First of all, I would ask my clerk if
3 he would provide y'all with a copy of the statutory
4 aggravating circumstances and the statutory mitigating
5 circumstances that the court would find that may be
6 supported by evidence in the record. Initially it's the
7 responsibility of the court to make that determination.
8 Then I would hear from the defense as to any additional
9 factors they may like to be -- that they think is supported
10 by the evidence, and if they would like any of those factors
11 deleted, or waived, or not charged.

12 MR. GIBSON: Your Honor, these are fine with the
13 defense.

14 THE COURT: I'll hear from the State.

15 MR. ARIAIL: Your Honor, we would -- we have no
16 objection to 1, 3, 4 and 5, but number 2 is contrary to the
17 facts in the case. The defendant has been found guilty of
18 the murder. He was not an accomplice to anything. He is
19 the murderer. And his participation was relatively minor?
20 He was found to be the one who pulled the trigger by a jury.

21 THE COURT: I don't know that, Mr. Ariail. We got
22 two people convicted of murder in this case, as I understand
23 it.

24 MR. ARIAIL: We do not have two people convicted
25 of murder.

1 THE COURT: There is one --

2 MR. ARIAIL: There is one person convicted of
3 murder, one person convicted of voluntary manslaughter.

4 Mr. Golden was not convicted of murder.

5 THE COURT: I'm not familiar with that.

6 MR. ARIAIL: Well, then it's a matter of public
7 record, and I can --

8 THE COURT: I thought he was serving life.

9 MR. ARIAIL: No, no.

10 THE COURT: I don't dispute that.

11 MR. ARIAIL: Okay.

12 THE COURT: But --

13 MR. ARIAIL: He was -- he was -- there is no
14 evidence of any accomplice, because if you get into
15 accomplice, then you are going to have to get into a full
16 charge on the hand of one, hand of all. You are going to
17 have to explain to the jury that participation in a murder
18 was a group effort of planning, and I think it's going to
19 take us way beyond what we have already told this jury, that
20 this defendant has been convicted of murder. He's not an
21 accomplice in murder. He's convicted of murder. Accomplice
22 gives him the idea that he's something after the fact. He's
23 a principal. He was convicted as a principal in the murder.
24 There is no way around that legally. So accomplice -- if we
25 are talking about accomplice liability is something that

1 occurs after the fact.

2 THE COURT: Well, why is it a statutory mitigating
3 circumstance under any murder then, Mr. Ariail?

4 MR. ARIAIL: As an accomplice?

5 THE COURT: Yeah.

6 MR. ARIAIL: Well, it would be that if you had a
7 situation where you couldn't determine which one was the one
8 who fired the shot. And in those situations where the
9 courts have made distinguishing -- or distinguished between
10 the shooter and those people who are accomplices, who are
11 primary accomplices and they are secondary accomplice. You
12 know, the ones that, you know, they talked about -- Mr.
13 Wood. Do you remember the probation officer and his -- I
14 think that -- I can't remember the defendant's name, but the
15 question being if he was outside the building, not inside
16 the building, could he be held to be convicted of murder,
17 even though he was an accomplice not inside. So it's
18 accomplice liability being inside the building.

19 But in this case, this defendant was convicted of
20 being the shooter and that's what he was tried on. That was
21 the facts of the case. In other words, the testimony in
22 that case was that he was the shooter and all the proof was
23 directed that he was the shooter.

24 THE COURT: You don't think that's argument to the
25 jury? Let me -- let me -- look --

1 MR. ARIAIL: This --

2 THE COURT: This is a sentencing proceeding. And
3 in a sentencing proceeding the statute says that that is a
4 mitigating factor, if there is any evidence to support it.

5 Now, the only -- I have to make a determination
6 about any evidence? And the document that was presented --
7 the statement by Mr. Owens presented through the detective,
8 he said "I was convicted of the crime which I did not
9 commit," and then he killed Mr. Lee. And that's in the
10 statement and that's in evidence.

11 MR. ARIAIL: I think --

12 THE COURT: Two of them went into the building.

13 MR. ARIAIL: I understand.

14 THE COURT: And the --

15 MR. ARIAIL: Well, going back to the statement of
16 Mr. Lee, the jury -- the jury had found otherwise. And I
17 don't know how a subsequent statement of a defendant after
18 his conviction could ever be used as a basis to override a
19 jury's verdict. In other words, he may -- he was guilty.

20 THE COURT: You didn't make this argument when
21 Judge Macaulay tried the case because he charged that
22 aggravating circumstance.

23 MR. ARIAIL: He charged this aggravating
24 circumstance?

25 THE COURT: He absolutely did. It's been

1 previously charged.

2 And if both people went in there, they could have
3 been convicted of murder for that.

4 MR. GIBSON: Your Honor, as a point of
5 clarification, Mr. Golden did actually plead to murder
6 initially. He came back on a PCR and --

7 THE COURT: I have not looked at those
8 proceedings. I thought he was convicted -- I thought I saw
9 where he pled to murder.

10 MR. GIBSON: He did, Your Honor.

11 THE COURT: And they both were convicted of
12 murder, and that's the only -- I do not intend to charge any
13 detail or anything about accomplice liability and the hand
14 of one is the hand of all. That's not an issue for this
15 jury. I don't know how y'all are going to approach that,
16 but it's not and I -- I made independent determinations, but
17 it was charged in the previous case.

18 MR. ARIAIL: All right.

19 But to go back, Mr. Golden was ultimately
20 convicted of manslaughter, voluntary. Even though he
21 initially he pled, he was subsequently convicted of
22 voluntary manslaughter.

23 THE COURT: Okay. Now, none of that is in
24 evidence.

25 MR. ARIAIL: No, that's not in evidence.

1 THE COURT: That is not permissible. Neither one
2 of you can argue that.

3 MR. ARIAIL: No, no, I was just telling you since
4 he --

5 MR. GIBSON: Your Honor, what happened was
6 actually he filed a PCR. They needed him to testify at the
7 second phase --

8 MR. ARIAIL: That's not -- that's not so.

9 THE COURT: That's not allowed. Whatever
10 happened, he initially pled to murder and they both were
11 stood convicted of murder. And so I think that I have to do
12 that.

13 Is there anything else that we need to take up in
14 regard to those?

15 MR. GIBSON: That's fine, Your Honor.

16 MS. STROM: Your Honor?

17 THE COURT: Yes, ma'am.

18 MS. STROM: The only thing, I was just -- nothing
19 as to the charge or as to the mitigating or aggravating
20 circumstance. I don't have anything else on that.

21 I didn't know if you were going to appoint a
22 foreperson or allow them --

23 THE COURT: I am.

24 MS. STROM: Okay.

25 THE COURT: I'm going to appoint Ronald D.

1 Dillard.. We've already typed up the verdict forms and put
2 his name in there as the foreman.

3 MS. STROM: I had just written down that you had
4 said that you were going to wait until the he did, so it's
5 simply a reminder.

6 THE COURT: In regard to the -- I want to -- Mr.
7 Owens, I need to address you one more time this morning
8 before we proceed any further with this trial.

9 I have to make a finding on the record that you
10 waive any Constitutional or statutory right that you have.
11 You have an absolute right, and I went over that with you,
12 just to refer back to it, your right to testify or remain
13 silent. And I went over that in detail and your attorney
14 made a statement for the record that he helpfully discussed
15 that with you. But now I need to -- again, I asked you this
16 last night, but I want to cover it again and make sure that
17 you have fully discussed with your attorneys and that you
18 have personally made a decision whether you would like to
19 argue to the jury or make a statement to the jury.

20 Now, I don't know if y'all discussed it again
21 since last night, but y'all had fully discussed that.

22 Mr. Owens, do you need any more time to discuss
23 that with your attorneys?

24 THE DEFENDANT: No, sir.

25 THE COURT: Okay. And it's your desire in that

1 regard that you not make a statement, is that correct?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Okay. You do not want to make a final
4 argument to the jury and you are waiving your right to do
5 that, is that right?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: So you fully understood your
8 Constitutional Right to testify and you fully understand
9 your Constitutional statutory right to make a final argument
10 to this jury?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And you are freely, voluntarily,
13 knowingly and intelligently waiving that right?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Okay. I so find for the record.

16 Are y'all prepared to go, or do you want a couple
17 of minutes? Do you need any more time, Mr. Ariail?

18 MR. ARIAIL: No, we are ready. I'm ready.

19 THE COURT: Okay.

20 MR. GODFREY: We are okay.

21 THE COURT: I have already printed out the verdict
22 forms and the -- where they have to make a personal finding
23 of the aggravating circumstances and things of that nature.

24 Okay, bring the jury in. Put Mr. Dillard in the
25 foreperson's seat.

1 My charge is unusually long. I usually give a
2 very short succinct charge, but make sure that I covered
3 everything, I'm going to give them a break after the two of
4 you make your arguments, and then I'll charge and -- bring
5 them back in and charge them.

6 (The following takes place in the presence of the
7 jury panel)

8 THE COURT: Ladies and gentlemen of the jury, each
9 person on the jury panel has an equal vote and an equal
10 voice in the verdict. And any verdict that you reach must
11 be unanimous, and I'll cover that in detail with you, but
12 someone has to preside. I could have chosen any one of you,
13 but it's kind of pull someone out. Mr. Dillard, I'm going
14 to ask you to be the foreperson. You will just preside.
15 Everybody has as an equal voice and an equal vote and equal
16 input into the verdict.

17 We are now ready for the closing arguments. We
18 will first hear from the State, and then we will hear from
19 the defense. And following that I will instruct on the law
20 that applies to this case.

21 Now, we certainly can take a break at your
22 convenience, if you need to do that.

23 Mr. Ariail.

24 MR. ARIAIL: Thank you, Your Honor.

25 Mr. Foreman, ladies and gentlemen, I feel like I

1 haven't introduced myself. It's been so long since I met
2 you and I didn't have an opportunity to talk to you.

3 We now coming to the close of this case and what
4 we are going to talk about now is what we refer to as a
5 summation or a closing argument, to bring together what we
6 have heard and evidence and what you are going to hear in
7 terms of the law. As soon as we complete these arguments
8 and jury charge, your deliberations, you are going to get to
9 return to your normal lives so you can enjoy some part of
10 the weekend. But we appreciate your service. And the judge
11 has told you that, and I for the State will tell you that
12 also.

13 I hope as a result of this service you realize how
14 important it is that we have fair and conscientious jurors
15 available to resolve the thousands of cases that we have to
16 handle in this court system every year. This prosecutor
17 certainly appreciates your willingness to be a part and to
18 be fair-minded, but the only decision left to be decided now
19 concerns the punishment, and there are two steps to
20 determining punishment, and there are two possible
21 punishments - life imprisonment without parole until the
22 death of the defendant and the death sentence, which the
23 court has explained to you.

24 Now, before you can reach or begin deliberations
25 on what sentence is appropriate, the law requires, as the

1 judge had told you, you must find an aggravating
2 circumstance; that is, we talked about it has to be a murder
3 committed during -- accompanied by an aggravating
4 circumstance.

5 In this case the State has identified or submitted
6 to the court for consideration by you two aggravating
7 circumstances which exists under our law.

8 The first is murder during a robbery while armed
9 with a deadly weapon. We colloquially call that armed
10 robbery, but the definition is murder committed during a
11 robbery, while armed with a deadly weapon.

12 And the second is murder during a larceny while
13 armed with a deadly weapon.

14 The judge has explained to you that larceny is
15 stealing, taking the property of someone else.

16 Robbery is the taking of the property, goods and
17 chattels, or personal property of someone else by force or
18 intimidation and accompanied, in this case, by the use of a
19 deadly weapon.

20 So actually there is some overlap in those two,
21 but under the law both of those circumstances exists as
22 aggravating circumstances, and the State has identified
23 those.

24 If you find one, or both, of those exists, then
25 you can proceed to consider the sentence. And we submit

1 that the evidence supports not one, but both of those, but
2 let's just review that evidence briefly.

3 The first evidence that you are going to see is,
4 or that you saw, was the video, the video of two masked
5 people coming in and carrying weapons, the deadly weapons,
6 the armed weapon that the law refers to, a pistol. Both of
7 them had the pistols. The guns were used by both and they
8 had masks. They were robbers. So robbery is taking place
9 on video in front of you that you can see.

10 Ms. Graves is shot with a pistol. So pistol is
11 used during the course of the robbery. There is money in
12 the cash drawer. The money has been taken, and the audit
13 reveals that there is a shortage of funds that have been
14 taken in versus that which is left. So those facts are
15 established from circumstances that existed at the store and
16 surrounding the crime.

17 The defendant, Mr. Owens, admitted to his
18 girlfriend, Aisha, that he, in fact, robbed the store when
19 she confronted him about it.

20 And, secondly, he admitted to his girlfriend that
21 he, in fact, had shot the lady. And, in fact, Ms. Graves
22 was shot and murdered during the course of an armed robbery
23 and a larceny.

24 Mr. Vance, Kiko, testified that when they got back
25 into the car, Freddie mentioned that "he had shot the

(1 bitch," and that "he had shot the whore," because she
2 wouldn't give him the money. Kiko testified also that
3 Steven Andre Golden, who accompanied Mr. Owens into the
4 store, also said "I didn't get to shoot mine." So the
5 evidence is overwhelming that Mr. Owens is the perpetrator
6 in the robbery.

7 Lastly, Mr. Vance, when he received his weapon
8 back, do you remember they had the discussion about where
9 the weapons were and who swapped off. He got it back. He
10 opened it up and it was, in fact, missing a shell that had
11 been fired.

(12 So we submit to you that the aggravating
13 circumstances have been established for you to proceed to
14 consider the sentences or appropriate sentence to be imposed
15 upon Mr. Owens for this crime.

16 The judge charged you, and you should keep in
17 mind, that Mr. Owens has been convicted of the murder in
18 which Ms. Graves was killed and was the victim of the armed
19 robbery.

(20 Now, I'll remind each of y'all that you swore when
21 you came in here that you would fairly consider both forms
22 of punishment, both life imprisonment without parole and the
23 death penalty. Each individual juror will consider what
24 sentence they believe they should impose, and each will hear
25 and consider the opinions of others, because jury service

1 and jury deliberations to reach its verdict is a
2 collaborative effort. It is something that -- a fair and
3 reasonable jury verdict is the process of exchange of ideas
4 and information, so it's expected that you should discuss
5 these ideas amongst yourselves.

6 If for any reason when you return or go to the
7 jury room you find that you cannot comply with that oath, or
8 that one of your fellow jurors cannot comply with that oath
9 and participate in the jury deliberations, you should report
10 that to your foreman, who will then report it to the court.

11 The judge will tell you in his charge that you can
12 consider both the evidence of the circumstances surrounding
13 the crime in considering your sentence and you can consider
14 the evidence surrounding the character and characteristics
15 of the defendant, and he's told you that. We have talked
16 about that on a number of occasions, but when we get into
17 specifics we will talk about the character and
18 characteristics of the defendant, and certainly talk about
19 the circumstances of the death of Ms. Graves.

20 But let me -- because I am required under the law
21 to make the first argument, let me anticipate a couple of
22 things that you may hear and respond to those now in
23 anticipation that it may occur.

24 The first thing is that the defense may suggest to
25 you that this process that we are going through is really

1 killing someone and that the word killing of the defendant
2 may be used in argument. If it is, I want you to put it in
3 context, and let's talk about what this process is. The
4 State is entitled, under the law, to ask for the death
5 penalty. It is an approved punishment in this state by our
6 legislature. Only limited circumstances are allowed for us
7 to seek the death penalty, and rarely do we seek the death
8 penalty in all those cases that are eligible. In only
9 certain cases do we choose to seek the death penalty.

10 This is a legal process. It is a process -- it is
11 a function of government. It is a process that is
12 established by our legislature and has been approved by our
13 courts as the manner in which a sentence will be passed in a
14 case of this nature. It is a function of you, as citizens,
15 acting and carrying out a process of government. The
16 legislature has designated you in this particular case to
17 carry out a function of government, to pass a sentence in
18 criminal case. So it is a lawful process, and you are
19 shaping a lawful punishment to an unlawful act. You are
20 serving the function of a judge. It's a responsibility
21 given to you by both our legislature and our courts to carry
22 out fairly, and there is nothing wrong with what you are
23 doing. It is a legal process, and your verdict, if it is
24 the death penalty, is not killing someone. It is the
25 passing of legal punishment under our law.

1 Now, that's a tough decision. We all know it's a
2 tough decision. You talked about it, some of you in voir
3 dire, how tough it would be, and we recognize it's a tough
4 decision. It's a tough decision for me to ask you to do it
5 when we seek the death penalty, but responsible people make
6 tough decisions all the time. We make those decisions in
7 our marriages. We make them in regard to our families. We
8 make them in regard to our children, our jobs. Every day
9 people, responsible people, make tough decisions. So this
10 process makes you responsible for a tough decision, but we
11 can't run and hide from that responsibility. It is a
12 responsibility that's placed on you as a part of our
13 governmental function.

14 But it means that we approach the decision the
15 same as you do any other tough decision that you make. You
16 consider the facts. You consider the evidence. You
17 consider the alternatives available and the solutions, and
18 you choose the most appropriate. You simply need to follow
19 the process and imagine yourself making a tough decision for
20 your family and handle it in the same way. And if you do,
21 we trust that you will -- if you use that approach, you will
22 reach the right result.

23 Also in this case you may hear the term mercy.
24 Mercy is a term that is talked about in death penalty cases,
25 and the defense may suggest to you that mercy is something

1 that you should give and impose a life sentence as an act of
2 mercy, and it's natural. It's natural that they want to
3 have mercy. It's natural to want to have mercy on a living
4 human being that's standing in front of you. That's human
5 nature, but mercy is not automatic. Otherwise, we would
6 never have a death penalty. Mercy is something that you
7 receive, but you do not deserve.

8 I would prefer to focus on justice. This process
9 is about justice which is receiving what you do deserve.
10 Justice is what this process should be about.

11 What punishment does this defendant deserve? If
12 you want to give mercy, that's your right, but Irene Graves
13 deserves justice. This is her day in court too. Just
14 because she's not here doesn't mean that it's not her day in
15 court. Her life was senselessly cut short and justice is
16 what she deserves for that. Don't forget her just because
17 she's not here. What is justice for the bullet that Freddie
18 Owens put in her brain and that split second of fear when
19 she knew death was on her?

20 If they ask for mercy, ask them to show you one
21 shred of evidence for any reason why he deserves mercy more
22 than he deserves justice.

23 Now, as I said earlier, it's not enjoyable for me
24 to ask you to impose the death penalty, but it's necessary.
25 We don't want to hurt his family. We don't want to hurt

1 anybody's family, but you have got to remember we are here
2 because of the acts of Freddie Owens. He brought all of us
3 here to this courtroom today. It is his responsibility. He
4 wrecked all these peoples lives and he can't just argue that
5 he had a bad upbringing, or his parents didn't treat him
6 right, or that he should have had a better chance in life
7 and get a minimal sentence. Surely there is more than
8 punishment in a case like this.

9 They have said earlier that the solicitor is not
10 satisfied with a life sentence, and I am not, and that's why
11 we have asked for the death penalty. They told you that I
12 was going to want the death penalty, and I do.

13 Why is the death penalty the appropriate
14 punishment? That's a fair question for you to ask, and
15 that's a fair one for me to answer. And the answer is very
16 simple. There are mean and evil people in this world who do
17 not deserve to continue to live with the rest of us,
18 regardless of how confined they may be. The law limits the
19 right to seek the death penalty to a very select number of
20 cases, very few, and we seek the death penalty in only a
21 few, but the circumstances where we seek it is available for
22 mean and evil people who commit atrocious acts of murder;
23 the worst of the worst. That is what the death penalty is
24 reserved for. Those whose behavior sets them apart even
25 from the criminal world, and that is Freddie Owens, and this

1 murder and his behavior are one of those cases.

2 Punishment and the death penalty are about
3 accountability and responsibility for choices made. I told
4 you earlier we are here because Freddie Owens acted the way
5 that he did. He is responsible for bringing us here. Now
6 is the time to talk about accountability.

7 Freddie Owens had a choice on November the 1st,
8 1997. He had a choice before him to kill or let Irene
9 Graves live. He made the choice, so we are here because
10 Freddie Owens made a terrible choice, a terrible choice. It
11 was an intentional and willful choice to kill her. He made
12 the intentional and calculated choice to kill and his
13 punishment should reflect the degree and the magnitude of
14 that choice. Bad decisions and bad judgment have
15 consequences, but intentional and premeditated acts or
16 violence carries severe consequences. We must hold people
17 accountable for their acts to the most severe punishment
18 when their acts are so atrocious as to justify that severe
19 punishment.

20 Freddie Owens had the ability to make choices. He
21 knew right from wrong. He could conform his behavior to the
22 law. Instead he chose evil. He chose brutality. He chose
23 unnecessary killing, and the punishment should reflect
24 accountability for that choice.

25 We must measure the extent of the culpability and

1 determine the proper punishment. The greater extent of the
2 culpability, the more severe the punishment. Remember, the
3 worst of the worst.

4 After you have found the aggravating circumstances
5 in this case and proceed to sentencing, there are only two,
6 and you know that. Life imprisonment then becomes the
7 minimum penalty for this crime. Does this case deserve the
8 minimum penalty?

9 Let's review the extent the degree of culpability.
10 The damage and destruction of Irene Graves' life. Irene
11 Graves was a mother of two small children. She had a right
12 to continue to live. She had a right to continue to work.
13 She had a right to see her children go to the cheerleading
14 competition. She had a right to see them grow up. She had
15 a right to work three jobs, if she wanted to, and she had a
16 right to ride a bicycle if she couldn't afford a car. She
17 had a right to care for her children. She had a right to
18 love them. She had a right to hold them. She had a right
19 to protect them. She had a right to enjoy life through her
20 children, just the way the rest of us do, but Irene Graves
21 had that stolen from her when Freddie Owens made that
22 horrific choice. Senseless destruction.

23 They suggests to you give him life in prison.
24 Let's put him on medications. He can adapt. He can adapt
25 in prison. And I guess I would have to agree to some extent

1 that we could probably, in the Department of Corrections,
2 medicate enough people and lock them in a cage inside -- or
3 lock them in a cell inside a cage and they would be away
4 from us, but that misses the point of why we are here. We
5 are not here to do what is the least and the easiest. We
6 are here to talk about accountability and responsibility and
7 shaping the punishment to fit the extent of the crime.
8 That's what this proceeding is about.

9 The defense has presented you evidence that he
10 Attention Deficit Disorder, had depression, had Antisocial
11 Personality Disorder. Could control his behavior from now
12 on with medications, but that's not so. If you look at his
13 record of disciplinary infractions since he went on his
14 medication, there is no significant difference than it was
15 before. He has no mental illness. He knew right from
16 wrong. He could assist in his own defense. He could not --
17 but he can still not be allowed to be outside of solitary
18 confinement. Dr. Brunetti knew that in 1999, when he made
19 his analysis.

20 Even in that environment of the cell inside a cage
21 his assaultive behavior still exists. Dr. Cobb told you
22 yesterday, and I don't know if you caught this, but he said
23 "when I talked to him, I go in the cage. When I talk to him
24 through the window." He doesn't even go inside the cell
25 with Freddie Owens.

1 He is still planning. He's still making shanks.
2 He is still planning for assaultive behavior. He has those
3 shanks under his mattress and he has them in his possession,
4 after he's been on medication.

5 But what we really have, Freddie Owens is playing
6 a game. Halloween night was a game. Ride around and rob
7 and then kill Irene Graves, because she wouldn't open the
8 safe or cash register fast enough, because it was in grocery
9 order mode. He has no respect for life. His statement was
10 "I shot the bitch. I shot the whore." The mother of three
11 children, working three jobs, he called her a bitch. He has
12 no respect for life. He has no respect for other people.
13 In fact, his disrespect is so apparent that it put chills on
14 the neck of Joe Wood, who said he had been a detective for
15 over 25 years, and he was only one of two people, Freddie
16 Owens, who put chills on his neck. And that's the reason,
17 because Freddie is a unique person. He killed Irene Graves
18 and he went home and went to bed. He killed Christopher
19 Lee. Hands on, horrific, predator killing; beat him the
20 whole time he was unconscious; rammed his head into the
21 floor; kicked him; stomped his chest; twisted his neck until
22 he ripped the skin off of him; broke two ribs; rammed the
23 pen up his nose to make him stop moaning; kicked him; burned
24 him. Then he threw his lifeless body up on a bunk like a
25 sack of potatoes and went to sleep. He could care less.

1 He's cold. He's unfeeling. And in the Department of
2 Corrections he continues to manifest that: Cold;
3 assaultive; planning for assaults; shanks; stabbing. He
4 continues as a predator.

5 Freddie wanted to be a person in Greenville who
6 killed the most people and got by with it. He said it best
7 what he is when he told Joe Wood "I'm a real menace." And
8 Major Nettles summed it up for you when he said "he's still
9 at this date my most problematic inmate in the population of
10 the worst of the worst inmates in this state."

11 The greater the extent of his culpability, the
12 greater the punishment. So what is the appropriate sentence
13 to fit this crime and hold him responsible for his actions?
14 Life imprisonment is not appropriate. You can't put him in
15 prison for life and expect him to suffer, because he has to
16 think about it every day? He's not going to give another
17 thought to Irene Graves. He's not going to give another
18 thought for her two children. He's not going to give
19 another thought for Christopher Lee. And he's not going to
20 give another thought to any of those correctional officers
21 that he assaults. Nobody is going to be there to talk to
22 him and say "do you remember the murder you did?" So he's
23 not going to suffer with any memory in prison. He will go
24 on with his self-teaching and making himself better and
25 reading his books, learning languages and doing the things

1 that he's doing. There is nobody going to be there to
2 remind him.

3 Sure, you and I may think going to prison would be
4 a serious thing, and it would be, but what about Freddie
5 Owens? Big prison is like a little city. In prison he will
6 have all the necessities of life. Sure, he will be in
7 solitary, but he will still have food to eat. They will
8 provide him clothes. He will have books to read. He will
9 be able to recreate and exercise. He will have doctors to
10 take care of him. He will have the clothing that they
11 provide, and he will have contact with his family and loved
12 ones, and TV at times, and he will have family business.
13 Not much more than a change of address for Freddie Owens.
14 So don't think putting Freddie Owens in prison for the rest
15 of his life is going to be a significant punishment for him.

16 The death penalty is the appropriate punishment.
17 Remember that Freddie could have made something of himself.
18 He had a mother who did the best she could by him. That's
19 what was testified by the psychiatrists. A teacher who
20 cared about him, beyond normal expectations, gave him
21 special help. He had average intelligence. In fact, his
22 intelligence, IQ, has increased over the years. He was
23 artistic. He was athletic, but he chose another route. He
24 chose a route to be a predator and he chose a route to be a
25 killer.

1 Remember, Irene Graves was a living, breathing
2 human being, who had a right to continue to live. She had
3 never harmed a soul. A good and sweet person. She loved
4 her children and she deserved to live, but he invaded her
5 workplace and he took her life. And when you consider the
6 punishment, I want you to consider the extent of the crime
7 and extent of his culpability. Killing Ms. Graves was a
8 horrible crime and it deserves the most severe punishment.
9 It was a senseless crime. Killing Christopher Lee was the
10 same. Senseless, unnecessary, brutal, predator. His
11 behavior in prison has been the same. Correctional officers
12 don't deserve the continuing abuse of Freddie Owens. He
13 should be held accountable.

14 And in closing, let me tell you this in
15 considering the proper punishment. You have been entrusted
16 under our law as the twelve people as representatives to
17 speak for the community as to what is an appropriate
18 sentence under the facts of this case. You know this case
19 as well as anybody, and it's your decision. And as you
20 speak for this community and make this decision, whatever
21 decision that you will make, it will ring like a bell
22 outside of this courthouse. It will ring like a bell to be
23 heard by all who are listening and all who will listen. And
24 I urge you on behalf of the State of South Carolina and this
25 community to let that bell ring, to let people know that

1 people who commit murders of this atrocity and have conduct
2 of this type is something that we will not tolerate without
3 the maximum punishment. Those who commit this type of crime
4 must pay the ultimate price. Thank you.

5 THE COURT: Mr. Gibson.

6 MR. GIBSON: Thank you, Your Honor.

7 Good morning, ladies and gentlemen. I just want
8 to start off, I just want to thank you for your time. I
9 know this has been a tremendous inconvenience for all of
10 you. You spent a lot of time on this, between the jury
11 selection, sitting and listening to the testimony, and now
12 listing to these arguments and deliberating and deciding
13 what should happen in this case. I thank you. Mr. Godfrey
14 thanks you and my client thanks you.

15 As Mr. Ariail said, this is a time that we are
16 going to start talking about our summations. And in
17 listening to his argument, I got one question that keeps
18 bugging me. If you remember Donna Schwartz-Watts, the
19 psychiatrist in this case. She got on the stand and she
20 testified about the condition that Mr. Owens suffers from.
21 The primary condition that she talked about and Dr. Cobb
22 talked about was impulsivity disorder, but yet he never
23 talked about that disorder. He talked about the other ones,
24 but he never talked about that. I wonder why? Let me get
25 back to that.

1 Before I start off I want to make sure that you
2 understand a couple of things, okay. Now, it wasn't my
3 intention to use the word kill, but since he used it, he's
4 absolutely right. You can say it's passing judgment,
5 passing legal judgment, or whatever, but if you decide to
6 sentence Mr. Owens to death, he will die. Your act will
7 lead directly to his death. Now, sometimes that's
8 appropriate. In some situations some people so heinous,
9 some people really are so bad, so intentionally bad, that
10 that is the proper punishment. I submit to you that in this
11 case it is not. It is not.

12 Now, I talked to some of you in the jury in the
13 voir dire and we talked about what was going on and what was
14 going to happen in this case, and I want to make sure that
15 you all understand what happens in that deliberation room as
16 to your sentence is your choice. The law does not mandate
17 death. It does not mandate that. It does not require that.
18 There is no fact sequence that you can go through and check
19 off and all of the sudden say okay, ah-hah, we have met our
20 requirements, we have to sentence him to death. That is
21 your choice. We are going to be asking that you choose
22 life, not death, in that situation.

23 Now, one more thing I want to cover before I get
24 into the facts of this case, my argument regarding the facts
25 of this case, and that is your decision has to be your

1 individual decision. This is not a situation where majority
2 rules. You can't get back there in that room and figure out
3 were the votes are and then everybody else caves. You have
4 to stand by your decision. Now, if after deliberations you
5 change your opinion, you truly change your opinion, then you
6 should vote that way. But if you were not absolutely
7 certain of one sentence or another, you should not vote for
8 it, and particularly in this case, sentence being death. If
9 you are not absolutely certain that that is the sentence
10 that you want to hand down, you should not vote for it.

11 Now, that gets me to the point where I reiterate
12 to you what I want you to do, and that's -- again, I want
13 you to choose life. I want you to spare Mr. Owens life.
14 And to use his words, I want you to give mercy. I want you
15 to be merciful.

16 Now, the question is what do I tell you to make
17 you rule the way that I want you to rule? What do I tell
18 you to make you choose life in this instance? What do I
19 tell you to make you spare a man's life? I don't know. You
20 know, and I have thought this about this long and hard. And
21 quite frankly, I really did not sleep a wink last night,
22 because I'm sitting there thinking what do I say to you.
23 I'm sitting in my office and I'm thinking I wish I could
24 look into their minds. I wish I could know what they are
25 thinking. I wish I could know what questions they are

1 asking themselves so I could give them that information.
2 With all of that nothing came to me except for one thing. I
3 need to make you see Freddie Owens, and I mean see Freddie
4 Owens for what he is, not what the solicitor says he is, but
5 what he actually is. And the way I'm going to try to do
6 that is I'm going to try to go back through the testimony
7 that we put up.

8 Now, if you remember Marjorie Hammock, who took
9 that witness stand, and she told you about Mr. Owens family,
10 his situation. And ladies and gentlemen, it was horrific.
11 It was bad. He was born into a situation where his mother
12 was only 18 years old and had extremely limited resources.
13 She had a -- he had a father who lived with him who
14 brutalized him, brutalized his mother, eventually abandoned
15 him and his four siblings and his mother to fend for
16 themselves.

17 When Ms. Maag came into the situation, there was
18 hardly any resources whatsoever. They often didn't have
19 food on the table. The neglect got so bad that at some
20 point the children were taken away from their mother and
21 placed in foster care. Now, he's absolutely right, and we
22 said it and it's true. She worked very hard to get her
23 children back, but that doesn't change the fact that it was
24 a horrific situation in which he grew up in.

25 And, ladies and gentlemen, it only got worse. She

1 married another man, a stepfather of this situation, and he
2 was as violent as his biological father. You heard Ms.
3 Hammock, I believe, testify about him chasing -- about
4 Freddie seeing his stepfather chase his mother through his
5 house with a machete. The stepfather went further than
6 that. Not only did he expose him to violence, he taught him
7 violence. He told him "you got to fight, and I'm going to
8 lock you out of this house until you learn how to fight.
9 You are going to resolve your situation with violence, the
10 same way that I do." And that's what he learned. That's
11 what he was taught. I wasn't taught that. I'm not that
12 way, because I was not taught that, but I can't say that if
13 I grew up in that same environment that my first response to
14 resolving a problem, to coping with a problem, would not be
15 violence. I can't say that. And, ladies and gentlemen, I
16 don't think any of you can really say that either.

17 Now, with that said, Ms. Hammock talked about his
18 situation. And at the end of her testimony she basically
19 summed up what his situation was. She used that genogram,
20 and I invite you to take a look at it when you are back in
21 that jury room and see what his family situation is like.
22 Take a look at that. It's going to be back there with you.
23 Take a look at that genogram, because it's going to show you
24 a history of abuse, violence, family disruption, poverty,
25 alcohol and drug abuse dependence, school failure,

1 interruption and incarceration throughout many members of
2 their family. I mean, I can't think of coming into a worse
3 situation than what he came into.

4 Now, ladies and gentlemen, at the same time this
5 is happening, on a parallel track and maybe even directly
6 because of it, he's also suffering a number of severe
7 psychological conditions. He has a history of depression as
8 early -- major depression as early as elementary school.

9 Now, Dr. Brunetti, the State's expert, told you
10 that in children depression can present itself as
11 irritability, impulsivity and resistance. That impulsivity
12 is a thread which goes throughout his entire life. As Dr.
13 Cobb explained, basically what it means is this. When he
14 gets an impulse -- or back up. When I get an impulse to do
15 something, I can control it. There is a timer or some type
16 of delay situation in my body that works, that keeps me from
17 acting on everything that I just have a guttural animal
18 instinct to do. That doesn't work normally in him. That
19 doesn't work normally in him.

20 Now, ladies and gentlemen, the tragic part about
21 this is is that he doesn't want to be that way. He's asked
22 for help. That's why we know he doesn't want to be that
23 way. As early as 1995, when he's having all these problems,
24 he gets down at DJJ, he asked for help.

25 In 1997, they finally diagnose him with severe

1 major depression. They put him on medicine and then kick
2 him out and send him to Turbeeville Correctional
3 Institution. He gets to Turbeeville Correctional
4 Institution and tells them I really would like to stay on my
5 meds. They say take him off his meds, and undo all that
6 work and then release him out into society.

7 He's a ticking time bomb at that point, ladies and
8 gentlemen, but not because he wants to be one. He's a
9 ticking time bomb because of his situation, his background,
10 and because of a psychological disorder that he can't
11 control.

12 Now, you put him in this situation and then you
13 have situation with Ms. Graves and you get the result that
14 you get. I'm not in any way trying to say that it was not
15 senseless and a horrible, horrible incident what happened
16 with Ms. Graves. I sat there and I watched -- saw the
17 photos, saw the pictures, saw her children, and my heart
18 leaps out to them, and yours should too, but at the same
19 token, by reaching out for her and feeling sympathy for her,
20 I ask that you also open your heart to feel some sympathy
21 for Mr. Owens. This was not something that happened solely
22 because of his choice. This was not something that
23 happened, something that he could have controlled. He was
24 placed -- because of his family situation, he was raised in
25 criminality. Those were the impulses that he was raised to

1 have. They were beaten into him, literally beaten into him.
2 And then top that off with an impulsivity disorder that he
3 can't control and you have got exactly what I said, a
4 ticking time bomb.

5 Now, ladies and gentlemen again, we know that he
6 doesn't want to be that way. And the reason why we know is
7 because when he gets down to Lieber and he finally meets Dr.
8 Cobb -- Dr. Cobb is not there to see him. He asks Dr. Cobb
9 "I'm getting in trouble. I need something to help me stay
10 out of trouble. Can you help me, please?" And Dr. Cobb
11 does. And he finally diagnosis him with what he needs and
12 he gives him the medication that he needs.

13 Now, does he have some incidents after that?
14 Absolutely. But, ladies and gentlemen, those incidents are
15 not as severe as the others before, and quite frankly if you
16 look at those records for the last five and a half months,
17 he's had no incidents whatsoever. Not a one. Not a shank.
18 Not an assault. Nothing. So we know that it's working. We
19 know that it's working. And this is not some fake thing.
20 Donna Schwartz-Watts or Dr. Schwartz-Watts testified that
21 they check his blood to see if he's on his medication and he
22 is.

23 Now, ladies and gentlemen, like I said before, the
24 death penalty can be appropriate in some particular
25 situations. But when you have a situation where you have a

1 man, a human being, who has a psychological disorder that he
2 cannot -- that causes him to not be able to control his
3 behavior, what does it say about us if we killed that man?
4 What does it say about our society if we kill a man who
5 can't control his actions?

6 Now, ladies and gentlemen, talk about character.
7 Freddie Owens, has he done some bad things? Absolutely.
8 He's assaulted some inmates? But in addition to that he's
9 also helped some inmates. He's taught inmates to read.
10 He's taught himself things. He's tried to make up for all
11 of the inadequacies of the school system in which he went
12 up, all the learning disability problems, he works to try to
13 improve himself and the solicitor makes light of it. What's
14 he supposed to do? He's just supposed to sit there and
15 become worse, become more animalistic, become worse and not
16 try to help himself?

17 There is good in Freddie Owens, and I'm going to
18 tell you how you know it, ladies and gentlemen. The way
19 that you know is Fain Maag, his 3rd grade teacher. She
20 comes in this courtroom and testifies on his behalf, crying,
21 telling you, crying. Ladies and gentlemen, I don't know --
22 I don't have a 3rd grade teacher who would come in here and
23 speak on my behalf if I had done half the things that
24 Freddie Owens has done. Obviously she sees something in
25 him. She's not a family member. She doesn't have to be

1 there. We haven't paid her to come up here. She came up
2 here on her own free will. And, ladies and gentlemen, I
3 think if you -- if you don't believe me, trust her. There
4 is good in that man.

5 And again, ladies and gentlemen, treat him as his
6 word. He was on the medicine for eight months. After eight
7 months started to kick in, he started to do a whole lot
8 better. In fact, in the last five and a half months no
9 incidents whatsoever. He's trying to make himself a better
10 man. He's trying to improve himself. Isn't that what we
11 want of somebody in that situation? Don't we want him to
12 try to improve himself? That's what he is doing, and he's
13 showing that he can. He is redeemable. He's not a threat
14 to anybody now, now that he's on medication, now that he's
15 finally receiving the treatment that he needs, that he's
16 finally receiving the help that he's called out for for
17 numerous occasions and did not get it. What does that say
18 about us as a society if we kill a man who has been asking
19 for help, but never getting it? What does that say about
20 us?

21 Like I say, ladies and gentlemen, sometimes the
22 death penalty is appropriate, but it's not appropriate here.

23 Now, the tragic part is a lot of us, it wasn't
24 found out until just recently, but we found it out now.

25 Now, I want to address a couple of things. I want

1 to go back to the question that I started off with. Why did
2 the solicitor not say anything about the impulsivity
3 disorder? Why did he not address it at all? The reason
4 why, ladies and gentlemen, is because it doesn't fit his
5 theory. He wants to tell you Freddie Owens is evil. He's
6 evil incarnate, and all these things he does, he does them
7 of his own free will and his own control. The impulsivity
8 disorder diagnosis does not fit that threat. That's why he
9 didn't mention it. And I assume that he was probably hoping
10 that I wouldn't mention it, hoping that you would forget
11 about it. It does not fit the script.

12 Now, ladies and gentlemen, the judge is going to
13 instruct you on several mitigating circumstances,
14 mitigating circumstances that are appropriate in this
15 instance, things that you should consider before you render
16 a death sentence, things that by statute make this situation
17 better, less bad.

18 The first thing is the defendant has no
19 significant history of prior criminal conviction involving
20 the use of violence against another person.

21 That means before Irene Graves, there is no
22 significant history, or history at all, of prior criminal
23 conviction involving the use of violence.

24 Second, the defendant was an accomplice in the
25 murder committed by another person and his participation was

1 relatively minor.

2 Now, some of you are saying to yourself now, wait
3 a minute, how is he just an accomplice? How is his
4 participation relatively minor? That piggybacks onto
5 another thing that you are allowed to consider, and that is
6 residual doubt. Well, residual doubt is this, ladies and
7 gentlemen. I have told many of you during voir dire that we
8 were stuck with the earlier jury's ruling, and we are to
9 some extent, but, ladies and gentlemen, you can consider
10 whether or not that earlier jury was right. That is
11 something that you are allowed to consider in your
12 deliberations.

13 Now, they didn't put on their whole case, but they
14 put on the best of it in this trial, and what you saw was a
15 jilted lover who was out to get him and a co-defendant who
16 very likely may have been gotten away with murder. Kiko
17 Vance. Why wouldn't he testify? In his first testimony, in
18 his first statement, the one that was read into the record
19 because he wouldn't testify this time, he says "I don't have
20 any kind of deal to testify. I'm only testifying because
21 it's the truth." If that's the case, why not get up on that
22 stand and say it again? Why not give the same testimony.
23 And if you look at his statement and you look -- and you
24 really remember what his testimony was, there were numerous
25 things which made no sense whatsoever. Kiko Vance, a .32

1 revolver which killed Irene Graves, that belonged to Kiko
2 Vance. That was Kiko Vance's weapon. Kiko Vance said "I
3 didn't have it because I gave it to Freddie. And I didn't
4 get it back because when I was going in the Waffle House, I
5 wanted to have a gun that I could pull the hammer back so I
6 could scare the people." Now, ladies and gentlemen, I don't
7 know if you have ever been in the Waffle House, but you are
8 not going to hear a hammer being pulled back on a weapon in
9 a Waffle House, not with dishes clanging, not with food
10 frying, not with people talking. That's just not going to
11 happen. And he told you that that -- from his perspective
12 he said the reason why Freddie wanted the .32 was because it
13 was more noticeable. It would seem to me that if he was
14 going in the Waffle House, that he would want the most
15 noticeable gun. The fact of the matter is, ladies and
16 gentlemen, he never went in the Waffle House. He went in
17 the Speedway with Steven Golden, and that's -- those are the
18 two people who did that crime, and you are allowed to
19 consider that in your deliberations.

20 MR. ARIAIL: Your Honor, I'm going to have to
21 object to that argument. I mean, that's outside the scope
22 of any fact in this record.

23 THE COURT: I'll note that.

24 MR. GIBSON: Second -- third, rather, the murder
25 was committed while the defendant was under the influence of

1 mental or emotional disturbance.

2 Assuming that you believe that first jury was
3 right and that Freddie Owens was the one who did kill Irene
4 Graves, we have talked about his emotional surface. We have
5 talked about that, ladies and gentlemen. We have also
6 talked about the fact -- or Kiko Vance talked about the fact
7 that that night they were all out doing drugs, smoking
8 blunts, drinking alcohol. That counts or is covered
9 underneath the influence of mental or emotional disturbance.

10 The fourth thing is that the capacity of the
11 defendant to appreciate the criminality of his conduct or to
12 conform his conduct to the requirements of law was
13 substantially impaired.

14 Now, ladies and gentlemen, we go back to the
15 impulsivity disorder. Assuming that you believe the earlier
16 jury was right, Freddie Owens had impulsivity disorder.
17 Freddie Owens had a background which made him prone to
18 violence and he could not control those impulses.

19 Finally, you can consider the age or mentality of
20 the defendant at the time of the crime.

21 Ladies and gentlemen, he's older now, but he was
22 18 when that happened. 18 years old. A child.

23 Now, finally, ladies and gentlemen, in closing I
24 want to go back to the Alpha, Omega. Let's go back to the
25 Alpha, and that is it's your choice as to what you do. It's

1 your choice. There is nothing out there which says that you
2 have to kill him, that you have to give the death sentence
3 in this case. There is nothing that says that. It's your
4 choice. And if you sign your name to that death warrant,
5 that's what's going to happen, and the judge is going to
6 tell you he's not going to disregard what you got to say.
7 There is no out on this. There is no out. If that's what
8 you guys say that you want, that's what's going to happen.
9 I would submit to you that that shouldn't happen.

10 There is one thing I want to go back to actually
11 clarify that I forgot to talk about. The solicitor in this
12 case said that life without the possibility of parole was
13 the minimum penalty. For a murder it isn't that. The
14 minimum penalty for a murder conviction is 30 years.

15 MR. ARIAIL: I'm going to object to that, Your
16 Honor. I didn't say that. I said find the aggravating
17 circumstances.

18 THE COURT: If they find the aggravating
19 circumstances, those would be the two sentences.

20 MR. GIBSON: All right. I apologize.

21 If you find the aggravating circumstances, yes,
22 he's right.

23 Ladies and gentlemen, the reason why it becomes a
24 minimum penalty is because they decide they would want that
25 to be the minimum penalty. We are not talking about a walk

1 in the park here, and he makes it seem like it is. We are
2 talking about a man who is 27 years old now. If he lived to
3 be 70, which is quite likely, we are talking about 43 years
4 living possibly inside of a cell inside of a cell. Isn't
5 that enough, particularly for a man who may not be able to
6 control his actions, a man who may not be able to control
7 the impulses that his violent upbringing gave him? Isn't
8 that enough?

9 Finally, ladies and gentlemen, I'm asking you one
10 thing. Choose life. You are going to go back there and you
11 are going to have a choice. Choose life. Thank you.

12 THE COURT: Ladies and gentlemen, my instructions
13 are a little bit long. I'm going to give y'all a stretch
14 break and let you clear your mind. Do not discuss the case
15 at this time. Step back to the jury room, please.

16 (Whereupon, the following takes place outside the
17 presence of the jury panel)

18 THE COURT: We will take about 15 minutes.

19 MR. GIBSON: Thank you, Your Honor.

20 THE COURT: All right. I'm going to give the jury
21 as much time as they need for all of them to go to the
22 restroom, or whatever.

23 (Whereupon, proceedings were recessed)

24 (Whereupon, proceedings were reconvened)

25 THE COURT: All right. Bring the jury in.

(1 (The following takes place in the presence of the
2 jury panel)

3 (Whereupon, at 11:54 a.m., the court gave the jury
4 panel the jury instructions)

5 THE COURT: Ladies and gentlemen, as you know now,
6 when the State seeks the death penalty, the trial, there are
7 two proceedings. One is to determine -- the first one is to
8 determine the guilt or innocence of a defendant for the
9 crime for which he's charged.

10 The second proceeding before a jury -- and both
11 are conducted before a jury. The second proceeding before a
12 jury is to determine the sentence to be imposed upon Freddie
13 Eugene Owens for the murder of Mrs. Irene Graves, and that's
14 this proceeding.

15 Now, ladies and gentlemen, as jurors in this case
16 you have certain functions and responsibilities to perform,
17 which are entirely separate and distinct from those of mine
18 as the trial judge. I am prohibited by the Constitution
19 from discussing the facts of this case with you, and I would
20 not do that. It is your responsibility, and yours alone, to
21 pass upon the issues of fact in this case and write a
22 verdict. I would, therefore, instruct you that if I have
23 done anything during the course of this trial to cause you
24 to believe that I have a feeling about the facts and the
25 issues in this case, you disregard that, because if I did, I

1 did not mean too, and I would not do anything to infringe
2 upon your responsibility to do that.

3 Ladies and gentlemen, in determining the facts in
4 the case, you have to pass upon the credibility and the
5 believability of the witnesses. In that regard you have the
6 right to believe all that a witness tells you. You have the
7 right to disbelieve all that a witness tells you. You can
8 believe part of what a witness told you, and you can
9 disbelieve part of what a witness told you. You can believe
10 one witness as against several, or several witnesses as
11 against one. And I know that you would not do that lightly.
12 These witnesses have testified in your presence under oath,
13 except for the previous testimony that was read to you from
14 Mr. Vance. You have observed the demeanor of those
15 witnesses. You can ask yourself were they forthright? How
16 did they come to know the facts about which they testified?
17 Was there other evidence and testimony in the case to make
18 the testimony of that witness stronger or weaker?

19 I say these things to emphasize to you, ladies and
20 gentlemen, that the weight that you see fit to give to the
21 testimony and credibility of the witnesses is for your sole
22 determination.

23 The Rules of Evidence ordinarily do not permit
24 witnesses to testify as to opinions or conclusions. An
25 exception to this rule exists for what we call expert

1 witnesses, people who by their education and experience have
2 become experts in some art, science, profession or calling.
3 They may state an opinion as to any relevant and material
4 matter in which they profess to be an expert, and they also
5 may state the reasons for that opinion.

6 Now, you should consider each expert opinion
7 received in evidence in this case and give it such weight as
8 you think it deserves.

9 If you should decide that the opinion of an expert
10 witness is not based upon sufficient education and
11 experience, or if you should conclude that the reasons given
12 in support of the opinion are not sound, or that the opinion
13 is outweighed by other evidence, you may disregard the
14 opinion entirely. An expert's testimony is to be given no
15 greater weight than that of other witnesses simply because
16 he or she is an expert. You are not required to accept a
17 purported expert's opinion, even though it is
18 uncontradicted.

19 Now, ladies and gentlemen, it is my duty to charge
20 you the law applicable to the issues of fact presented in
21 this case. It is not a question of what you think the law
22 should be, or might be, or what the attorneys say the law
23 is, because under your oath you are to take the law as I
24 give it to you. You apply the law to the facts as you
25 determine them to be and you write a verdict accordingly.

1 Now, ladies and gentlemen, there are two types of
2 evidence which are generally presented during a trial;
3 direct evidence and circumstantial evidence.

4 Direct evidence is testimony of a person who
5 asserts or claims to have actual knowledge of a fact, such
6 as an eyewitness.

7 Circumstantial evidence is proof of a chain of
8 facts and circumstances indicating the existence of a fact.

9 The law makes absolutely no distinction between
10 the weight or value to be given to either direct or
11 circumstantial evidence, nor is a greater degree of proof
12 required of circumstantial evidence than of direct evidence.

13 In considering the issues requiring proof beyond a
14 reasonable doubt, you should weigh all the evidence in the
15 case. And if you are not convinced of its proof beyond a
16 reasonable doubt, you must find for the defendant.

17 Now, ladies and gentlemen, the fact that a
18 defendant does not testify in his own behalf cannot and must
19 not be considered against him under any circumstances or in
20 any manner whatsoever. The fact that a defendant does not
21 take the witness stand in his own behalf does not create any
22 presumption against him. And I charge you that you must not
23 permit that fact to weigh in the slightest degree against
24 the defendant, nor should this fact enter into the
25 discussions or deliberations of the jury in any manner.

1 Now, under the Constitution of South Carolina and
2 under the Constitution of the United States, it's the
3 prerogative of the defendant to testify or to remain silent,
4 and the burden is always upon the State of South Carolina to
5 prove its case by competent testimony and evidence beyond a
6 reasonable doubt.

7 Now, the term reasonable doubt will be used in
8 several instances throughout the charge. Ladies and
9 gentlemen, a reasonable doubt is the kind of doubt that
10 would cause a reasonable person to hesitate to act.

11 The government has the burden of proving their
12 case beyond a reasonable doubt. Some of you may have served
13 on juries in civil cases and you would have been told that
14 the burden of proof is by the greater weight or
15 preponderance of the evidence. In criminal cases the
16 government's proof must be more powerful than that. It is
17 beyond a reasonable doubt. Proof beyond a reasonable doubt
18 is proof that leaves you firmly convinced of the issues.
19 There are very few things in this world that we know with
20 absolute certainty, and in criminal cases the law does not
21 require proof that overcomes every possible doubt.

22 If, based on your consideration, you are firmly
23 convinced of the issues asserted by the State where the
24 requirement is proof beyond a reasonable doubt, you must
25 find those proven beyond a reasonable doubt, if you are

1 firmly convinced.

2 If you think, on the other hand, there is a real
3 possibility that the issue is not established that must be
4 proven beyond a reasonable doubt, you must give the benefit
5 of that doubt to the defendant and find for the defendant.

6 Now, ladies and gentlemen, no statement may be
7 considered by you unless the State has proven beyond a
8 reasonable doubt that the defendant was first given an
9 explanation of his Miranda Rights before making a statement,
10 that he fully understood the warnings, and knowingly and
11 voluntarily elected to waive those rights.

12 You further must find beyond a reasonable doubt
13 that the statement was made and that it was made freely and
14 voluntarily under a totality of the circumstance. In other
15 words, I would instruct you that an alleged statement of the
16 defendant cannot be considered against him, unless he was
17 first advised of his right to remain silent; advised that
18 anything he said could be used in evidence against him in a
19 court of law; that he had a right to counsel or a lawyer;
20 and that if he could not afford a lawyer, that one would be
21 provided him without charge; and that if he elected to talk,
22 he could stop at any time.

23 If you find that the defendant was so advised, you
24 may only consider the statement if you also find beyond a
25 reasonable doubt that he fully understood the warnings and,

1 nevertheless, intelligently and knowingly elected to waive
2 his rights.

3 I would charge you that a statement cannot be
4 considered against a defendant if it was made through force,
5 fear or under duress or compulsion of any kind, or if it was
6 induced by any promise of leniency or reward of any kind.
7 Therefore, it is your duty to determine from all the
8 evidence before you whether the State has proven beyond a
9 reasonable doubt that the alleged statement was, in fact,
10 free and voluntary.

11 To summarize that, in order for you to consider a
12 statement made, a defendant must first be advised beyond a
13 reasonable doubt of his Miranda Rights; that the defendant
14 fully understood the warnings; and he knowingly elected to
15 waive his rights; that he did indeed make a statement; and
16 that the statement was freely and voluntarily made under the
17 totality of the circumstances.

18 Now, ladies and gentlemen, by your verdict in this
19 case you have no friends to reward and no enemies to punish.
20 The verdict should speak the truth, based on the law and the
21 evidence.

22 Ladies and gentlemen, any decision that you make
23 with regard to any sentence for this defendant must be
24 unanimous. All twelve of you who deliberate must agree.

25 Moreover, a sentence of death must be based on

1 proof in your judgment beyond a reasonable doubt.

2 In determining the appropriate sentence for the
3 defendant, you may consider whether a statutory aggravating
4 circumstance is supported by the evidence.

5 As the sentencing authority in this case, in
6 determining appropriate sentence, you must focus on the
7 specific circumstances surrounding this crime and the
8 character of the individual defendant.

9 You may also consider any evidence presented with
10 regard to the defendant's prior record, if any, and any
11 other alleged acts, although such evidence must not be
12 considered as evidence of any statutory aggravating
13 circumstance. Rather a defendant's criminal record, alleged
14 prior or subsequent bad acts or crimes, may be considered
15 only as evidence of defendant's character and
16 characteristics.

17 During the course of this trial there has been
18 evidence about crimes allegedly committed or bad acts
19 allegedly committed by the defendant prior to and subsequent
20 to the murder of Ms. Graves. And I would instruct you that
21 you may consider this evidence as evidence of the
22 defendant's character. You may not consider other crimes or
23 acts or bad acts, if any, as evidence of a statutory
24 aggravating circumstance.

25 Now, ladies and gentlemen, in arriving at your

(1 decision, you must first determine from the evidence
2 presented during the trial and during this sentencing
3 proceeding whether the alleged statutory aggravating
4 circumstance or circumstances existed beyond a reasonable
5 doubt at the time the victim, Irene Graves, was murdered by
6 Freddie Eugene Owens.

7 The statutory aggravating circumstances or
8 circumstances are facts, incidents, a detail or an
9 occurrence which the General Assembly of the State of South
10 Carolina has declared by statute to aggravate, to make worse
11 the offense of murder, when that fact or that incident and
12 that detail or that occurrence accompanies the act of
13 murder. In other words, a statutory aggravating
14 circumstance increases the enormity of the offense, adds to
15 the injurious consequences of the offense.

16 Before you can impose a death sentence on a
17 defendant, all twelve of you must agree and find beyond a
18 reasonable doubt that the evidence in this case establishes
19 that a statutory aggravating circumstance exists, either one
20 or both of those alleged. Unless you so find, you cannot
21 sentence the defendant to death or life in prison.

22 The statutory aggravating circumstances alleged by
23 the State here will be submitted to you in writing in a
24 document which I have entitled statutory instructions.

(25 At the end of this process I will have -- I have

1 fifteen copies, and I'm going to hand them out to you and
2 let you look at them. So as we review it at the end, I
3 think you will see how this flows and is consistent in the
4 manner and order in which I have given these instructions.
5 You will have these instructions with you, just the
6 statutory instructions, not what I'm saying, in the jury
7 room.

8 Now, ladies and gentlemen, the statutory
9 aggravating circumstances alleged by the State are that the
10 murder was committed while in the commission of robbery
11 while defendant was armed with a deadly weapon.

12 Number two, that the murder was committed while in
13 the commission of larceny with use of a deadly weapon.

14 Now, I need to define for you those crimes so that
15 will you know if they have been established beyond a
16 reasonable doubt. You have to know what robbery is to
17 determine if all the elements of robbery have been proven
18 beyond a reasonable doubt; and what larceny is, to determine
19 if all the elements of larceny are proven beyond a
20 reasonable doubt. Those are the words that used in the
21 statutory instructions, which the State must prove beyond a
22 reasonable doubt.

23 I'll take up larceny first, the statutory
24 allegation number two.

25 Larceny is defined as the taking and carrying away

1 by any person the goods or things personal of another with
2 the felonious or unlawful intent to permanently deprive that
3 owner of his or her property and to convert it to the
4 taker's own use.

5 Therefore, there are four elements of this
6 offense, all of which must be proved beyond a reasonable
7 doubt.

8 First, there must be a taking and carrying away of
9 the goods or things personal of another. In other words, it
10 must be chattels or personal property, including money.

11 Secondly, it must be the property of someone else,
12 another.

13 Third, there must have been a felonious or
14 unlawful intent to permanently deprive that owner of his or
15 her property.

16 And fourth, there must have been an intent to
17 convert that property to the taker's own use. Essentially
18 it's commonly known as stealing.

19 Robbery, ladies and gentlemen, one of the alleged
20 statutory instructions, is the felonious or unlawful taking
21 of money, or goods, or personal property of any value from
22 the person, or in the presence of another, by violence or by
23 putting such person in fear.

24 Robbery includes all the elements that are
25 necessary to constitute larceny as I have defined that to

1 you.

2 The aggravating circumstances necessary to
3 constitute a robbery, as distinguished from larceny, are
4 these: The taking must not only be accomplished without
5 consent, but it also must be accomplished with violence, or
6 putting a person in fear.

7 The property must be taken from the person of
8 another or taken in that person's presence. In other words,
9 for the purpose the robbery, a thing is in the presence of a
10 person if it is within the reach, inspection, observation,
11 or control, so that that person could retain possession of
12 it, if not overcome by violence or prevented by fear.

13 Now, ladies and gentlemen, as to the statutory
14 instructions, the last part of each allegation states while
15 armed with a deadly weapon as to robbery, and as to the
16 larceny allegation it says with the use of a deadly weapon.

17 I would instruct you that deadly weapon is a dirk,
18 a slingshot, metal knuckles, razor, or pistol, or other
19 deadly weapon.

20 Now, if all twelve of you who deliberate have
21 agreed and find beyond a reasonable doubt that one, or both,
22 of the alleged aggravating circumstances existed at the time
23 in this case when the victim was murdered, then you would be
24 authorized to impose either a sentence of life imprisonment
25 or a sentence of death.

1 In the event you find beyond a reasonable doubt
2 the existence of an alleged statutory aggravating
3 circumstances, a sentence of life imprisonment means life
4 without the possibility of parole until the death of the
5 defendant. In that situation, having found a statutory
6 aggravating circumstance, under sentence of life
7 imprisonment, the defendant would never be released from
8 jail.

9 If, however, you do not find beyond a reasonable
10 doubt that the alleged statutory aggravating circumstance or
11 circumstances existed at the time of Mrs. Graves murder,
12 then you would cease your deliberations and advise the court
13 of your decision by having the foreperson sign the verdict
14 form entitled no finding of an aggravated circumstance.

15 In arriving at your decision, if you find the
16 presence beyond a reasonable doubt of a statutory
17 aggravating circumstance, you must also consider, if you
18 find from the evidence the following statutory mitigating
19 circumstances, which the General Assembly of the State of
20 South Carolina has declared by statute to mitigate an
21 offense of murder. I'm going to read these to you, but they
22 will be on the form given to you in the jury room. And the
23 form states, you may also consider the following statutory
24 mitigating circumstances:

25 1. The defendant has no significant history of

1 prior criminal conviction involving the use of violence
2 against another person.

3 2. The defendant was an accomplice in the murder
4 committed by another person and his participation was
5 relatively minor.

6 3. The murder was committed while the defendant
7 was under the influence of mental or emotional disturbance.

8 4. The capacity of the defendant to appreciate
9 the criminality of his conduct or to conform his conduct to
10 the requirements of law was substantially impaired.

11 5. The age or mentality of the defendant at the
12 time of the crime.

13 You may also consider any non-statutory mitigation
14 circumstances that may exists in the record or under the
15 evidence that you have heard.

16 Now, you may find mitigation evidence beyond those
17 enumerated by the General Assembly and the Code of Laws.
18 You must consider as a mitigating factor any aspect of the
19 defendant's character or record or any of the circumstances
20 of the offense, or any other evidence presented in this
21 court for which you can find a basis for a sentence other
22 than death. In other words, you may consider any relevant
23 mitigating factors or circumstances enumerated in the Code
24 of Laws, or any other evidence that you may consider as you
25 may find.

1 A mitigating factor is treated equally under the
2 law, whether it is found in the statute, or simply found by
3 you, based on the evidence before you.

4 Mitigating circumstances are facts, details,
5 incidents, or occurrences which mitigate the offense of
6 murder. Mitigating circumstances are any facts which in
7 fairness and mercy must be considered as extenuating or as
8 reducing the defendant's culpability for the commission of
9 the act of murder or that weigh in favor of a life sentence
10 for any reason.

11 You must consider mitigating circumstances, if you
12 find them in the record or in evidence in this case, because
13 if you are to make an individualized assessment of this
14 particular defendant, which the law requires you to do,
15 evidence about the defendant's background and character is
16 relevant.

17 While it is necessary that you find beyond a
18 reasonable doubt the alleged statutory aggravating
19 circumstances existed at the time Mrs. Graves was murdered
20 in order to impose the sentence of death upon the defendant,
21 it is not necessary that you find unanimously that any
22 mitigating circumstance exists in order to impose a sentence
23 of life imprisonment.

24 Unlike the aggravating circumstance, which the
25 State must prove beyond a reasonable doubt, there is no

1 mitigating burden placed on a defendant to establish
2 mitigating factors.

3 Moreover, you are authorized to impose a sentence
4 of life imprisonment, regardless of whether you find any
5 mitigating circumstances exists.

6 Simply stated you may sentence this defendant to
7 life imprisonment for any reason, or for no reason at all,
8 or simply as an act of mercy. However, a decision to impose
9 a life sentence, like a decision to impose one of death,
10 must be unanimous.

11 If you find beyond a reasonable doubt the
12 existence of one of the statutory aggravating circumstances,
13 or both, and if you further find any mitigating
14 circumstances in the record of evidence in this case, you
15 must give serious and meaningful consideration to all the
16 factors before making a decision.

17 In arriving at your decision, you are not to allow
18 passion, prejudice, or any other arbitrary factor to
19 influence your judgment. As jurors, you must make your
20 decision without bias toward or without prejudice against
21 any party. You must not allow yourself to be governed by
22 passion or sympathy. You are to honor your oath and in that
23 regard carefully and impartially consider all the evidence
24 in the case and follow the law as I have explained it to
25 you.

1 At this time Ms. Daly is going to pass out to you,
2 all 14 of you, a copy of the various forms and we are going
3 to go over those here. They should be in the order that we
4 are going to review them. I have the originals, which I'll
5 make a part of the record. I'll just send one -- the
6 originals back to you, but I wanted all of you to have these
7 here in the courtroom so that we could go over them.

8 Okay. Your top document should say statutory
9 instructions. And the first bit of the information in this
10 case from the Code of Laws, there is one. It's set forth as
11 I have charged you. It's exactly as is written in the code.
12 They are the statutory aggravating circumstances alleged by
13 the State.

14 The aggravating circumstances state that the
15 murder was committed while in the commission of robbery
16 while armed with a deadly weapon; that the murder was
17 committed while in the commission of larceny with use of a
18 deadly weapon.

19 Okay. Now, below those statutory aggravating
20 circumstances are the statutory mitigating circumstances
21 which you are to consider. And if you find evidence
22 supports the existence of one, or all, of these, you must
23 give thorough and meaningful consideration to each one of
24 these that you find supported by the evidence.

25 Now, if you would go -- there are two pages for

1 that, statutory mitigating circumstances.

2 That the defendant has no significant history of
3 prior criminal conviction involving the use of violence
4 against another person.

5 The defendant was an accomplice in the murder
6 committed by another person and his participation was
7 relatively minor.

8 The murder was committed while the defendant was
9 under the influence of mental or emotional disturbance.

10 The capacity of the defendant to appreciate the
11 criminality of his conduct or confirm his conduct to the
12 requirements of law was substantially impaired.

13 The age or the mentality of the defendant at the
14 time of the crime.

15 And you may also consider any non-statutory
16 mitigating circumstances. That's what the form states.

17 Now, as I said, at the top of the next page it
18 states that unanimous finding of a statutory aggravating
19 circumstance. We, the jury, find beyond a reasonable doubt
20 the following statutory aggravating circumstance:

21 And if you find one, or both -- I put an S on
22 there, aggravating circumstances. If you find the existence
23 of one, or both, of the statutory aggravating circumstances
24 beyond a reasonable doubt, you would write out the
25 aggravating circumstance or circumstances that you find.

1 And it requires the signature of all twelve jurors. And I
2 have already typed your names in where you can sign. I just
3 did that for the records of the court. And if for any
4 reason we have to use an alternate juror, of course, we can
5 change the names without any difficulty.

6 Now, the second document is no finding of a
7 statutory aggravating circumstance. We, the jury, find are
8 unable to unanimously agree on the existence of the
9 statutory aggravating circumstance. If that is the case and
10 your deliberations and you reached that decision, then you
11 would sign it by the foreperson and you would notify the
12 court and that would end the jury deliberations in this
13 proceeding.

14 Now, Mr. Foreman, y'all would be required, if you
15 found the statutory aggravating circumstance, on the
16 document to completely write it out, and you have those on
17 the first document.

18 Now, the next document I believe that you have is
19 the unanimous recommendation of a sentence for life. Having
20 found beyond a reasonable doubt the existence of the
21 following statutory aggravating circumstance or
22 circumstances, again, you would write those in. It says we
23 now recommend to the court that the defendant be sentenced
24 to life. And if this is ultimately your decision, and all
25 twelve of you agree, then Mr. Foreman and ladies and

1 gentlemen, the foreperson would sign that and date it and
2 inform the court of your decision.

3 Now, the last document that you have, this is the
4 unanimous recommendation for sentence for the death penalty.
5 And it is the same lead-in. We, the jury, having found
6 beyond a reasonable doubt the following statutory
7 aggravating circumstance or circumstances, and you would
8 have to write those out, now recommend to the court that the
9 defendant be sentenced to death.

10 Now, again, there is a signature line for all
11 twelve jurors who are deliberating and a place for a date.
12 And it would have to be a unanimous decision. All twelve of
13 you would have to sign the document.

14 Now, ladies and gentlemen, any decision that you
15 make in this case must be unanimous. All twelve of you have
16 to agree.

17 Again, regardless of the sentence that you decide
18 to impose, you must first determine that the State has
19 proven beyond a reasonable doubt at least one, or both, of
20 the alleged statutory aggravating circumstances. You may
21 impose the death penalty only if you unanimously find beyond
22 a reasonable doubt the existence of one of those aggravating
23 circumstances, and you further unanimously find and agree
24 beyond a reasonable doubt that the sentence should be death.

25 You may impose a sentence of life imprisonment

1 only if you unanimously find beyond a reasonable doubt one,
2 or both, of the aggravating circumstances and agree that the
3 sentence should be life imprisonment.

4 You may sentence the defendant to life
5 imprisonment, regardless of the presence or absence of
6 mitigating circumstances. In this case life means until the
7 death of the defendant without the possibility of parole.

8 Now, ladies and gentlemen, your lunch should be
9 here about right now. If it is, I am going to allow you to
10 have lunch before you begin your deliberations. I'm going
11 to let all fourteen of you stay together and go back to the
12 jury room just for a few minutes and let me go over the law
13 as I have explained it to you. And I will cover it with the
14 attorneys. I may bring you back in to cover some other
15 points of law, and I may not. I may have covered it.

16 If you should have any questions about the law,
17 you can write those questions to me and we will answer those
18 questions for you during your deliberations.

19 Go back to the jury room. Do not start your
20 deliberations now. Do not discuss the case exactly at this
21 time, and let me go over my charge with the attorneys first
22 very carefully. And then if I should come back, if I
23 misstated something, I'll do that. If I did, I didn't mean
24 to do it, but I could have, but I'll bring you back in and
25 restate it. If not, I'll send all the evidence back. And

1 if your lunch is not here, I'm going to let the twelve begin
2 their deliberations, and we would keep the two alternates
3 with us separately while the jury is deliberating or until
4 you reach a verdict.

5 And I would instruct the alternates that they will
6 be kept in another courtroom or another jury room and you
7 cannot discuss the case. If your services were needed, at
8 that time you could do that, but until you go in to
9 deliberate with this jury or something happens before
10 deliberations begin, I would not want you to have talked
11 about the case. Okay.

12 So if all of you would just step back for a minute
13 and do not begin deliberations at this time.

14 If y'all -- I'm just going to give y'all one copy
15 of those. Would y'all just leave them in your chairs there?

16 (Whereupon, at 12:37 p.m., the jury panel went to
17 the jury room, awaiting instructions to begin deliberations)

18 THE COURT: Additions or exceptions?

19 MS. STROM: Just one addition, Your Honor, and I
20 know that you have told them if -- like during voir dire and
21 everything else, but since the forms use the term
22 recommendation --

23 THE COURT: Oh, yeah.

24 MS. STROM: I think it may be prudent that we just
25 remind them again that any sentence that you will -- I know

1 that you have told them before, but I'm thinking right here
2 at the end we need to remind them.

3 THE COURT: I had a note. I don't know how I --

4 MS. STROM: I know you said last night that you
5 were going to do it.

6 THE COURT: Bring them back in.

7 MS. STROM: Do you want to see if there is
8 anything else from them?

9 THE COURT: Yes.

10 MR. GODFREY: There is nothing else from the
11 defense. We agree with the State on the recommendation.

12 THE COURT: Ladies and gentlemen, I think I'll let
13 them have lunch before we start deliberating. I don't know
14 if they should deliberate this case while they are having
15 food or not.

16 Any problem from the State if I let them have
17 lunch before they deliberate?

18 MR. ARIAIL: We don't have any problem. I just
19 think we ought to separate the alternates just in case.

20 THE COURT: Okay.

21 MR. ARIAIL: While they are eating lunch.

22 THE COURT: Bring the jury in.

23 They are setting up the lunch in one of the other
24 courtrooms and they are just going to go through and get
25 sandwiches. They may be able to deliberate. They need to

1 make their sandwiches first.

2 (Whereupon, at 12:40 p.m., the jury panel returned
3 to the courtroom)

4 THE COURT: Ladies and gentlemen, there is one
5 very important point that I omitted, and both sides agree,
6 and I certainly did not intend to do that, and I may have
7 told you this before, I think, that it would -- some other
8 point preliminarily or in voir dire.

9 The form uses the word recommend, that the jury
10 recommends a sentence, and that's used. Let me assure you
11 under no -- this court will follow the sentence determined
12 by the jury. I did not want there to be any question in
13 your mind. This court will follow the sentence that you
14 determine should be administered punishment in this case.
15 Okay.

16 And with that, I'm going to let you go out. And I
17 believe the procedure is going to be for y'all to make
18 sandwiches from McCallisters, or maybe they have got the
19 food in another room, I don't know, but once you do that, I
20 will go ahead and separate the two alternates in another
21 place. Y'all have to stay with us throughout until their
22 deliberations are concluded, okay? And do not discuss the
23 case at all until they complete their deliberations. All
24 right. The two of you can't talk about it.

25 Okay. Y'all may step out and have lunch. I'll

1 send the evidence back. I'll permit you to go back and
2 start your deliberations while you have lunch. You cannot
3 conduct any deliberations unless that door is closed and all
4 twelve jurors are in there to hear anything that's discussed
5 in the jury room. If any person leaves to go to the
6 bathroom, or go smoke -- I don't know if you take smoke
7 breaks or need fresh air or something. You cannot conduct
8 any discussions or deliberations with any one of the twelve
9 or more that are outside of the jury room. All twelve of
10 you have got to be in that jury room for the discussions and
11 deliberations in this case. All right. Thank you.

12 (Whereupon, at 12:43 p.m., the jury panel left the
13 courtroom)

14 THE COURT: If y'all want to go to lunch, if y'all
15 got a cell phone or something that you want to leave with
16 us, because they are going to be -- I think they are going
17 to be doing it right now, and it may be a good time. I
18 don't think they would have any questions, but I intend to
19 separate the two. And as soon as they get their sandwiches
20 and whatnot, I'm going to send the evidence back and let
21 them begin. Okay.

22 We will be in recess until they reach a verdict.
23 If y'all just leave the phone numbers with Caroline so that
24 we can reach you and get you back here. We wouldn't have to
25 wait -- we don't want to wait too long if they have a

1 question, but I think you have got 40, 45 minutes or an
2 hour, probably, to get some lunch, if you want to do that.

3 MS. STROM: And, Your Honor, I would just suggest
4 that -- I think defense only put in one exhibit. I would
5 just suggest that we look at the exhibits to make sure
6 everybody agrees that, you know, it's all there before we
7 send it back.

8 THE COURT: Okay. I would ask each side to make
9 sure that all of the exhibits are there. I would ask my
10 court reporter to make sure that the appropriate exhibits go
11 back, and do not send any of the court exhibits back.

12 MS. STROM: Thank you, judge.

13 (Off the record)

14 (Back on the record)

15 THE COURT: I want to make a part of the record --
16 Ms. Strom --

17 MS. STROM: Sir?

18 THE COURT: I'm going to make a part of the record
19 the order that I gave to the qualified jurors.

20 MS. STROM: Yes, sir.

21 THE COURT: Because -- I thought I had already
22 done that.

23 MS. STROM: Yes, sir.

24 THE COURT: In case I have not, it's dated
25 November the 6th, and we had all these copies, about 70 or

1 80 copies that we passed out to each juror after they were
2 qualified.

3 MS. STROM: Yes, sir.

4 THE COURT: And I'll make that part of the record
5 at this time, if it's not already a part of the record, as a
6 Court's Exhibit.

7 MS. STROM: Yes, sir.

8 THE COURT: We have kept those in a separate
9 binder. Thank you.

10 (Off the record)

11 (Back on the record)

12 MR. GIBSON: We concur with the exhibits as marked
13 as going back to the jury room.

14 MS. VERDIN: We agree with the exhibits.

15 (Summary of SCDC Records marked as Court's Exhibit
16 No. 5 for identification)

17 (Order For Qualified Jurors marked as Court's
18 Exhibit No. 6 for identification)

19 (Statutory Instructions marked as Court's Exhibit
20 No. 7 for identification)

21 (Unanimous Finding of a Statutory Aggravating
22 Circumstance marked as Court's Exhibit No. 8 for
23 identification)

24 (No finding of a Statutory Aggravating
25 Circumstance marked as Court's Exhibit No. 9 for

1 identification)

2 (Unanimous Finding of Sentence for Life

3 Imprisonment marked as Court's Exhibit No. 10 for

4 identification)

5 (Unanimous Recommendation of Sentence for Death

6 Penalty marked as Court's Exhibit No. 11 for identification)

7 (Juror Information Packets marked as Court's

8 Exhibit No. 12 for identification)

9 (Whereupon, at 1:30 p.m., the Jury Panel was
10 instructed to begin deliberations)

11 (Whereupon, at 3:00 p.m., proceedings were
12 reconvened)

13 THE COURT: I have been informed --

14 I'll give you the original indictment, Madam
15 Clerk, which we didn't have to use in the sentencing
16 proceeding.

17 I have been informed that the jury has reached a
18 verdict. I normally have to caution the audience, but we
19 don't have that many people here about any outbursts or
20 anything like that. Just maintain order and decorum, and
21 order in the decorum in the courtroom when the verdict is
22 rendered. Everyone has worked - bailiffs, and all the
23 agents, the SLED agents, and defense counsel and defendant -
24 everyone have conducted themselves on both sides. Both
25 lawyers have done an excellent job in presenting the case

1 and been very professional, and the court appreciates that.

2 We will bring the jury in.

3 Is the state ready to take the verdict?

4 MR. ARIAIL: Yes, Your Honor.

5 THE COURT: Defense ready?

6 MR. GODFREY: Yes, Your Honor.

7 THE COURT: Bring the jury in, please.

8 (Whereupon, at 3:03 p.m., the jury returned to
9 open court to report its verdict)

10 THE COURT: Mr. Foreman, ladies and gentlemen of
11 the jury, I understand that you have reached a verdict, is
12 that correct?

13 JURY FOREMAN: We have, Your Honor.

14 THE COURT: Okay. Would you hand it to the
15 bailiff, please, sir?

16 At this time the twelve jurors have come in. At
17 this time I'll bring the two alternate jurors who have been
18 separated and in a separate courtroom, without any objection
19 from either side.

20 MR. GODFREY: Without objection.

21 MS. STROM: No objection.

22 MR. ARIAIL: No objection.

23 THE COURT: Bring the alternates in.

24 (Whereupon, the alternate jurors were brought into
25 the courtroom)

1 THE COURT: The verdict appears to be in proper
2 form and I would ask the clerk to publish the verdicts.

3 THE CLERK: Your Honor, 98-GS-5220, the State of
4 South Carolina versus Freddie Eugene Owens, unanimous
5 finding of a statutory aggravating circumstance, we, the
6 jury, find beyond a reasonable doubt the following statutory
7 aggravating circumstance:

8 1. That the murder was committed while in the
9 commission of robbery while armed with a deadly weapon.

10 2. That the murder was committed while in the
11 commission of larceny with the use of a deadly weapon.

12 Signed foreperson Ronald D. Dillard.

13 Juror Joseph Hedrick.

14 Juror William Law.

15 Juror Pamela Benfield.

16 Juror Christian Zeimet.

17 Juror Nathan Asire.

18 Juror Sherry Gratzner.

19 Juror Sharon Breazeale.

20 Juror Donna Hanvy.

21 Juror Pamela Jennings Gregg.

22 Juror Susan B. Campbell.

23 And juror Randy R. Mathena.

24 Unanimous recommendation of sentence for death
25 penalty. We, the jury, having found beyond a reasonable

1 doubt the following statutory aggravating circumstance, to
2 wit:

3 That the murder was committed while in the
4 commission of robbery while armed with a deadly weapon.

5 2. That the murder was committed while in the
6 commission of larceny with the use of a deadly weapon.

7 Now recommend to the court that the defendant be
8 sentenced to death.

9 Signed Ronald D. Dillard, foreperson.

10 Juror Joseph G. Hedrick.

11 Juror William J. Law.

12 Juror Pamela S. Benfield.

13 Juror Christian L. Zeimet.

14 Juror Nathan K. Asire.

15 Juror Sherry L. Gratzner.

16 Juror Sharon Breazeale.

17 Juror Donna Hanvy.

18 Juror Pamela Jennings Gregg.

19 Juror Susan B. Campbell.

20 And juror Randy R. Mathena.

21 Ladies and gentlemen, the verdicts that I have
22 just published were the verdicts that you reached in the
23 jury room, I ask you are they your -- were they your
24 verdicts then and are they your verdicts now.

25 As I call your names, please answer yes or no.

1 THE COURT: This is the polling of the jury.
2 Standard procedure in these matters.
3 THE CLERK: Ronald Dillard.
4 JURY FOREMAN: Yes.
5 THE CLERK: Joseph Hedrick.
6 JUROR NUMBER 194: Yes.
7 THE CLERK: William Law.
8 JUROR NUMBER 252: Yes.
9 THE CLERK: Pamela Benfield.
10 JUROR NUMBER 29: Yes.
11 THE CLERK: Christian Zeimet.
12 JUROR NUMBER 474: Yes.
13 THE CLERK: Nathan Asire.
14 JUROR NUMBER 12: Yes.
15 THE CLERK: Sherry Gratzner.
16 JUROR NUMBER 458: Yes.
17 THE CLERK: Sharon Breazeale.
18 JUROR NUMBER 51: Yes.
19 THE CLERK: Donna Hanvy.
20 JUROR NUMBER 184: Yes.
21 THE CLERK: Pamela Gregg.
22 JUROR NUMBER 221: Yes.
23 THE CLERK: Susan Campbell.
24 JUROR NUMBER 66: Yes.
25 THE CLERK: And then the alternates are the

1 remaining names on the list.

2 And Randy R. Mathena.

3 JUROR NUMBER 272: Yes.

4 THE CLERK: Is there any more questions in regards
5 to the form of the verdict?

6 MR. GODFREY: No, Your Honor.

7 MR. ARIAIL: Nothing from the State.

8 THE COURT: All right.

9 Ladies and gentlemen, I want to thank you for your
10 conscientious service in this case this week. It was a very
11 heavy responsibility and difficult matter.

12 At this time I'm going to ask you to step back to
13 the jury room just for a few minutes until I take up some
14 legal matters with the court, and then I'll -- with the
15 attorneys, and then I'll come back and speak with you.
16 Okay. Y'all may step back there.

17 (Whereupon, at 3:13 p.m., the jury panel was
18 discharged)

19 THE COURT: From the State it would appear -- do
20 we have any people from the victim?

21 MR. ARIAIL: None that would wish to be heard.

22 THE COURT: All right. And I would be glad to --
23 if you want to -- we can take a brief recess or we will
24 entertain any motions that you have. Anything at this time?

25 MR. GODFREY: May it please the court?

1 THE COURT: Yes.

2 MR. GODFREY: On behalf of Freddie Owens, we would
3 move that the verdict be set aside and move for a new trial
4 and that the finding of the jury does not follow the
5 evidence that they had.

6 THE COURT: I would have to deny that motion.

7 Has the defense discussed with Mr. Owens if he
8 wants to make any statement to the court?

9 MR. GODFREY: I have not discussed that with him,
10 judge.

11 THE COURT: All right, sir.

12 MR. GODFREY: Judge, he's telling me that he does
13 not wish to make a statement.

14 THE COURT: Okay. If counsel and Mr. Owens would
15 approach the bench, please, for -- if you would come forward
16 for sentencing.

17 If the counsel would want to say anything, or Mr.
18 Owens, you have an absolute right to make statements to the
19 court, if you would like. Do you understand that?

20 THE DEFENDANT: Yes.

21 THE COURT: Do you have any statement that you
22 would like to make?

23 THE DEFENDANT: No, sir.

24 THE COURT: All right. Then the law requires me
25 to at this particular point make two findings.

1 I have heard all the evidence and testimony, as
2 all of you have, and it is a tragic situation for everyone
3 involved, but as the trial judge in this matter and prior to
4 the imposition of any sentence of death upon the defendant,
5 I find as an affirmative fact that the evidence in this case
6 warrants the imposition of the death penalty and its
7 imposition is not a result of prejudice, passion, or any
8 other arbitrary factor, and it is so ordered by the court,
9 November the 11th.

10 And the defendant, Mr. Owens, has been found
11 guilty by a jury of the offense of murder. This jury has
12 recommended that the defendant be sentenced to death.

13 Therefore, the judgment and sentence of the court
14 that the defendant Freddie Eugene Owens be taken to the
15 Greenville County -- or be turned over to the Department of
16 Corrections and then to be housed by the Department of
17 Corrections, be kept in close and safe confinement until the
18 15th day of May, 2007, upon which date between the hours of
19 six o'clock p.m. and six o'clock a.m. on May the 16th of
20 2007, or upon an order of execution issued by the South
21 Carolina Supreme Court, the defendant Freddie Eugene Owens
22 shall suffer death in the manner provided by law.

23 May God have mercy on his soul. Thank you.

24 MS. STROM: Judge, I was just thinking, do you
25 have to advise him of his right to appeal?

1 THE COURT: Okay. If you would bring him back in.

2 MS. STROM: That's the only thing.

3 THE COURT: Within ten days?

4 MS. STROM: Within ten days, yes, sir, he has to
5 serve his notice of appeal.

6 THE COURT: I'm sorry, Mr. Owens, you have right
7 to appeal this case within ten days, sir.

8 THE DEFENDANT: Okay.

9 THE COURT: Thank you very much.

10 MS. STROM: Thank you, Your Honor.

11 (END OF REQUESTED TRANSCRIPT OF RECORD)

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1
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3 CERTIFICATE
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5 I, the undersigned, Michael R. Watts, Official Court
6 Reporter for the Thirteenth Judicial Circuit of the State of
7 South Carolina, do hereby certify that the foregoing is a
8 true, accurate and complete Transcript of Record of the
9 proceedings had and the evidence introduced in the trial of
10 the captioned case, relative to appeal, in the Court of
11 General Sessions for GREENVILLE County, South Carolina, on
12 the 6th, 7th, 8th, 9th, 10th, 11th days of November, 2006.

13 I do further certify that I am neither of kin, counsel
14 nor interest to any party hereto.
15

16
17 February 14, 2007
18

19
20
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22
23
24
25


Michael R. Watts
Circuit Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
State of South Carolina)
v.)
Freddie Eugene Owens)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT
C.A. No. 1998-GS-23-5220

STATUTORY INSTRUCTIONS

In determining whether to recommend that the defendant be sentenced to life imprisonment or to death, you may consider the following statutory **AGGRAVATING CIRCUMSTANCES**:

1. That the murder was committed while in the commission of robbery while armed with a deadly weapon.
2. That the Murder was committed while in the commission of larceny with use of a deadly weapon.

You may also consider the following statutory **MITIGATING CIRCUMSTANCES**:

1. The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
2. The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.
3. The murder was committed while the defendant was under the influence of mental or emotional disturbance.

COURT'S	
EXHIBIT NO.	7
IDENTIFICATION/EVIDENCE	
DKT. #	
DATE	

4. 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.
5. The age or mentality of the defendant at the time of the crime.

You may also consider any **NON-STATUTORY** mitigating circumstances.

AND IT IS SO ORDERED.

November 11, 2006
Greenville, South Carolina


Larry R. Patterson
Presiding Judge

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

State of South Carolina)

v.)

Freddie Eugene Owens)

IN THE COURT OF GENERAL SESSIONS

THIRTEENTH JUDICIAL CIRCUIT

C.A. No. 1998-GS-23-5220

UNANIMOUS FINDING OF A STATUTORY AGGRAVATING CIRCUMSTANCE

We, the jury, find beyond a reasonable doubt the following statutory aggravating circumstance(s): 1. THAT THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF ROBBERY WHILE ARMED WITH A DEADLY WEAPON.
2. THAT THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF LARCENY WITH USE OF A DEADLY WEAPON.

Foreperson

Ronald D. Dillard
Ronald D. Dillard

Juror

Joseph G. Hedrick
Joseph G. Hedrick

Juror

William J. Law
William J. Law

Juror

Pamela S. Benfield
Pamela S. Benfield

Juror

Christian L. Zelnick
Christian L. Zelnick

Juror

Nathan K. Asire
Nathan K. Asire

Juror

Sherry L. Gratz
Sherry L. Gratz

Juror

Sharon Breazeale
Sharon Breazeale

Juror

Donna L. Hanvy
Donna L. Hanvy

Juror

Pamela Jennings Gregg
Pamela Jennings Gregg

Juror

Susan B. Campbell
Susan B. Campbell

Juror

Randy R. Mathena
Randy R. Mathena

November 11, 2006
Greenville, South Carolina

COURT'S	
EXHIBIT NO. <u>8</u>	
IDENTIFICATION/EVIDENCE	
DKT. #	
DATE:	

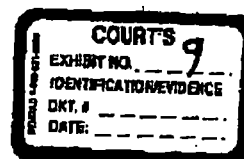
STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
State of South Carolina	)	C.A. No. 1998-GS-23-5220
	)	
v.	)	
	)	
Freddie Eugene Owens	)	
	)	

NO FINDING OF A STATUTORY AGGRAVATING CIRCUMSTANCE

We, the jury, are unable to unanimously agree on the existence of a statutory aggravating circumstance.

November ____, 2006
Greenville, South Carolina

Foreperson



STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
State of South Carolina	)	C.A. No. 1998-GS-23-5220
	)	
v.	)	
	)	
Freddie Eugene Owens	)	
	)	

UNANIMOUS RECOMMENDATION OF SENTENCE FOR LIFE IMPRISONMENT

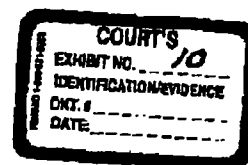
We, the jury, having found beyond a reasonable doubt the existence of the following statutory aggravating circumstance(s), to wit:

_____ now recommend

to the court that the Defendant be sentenced to life.

November ____, 2006
Greenville, South Carolina

Foreperson



STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

State of South Carolina)

v.)

Freddie Eugene Owens)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No. 1998-GS-23-5220

UNANIMOUS RECOMMENDATION OF SENTENCE FOR DEATH PENALTY

We, the jury, having found beyond a reasonable doubt the following statutory
aggravating circumstance(s), to wit:

1. THAT THE MURDER WAS COMMITTED WHILE IN THE COMMISSION
OF ROBBERY WHILE ARMED WITH A DEADLY WEAPON. 2. THAT THE
MURDER WAS COMMITTED WHILE IN THE COMMISSION OF LARCENY WITH
THE USE OF A DEADLY WEAPON.

now recommend to the court that the Defendant be sentenced to death.

Foreperson

Ronald D. Dillard
Ronald D. Dillard

Juror

Joseph G. Hedrick
Joseph G. Hedrick

Juror

William J. Law
William J. Law

Juror

Pamela S. Benfield
Pamela S. Benfield

Juror

Christian L. Zeimet
Christian L. Zeimet

Juror

Nathan K. Asire
Nathan K. Asire

Juror

Sherry L. Gratzner
Sherry L. Gratzner

Juror

Sharon Breazeale
Sharon Breazeale

Juror

Donna L. Hanvy
Donna L. Hanvy

Juror

Pamela Jennings Gregg
Pamela Jennings Gregg

Juror

Susan B. Campbell
Susan B. Campbell

Juror

Randy R. Mathena
Randy R. Mathena

November 11, 2006
Greenville, South Carolina

RECEIVED	COURT'S
	EXHIBIT NO. <u>21</u>
	IDENTIFICATION/EVIDENCE
	DKT. # _____ DATE: _____

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER AND
POSSESSION OF A FIREARM DURING THE
COMMISSION OF A VIOLENT CRIME

At a Court of General Sessions, convened on October 20, 1998,
the Grand Jurors of Greenville County present upon their oath:

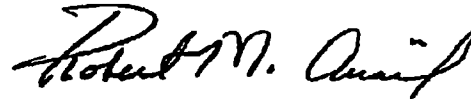
COUNT ONE - MURDER

That FREDDIE EUGENE OWENS did in Greenville County on or about November 1, 1997, while aiding, abetting and assisting Steven Andra Golden in the commission of an Armed Robbery, kill one Irene Graves by means of shooting her, and that the said victim died as a proximate result thereof. This is in violation of South Carolina Code of Laws § 16-03-10.

**COUNT TWO - POSSESSION OF A FIREARM DURING THE COMMISSION
OF A VIOLENT CRIME**

That FREDDIE EUGENE OWENS did in Greenville County on or about November 1, 1997, possess or visibly display a firearm during the commission of a violent crime, to wit: Murder and/or Armed Robbery. This is in violation of South Carolina Code of Law § 16-23-490.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

98-GS-23

005220

DOCKET NO. _____

WITNESSES

INV. J.G. Wood

GCSO

11-11-97

BCS

The State of South Carolina,

County of GREENVILLE

COURT OF GENERAL SESSIONS

OCTOBER 20

TERM 1998

GUILTY THE STATE
VS.

FREDDIE EUGENE OWENS

ARREST WARRANT NO. E-658835

ACTION OF GRAND JURY

TRUE BILL

Mason & Turner
FOREMAN GRAND JURY

Foreman of Grand Jury

VERDICT

Count 1 Guilty
Count 2 Guilty

Agnes Williams 2-15-99
Foreman of Petit Jury Date:

VO116
PCNC 1245 **Indictment for**

MURDER AND
POSSESSION OF A FIREARM DURING THE
COMMISSION OF A VIOLENT CRIME

VIOLATION § 16-03-10
VIOLATION § 16-23-490

SCANNED

611

STATE OF SOUTH CAROLINA)

COUNTY OF CHESTERFIELD)

STATE OF SOUTH CAROLINA)

vs.)

FREDDIE EUGENE OWENS)

Defendant)

IN THE COURT OF GENERAL SESSIONS

C.A. No. 98-GS-23-5218

98-GS-23-5220

98-GS-23-5222

VERDICT

We, the Jury, unanimously find, on the above mentioned indictments, that the Defendant, Freddie Eugene Owens, is:

98-GS-23-5218

☒

Guilty of Armed Robbery.

OR

☐

Not Guilty of Armed Robbery.

98-GS-23-5220 -- Count One

☒

Guilty of Murder.

OR

☐

Not Guilty of Murder.

AND -- Count Two

☒

Guilty of Possession of a Firearm During the Commission of a Violent Crime.

OR

☐

Not Guilty of Possession of a Firearm During the Commission of a Violent Crime.

98-GS-23-5222

☒

Guilty of Criminal Conspiracy.

OR

☐

Not Guilty of Criminal Conspiracy.

Robert D. Williams
Foreperson

February 15, 1999
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
STATE OF SOUTH CAROLINA)
vs.)
FREDDIE EUGENE OWENS,)
Defendant)

IN THE COURT OF GENERAL SESSIONS

STATUTORY INSTRUCTIONS

Ca. No. 98-GS-23-5220

In determining whether to recommend that the Defendant, Freddie Eugene Owens, be sentenced by the Court to Life Imprisonment or to Death, you may consider the following statutory AGGRAVATING CIRCUMSTANCE(S):

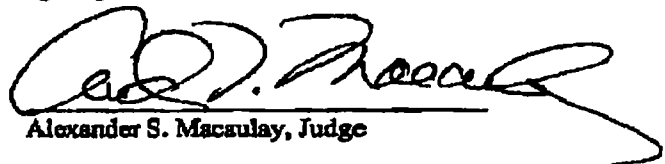
The murder was committed while in the commission of the following crimes or acts:

1. Robbery while armed with a deadly weapon.
2. Larceny with use of a deadly weapon.

You may also consider the following statutory MITIGATING CIRCUMSTANCE(S):

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 defendant was an accomplice in the murder committed by another person and his participation was relatively minor.
4. 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.
5. The age or mentality of the defendant at the time of the crime.

You may also consider any NON-STATUTORY mitigating circumstance(s).


Alexander S. Macaulay, Judge

February 17, 1999
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 STATE OF SOUTH CAROLINA)
)
 vs.)
)
 FREDDIE EUGENE OWENS,)
 Defendant)

IN THE COURT OF GENERAL SESSIONS

AGGRAVATING CIRCUMSTANCES

Ca. No. 98-GS-23-5220

We, the jury in the above-entitled case, find beyond a reasonable doubt the following statutory aggravating circumstance(s):

The murder was committed while in the
commission of the following crime
@ Robbery while armed with a deadly weapon

Foreperson Agnes M. Williams

Juror Richard H. Boler

Juror John A. Smith

Juror Christa R. R. R.

Juror Sherry A. Wilson

Juror Donald B. Linder

Juror Catherine S. Elmer

Juror Martha Barnhart

Juror Robert J. Luther

Juror [Signature]

Juror [Signature]

Juror [Signature]

February 17, 1999
 Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

THE STATE

VS.

FREDDIE E. OWENS,
DEFENDANT.

IN THE COURT OF GENERAL SESSIONS

THIRTEENTH JUDICIAL CIRCUIT

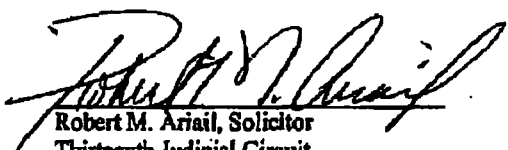
STATE'S NOTICE OF EVIDENCE
IN AGGRAVATION

98-GS-23-05218, 98-GS-23-5220, 98-GS-23-5222

COMES NOW THE STATE OF SOUTH CAROLINA, by and through its attorney, Robert M. Ariail, Solicitor for the Thirteenth Judicial Circuit and hereby gives notice to the defendant, through his counsel of record, Steve Sumner, of the evidence the State may introduce as evidence of aggravation.

1. That the murder occurred during the commission of a robbery while armed with a deadly weapon pursuant to 16-3-20(C)(a)(1)(d);
2. That the murder occurred during the commission of a larceny while armed with a deadly weapon pursuant to 16-3-20(C)(a)(1)(e);
3. Victim Impact Testimony;
4. Defendant's prior criminal history;
5. The character/characteristics of the defendant and the circumstances of the crime; and/or
6. Defendant's propensity for future dangerousness, to include any and all acts of misconduct and/or criminal activity on the part of the defendant while he has been incarcerated in any detention or corrections facility and any and all acts of misconduct and/or criminal activity on the part of the defendant which may occur during the commission of this proceeding.

Respectfully submitted this 15th day of August, 2006.


Robert M. Ariail, Solicitor
Thirteenth Judicial Circuit

*Original
sent to
Litch*

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

STATE OF SOUTH CAROLINA

vs.

FREDDIE EUGENE OWENS,
Defendant

IN THE COURT OF GENERAL SESSIONS

RECOMMENDATION OF SENTENCE
DEATH PENALTY

Ca. No. 98-GS-23-5220

We, the jury in the above entitled case, having found beyond a reasonable doubt the existence of the following statutory aggravating circumstance(s),

*The murder was committed while in the commission
of the following crime:
① Robbery while armed with a deadly weapon*

now recommend to the Court that the Defendant, Freddie Eugene Owens, be sentenced to death.

Foreperson *Agnes A. Williams*

Juror *Richard A. Bello*

Juror *John A. Smith*

Juror *Christina Reese*

Juror *Sherry J. White*

Juror *Donald B. Cook*

Juror *Catherine S. Elmes*

Juror *Martha Barnhart*

Juror *Robert C. Butler*

Juror *Lucie Lewis*

Juror *John F. Taylor*

Juror *John M. Reynolds*

February 17, 1999
Greenville, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

STATE OF SOUTH CAROLINA)

vs.)

FREDDIE EUGENE OWENS,)
Defendant)

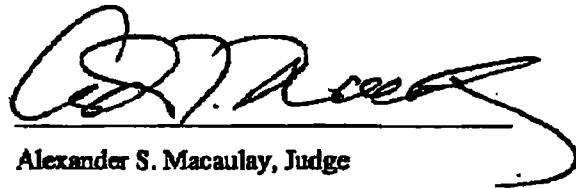
IN THE COURT OF GENERAL SESSIONS

SENTENCE

Ca. No. 98-GS-23-5220

The Defendant, Freddie Eugene Owens, has been found by the jury to be guilty of the offense of murder. The jury has recommended that the Defendant should be sentenced to death.

It is, therefore, the judgment of the law and the Sentence of the Court that the Defendant, Freddie Eugene Owens, be taken to the Greenville County Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 16th day of April, 1999, upon which day between the hours of six o'clock P.M. and six o'clock A.M., or upon an Order of Execution issued by the South Carolina Supreme Court, the Defendant, Freddie Eugene Owens, shall suffer death by electrocution or by lethal injection in the manner provided by law.


Alexander S. Macaulay, Judge

February 17, 1999

Greenville, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
State of South Carolina)
v.)
Freddie Eugene Owens)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT
C.A. No. 1998-GS-23-5220

ORDER

Handwritten:
1998 May 14, 2006
Greenville County Clerk
of Court
S.C.

Defendant has been found by a jury to be guilty of the offense of murder. This jury has recommended that Defendant should be sentenced to death.

It is, therefore, the judgment and sentence of the court that Defendant, Freddie Eugene Owens, be taken to the Greenville County Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the fifteenth day of May, 2007, upon which day between the hours of six o'clock P.M. and six o'clock A.M. on May sixteenth, 2007, or upon a order of Execution issued by the South Carolina Supreme Court, Defendant, Freddie Eugene Owens, shall suffer death in the manner provided by law.

AND IT IS SO ORDERED.

November 11, 2006
Greenville, South Carolina

Handwritten signature of Larry R. Patterson
Larry R. Patterson
Presiding Judge

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

State of South Carolina)

v.)

Freddie Eugene Owens)

IN THE COURT OF GENERAL SESSIONS

THIRTEENTH JUDICIAL CIRCUIT

C.A. No. 1998-GS-23-5220

Handwritten:
 Filed Nov 11, 2006
 Greenville Court Clerk
 H. Court
 Greenville Court
 SC

As the trial judge in the above entitled action, and prior to the imposition of the death sentence upon Defendant, I find as an affirmative fact that the evidence of this case warrants the imposition of the death penalty and its imposition is not a result of prejudice, passion, or any other arbitrary factor.

AND IT IS SO ORDERED.

November 11, 2006
 Greenville, South Carolina

Signature of Larry R. Patterson
 Larry R. Patterson
 Presiding Judge

08-102

F08102

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

THE STATE,

RESPONDENT

V.

FREDDIE EUGENE OWENS,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Chief Appellate Defender

LANELLE C. DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The trial judge abused his discretion when he summarily disqualified a potential juror, Sonya Ables (Juror Number 1), solely because she "went to [her] pastor and talked to him about [the death penalty]," as he incorrectly believed "there is a case right on point, that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law."

2. The trial judge committed reversible error by admitting Owens' prison disciplinary records, as they violated the rule against hearsay, as well as the Sixth and Fourteenth Amendments.

3. The trial judge committed reversible error by allowing the Solicitor to argue in closing that the conditions of life imprisonment in general justified a death sentence for Owens, as this argument injected an arbitrary factor into the jury sentencing considerations in violation of S.C. Code Section 16-3-25(C)(1).

STATEMENT OF FACTS

Halloween 1997 was over, but during the early morning hours of November 1 two men robbed a Speedway convenience store in Greenville and fatally shot the clerk, Irene Graves, once in the head when she was unable to open the safe. See *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001). The grand jury indicted Freddie Owens and Steven Golden for Grave's murder, armed robbery and two related but lesser offenses.

In February 1999 the State sought the death penalty against both Owens and Golden at a joint trial. Judge Alexander S. Macaulay presided. The second day of jury selection Golden pleaded guilty and avoided a possible death sentence in return for his testimony against Owens. Owens' defense was alibi. The jury found him guilty as charged. That night one of Owens' cellmates at the Greenville County Detention Center, Christopher Lee, who was in jail for a traffic offense, was brutally murdered. The following morning Owens gave SLED agents a statement in which he claimed sole responsibility for the homicide. This statement became the centerpiece of the State's case at sentencing. Owens was sentenced to death.

On direct appeal Owens argued that defense counsel had not been afforded an adequate opportunity to investigate the circumstances surrounding Lee's death. The Court agreed and remanded for resentencing. *Id.*

In January 2003 Judge John W. Kittredge presided at the resentencing hearing. Owens waived his right to a jury. The State relied primarily upon Owens' purported bad

conduct while in prison since his initial trial and, once again, his statement regarding Lee's murder. The judge sentenced Owens to death in a written order dated February 14, 2003.*

The notice of intent to appeal was untimely. The Court construed the letter which accompanied the late notice as a petition for a common law writ of certiorari in its original jurisdiction and granted the petition. Owens then argued:

The judge erred during the jury waiver colloquy by informing Owens that his best hope for a life sentence might ultimately depend on lying jurors who would "claim to support the death penalty in hopes of getting on the jury" when "in reality such a juror is opposed to the death penalty and ... when they're selected and the time comes, they refuse to vote for the death penalty and will only vote for life."

Brief of Appellant, p. 3. The Court agreed and again remanded for resentencing. *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004).

On November 6 through 11, 2006, Judge Larry R. Patterson presided at Owens' jury resentencing. The State relied on Owens' alleged poor behavior while incarcerated as before, and a forensic pathologist attempted to correlate his own findings with Owens' statement describing the manner of Lee's death. The judge charged the jury on two statutory aggravators:

- (1) The murder was committed while in the commission of robbery while armed with a deadly weapon; and :
- (2) The murder was committed while in the commission of larceny with use of a deadly weapon

S.C. Code Section 16-3-20 (C)(a)(1)(d and (e). He also charged five mitigators:

* The judge specifically afforded "no consideration" to Owens' "alleged involvement" in the homicide of his cellmate. The accuracy of Owens' statement remains in doubt and he has never been prosecuted for that incident.

- (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 defendant was an accomplice in the murder committed by another person and his participation was relatively minor.
- (4) 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; and
- (5) The age or mentality of the defendant at the time of the crime

Section 16-3-20(C)(b)(1), (2), (4), (6) and (7). The jury found both aggravators and recommended death. The judge sentenced Owens accordingly.

ARGUMENT

1.

The trial judge abused his discretion when he summarily disqualified a potential juror, Sonya Ables (Juror Number 1), solely because she "went to [her] pastor and talked to him about [the death penalty]," as he incorrectly believed "there is a case right on point, that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law."

In response to the judge's leading question on voir dire, potential juror Sonya Ables (Juror Number 1) stated that she was probably most like the hypothetical juror who could never give the death penalty under any circumstances. ROA p. 526, lines 12-17. The judge followed up with only two additional questions exploring Ables' personal feelings about capital punishment:

Understanding [the] process, and if you heard evidence in aggravation and mitigation, do you feel that you could seriously give meaningful consideration to aggravating circumstances, mitigating circumstances, and write a sentence of death?

ROA p. 528, lines 11-15. And:

If that were to be the determination of the jury, based on evidence and testimony in mitigation and aggravating evidence, you would be called upon to sign your name to the death verdict. Could you do that?

ROA p. 528, lines 20-23. Her answer:

I thought about it a lot since October [2006]. I really have. I lost a lot of sleep over it. I really don't believe that I could. ... I don't think I can do it. I have - it's that thing of for me personally just believing that, yes, he should get the death penalty, but being the one to write that sentence, personally I just don't think that I can do it. ... I just don't believe that I

could do it, you know, and just be able to go forward with my life then, and then – I just don't think that I can do it and live okay. It's just too deep within me. I have battled it since you told us that in October. I thought about it a lot. I went to my pastor and talked to him about it. I really don't think that I could do it.

ROA p. 526, lines 19-22; ROA p. 528, lines 16-19; ROA p. 528, line 24 – p. 529, line 5. At this point the judge excused Ables from the courtroom and summarily disqualified her from serving on Owens' jury for the following reason:

Ladies and gentlemen, there's a case right on point, that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law.

ROA p. 529, lines 10-14. He afforded defense counsel no opportunity to rehabilitate Ables.

ROA p. 529, line 15 – p. 484, line 2.

Witherspoon v. Illinois, 391 U.S. 510 (1968), holds that a capital defendant's right to an impartial jury under the Sixth and Fourteenth Amendments is violated by a jury selection procedure which automatically removes for cause those members of the venire who express conscientious objections to the death penalty. *Wainwright v. Witt*, 469 U.S. 412 (1985), provides that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'." 469 U.S. at 424, quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980). See, also, *State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007).

S.C. Code Section 16-3-20(E) similarly provides:

In a criminal act 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.

Lockhart v. McCray, 476 U.S. 162, 176 (1986), emphasizes:

It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

The bottom line:

The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oath."

Gray v. Mississippi, 481 U.S. 648, 658 (1987), quoting *Witt*, 469 U.S. at 423.

The disqualification of even a single juror in violation of *Witherspoon* and *Witt* can never be harmless error. *Id.*

The Court has held that S.C. Code Section 14-7-1010 "requires the judge [to] determine whether a juror is disqualified or exempted by law, a determination that may be made before [the] parties are given an opportunity to examine the juror in a death penalty case." *State v. Wise*, 359 S.C. 14, 596 S.E.2d 475, 479 (2004).

When the record reveals a juror plainly is not qualified, after thorough examination by the trial judge, to serve and it does not reasonably appear further examination would likely reveal the juror could subordinate his views and apply the law of the state, a reasonable basis exists for excusal for cause of the juror without further examination by defense counsel.

596 S.E.2d at 481. See, also, *State v. Tucker*, 334 S.C. 1, 512 S.E.2d 99 (1999).

The undersigned have been unable to identify any case, state or federal, which supports the proposition that, "if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law." More about this shortly.**

In *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996), an already-qualified juror was excused after he subsequently concluded that his religious beliefs would prevent him from sentencing anyone to death under any circumstances. In *State v. Tucker*, S.E.2d at 104, a prospective juror was disqualified when he indicated that "his religious beliefs would not allow him to sit as a juror and that the special circumstances which might allow him to serve would require four days of counseling." Similarly, in *State v. Wise*, 596 S.E.2d at 479, a prospective juror was excused after she testified that "her beliefs were personal and she was unaware of any pastoral counseling or similar program she could undergo in order to sit in judgment of another person." The religious convictions of the two jurors in *Tucker* and *Wise* precluded them from finding a defendant guilty, much less sentencing someone to death. Finally, in *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883, 887 (2005), the disqualified juror "unequivocally stated ... that she could not consider the law regarding imposing the death penalty because of her religious beliefs," then apologized and began sobbing.

As noted, the judge asked Ables exactly three questions, the first of them leading, to ascertain her opinion about capital punishment. She never unequivocally indicated she could not impose the death penalty because of her religious beliefs. Any reservations about capital punishment she tentatively expressed were not sufficient to disqualify her for cause under *Witherspoon* and *Witt*. In *Darden v. Wainwright*, 477 U.S. 168, 178 (1986), for

At this point it should be observed that such a "rule" would appear to violate the Equal Protection Clause of the Fourteenth Amendment. See, for example, *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994).

example, a prospective juror answered "yes" when asked by the judge, "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" The Supreme Court observed, "The precise wording of the question asked of [the juror], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty." *Id.* The same holds true here.

In any case, the judge did not disqualify Ables because of her religious uncertainty about capital punishment. He removed her because of his erroneous belief that "there's a case right on point that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law." Automatically disqualifying Ables for this (non)reason constituted an abuse of discretion. See, also, *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002).

A comparison of the truncated voir dire and removal of Ables with the treatment of other potential jurors, both for and against the death penalty, underscores this point. Keith Faust (Juror Number 133) initially told the judge that he would always sentence a defendant guilty of murder to death and could not even consider life imprisonment, regardless of the circumstances. ROA p. 650, line 22 – p. 651, line 12. He was quite emphatic about his beliefs. ROA p. 651; lines 13 and 14. The Solicitor nevertheless requested and received an opportunity to rehabilitate Faust. ROA p. 651, lines 18-25. Faust eventually agreed that he could "meaningfully consider imposing either a life imprisonment sentence or a death sentence." ROA p. 660, lines 10-16. The judge found him qualified to sit on Owens' resentencing jury. ROA p. 667, lines 10 and 11. (The defense wisely used a peremptory

challenge to preclude Faust from sitting as an alternate. ROA p. 1069, line 25 – p. 1070, line 5.) Nor did the judge summarily disqualify a trio of jurors who initially expressed religious reservations against capital punishment. See Margaret Payne (Juror Number 324), Patsy Barton (Juror Number 22) and John Adams (Juror Number 2). ROA p. 301, line 3 – p. 304, line 13 (Payne); ROA p. 593, line 15 – p. 597, line 1 (Barton); ROA p. 925, line 21 – p. 927, line 15 (Adams). Another juror, Rebecca Hunter (Juror Number 211), was rehabilitated by defense counsel and qualified over the Solicitor's objection after initially indicating that she could never give the death penalty "[b]ecause of my moral convictions." ROA p. 630, line 22 – p. 645, line 17.

A comparison of Ables' answers with these other jurors' demonstrates that the judge's removal of Ables resulted not from her religious doubts about the death penalty, which were left relatively unexplored, but because she was a woman who had talked to her priest about capital punishment after learning she might have to sit on a death penalty case. The judge automatically removed Ables without determining if her beliefs would have substantially impaired her ability to perform the duties required of a capital juror.

The inflexible application of a general rule excluding women who seek religious guidance to clarify their feelings and beliefs about capital punishment violates the Sixth and Fourteenth Amendments. *Wainwright* and *Witt*. It constitutes an abuse of discretion and reversible error as a matter of law. *Gray*.

The Court should reverse Freddie Owens' death sentence and remand for resentencing.

The trial judge committed reversible error by admitting Owens' prison disciplinary records, as they violated the rule against hearsay, as well as the Sixth and Fourteenth Amendments.

FACTS

During the sentencing phase, the State called Major Thierry Nettles, who was the custodian of records for the Department of Corrections at Lieber Correctional Facility, where records pertaining to Owens were kept. ROA p. 1406, line 2; ROA p. 1411, lines 22-23; ROA p. 1413, lines 3-9. The defense immediately objected and the judge held an *in camera* hearing related to Owens' records being admitted. ROA p. 1406, lines 3-7.

The defense stated their objection to the court:

Your Honor, the defense would object to the testimony of Mr. Nettles to the extent that he intends to talk about records, any SCDC records regarding incidents or behavior. Our understanding of the law is that - and I'm looking at this case, is *Ex parte Department of Health and Environmental Control v. the State*, or *State v. John Doe*, and I can give you the cite of it - but they have to prove in order to get business records in, which I assume that's what they are trying to get them into, or the venue they are trying to get into, they have to prove the record in themselves trustworthy. My problem with these records are I do not believe they are trustworthy.

ROA p. 1406, Lines 10-22. And:

In a lot of these occasions, Your Honor, they are talking about attacks on guards. So the person filling out the record would be the victim. It would be extremely difficult for me to think that a victim's testimony, without any other inquiry whatsoever, would be trustworthy.

ROA p. 1406, line 23 - p. 1407, line 2.

The State argued that these records were admissible as a business record under Rule 803(6), SCRE:

Your Honor, I do believe that these records do fall - do come into evidence under the Business Record Act, that we must show - I'm getting to the rule real quick, Your Honor. According to the Rule 803(6), records of regularly conducted activity. A memorandum, report, or record compiled at or near the time of the incident, and if it is shown that that is compiled at the time of the incident, and the custodian of records can testify to that. Then it is admitted into evidence under the Business Record Act, Your Honor.

ROA p. 1407, line 19 - p. 1408, line 4. The defense responded that trying to enter these prison records "would be the same as the police trying to enter an incident report in a regular general sessions trial." ROA p. 1407, lines 10-12.

During the *in camera* testimony of Major Nettles, the State asked a series of questions related to record-keeping at SCDC.

Q. And as part of the business of housing inmates, is it the ---- is it the normal course of business to record incidents of infractions or rule violations or assaults by the inmate?

A. Yes, ma'am.

Q. And are those records kept in the normal course of business of the corrections department?

A. Yes, ma'am.

Q. And the records which are kept, are they made at or near the time of the incident involved?

A. Yes, ma'am.

Q. And are they made by persons who have personal knowledge of the events which occurred?

A. Yes, ma'am.

ROA p. 1412, lines 10 - 23. On cross-examination, Nettles acknowledged the subjectivity of the records:

Q. Now let me ask you this about these incidents reports. Are there ever incidents which occur which are not reported incidents, incident reports; violations of the rules which are not---an incident report is not made from?

A. Sure there is.

Q. So there is a subjective component as to what comes - what an incident report---Let me back up. So there is some subjective component to determining what events caused the creation of an incident report, is that correct?

A. It's the degree of severity.

Q. Okay. So basically somebody when they make an incident report in the first case, they are making some kind of judgment as to the severity of the situation?

A. You are correct. Normally, that's the correctional officer on the scene.

ROA p. 1417, lines 5-21.

After the proffer of Major Nettles' testimony, the judge said that it appeared that the SCDC would be in the nature of a business which keeps regular records of incidents in the ordinary course of business. However, the judge ruled that subjective statements or opinions and judgments and hearsay within hearsay could not come in. He ruled that a record of an incident could come in but that the specific facts and circumstances surrounding the incident could not come in as they would be subjective. Nevertheless, the judge said that it was absolutely hearsay not subject to cross-examination. ROA p.

1413, line 16 – p. 1414, line 25; ROA p. 1419, lines 20-25. The judge decided to go through each incident separately to determine which ones could come in.

Ultimately, the State prepared a list of incidents which they believed met the judge's ruling and gave this list to the judge and defense for review. The defense renewed their objection to the records in their entirety but agreed to review the list. ROA p. 1431, lines 11-17; ROA p. 1427, lines 5-6. After some changes, the defense said, "[s]ubject to our earlier objections, given the court's ruling, this exhibit as proposed now is fine with us." ROA p. 1436, lines 8-11.

Major Nettles testified before the jury as to the incidents in the SCDC report:

1. April 13, 2001, breaks toilet, sink and sprinkler
2. May 26, 2001, throws hot water on another inmate
3. May 27, 2001, had six and half inch shank
4. June 14, 2002, spat on correctional officer
5. February 8, 2002, a fourteen inch solid brass shank
6. March 29, 2002, stabs correctional officer with shank
7. June 12, 2002, stabs Andra Golden in shower
8. June 15, 2002, kicks inmate restrained in chair
9. August 5, 2002, slaps male nurse
10. August 17, 2002, hits officer in head with food tray
11. August 23, 2002, hits officer in face with his fist
12. October 22, 2002, hits officer Eaton in face with his fist
13. October 23, 2002, sets fire to cell
14. December 22, 2002, shank made from fencing
15. December 30, 2002, a ten inch made from a push rod of sink
16. July 17, 2005, spits in face of officer Jones
17. August 26, 2005, slaps officer Henley in face
18. August 31, 2005, sets fire to cell
19. September 11, 2005, threatens officer Jones
20. January 1, 2006, a 12 inch homemade knife
21. January 3, 2006, breaks cell door with broom
22. January 13, 2006, Throws feces on officer Williams hitting him in face
23. February 3, 2006, spits in face of inmate
24. February 4, 2006, orally threatens officer Jones

25. February 28, 2006, a 12 inch weapon hidden in mattress
26. April 4, 2006, a eight and half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage
27. May 1, 2006, sets fire to mattress
28. May 20, 2006, throws coffee on Officer Smith.

ROA p. 1441, line 22 – p. 1443, line 13.

The Judge's ruling was reversible error. The records were hearsay and did not fall under an exception to the rule against hearsay and also violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. The admission of these prison records additionally violated due process under the Fourteenth Amendment to the United States Constitution.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *Rule*

801(C), SCRE. The business records exception states that even though the declarant is available to testify as a witness:

A memorandum, report, record or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(6), SCRE.

The Supreme Court ruled in *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996), that disciplinary records from capital defendant's incarceration were admissible at sentencing under business records exception because they were relevant to defendant's future adaptability in prison. The prison records in *Whipple* included "various minor infractions" and a drawing by another inmate depicting a bottle of "Cold Filter Whipple" captioned, "If you want to be a woman killer, drink some cold filtered Whipple and get yourself fried." The Court held that the issue was not preserved for review but went on to say that, in any event, the records were admissible under the business records exception.

The Uniform Business Records as Evidence Act, S.C. Code Section 19-5-510, was enacted before the South Carolina Rules of Evidence became effective. *Rule 1103, SCRE*. Section 19-5-510 states:

The term business shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The Rules of Evidence, which became effective after Business Records Act, include a requirement that the records must be trustworthy with no subjectiveness. The prison disciplinary records in Owens' case were admitted as business records under *Rule 803(6), SCRE*.

The United States Supreme Court focused on the matter of trustworthiness in *Crawford v. Washington*, 541 U.S. 36 (2004), where it ruled that out-of-court statements that are testimonial are barred under the Confrontation Clause unless witnesses are unavailable and defendants had a prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable abrogating *Ohio v. Roberts*, 448 U.S. 56 (1980).

The Court reached this conclusion after an in depth review of the history of the hearsay rule and the Confrontation Clause. During the historical review, the Court cited the South Carolina case of *State v. Campbell*, 1 S.C. 124, 125 (1844), which stated: "One of the 'indispensable conditions' of the South Carolina Constitution is that prosecutions be carried on by witnesses confronted by [the accused], and subjected to his personal examination."

The Court in *Crawford* declined to offer a comprehensive definition of testimonial and nontestimonial evidence, but did define these terms to some extent. It explained that an accuser who makes a formal statement to government officers is testimonial in a sense that a person who makes a casual remark to an acquaintance does not. The involvement of government officers in the production of testimonial evidence presents the risks for prosecutorial abuse. The Court also ruled that "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" would be considered testimonial. Materials such as affidavits, where the defendant was unable to cross-examine and would reasonably be expected to be used prosecutorially, were included in the various formulations of testimonial statements.

The *Crawford* Court went on to say that the ultimate goal of the Confrontation Clause is to ensure reliability of evidence, but that it is a procedural rather than substantive guarantee, in that it commands not that evidence be reliable but that reliability be assessed in a particular manner, i.e., by testing in crucible of cross-examination.

Freddie Owens was being accused by the people paid to guard him and watch over him for almost ten years of numerous and serious disciplinary infractions and violations of the rules without having, nor without ever having had in the past, the opportunity to question and cross-examine these witnesses. This was a direct violation of the Confrontation Clause of the Sixth Amendment, as it involved the unreliable testimonial evidence that *Crawford* meant to exclude. These were not business records but were accusatory testimonial statements and affidavits made by witnesses and victims who were not in court simply disguised as business records.

First, the records were hearsay because they were out-of-court statements made by officers who were not in court to testify. They did not meet the business records exception under Rule 803(6) because the statements contained subjective opinions and judgments. Rule 803(6) states clearly that subjective opinions and judgments contained in the records should not come in. Major Nettles testified that the correctional officers decided which incidents went into the incident report based on the severity of the event. This clearly made even the inclusion of an event a subjective judgment whether the details were described or not.

In the case of *In re Harvey*, 355 S.C. 53, 584 S.E.2d 893 (2003), the Supreme Court ruled that the log book of the treatment center where the defendant had resided, which contained summaries of "critical incidents" in which the defendant had been

involved, were not admissible under the business records exception because of the subjective opinions and judgments included in the log. The staff reported any behaviors that the staff decided were significant in the log book. The Court ruled that improper admission of the log book was not harmless.

Owens' case is similar to *In re Harvey* in that just the entry of an event into the disciplinary record was a subjective judgment and opinion. The officers had a personal stake in the disciplinary records because they were the victims of the incidents. Owens actually threw feces into the face of an officer, an act which would invoke the personal emotions and anger of anyone as is the nature of human beings. The officers had every incentive to distort the records against Owens whether it was intentional or not. Of the twenty-eight incidents included in Major Nettles' testimony to the court, thirteen of them involved direct assaults of various nature against correctional officers; five involved the finding of a shank in Owens' cell, and three involved setting fires in his cell and only four involved assaults against other inmates. ROA p. 1441, line 16 - p. 1443, line 14.

The statements were made under circumstances which would lead an objective witness to believe that the statement would be available for use at a trial later. These officers were guards on death row. They knew that a person's prison disciplinary records could be admitted at the sentencing phase. Owens had already been resentenced to death two previous times. The States' case had relied heavily on Owens' conduct in prison during his last resentencing trial. The officers made these entries into the disciplinary records with the full understanding - indeed, the expectation - that this information would be used in a future sentencing trial.

Carter v. Florida, 951 So.2d 939, 32 Fla.L. Weekly D651 (2007), held that the officer's police report which contained victim's sworn statement concerning incident, did not fit within business or public records exception to hearsay rule and that the error in admitting the officer's police report was not harmless.

Commonwealth v. Trapp, 396 Mass. 202, 485 N.E.2d 162 (1985), held that the officer's disciplinary reports describing incidents involving defendant when he was detained at house of corrections awaiting trial were hearsay and were not admissible as business records. The court said that the common law exceptions to the rule excluding hearsay depended on two elements: a necessity for evidence that would otherwise be excluded and a guarantee of trustworthiness in the circumstances surrounding the making of the hearsay declarations. The opinion points out that when the State has custody and control of the accused, a dispute or controversy has already begun. During the defendant's trial for murder the trial judge admitted disciplinary records from his period of incarceration awaiting trial. The court said the dispute had already begun and that these records were so prejudicial as to require reversal of the judgments.

Brown v. State, 274 Ga. 31, 549 S.E.2d 107 (2001), held that the narrative portion of police report was not admissible under the business records hearsay exception. "Police work is often heavily influenced by the beliefs, impressions, and at times, hunches of the investigating officer. It is because of these difficulties that police report narratives do not fit easily within the business records exception to the hearsay rule". 549 S.E.2d at 109.

In *California v. Green*, 399 U.S. 149, 158 (1970), the Supreme Court held that untrustworthy evidence should not be presented to the triers of fact and that out-of court

statements are usually excluded because they lack trustworthiness. Included in the Court's reasons for untrustworthiness were two issues: (1) the witness not being available for the jury to assess his demeanor and credibility and (2) the witness not being subject to cross-examination.

The admission of these incidents also violated due process under the Fourteenth Amendment to the United States Constitution. The sentencing process must satisfy requirements of the due process clause. *Gardner v. Florida*, 430 U.S. 349 (1977). A capital defendant is denied due process when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain. 430 U.S. at 362, *State v. Riddle*, 291 S.C. 232, 353 S.E.2d 138 (1987).

For these reasons, the trial judge erred in admitting Owens' prison disciplinary records under the business records exception to the rule against hearsay. This Court should reverse his death sentence and remand for resentencing.

The trial judge committed reversible error by allowing the Solicitor to argue in closing that the conditions of life imprisonment in general justified a death sentence for Owens, as this argument injected an arbitrary factor into the jury sentencing considerations in violation of S.C. Code Section 16-3-25(C)(1).

One year before Owens' resentencing the Supreme Court decided *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005). The opinion gave fair warning to all:

We take this opportunity ... to caution the State and the defense that the evidence presented in the penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

623 S.E.2d at 385.

Neither the State nor the defense introduced evidence regarding general prison conditions at Owens' resentencing. But the Solicitor was not deterred. He simply made the following argument without evidentiary support:

Sure, you and I may think going to prison would be a serious thing and it would be, but what about Freddie Owens? Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, but he will still have food to eat. They will provide him clothes. He will have books to read. He will be able to recreate and exercise. He will have doctors to take care of him. He will have the clothing that they provide, and he will have contact with his

family and loved ones and TV at times, and he will have family business. Not much more than a change of address for Freddie Owens. So don't think putting Freddie Owens in prison for the rest of his life is going to be a significant punishment for him. The death penalty is the appropriate punishment.

ROA p. 1615, lines 3-16.

Two months later the Court decided *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007). During the sentencing phase of that case the State presented testimony "regarding the privileges available to an inmate who receives a sentence of life without parole," which included "access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors." 640 S.E.2d at 452-3. The Court reversed Burkhart's death sentence, holding that "this entire subject matter injected an arbitrary factor into the jury sentencing considerations" in violation of S.C. Code Section 16-3-25(C)(1), which requires the Court to reverse any death sentence "imposed under the influence of passion, prejudice, or any other arbitrary factor." *Id.*

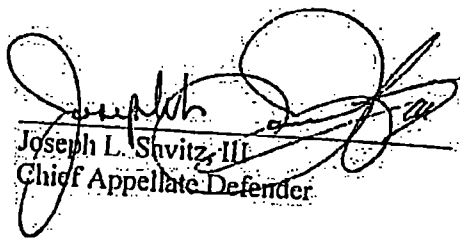
Burkhart leaves open the question of whether this error can ever be harmless. Regardless of how that issue is ultimately resolved by the Court, the error could not possibly have been harmless in Owens' case. The Solicitor specifically contrasted Owens' evidence in mitigation with his own evidence-free depiction of life imprisonment as nothing less than an extended free vacation. In *State v. McClure*, 342 S.C. 403, 537 S.E.2d 273, 275 (2000), which also involved an improper sentencing phase argument, the Court noted that "the evaluation of the consequences of an error in the sentencing phase of a capital trial are more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all."

The Court should reverse Freddie Owens' death Sentence and remand for resentencing.

CONCLUSION

The trial judge committed three reversible errors during Freddie Owens' capital resentencing. This Court should reverse his death sentence and remand for resentencing.

Respectfully submitted,


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This 25th day of March, 2008.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

March 25, 2008



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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

THE STATE,

RESPONDENT,

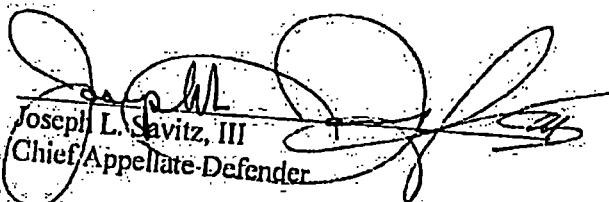
V.

FREDDIE EUGENE OWENS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Anthony Mabry, Esquire, this 25th day of March, 2008.


Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of March, 2008.


Notary Public for South Carolina (L.S.)

My Commission Expires: March 19, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
Larry Patterson, Circuit Court Judge

THE STATE,

Respondent,

X

FREDDIE EUGENE OWENS,

Appellant.

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APPELLANT'S ISSUES ON APPEAL

- I. The trial judge abused his discretion when he summarily disqualified a potential juror, Sonya Ables (Juror Number 1), solely because she "went to [her] pastor and talked to him about [the death penalty]," as he incorrectly believed "there is a case right on point, that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law."
- II. The trial judge committed reversible error by admitting Owens' prison disciplinary records, as they violated the rule against hearsay, as well as the Sixth and Fourteenth Amendments.
- III. The trial judge committed reversible error by allowing the Solicitor to argue in closing that the conditions of life imprisonment in general justified a death sentence for Owens, as this argument injected an arbitrary factor into the jury sentencing considerations in violation of S.C. Code Section 16-3-25(C)(1).

RESPONDENT'S STATEMENT OF FACTS

Freddie Owens brutally murdered Irene Graves on November 1, 1997. (R. 1111, 1113, Tr. p. 1060, ll. 11-14, p. 1062, ll. 11-17). Owens shot Graves in the right side of the head with a .32 caliber pistol. (R. 1239, 1255, 1106, Tr. p. 1188, ll. 16-24, p. 1204, ll. 8-20, p. 1055, ll. 1-13). The bullet went through Graves' brain and ricocheted back off of the inside of her skull to the other side of her head. (R. 1106, Tr. p. 1055, ll. 7-21). Ms. Graves was a single mother of one adult and two small children at the time of her murder. (R. 1156, Tr. p. 1105, ll. 18-25). She worked three jobs at the time of her death. (R. 1153, Tr. p. 1102, ll. 9-17).

Ms. Graves was operating a convenience store on Lauren's Road in Greenville during the early morning hours of November 1st, just after Halloween night. (R. 1148, Tr. p. 1097, ll. 5-16). Appellant and three of his friends had been on a crime spree on Halloween afternoon and into Halloween night. (R. 1194-1224, Tr. p. 1143, l. 21-p. 1173, l. 2). Owens and his three co-defendants cased several stores and eventually robbed Prestige Cleaners on Lauren's Road and the Conoco Hot Spot on Augusta Road prior to the robbery of Ms. Graves' business. (R. 1194-1224, Tr. p. 1143, l. 21-p. 1173, l. 2). During each robbery, the assailants wore ski masks or panty hose over their heads and carried handguns. (R. 1210-11, 1214-15, 1222-23, 1209-11, 1220, 1260, 1277, Tr. p. 1159, l. 21- 1160, l. 20, p. 1163, l. 13- p. 1164, l. 17, p. 1171, l. 16- p. 1172, l. 19, p. 1158, l. 18- 1160, l. 20, p. 1169, ll. 8-24, p. 1209, ll. 5-13, p. 1226, ll. 2-12). After midnight, the four men met again on Owens' front porch and discussed robbing two stores near the intersection of Lauren's Road and I-85. (R. 1224-27, Tr. p. 1173, l. 2 - p. 1176, l. 3). One of the stores was the Speedway convenience store at which the victim worked. (R. 1226-27, Tr. p. 1175, l. 15-p. 1176, l. 8).

Ms. Graves was murdered for money. Appellant and one of his co-defendants, Andre

Golden, entered the store wearing a ski mask and panty hose over their faces. (R. 1126, Tr. p. 1075, ll. 2-16). Appellant wore the ski mask. (R. 1236, Tr. p. 1185, ll. 11-22). Upon Appellant initially entering the store, Ms. Graves was accosted and cash was removed from one register. (R. 1126, Tr. p. 1075, ll. 10-24). At gun point, Ms. Graves was then taken to the area of the store safe. (R. 1126, Tr. p. 1075, ll. 24-25). She was then shot in the head. (R. 1126, Tr. p. 1075, ll. 24-25). Surveillance video captured the robbery and her murder. Another employee, who had stepped out of the store to obtain ice for the store's drink machine shortly before Owens and Golden entered, found Ms. Graves' lifeless body in front of the safe. (R. 1127, Tr. p. 1076, ll. 4-11). Appellant bragged to his girlfriend the next morning that he shot the victim, because she would not open the safe.¹ (R. 1165, Tr. p. 1114, ll. 8-25). Appellant also bragged to another co-defendant, not Golden, that he shot Ms. Graves for the same reason.² (R. 1232, Tr. p. 1181, 14-25). After the robbery, when the cash register was totaled up by store personnel, \$37.29 was missing from the store. (R. 1180, Tr. p. 1129, ll. 1-2).

Owens was convicted by a Greenville County jury of Murder, Possession of a Weapon During a Violent Crime, Armed Robbery and Conspiracy.³ The night after Owens was convicted,

¹Ms. Graves, as a cashier, could not open the safe. She did not have the combination. (R. 1180, Tr. p. 1129, ll. 7-18).

²Owens told Nikko Vance when he got back in the car that "He shot that bitch in the head", and "she wasn't opening the safe, so he shot the whore." (R. 1232, Tr. p. 1181, ll. 18-25). Owens' girlfriend testified Owens told her "[s]he kept throwing up her hands and said she couldn't open the safe, so he just said 'I shot the bitch'". (R. 1165, Tr. p. 1114, ll. 23-25).

³In addition to Appellant's girlfriend Aisha Austin, Andre Golden testified in the guilt phase of Petitioner's first trial and also identified Petitioner as the person who shot Ms. Graves. State v. Owens, infra (Owens I). Golden pled guilty to murder and armed robbery. Nikko Vance, another co-defendant, who did not enter the store, testified at Petitioner's first trial and identified Appellant as the shooter based on statements Appellant and Golden made when they

Owen's cellmate, Christopher Lee, was beaten to death in the cell he shared with Owens in the Greenville County Detention Center. S.L.E.D. agents questioned Owens, and he confessed to the murder of Lee. (R. 1388-1391, Tr. p. 1336, l. 9 - p. 1339, l. 6). Owens admitted he beat, strangled, slammed, and kicked Lee, jabbed the victim with a ballpoint pen and then stuffed the pen up Lee's nose. (R. 1388-1391, Tr. p. 1336, l. 9 - p. 1339, l. 6). Owens also confessed to burning Lee with a cigarette lighter after he beat him unconscious. (R. 1388-1391, Tr. p. 1336, l. 9- p. 1339, l. 6). The findings at Lee's autopsy were consistent with Owens' confession including the fact that Lee's chin hair was singed. (R. 1404, Tr. p. 1352, ll. 1-21).

Owens was sentenced to death by the jury in his first trial. The case was reversed and remanded for a new sentencing hearing only. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Owens waived his right to a jury at this subsequent sentencing proceeding. After a second sentencing hearing, Circuit Judge John Kittredge sentenced Owens to death. This Court reversed and remanded for a third sentencing proceeding. State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004). After a third sentencing proceeding, Owens was sentenced to death a third time by a Greenville County jury on November 11, 2006. The jury unanimously found two aggravating circumstances: (1) the murder was committed during the commission of robbery while armed with a deadly weapon, and (2) the murder was committed while in the commission of a larceny with a deadly weapon. Circuit Judge Larry R. Patterson imposed the death sentence. This appeal follows.

returned to the getaway vehicle. Detectives Wood and Willis testified Appellant initially denied involvement but later admitted he shot Ms. Graves. Id. Appellant's convictions were affirmed on direct appeal. Id.

ARGUMENT

- I. This issue is not preserved for appellate review. Even if it had been preserved, the trial judge did not abuse his discretion in disqualifying potential juror Sonya Ables (Juror #1), when she admitted she went to her pastor and talked to him about the death penalty.**

In his first appellate issue, Owens alleges that the trial judge committed reversible error in disqualifying potential juror Sonya Ables. This issue has no merit.

Failure to Preserve Alleged Error

This issue is not preserved for appeal. No objection was made by Appellant at any time to the court's questioning of or disqualification of Juror Sonya Ables. (See R. 525-530, Tr. p. 479-484). Appellant made no objection before the petit jury was empaneled and sworn. (See R. 530, Tr. p. 484-1033). No objection was made at all thereafter regarding this issue. (See R. 1084-1668, Tr. p. 1034-1614). Appellant made no request to conduct any additional voir dire of the juror. (See R. 525-530, Tr. p. 479-484).

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. In the Interest of Michale H., 360 S.C. 540, 602 S.E.2d 729 (2004)(trial court must be given an adequate opportunity to resolve the issue); State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Knight v. Waggoner, 359 S.C. 492, 597 S.E.2d 894 (Ct. App. 2004)(arguments raised for the first time on appeal are not preserved for review).

This principle is applicable to issues of jury disqualification. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996)(failure to object to the excusal of a juror for good cause constitutes waiver of issue on appeal); Ott v. Pittman, 320 S.C. 72, 463 S.E.2d 101 (Ct. App. 1995)(failure to object

to exclusion of potential jurors by trial judge constitutes waiver of issue on appeal).

This principle is also applicable in the voir dire setting. Failure to object to voir dire or lack of voir dire constitutes a waiver of the right to claim error on appeal. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996); Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998) (absent timely objection to examination of juror, issue not properly preserved for appeal; although appellant requested two jurors be dismissed, they did not request further inquiry by trial court, which was argument on appeal; therefore, issue raised on appeal was not preserved below for appellate review); State v. Ivey, 331 S.C. 118, 502 S.E.2d 92 (1998) (If dissatisfied with the trial judge's examination of juror, appellant should have immediately moved for permission to make additional inquiries. Request the day after juror was qualified was untimely.). Owens now makes his first request on appeal. This issue is not preserved.

An objection to a juror's disqualification cannot be made after the jury returns its verdict, and in case of disappointment, have the verdict set aside upon a technicality. State v. Williams, 266 S.C. 325, 223 S.E.2d 38 (1976); State v. Rayfield, 232 S.C. 230, 101 S.E.2d 505 (1958); State v. Harrel, 228 S.C. 311, 89 S.E.2d 879 (1955); State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985). That is exactly what Appellant is attempting to do in this case. Appellant failed to preserve this issue and waived this issue.⁴

⁴Likewise our Legislature has made it clear that an objection to a juror's qualification must be made before the jury is empaneled and sworn. S.C. Code Ann. Section 14-7-1030.
Time for making objections to jurors.

All objections to jurors called to try prosecutions, actions, issues or questions arising out of actions or special proceedings in the various courts of this State, if not made before the juror is empaneled or charged with the trial of the prosecution, action, issue or question arising out of an action or special proceeding, is waived, and if made thereafter is of no effect.

Standard of Review

In a capital case, a defendant has no right to a trial by any particular jury, only a right to a trial by a competent and impartial jury. State v. Caldwell, 300 S.C. 494, 338 S.E.2d 816 (1990); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). It is the duty of the trial judge to see that a jury of unbiased, fair and impartial jurors are impaneled. State v. Mathews, 291 S.C. 339, 353 S.E.2d 444 (1986). A determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and not reversible on appeal unless wholly unsupported by the evidence. State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985). The voir dire examination of a juror must be viewed in its entirety to determine whether the trial judge erred in his qualification or disqualification of a prospective juror. State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987). 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. State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990).

The Merits

1. Disqualification Due to Failure To Follow Instructions.

The trial judge's decision regarding Juror Ables was correct based on precedent of this Court. In State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179 (1982), it was held that a trial judge properly excused a prospective juror, who, despite the court's instructions, revealed to her priest that she might be serving in a capital case and solicited his opinion as to the Catholic Church's stance on capital punishment. This Court reasoned that the possible seating of this juror would have introduced

an outside influence into the deliberations of the jury.⁵ The same is true in the present case. Juror Ables testified during the voir dire by the court regarding the death penalty: "I just don't think that I can do it and live okay. It's just too deep within me. I have battled it since you told us that in October. I have thought about it a lot. *I went to my pastor and talked to him about it.* I really don't think I could do it." (R. 5258-29, Tr. p. 482, l. 24 - p. 483, l. 5). The trial judge was correct in stating on the record: "Ladies and gentlemen, there's a case right on point that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law. (R. 529, Tr. p. 483, ll. 10-13). The trial judge properly disqualified the juror, and Appellant, by his lack of any objection at all, agreed with the decision. Juror Ables, if qualified and seated on this case, would have introduced an outside influence into the jury's deliberations. Gilbert, 277 S.C. at 57. This would be improper.

Appellant's failure to object is significant in this situation. If Appellant had raised some objection to the court's disqualification of Juror Ables, Judge Patterson could have allowed further voir dire on this issue or explained his ruling in more detail. Simply put, there was no objection to her disqualification or request to voir dire her on the issue of her talking to her pastor or priest. If an objection to her disqualification had been made, the court could have attached the juror's summons and letter from the court as a court's exhibit evidencing the fact that the juror talked to an outside source about the case and the issues therein after being summoned for jury service.⁶ Since

⁵Appellant argues in his brief that the trial judge was wrong in stating that there was *a case directly on point* on this issue. Appellant fails to mention or discuss Gilbert, *supra*, which is on point, anywhere in his brief.

⁶This is obviously what the juror was referring to when she said "I have battled this since you told us that in October". Voir dire of the jury did not begin until November 7, 2006. (See Tr., November 7, 2006, p. 1).

Appellant made no objection or request to conduct any further voir dire, the issue was waived. "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." Elam v. South Carolina Dep't. of Transp., 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004); Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

Obviously, since Appellant did not object, Appellant offered no facts, law, or arguments to the trial judge with regard to this issue. This is exactly what the preservation requirement was meant to prevent. By his inaction, Appellant stated to the trial court that the juror's disqualification was not an issue. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005)(issue cannot be raised for the first time on appeal, but must have been raised to and ruled on by the trial judge to be preserved for appellate review). The preservation requirement prevents a party from keeping an ace card up his sleeve-intentionally or by chance-in the hope that an appellate court will accept that ace card and via a reversal, give him another opportunity to prove his case. P'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000); *see also* Ellie, Inc. V. Micchichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004). Appellant made no objection or request regarding this juror, therefore this issue was not preserved and was clearly waived. Even if it had been preserved for appeal, there is no merit to this issue. Gilbert, *supra*.

2. Not a Witherspoon Violation.

Owens mistakenly argues for the first time on appeal that the juror's disqualification was a Witherspoon⁷ violation. Judge Patterson's disqualification of Juror Ables was not a Witherspoon

⁷Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968)(holding right to an impartial jury is violated by procedure which automatically removes for cause those members of the jury who have general objections to the death penalty, however, a juror who states an unwillingness to

violation for two reasons.

First, the record is clear that Juror Ables was disqualified, because she had gone to her pastor and spoken to him about the case and the death penalty after being summoned for jury service, not because of her personal views for or against the death penalty. (R. 529, Tr. p. 483, ll. 10-14).⁸

Second, it is clear from the record that further examination of the juror would have been unlikely to reveal she could subordinate her views and apply the law of the state. Juror Ables clearly stated during thorough examination by the trial judge that she would be unable to impose a death sentence, because she would be unable to go forward with her life or live if she did so. (R. 525-29, Tr. p. 479-483). A juror may be excluded for cause when her views on capital punishment are such as would “prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.” State v. Sapp, 366 S.C. 283, 291 (2005) *quoting* Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844 (1985).⁹ A juror may be excused in a death penalty case if her beliefs or attitudes against capital punishment would render her unable to return a verdict according to the law. Sapp, *supra*. The record shows Juror Ables beliefs rendered her unable to return a verdict according to the law. She clearly stated an unwillingness to impose the death penalty and could properly have been disqualified. Witherspoon, *supra*; State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007); State v. Jones, 288 S.C. 1, 340 S.E.782 (1985); State v. Copeland, 278 S.C. 572,

impose the death penalty may be disqualified).

⁸Owens also asserts that the Judge violated J.E.B. v. Alabama, ex rel T.B., 511 U.S. 127 (1994) by disqualifying a *woman* who went to her priest. This assertion is ridiculous. Neither Judge Patterson nor this Court in Gilbert, *supra*, based its decision on the sex of the juror but on the fact that the juror had spoken to an outside source about a critical issue in the case. The mention of the juror’s sex was merely descriptive.

⁹In Sapp, this Court also dealt with an alleged Witherspoon violation. Id., at 287-292.

300 S.E.2d 63 (1982). Her disqualification, even if based on her views regarding the death penalty, was proper.

Appellant also appears to argue there was an Atkins¹⁰ violation, because defense counsel did not conduct individual voir dire of Juror Ables. This argument, if made, is also erroneous for two reasons. First, the juror was not excused for cause because of her views regarding the death penalty, but was disqualified because she had spoken to her pastor regarding the case, the death penalty, and her service as a juror. (Tr. p. 483, ll. 10-14). The record is clear on this point. Atkins is simply not implicated. State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004) (holding Atkins was distinguishable when juror was disqualified for reason other than jurors personal views regarding the death penalty). Juror Ables was *disqualified*, because she had contact with an outside source regarding the case after she was summoned for jury service. If she had been seated on the jury she would have introduced an outside influence into the jury's deliberations. Gilbert, *supra*.

"Second, it is clear from this record that further examination of [the] Juror would have been unlikely to reveal she could subordinate her views and apply the law of the state." Wise, *supra* at 26. As previously stated, Juror Ables clearly stated she would not be able to live or go on with her life if she sentenced someone to death. (R. 528-29, Tr. p. 482, l. 24 - p. 483, l. 6). The record reflects she stated an unwillingness to impose the death penalty.

In fact, Appellant's attorneys were not denied the right to question Juror Ables, they simply did not request to ask any questions given her clear testimony. They did not suggest or offer any additional questions to the trial judge. See Wise, *supra* at 26. As previously stated, no objection was

¹⁰State v. Atkins, 293 S.C. 294, 360 S.E.2d 302 (1987). See also State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1998); State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995); State v. Owens, 277 S.C. 189, 284 S.E.2d 584 (1981).

made to the Judge's voir dire of the juror nor did trial counsel request to ask any further questions. (R. 529-530, Tr.p. 483-484).

While this Court made clear in Wise that it was not diluting the mandate of Section 16-3-20(D) as expressed in Atkins, *supra*, it also made clear the following:

When the record reveals a juror plainly is not qualified, after thorough examination by the trial judge, to serve and it does not reasonably appear further examination would likely reveal the juror could subordinate his views and apply the law of the state, a reasonable basis exists for excusal for cause of the juror without further examination by defense counsel.

There was no Atkins, violation in this case.

3. Harmless Error.

Even if Juror Ables was improperly disqualified, her disqualification was harmless. Holmes, *supra* (holding disqualification of juror was harmless where juror was placed on alternate list and alternates were never called). In the present case, if Juror Ables had been qualified, she would have been the seventeenth (17th) juror qualified. The jurors were struck in order of their qualification. (R. 1064-69, Tr. p. 1014-1019). Juror Ables voir dire occurred after the 16th juror qualified, Juror Fawn Norton. (R. 524-25, Tr. p. 478-479). Juror Ables would have been the seventeenth (17th) juror presented at the jury strike. (R. 1067-68, Tr. p. 1017-1018). At the time she would have been presented, the State had exercised only two of its five (5) peremptory challenges. (R. 1064-68, Tr. p. 1014-1018). The State had excused Jurors Cassandra Carrol and Fawn Norton. (R. 1066, 1067-68, Tr. p. 1016, ll. 20-21, p. 1017, l. 25-p. 1018, l.1). There can be no question, based on Juror Ables testimony that she could not live or go on with her life if she imposed the death penalty, that the State would have struck Juror Ables with its third strike. Furthermore, this is supported by the fact

that the State exercised only one more of its peremptory challenges, Juror Rebecca Hunter, and that occurred during alternate juror selection. (R. 1069, Tr. p. 1019, l. 23). The State only exercised a total of two (2) peremptory challenges during the petit jury panel selection. (R. 1064-69, Tr. p. 1014-1019). After all twelve (12) jurors were seated on this case, the State still had three (3) of its five (5) peremptory challenges remaining. Even if Juror Ables had been qualified, she would not have been seated on this jury, because the State would have exercised at least one of its three remaining peremptory challenges to excuse Juror Ables.¹¹ Any error in Juror Ables disqualification was harmless.

II. The trial judge properly admitted the limited prison disciplinary records summary as business records; however, even if their admission was erroneous, it was harmless given the other evidence in aggravation presented in this case.

Owens alleges the court improperly admitted evidence of his bad prison behavior under the business records exception to the hearsay rule. Owens has been incarcerated in the South Carolina Department of Corrections since his first conviction and death sentence. During his incarceration, the South Carolina Department of Corrections recorded the following incidents in their disciplinary records that were offered by the State in the sentencing phase of his 3rd trial:

April 13, 2001, breaks toilet, sink and sprinkler.

May 26, 2001, throws hot water on another inmate.

May 27, 2001, had a six and a half inch shank made from fencing and toothbrush.

June 14, 2001, spat on a correctional officer.

¹¹Owens will certainly argue in reply that this analysis is merely speculative, however it strains credulity to argue the State would have allowed Juror Ables to be seated on the jury when she stated she could not give someone the death penalty and "...be able to go forward with my life then and then—I just don't think that I can do it and live okay. Its just too deep within me." (R. 528-29, Tr. p. 482, l. 24 -p. 483, l. 2).

February 8, 2002, a 14 inch solid brass shank.
March 29, 2002, stabs correctional officer Smith in the face with shank.
June 12, 2002, stabs Undra Golden in the shower.
June 15, 2002, kicks an inmate who is restrained in a restraint chair.
August 5, 2002, slaps a male nurse in the face.
August 17, 2002, throws a food tray and hits officer Guess in the head.
August 23, 2002, struck an officer in the face with his fist.
October 23, 2002, hits officer Eaton in the face with the fist.
October 23, 2002, sets fire to cell.
December 22, 2002, shank made from fencing.
December 30, 2002, a ten inch made from a push rod of the sink.
July 17, 2005, spits in the face of officer Jones.
August 26, 2005, slaps officer Henley in the face.
August 31, 2005, sets fire to cell.
September 11, 2005, threatens officer Jones.
January 1, 2006, a 12 inch homemade knife.
January 3, 2006, breaks cell door window with broom stick.
January 13, 2006, throws feces on officer Williams hitting him in the face.
February 3, 2006, spits in the face of another inmate.
February 4, 2006, orally threatens officer Jones.
February 28, 2006, a 12 inch weapon hidden between the mattresses.
April 4, 2006, an eight an a half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage.
May 1, 2006, sets fire to his mattress.
May 20, 2006, throws coffee on officer Smith.

(R. 1441-43, Tr. p. 1389-1391).

Standard of Review

The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court, and a ruling will be disturbed only upon a showing of an abuse of discretion. State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999).

The Merits

The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Evidence which would ordinarily be inadmissible in the guilt phase of trial may be introduced during the penalty phase. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1592 (1987). During the sentencing phase, the trial judge may permit the introduction of additional evidence of aggravation in order to aid the jury in determining whether to recommend a death sentence. *Id.* See also, State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003).

Certainly the records were relevant to Owen's future adaptability in prison, a matter which was clearly proper for the sentencing jury. See State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988); State v. Riddle, 291 S.C. 232, 353 S.E.2d 138 (1987), *overruled in part on other grounds*, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The records were also relevant, because they demonstrated the character of the accused. Owens, *supra*.

There were a total of 56 disciplinary violations of Owens while in the Department of Corrections. (Tr. p. 1486, ll. 8-15). The State did not introduce all 56 violations. After an *in limine* ruling by the trial judge, the state only offered the short summary above of the 28 violations in which an officer was involved and *required* or had a *business duty* to report the incident. The trial judge carefully considered this issue and had even researched the issue before the trial. (R. 1409, Tr. p. 1357). The court limited the State to the above summary under the business records exception. After the trial court's ruling *in limine*, the State did not offer nor would the court allow each individual disciplinary record, because the court felt it contained subjective matter. (R. 1406-1437,

Tr. p. 1354-1385). The limited summary was all that was admitted.

Rule 803(6)(c) South Carolina Rules of Evidence provides that even though the declarant is available to testify as a witness:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996), this Court specifically decided this issue and held that prison disciplinary records were admissible under the Uniform Business Records as Evidence Act. S.C. Code Ann. § 19-5-510 (1985).¹² The Whipple court specifically cited as authority State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987)(parole records admissible) and State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988)(police fingerprint records admissible). Appellant attacks the Whipple decision on the basis that it was decided under Section 19-5-510 and not SCRE 803(6). This reasoning is incorrect.

In State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004) *reversed on other grounds* Holmes

¹²Section 19-5-510 provides:

A record of an act, condition, or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event and if, the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006), decided after the enactment of SCRE 803(6), this Court specifically cited Whipple as controlling authority on the issue of whether prison disciplinary records are admissible under the Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510(1985). Clearly, § 19-5-510 was not obviated by the Rules of Evidence. Otherwise, this Court would not have recognized that statute as controlling in Holmes, a 2004 decision. In fact, in Holmes, the trial judge admitted the prison disciplinary records in the penalty phase of the trial under both § 19-5-510 and Rule 803(6).¹³ Appellant Holmes raised the same objections Owens is raising now and his appeal was emphatically denied by this Court as having no merit. Holmes, supra.¹⁴

Regardless, “SCRE 803(6) is substantially the same as former South Carolina law as Section 19-5-510 of the *Code of Laws of South Carolina* has been interpreted.” Danny R. Collins, South Carolina Evidence (2nd Ed. 2000), South Carolina Bar, *emphasis in the original*. The case law interpreting Section 19-5-510 also required that the record be trustworthy in the opinion of the court. Id. at 603, *citing Jenkins v. Dixie Specialty, Co.*, 284 S.C. 425, 326 S.E.2d 658 (1985); State v. Duncan, 274 S.C. 379, 264 S.E.2d 421 (1980). The disciplinary records were admissible under either 19-5-510 or SCRE 803(6).

This issue has been decided by this Court twice now. Whipple, supra; Holmes, supra. Furthermore, the summary used by the State was appropriate under South Carolina Law. Rule 1006, SCRE (contents of voluminous records may be presented in form of a summary provided underlying data are admissible in evidence). Holmes, supra (same).

¹³See brief of Respondent from Holmes, supra.

¹⁴Appellant Owens fails to mention the Holmes decision anywhere in his brief.

Other states are in agreement. In People v. Jackson, 182 Ill.2d 30, 230 Ill. Dec. 901, 692 N.E.2d 391 (1998), the court rejected an assertion similar to the one raised by Owens in this case. In Jackson, the court held that prison incident reports were admissible in a capital sentencing proceeding through the custodian, even when the author did not testify. In addressing these issues in People v. Casillas, 749 N.E.2d 864 (Ill. 2001), the court noted that it had previously rejected such a claim by an appellant, holding that the contents of prison incident reports are admissible during the penalty phase of a sentencing hearing so long as they are relevant and reliable. People v. Armstrong, 183 Ill.2d. 130, 233 Ill. Dec. 252, 700 N.E.2d 960 (1998); People v. Jackson, *supra*.

Similarly, in U.S. v. Chong, 98 F. Supp.2d 1110 (D. Hawaii. 1999), the court held disciplinary reports covering the defendant while in prison were admissible in the penalty phase of a capital proceeding, under the business records exception to the hearsay rule under Federal Rules of Evidence 803(6).¹⁵ In Chong, the defendant, like Owens, contended that these records are inherently untrustworthy and, hence, inadmissible. The defendant also argued the correctional officers were motivated to make unfavorable records, because they were involved in the proceedings and this fact erodes their reliability. The defendant further argued the reports were not generated with sufficient regularity to qualify for this hearsay exception. The court ruled otherwise, finding the records were reliable because the officers were required to report these incidents.

The Nevada court has similarly held these types of prison records admissible. In Thomas v. State, 114 Nev. 1127, 967 P.2d 1111 (Nev. 1999), the court held prison documents pertaining to the defendant were properly authenticated, and thus were properly admitted during the penalty phase of

¹⁵Federal Rule 803(6) does not exclude subjective opinions or judgments as does 19-5-510 and SCRE 803(6), however Respondent still believes the reasoning in Chong is apposite.

a murder trial pursuant to the business records hearsay exception. The court, based on persuasive federal and California authority, concluded the proper foundation was laid for the documents to fall under the business records hearsay exception. Other courts have similarly allowed the admission of the prison disciplinary records under a business or public records 803(8) exception. See Hall v. State, 650 P.2d 893 (Okla. Cr. 1982)(prison records containing information about an inmate's history of misconduct within the system fell within the business records exception to the hearsay rule found at 12 O.S. 1981 § 2803(8), and were not excluded under 2803(8)(a)-(e)). See also Frazier v. State, 874 P.2d 1289, 1292 (Okla. Cr. 1994)("pen-pack" falls squarely within 2803).

The trial court in the present case directed Appellant's attorney to examine each record, and the court determined he would only allow the admission of the report of an incident by an officer who was under a duty to report the same. (R. 1435, 1436-37, Tr. p. 1383, ll. 4-23, p. 1384, l. 23 -p. 1385, l. 17). He would not allow details of the incident or hearsay within hearsay. (R. 1413-15, Tr. p. 1361, ll. 16- p. 1363, l. 2). Appellant's trial counsel reviewed each underlying record and agreed that 28 were officer reported as required by the judge. (R. 1436-37, Tr. p. 1384, ll. 1-11, p. 1385, ll. 7-17). The trial court found the records to be trustworthy. (R. 1436-37, Tr. p. 1384, l. 24-p. 1385, ll. 1-17). Furthermore, the records which were introduced have special indicia of reliability. The Solicitor only offered a summary of those particular business records of which there was an administrative hearing in the Department of Corrections, which resulted in a conclusion by that body that the incident or infraction actually occurred, or Appellant waived his right to such a hearing. (R. 1434, Tr. p. 1382, ll. 12-25).

Respondent submits the disciplinary summary was properly admissible first under Holmes, *supra* and Whipple, *supra*. Disciplinary reports are admissible under the common law of this state

in capital sentencing proceedings under the business records exception of § 19-5-510. Without question, the underlying records are relevant, because they address Appellant's adaptability to prison based on his past conduct and his future dangerousness and character.

Second, the submitted summary was reliable. The prison system is obligated as a matter of state law to keep records concerning prisoner's habits and deportment. S.C. Code Ann. §§ 24-1-130, 24-1-140, 24-21-60, 24-21-70. *See, Rayfield v. South Carolina Dep't. Of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988)(discussing state statute requiring prison and parole officials to keep records of prisoners' habits and deportment and to prepare adequate reports concerning parole candidates). The custodian of the records testified that the records were kept in the regular course of business and were timely reported. Further, it has been generally held that such public records "have circumstantial guarantees of trustworthiness." *Accord, State v. Pearson*, 223 S.C. 377, 76 S.E.2d 151 (1953). Since the evidence is both relevant and reliable it was properly admitted.

The evidence is admissible under S.C.R.E. 803(6). Rule 803(6) SCRE provides that memorandum, reports, records, etc. in any form, of acts, events conditions, or diagnosis, are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court. Rule 803(6); S.C. Code Ann. § 19-5-510 (Supp. 2001). *Accord, Ex Parte D.H.E.C.*, 350 S.C. 243, 565 S.E.2d 293 (2002).

The evidence was properly admitted under this Rule, recognized as the business records exception.

1. Record prepared at or near the time of the event recorded.

The evidence before the court revealed the underlying correctional officer disciplinary reports were prepared at or near the time of the incident and in fact were made contemporaneously. (R. 1440, 1412, Tr. p. 1388, ll. 18-20 & p. 1360, ll. 10-17). Major Nettles testified the summary accurately reflected the records themselves. (R. 1441, Tr. p. 1389, ll. 3-5).

The federal courts, applying this rule, have recognized that the record of the transaction need not be contemporaneous with the event, but should be recent enough to be reliable as evaluated by the court. *Accord, U.S. v. Goodchild*, 25 F.3d 55 (1st Cir. 1994)(computer printouts of collection memos containing records of phone statements allowed as business records since underlying data recorded during conversation or immediately thereafter); *Wheeler v. Sims*, 951 F.2d 123 (7th Cir. 1992)(11 day lapse between observation and production of the record allowed). The records in this case satisfy this requirement.

2. Record prepared by or from information by a person with knowledge.

The record conclusively reveals that the summary admitted in this case was based upon disciplinary reports prepared by a correctional officer with knowledge of the incident. (R. 1412, 1435, 1436-37, Tr. p. 1360, ll. 21-23, p. 1383, ll. 4-7, p. 1384, l. 1-p. 1385, l. 17). Judge Patterson would not allow evidence of any other records into evidence but those prepared by a correctional officer with knowledge. (R. 1426, 1433, 1435, 1436-37, Tr. p. 1374, ll. 10-25, p. 1381, ll. 14-18, p. 1383, ll. 4-7, p. 1384, l. 1 - p. 1385, l. 17). It is not necessary to have the person who prepared the report present at trial. *U. S. v. Moore*, 923 F.2d 910 (1st Cir. 1991). The trustworthiness of the source was enhanced by the fact that it was reported through the prison disciplinary process. (R. 1434, Tr. p. 1382, ll. 12-25). A sufficient foundation is laid if the party seeking to introduce the

evidence is able to show that it was the regular practice of the activity to base the incident report upon transmission from a person with knowledge. (R. 1412-13, Tr. p. 1360, l. 10-p. 1361, l. 9). This was satisfied.

3. Record prepared in the regular course of business.

The record custodian testified that this data was prepared or recorded in the regular course of business. (R. 1412-13, Tr. p. 1360, l. 10-p. 1361, l. 6). As stated above, South Carolina statutory law requires that prisoner records be maintained and provided to another state agency to assist in its decision-making process. It cannot be seriously disputed that these records qualify. Records which are drafted during regularly conducted business and not in response to isolated or unusual events are admissible. Courts have held that the regular practice requirement should be generously construed to favor admission, and stringent standards including requirements of careful checking and habits of precision were rejected in In re Japanese Electronic Antitrust Litigation, 723 F.3d 238 (3rd Cir. 1983). See Blondie v. Bic. Corp., 947 F.2d 15321 (6th Cir. 1991)(social worker's report on what fire victims said about cause of fire admissible as business record inasmuch as made in scope of employment and as part of regularly conducted activity). Here the practice of providing accurate information of the prison incidents for parole reasons, to enhance safety and make the appropriate housing assignments requires the prison guards to timely report, making this an essential link in the trustworthiness chain.

4. Qualified witness identifies the record.

An actual custodian of the records of the South Carolina Department of Corrections, Major Thierry Nettles, the custodian at Lieber Correctional where Appellant was housed, was the witness who presented and identified the records. (R. 1413, Tr. p. 1361, ll. 7-9). And Major Nettles is

aware of what happens at other facilities with regards to how records are maintained. (R. 1416, 1418, Tr. p. 1364, ll. 8-12, p. 1366, ll. 7-13). And the record establishes that how the records are kept, the process for reporting incidents, and making a record of that, is standardized throughout the Department of Corrections. So, the same policy regarding making of the disciplinary record and the keeping of it is the same at each institution, not just at Lieber. (R. 1418, Tr. p. 1366, ll. 7-13). Under Connelly v. Wometco Enterprises, 314 S.C. 188, 442 S.E.2d 204 (S.C. App. 1994), the appropriate custodian testified. As stated in U.S. v. Reese, 568 F.2d 1246 (6th Cir. 1977), it is not required that the custodian have actual knowledge of actual data contained in the business record. See Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999). Major Nettles was certainly a qualified witness under Rule 803(6). The trial court found he was qualified to testify under the Rule. (Tr. p. 1358, ll. 18-20, p. 1375, ll. 12-14, p. 1379, l. 18-p. 1380, l. 1). He had custody of Appellant's file since Appellant was housed at his facility. (R. 1431-32, 1433, 1439-1441, Tr. p. 1379, l. 18-p. 1380, l. , p. 1381, ll. 13-20, p. 1387, l. 10 - p. 1389, l. 5). Who better to testify to the contents of Owens' disciplinary file than the custodian of records at the facility at which Appellant was housed and the person responsible for the supervision of Appellant Owens' housing. (R. 1444, 1431-32, Tr. p. 1392, ll. 13-15, p. 1379, l. 23-p. 1380, l. 1).

5. Record is trustworthy in the opinion of the court.

Judge Patterson found these prison records trustworthy.¹⁶ (R. 1410, 1436-37, Tr. p. 1358,

¹⁶Judge Patterson in his final decision did not use the exact word "trustworthy", however a reading of the record dealing with this issue can lead to no other conclusion but that the judge found the offered portion of the records trustworthy, since Judge Patterson was clearly familiar with the requirements of Rule 803 and admitted the summary into evidence. (See R. 1406-1441, Tr. p. 1354-1389). In fact, Judge Patterson pointed to the fact that the officers were required to

ll. 9-22, p. 1384, l. 24-p. 1385, l. 17). The lower court reviewed the underlying incident reports for the summary and found the portions he admitted had an indicia of trustworthiness, because they were reported by an employee of the Department of Corrections who was under a duty to report the incidents and the Department kept a record on incidents involving inmates. (R. 1436-37, Tr. p. 1384, l. 24-p. 1385, l. 17). Further, this summary is purely a factual recording of the incident which eventually had a disciplinary result. (R. 1434, Tr. p. 1382, ll. 12-25). It was properly admitted. See State v. Key, 277 S.C. 214, 284 S.E.2d 781 (1981). Further, the summary is admissible, because the underlying records were (1) kept pursuant to a routine procedure designed to assure accuracy; 2) created for motives that end to assure accuracy; and (3) they are not merely accumulations of hearsay. See Rosenburg v. Collins, 624 F.2d 659 (5th Cir. 1980). (R. 1413, 1427, 1433, 1436-37, Tr. p. 1361, ll. 16-22, p. 1375, ll. 21-22, p. 1381, ll. 14-17, p. 1384, l. 24- p. 1385, l. 17).

6. The Prison Records are admissible under either 803(6) or 803(8).

At trial, the State proffered this evidence under Rule 803(6). As set forth above, this evidence meets the conditions precedent to its admission under this Rule. In addition to the cases cited above, prison disciplinary records have been held to be admissible under Rule 803(8) in Games v. State, 743 N.E.2d 1132 (Ind. 2001), a capital case in which similar underlying reports were admitted. Also, in Combs v. Wilkinson, 315 F.3d 548 (6th Cir. 2002), the court found that the report prepared by a use of force committee was admissible under Rule 803(8), even though the committee lacked personal knowledge and its report was based upon 123 interviews and numerous documents, including staff and inmate incident reports, as well as an investigative report.

Appellant has asserted the summary contains "subjective opinions and judgements." Appellant reads this exclusionary phrase too broadly. The summary is based upon the factual

recitation of the incident and includes the disciplinary result. It is not a listing of subjective opinion, i.e. "proceeding from taking place within the mind." but rather an objective statement of a factual result. Under Appellant's theory, the business records exception to the hearsay rule would be eviscerated, since factual representations with an indicia of trustworthiness are the reasoning for its existence.¹⁷

The Evidence does not violate the Confrontation Clause

Appellant next alleges that even if the records are admissible, they violate the Confrontation Clause under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). Appellant's reliance on Crawford is misplaced. The Court in Crawford specifically excepted the contents of business records from a Confrontation Clause challenge. Id. In fact this exact issue, regarding prison disciplinary records, was also decided by this Court in Holmes, *supra*. Id. ("properly administered the business and public records exceptions are among the safest against a Confrontation Clause challenge of the hearsay exception") *citing* Crawford, *supra*.

The Court in Holmes was correct. Hearsay evidence contains sufficient indicia of reliability to satisfy the Confrontation Clause when the evidence either falls within "a firmly rooted hearsay exception" or "contains particularized guarantees of trustworthiness such that adversarial testing

¹⁷At trial, the prosecution did not assert admissibility under Rule 803(8). As an additional sustaining ground, Respondent would submit this evidence can be admitted under this alternate rule. Rule 220(c) SCAR. Although S.C.D.C. employees are "peace officers", disciplinary reports do not involve necessarily criminal case matters observed by police and law enforcement personnel. Instead, this information is maintained for correctional purposes to evaluate the deportment of the inmate and the safety of the institution. Respondents submit the excluded data was to exclude observations made by law enforcement at a crime scene, because such observations were made in an adversarial setting which were deemed less reliable than observations made by public officials in other settings. Here, the disciplinary records were not necessarily crimes, but prison violations. As such, Respondents submit the exclusion does not apply and the reports are admissible under Rule 803(8).

would be expected to add little, if anything, to the statements reliability. “Lilly v. Virginia, 527 U.S. 116, 124-125, 119 S.Ct. 1887 (1999), (quoting Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531 (1980) *see also* Idaho v. Wright, 497 U.S. 805, 815, 110 S.Ct. 3139 (1990)). A defendant’s right to confrontation is not absolute. Lilly, *supra* at 123-24, Ohio, *supra* at 65-66, Christian v. Rhode, 41 F.3d 461, 467 (9th Cir. 1994).

This Court has recognized subsequent to Holmes, *supra* that business records do not implicate the Confrontation Clause. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005) (“Finally, in Crawford v. Washington, 541 U.S.36, 54, 124 S.Ct. 1354 (2004), the United States Supreme Court noted the hearsay exception for business records and observed that business records are not ‘testimonial’ and therefore do not implicate the Confrontation Clause.”). In Cutro, *supra*, this Court held public records do not implicate the Confrontation Clause.¹⁸

¹⁸In pre-Crawford decisions, business records were introduced in criminal cases in state and federal courts and determined not to violate the Confrontation Clause. *See* Manocchio v. Moran, 919 F.2d 770, 776-80 (1st Cir. 1990)(autopsy report admitted to prove cause of death without medical examiner did not violate the Confrontation Clause). “The admission of evidence under a firmly rooted exception to the hearsay rule that does not require unavailability of a witness, such as the public records exception, does not violate the Confrontation Clause, and the public record recognition to the hearsay rule is firmly rooted.” Roberts, 448 U.S. at 66 n.8, 100 S.Ct. At 2539 n.8; United States v. Contreras, 63 F.3d 852; 857 (9th Cir. 1995)(citations omitted); United States v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1990), cert. denied, 498 U.S. 1124, 111 S.Ct. 1084 (1991). “Properly administered, the business and public records exceptions would seem to be among the safest of the hearsay exceptions.” Contreras, 63 F.3d at 857. *See* Sherman v. Scott, 62 F.3d 136 (5th Cir. 1995)(testimony of supervisor demonstrated lab report finding cocaine had particular guarantees of trustworthiness and because cross-examination of chemists who prepared report would have been of little use to petitioner, admission of the report did not violate the Confrontation Clause.); Minner v. Kirby, 30 F.3d 1311 (10th Cir. 1994)(admission of chemists lab notes through chemist’s supervisor was proper under the Confrontation Clause”); United States v. Baker, 855 F.2d 1353, 1360 (8th Cir. 1988)(lab reports of controlled substances did not violate Confrontation Clause); Reardon v. Manson, 806 F.2d 39, 41-43 (2d Cir. 1986)(chemists’ reports admitted through supervisor did not violate Confrontation Clause); United States v. Simmons, 773 F.2d 1455, 1460 (4th Cir. 1985)(no Confrontation Clause violation because utility of confronting ATF record-keepers at trial was negligible); People v. Hall, 114 Ill.2d 376, 416-

Harmless Error

Even if this Court were to assume *arguendo* that the state trial court committed error in admitting the records under the business records exception or had violated Owens' rights under the Confrontation Clause by admitting the disciplinary summary, the Court must conclude that such error was harmless. See State v. Bell, 302 S.C. 18, 393 S.E.2d 362 at 372 (1990); See also King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1988) ("assuming without deciding that the case summaries and disciplinary records were improperly admitted", the court held its examination of the record in its entirety lead it to conclude the alleged error did not affect a substantial right of the appellant).¹⁹ Likewise in the present case there was overwhelming evidence of Petitioner's future dangerousness, character, and inability to adapt to prison life outside of the business records.

The violation of a defendant's right of confrontation is also subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431(1986). A violation of the Confrontation Clause is not *per se* reversible error. State v. Dinkins, 345 S.C. 412, 548 S.E.2d 217 (2001), citing State v. Dinkins, 339 S.C. 597, 529 S.E.2d 557 (Ct. App. 2000); State v. Jenkins, 322 S.C. 360, 364, 474 S.E.2d 812, 815 (Ct. App. 1996). Also Bell, 302 S.C. 18, 393 S.E.2d at 372

17, 102 Ill. Dec. 322, 499 N.E.2d 1335 (1986)(admission of prison records at sentencing hearing did not violate defendant's right of confrontation). See also People v. Ward, 154 Ill.2d 272, 328030, 181 Ill.Dec. 884, 609 N.E.2d 252 () (court did not abuse discretion in allowing prison record to be introduced in sentencing hearing); See State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999)(since there is an adequate indicia of trustworthiness, adversarial testing would add little, there is no Confrontation Clause violation).

¹⁹While the King court relied on Kotteakos v. U.S., 328 U.S. 750 (1946) harmless error standard rather than that set forth in Chapman v. California, 386 U.S. 18 (1967), the court's decision is still persuasive, because it found harmless error in light of other properly admitted evidence of future dangerousness.

(1990).

The Court must consider several factors to determine whether the alleged error is harmless or requires reversal. These factors include the importance of the challenged evidence to the State's case, whether the evidence was cumulative, whether the evidence was materially corroborated or contradicted by other evidence introduced at trial, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. Jenkins, supra at 364-65, 474 S.E.2d at 815. On this issue, these factors conclusively weigh towards a conclusion of harmless error since the factors reveal: 1) The summary is similar to testimony of Major Thierry Nettles who stated Owens was the worst inmate in his custody and he houses problem inmates, and this statement came from personal knowledge of the witness, 2) the evidence is cumulative to other evidence of his inability to adapt in prison, i.e. the murder of Christopher Lee,²⁰ 3) the exhibit was corroborated by a defense witness, Dr. Donna Schwartz Watts, and not contradicted in the record, 4) cross examination clarified the record, defense counsel was able to clarify for the jury exactly what was meant by each entry if he so chose, 5) the strength of the state's case in developing Owens' character was

²⁰Dr. David Brunetti, a psychologist, also testified that Owens has antisocial personality disorder which is primarily characterized by repeated disregard for the rights and safety of others. (R. 1341, Tr. p. 1289, ll. 1-14). Brunetti stated Owens was likely to be an individual who is hostile in his relationship with others, very quick to experience anger, and had learned the way to deal with anger is aggressively, as well as with the use of weapons. (R. 1342, Tr. p. 1290, ll. 3-18). After reviewing Owens' confession to the Lee murder, Dr. Brunetti's opinion changed from Owens being an impulsive actor "to that this was a much more predatory type of aggression." (R. 1348-49, Tr. p. 1296, l. 16- p. 1297, l. 18). Brunetti also testified he reviewed all of Owen's records from the D.O.C. since 1999 and in his opinion even in maximum solitary confinement Owens continues to harm others. (1350-51, Tr. p. 1298, l. 11-p. 1299, l. 8). This testimony was admitted without objection.

overwhelming without the challenged summary.²¹ The disciplinary records were clearly cumulative to other evidence in aggravation. Likewise, the evidence that he would be a predator in prison was firmly established without reference to the records. (R. 1444, Tr. p. 1392, ll. 11-20). The admission of the records, was harmless beyond a reasonable doubt.

Furthermore, the record is clear that Appellant's own experts reviewed and relied on Department of Corrections disciplinary records in rendering their opinions. (R. 1457-58, Tr. p. 1404, l. 16-p. 1405, l. 15). These witnesses included Marjorie Hancock and Doctor Thomas Cobb. (R. 1457-58, 1502, Tr. p. 1404, l. 16-p. 1405, l. 15 & Tr. p. 1449, ll. 12-16). Doctor Cobb testified Owens was in maximum security at Leiber Correctional Facility and Owens was getting in a lot of trouble. (R. 1490, Tr. p. 1437, ll. 1-6). Cobb testified Owens was kept "in a cell, inside of a cage" which was different than all the other cells on the cell block. (R. 1494, Tr. p. 1441, ll. 9-13). Cobb also testified Owens was found with a shank in his cell. (R. 1506, Tr. p. 1452, ll. 8-16). Cobb also testified Owens made things [weapons] for protection. (R. 1506, Tr. p. 1453, ll. 19-21).

And Doctor Donna Schwartz-Watts relied on the DOC records as well. (R. 1514, Tr. p.

²¹In addition to the evidence of the robberies and brutal murder committed by Appellant, the jury heard testimony that Appellant was adjudicated delinquent as a juvenile for burglary (two counts), assault with intent to kill, and unlawful possession of a pistol. (R. 1547, Tr. p. 1494, ll. 3-17). The jury also heard Appellant's confession to the murder of his cellmate in the Greenville County detention center along with the testimony of the pathologist who performed the autopsy on Christopher Lee, who described the savage beating that resulted in Lee's death. (R. 1359-1391, 1393-1405, Tr. p. 1307-1339, 1341-1353). The jury also heard testimony that Owens, because of his prison conduct, was required to be housed "in a cell inside a cage" and that of the worst inmates in his cellblock, he was the most problematic inmate. (R. 1444, Tr. p. 1392, ll. 11-20). The jury also heard testimony from officer Joe Wood who testified Appellant bragged about selling lots of drugs and stated he wanted to be remembered as the one "who killed the most people in Greenville." (R. 1144, Tr. p. 1093, ll. 10-13). Owens also told his girlfriend he wanted to go down in history for committing the most murders in Greenville County without getting caught. (R. 1167, Tr. p. 1116, ll. 1-4).

1461, ll. 2-5). Dr. Schwartz-Watts testified without objection that she was "...aware of many of his disciplinaries since he's been confined in the Department of Corrections." (R. 1514, Tr. p. 1461, ll. 2-5). Schwartz-Watts told the jury Appellant had horrible behavior in the Department of Juvenile Justice which included write ups for fighting and being disruptive in school, among other things. (R. 1523, Tr. p. 1470, ll. 17-23). Schwartz-Watts testified Appellant's behavior in the juvenile correction facilities was at times "aggressive". (R. 1525, Tr. p. 1472, ll. 12-19). Schwartz-Watts testified that upon Owens' release from Turbeville Correctional Institute, Owens accrued a number of armed robbery and assault charges. (R. 1524-25, Tr. p. 1471, l. 24-p. 1472, l. 7). Schwartz-Watts testified Owens had about 56 write-ups in the adult correctional system, including assaultive behavior. (R. 1525-26, Tr. p. 1472, l. 35-p. 1473, l. 7). She also stated he had a "long disciplinary history". (R. 1526, Tr. p. 1473, ll. 6-7). Dr. Schwartz-Watts testified Owens "has a long history of illegal behaviors." (R. 1534, Tr. p. 1481, ll. 13-14). She also testified Owens set fire to his cell and threw coffee in an officer's face. (R. 1541-42, Tr. p. 1488, l. 16- p. 1489, l. 2). Schwartz-Watts admitted Owens was caught with a 12 inch weapon and a 8 inch shank on two different occasions in 2006. (R. 1540-41, Tr. p. 1487, l. 16-p. 1488, l. 10). And Dr. Schwartz-Watts testified to the following:

Q: And I don't want to belabor this point, but in your report it talks that you referred to the disciplinary reports of the South Carolina Department of Corrections from 2001 through 2006?

A: Yes, sir.

Q: You had copies of all those infractions, incident reports?

A: Yes, sir. I would have had a list of them and then I think for probably the majority of them, there would have been a narrative to describe what happened.

Q: Right, the internal report --

A: Yes.

Q: -- that describes all that.

A: Yes.

Q: Now, I don't want to stand up here and read or have you read all those reports, but you did consider and use those reports as part of your review and diagnosis?

A: Absolutely, yes.

Q: And I assume you also used the material contained in the report as to who said what and who did what?

A: Yes, sir.

Q: All right. So if we needed to, we could go through those with you, but I just want to summarize in the end your comments were that Mr. Owens had substantial disciplinary infractions during his course of incarceration?

A: That is very fair to say.

Q: In fact, I believe you said he had something more than ordinary?

A: I counted 56, and -- of course, in the course of my career I look at -- its very common in doing evaluations I'll look at the list of assaultive disciplinaries, and it was a lengthy list.

Q: And we have -- and you may have been in the courtroom. We put in, through Mr. Nettles, a summary, very brief summary, of each one of those events, 28 of them to be exact we put in, and were you in the courtroom when we --

A: No, sir.

Q: Okay, Well, there is a summary or a list of those that I would like to show you, State's Exhibit 30.

A: Thank you.

Q: And just so you will understand what that is, that is a summary of all of -- of 28 of those reports that -- you had the whole report. That's just a summary

of what the heading of it was.

A: Yes, these all look familiar. Each one of these I have some recollection of reading the reports that went with them.

(R. 1538-40, Tr. p. 1485, l. 12 - p.1487, l. 8).

In summary, Dr. Schwartz-Watts and others testified without objection that Appellant had a lengthy disciplinary history including a history of assaultive behavior and possession of illegal weapons while incarcerated. In fact, the defense' witnesses testified to more disciplinary violations than the State offered into evidence. All of this evidence was before the jury without reference to the challenged summary. Additionally, Dr. Schwartz-Watts testified that the State's summary admitted into evidence was in fact a summary of the very documents she relied upon in reaching her opinion.²² The summary could have been properly admitted through Doctor Schwartz-Watts if it had not already been entered.

Even assuming *arguendo* that the admission of the records was error, their admission was harmless beyond a reasonable doubt. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003)(admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); *see also* State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996)(instructing that error in admission of evidence is harmless where it is cumulative to other evidence which was properly admitted); State v. Douglas, 367 S.C. 498, 520, 626 S.E.2d 59, 71 (Ct. App. 2006)("The

²²In fact, Dr. Brunetti, a former defense expert, testified on behalf of the State that after reviewing the very same records, Owens continues to harm others while in maximum solitary confinement. This testimony was admitted without objection. (R. 1350-51, Tr. p. 1298, l. 22- p. 1299, l. 8). Brunetti testified before Major Nettles and before the records themselves were offered by the state. This evidence was also before the jury.

admission of improper evidence is harmless where the evidence is merely cumulative to other evidence").²³

The jury, without regard to the summary, was aware Owens had a lengthy record of assaultive behavior while in confinement, including murder, and a history of making weapons or "shanks". And, within his housing unit he was considered "assaultive", "destructive", and "damaging", the "most problematic inmate". (R. 1444, Tr. p. 1392, 18-20). Even in maximum solitary confinement "he continues to harm others." (R. 1351, Tr. p. 1299, ll. 1-8). The admission of the summary was harmless beyond a reasonable doubt. State v. Motley, 251 S.C. 568, 164 S.E.2d 569 (1968)(no prejudice shown where a different witness testified to the same matter without objection).

III.

There was no reversible error with regard to the Solicitor's closing argument, given that the issue was not preserved, and the argument was permissible in any event.

In his third issue on appeal, Appellant alleges the Solicitor entered an arbitrary factor into this sentencing proceeding by allegedly arguing general conditions of prison confinement. This issue has no merit.

Failure to Preserve Alleged Error

This issue is not preserved for appellate review. There was no objection to the portion of the Solicitor's closing argument Owens now challenges on appeal. (Tr. p. 1561). In fact, there was no objection made to any portion of the Solicitor's closing argument. (Tr. p. 1547-1563). "All that this Court has ever required is that the questions presented for its decision must first have been fairly and

²³See also State v. Rice, ___ S.E.2d ___, 2007 WL 2914651 (Ct. App. Oct. 5, 2007)(admission of business records was harmless where records were cumulative to other evidence).

properly raised in the lower court and passed upon by that Court.” Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939). Issues not raised to and ruled upon in the trial court will not be considered on appeal. In the Interest of Michael H., *supra* (trial court must be given an adequate opportunity to resolve the issue); Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000)(issue cannot be raised for the first time on appeal); State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994)(contemporaneous objection must be made to preserve issue for appellate review).

“There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.” Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002). Appellant has met none of these requirements.

The preservation rule is also applicable to closing arguments. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998)(failure to object to closing argument precluded appellant from raising issue on appeal); State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005); State v. Richardson, 358 S.C. 586, 595 S.E.2d 858 (Ct. App. 2004)(appellant failed to make any objection during closing arguments).

In State v. Patterson, 324 S.C. 5, 482 S.E.2d (1997), the solicitor “..equated life in prison with that of a motel with appellant as the innkeeper.” *Id.* at 17. Patterson objected for the first time on appeal. This Court held that because no objection was made at trial, the issue was not preserved. *Id.*, citing Southerland, *supra*.

In State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998), the solicitor argued to the jury that the “easy life” afforded an inmate housed in the general population, was not an appropriate

punishment for appellant's crimes. Gardner challenged the argument for the first time on appeal. This Court held: "There was no objection to the closing argument, and therefore no issue is preserved for our review." *Id.* at 393, citing State v. Franklin, 318 S.C. 47, 456 S.E.3d 357, *cert. denied*, 516 U.S. 856, 116 S.Ct. 160 (1995).

The proper course is to object immediately to an improper argument. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996)(failure to object during closing argument); State v. Black, 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995)(proper course during an improper argument is for opposing counsel to immediately object and have a record made of the statements or language complained of and ask the court for a distinct ruling thereon). Failure to do so results in the issue not being preserved for appellate review. Knight, *supra*.

And the objection, if made, must be timely. State v. Somerset, 276 S.C. 220, 277 S.E.2d 593 (1981)(ordinarily, if an appellant fails to object the first time a statement is made, he waives his right to raise the issue on appeal); Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000). Appellant made no timely objection to any of the Solicitor's closing argument. In fact, Appellant made no objection at all. See Wiggins, *supra*("This argument is not preserved for appellate review because Appellant made no objection to Solicitor's arguments at any point during the trial").²⁴

²⁴If an objection had been made and sustained, Appellant must move for a curative instruction or request a mistrial, otherwise he has received what he asked for and cannot be heard to complain on appeal. See Patterson, *supra* (during closing argument appellant objected, the judge ruled in appellant's favor and appellant failed to move to strike or request a curative instruction; issue not preserved for review, objecting party must contemporaneously make an additional objection); George, *supra*; State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005); State v. Richardson, 358 S.C. 586, 595 S.E.2d 858 (Ct. App. 2004)(appellant did not move for mistrial on ground of improper argument); Holroyd v. Requa, 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004)(failure to request curative instruction when objection during closing

Furthermore, there is no issue of an inflammatory argument,²⁵ because this issue was not raised to the trial judge by way of a post-trial motion. Dial v. Niggel Assoc., Inc., 333 S.C. 253, 509 S.E.2d 269 (1998)(Toyota challenge must be raised to the trial judge by way of post-trial motion to be preserved for appeal.); *See also* Scott, *supra* (solicitor's comments during closing argument did not rise to the level of a Toyota argument). No post trial motion regarding the Solicitor's closing argument was made in this case. This issue is simply not preserved for appellate review. Dial, *supra*. Even if a post-trial motion had been made, the Solicitor's challenged comments do not constitute an abuse of a party or witness.

The preservation rule also applies to constitutional arguments of an appellant. State v. Powers, 331 S.C. 37, 501 S.E.2d (1998)(citations omitted). And, it applies when the appellant alleges an arbitrary factor has been introduced into the sentencing proceedings. State v. Stone, Shearouse Advance Sheets, Opinion No. 26408 (filed December 20, 2007) (citations omitted).

Finally, even if Appellant's contention on this issue was true, which it is not, in State v. Bowman, 366 S.C. 485, 623 S.E.2d 328 (2005), this Court held the appellant's claim the trial judge should not have allowed evidence of general prison conditions was not preserved for review, because "appellant did not raise this issue to the trial court before the testimony was presented and did not make a contemporaneous objection when the testimony was actually elicited. Further, the trial court

argument was sustained). In this case, there simply was no objection, and obviously no request for a mistrial or a curative instruction. Appellant has failed to preserve this issue for appeal.

²⁵Toyota of Florence v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994)(where challenged argument constitutes abuse of a party or witness); South Carolina State Highway Dep't. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1971). *See also* State v. Bennett, 369 S.C. 219, 632 S.E.2d 281(2006)(in which the appellant raised the issue in a post-trial motion for a new trial) *citing* Dial, *supra* and Toyota, *supra* as controlling.

did not rule on this issue as now stated by appellant.” *Id.*, at 498, *citing State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004); *State v. Byrum*, 326 S.C. 107, 485 S.E.2d 360 (1997); *State v. Johnson*, 363 S.C. 53, 609 S.E.2d 520 (2005). Appellant failed to preserve this issue for appellate review by failing to make any objection at all to the Solicitor’s closing argument. (R. 1601-1617, Tr. p. 1547-1563). *Wiggins, supra, citing Patterson, supra.*

Standard of Review

Owens alleges the trial judge erred in allowing the Solicitor to make the challenged portion of his closing argument. A trial judge is vested with broad discretion in dealing with the range and propriety of closing argument and ordinarily his rulings on such matters will not be disturbed. *Patterson, supra* at 17. The trial court’s discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant. *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996) *citing State v. Washington*, 315 S.C. 108, 432 S.E.2d 448 (1992) *also State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989). Additionally, the appellant has the burden of showing that any alleged error in argument deprived him of a fair trial. *Bell, supra.* Owens has failed to meet that burden.

The Merits

Even if preserved, the argument was not improper, because the Solicitor’s closing argument was tied directly to Appellant, Freddie Eugene Owens. Additionally, the matters discussed in this portion of the Solicitor’s closing argument were tied to the record and the reasonable inferences from the record. The central theme and focus of the Solicitor’s closing argument was that the death penalty was the appropriate punishment for Owens, not life in prison, because of the heinousness of the murder of Irene Graves, the evidence of Owens bad character and his assaultive conduct while

incarcerated. (See R. 1600-1617, Tr. p. 1546-1563). The following is the portion of the Solicitor's argument Owens alleges was improper (*in italics*) in the context that it was made:²⁶

Even in that environment of the cell inside a cage his assaultive behavior still exists. Dr. Cobb told you yesterday, and I don't know if you caught this, but he said "when I talked to him, I go inside the cage. When I talk to him through the window." He doesn't even go inside the cell with Freddie Owens.

He is still planning. He is still making shanks. He is still planning for assaultive behavior. He has those shanks under his mattress and he has them in his possession after he's been on medication.

But what we really have, Freddie Owens is playing a game. Halloween night was a game. Ride around and rob and then kill Irene Graves, because she wouldn't open the safe or cash register fast enough, because it was in grocery order mode. He has no respect for life. His statement was "I shot the bitch. I shot the whore." The mother of three children working three jobs, he called her a bitch. He has no respect for life. He has no respect for other people. In fact, his disrespect is so apparent that it put chills on the neck of Joe Wood, who said he had been a detective for over 25 years, and he was only one of two people, Freddie Owens, who put chills on his neck. And that's the reason, because Freddie is a unique person. He killed Irene Graves and he went home and went to bed. He killed Christopher Lee. Hands on, horrific predator killing; beat him the whole time he was unconscious; rammed his head into the floor; kicked him; stomped his chest; twisted his neck until he ripped the skin off of him, broke two ribs; rammed the pen up his nose to make him stop moaning; kicked him; burned him. Then he threw his lifeless body up on a bunk like a sack of potatoes and went to sleep. He could care less. He's cold. He's unfeeling. And in the Department of Corrections he continues to manifest that: Cold; assaultive; planning for assaults; shanks; stabbing. He continues as a predator.

Freddie wanted to be a person in Greenville who killed the most people and got by with it. He said it best what he is when he told Joe Wood "I'm a real menace." And Major Nettles summed it up for you when he said

²⁶In his brief, Owens only presents the portion of the argument to which he *now* objects, and does not present this Court with the context in which the argument was made.

"he's still at this date my most problematic inmate in the population of the worst of the worst inmates in this state."

The greater the extent of his culpability, the greater the punishment. So what is the appropriate sentence to fit this crime and hold him responsible for his actions? Life imprisonment is not appropriate. You can't put him in prison for life and expect him to suffer, because he has to think about it everyday? He's not going to give another thought for Irene Graves. He's not going to give another thought for her two children. He's not going to give another thought for Christopher Lee. He's not going to give another thought to any of those correctional officer's that he assaults. Nobody is going to be there to talk to him and say "do you remember the murder you did?" So he's not going to suffer with any memory in prison. He will go on with his self teaching and making himself better and reading his books, learning

languages and doing things that he's doing. There is nobody going to be there to remind him.

Sure, you and I may think going to prison would be a serious thing, and it would be, but what about Freddie Owens? Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, but he will still have food to eat. They will provide him with clothes. He will have books to read. He will be able to recreate and exercise. He will have doctors to take care of him. He will have clothing that they provide, and he will have contact with his family and loved ones, and TV at times, and he will have family business. Not much more than a change of address for Freddie Owens. So don't think putting Freddie Owens in prison for the rest of his life is going to be a significant punishment for him.

The death penalty is the appropriate punishment for him. Remember Freddie could have made something of himself. He had a mother who did the best she could by him. That's what was testified by the psychiatrists. A teacher who cared about him, beyond normal expectations, gave him special help. He had average intelligence, IQ, has increased over the years. He was artistic. He was athletic, but he chose another route. He chose a route to be a predator and he chose a route to be a killer.

Remember, Irene Graves was a living, breathing human being, who had a right to continue to live. She had never harmed a soul. A good sweet person. She loved her children and she deserved to live, but he invaded her workplace and he took her life. And when you consider the punishment, want you to consider the extent of the crime and extent of his culpability. Killing Ms. Graves was a horrible crime and it deserves the most severe punishment. It was a senseless crime. Killing Christopher Lee was the same. Senseless, unnecessary, brutal predator. His behavior in prison has been the same. Correctional officers don't deserve the continuing abuse of Freddie Owens. He should be held accountable.

(R. 1612-16, Tr. p. 1558, l. 20- p. 1562, l. 13). Given the record in this case, and the context that the argument was made, it was not improper, but entirely proper.

In keeping with this Court's previous decision in State v. Bowman, *supra*, the State did not offer an expert witness or testimony regarding general conditions of confinement.²⁷ Testimony regarding how *Freddie Eugene Owens* was confined, and how he behaved in those conditions, came from his own psychologist and psychiatrists and the state's custodian of records who testified to Owens' record of disciplinary infractions and from the officer's own personal experience with Mr. Owens. See State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007)(how inmates other than the defendant at trial are treated in prison is inappropriate, evidence should be connected to particular defendant)(citation omitted). The record reflects that the Solicitor's comments were not only *not* improper, but also were entirely proper.

An appellate court must review the argument in the context of the entire record. Patterson,

²⁷The Solicitor also complied with this Court's subsequent decision in State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007) decided approximately 2 months after this sentencing proceeding.

supra; Rice, *supra*, citing Patterson.²⁸ Considerable latitude is generally allowed in matters of drawing and arguing inferences and deductions from evidence. Johnson v. Life Ins. Co. of Ga., 227 S.C. 351, 88 S.E.2d 260 (1955). A lapse of good taste will rarely constitute prejudicial error nor will robust language introduce an arbitrary factor. State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984). Arguments must be confined to the evidence in the record and reasonable inferences therefrom, although failure to do so will not automatically result in reversal. State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997). A new trial will not be granted unless the comments so infected the trial with unfairness so as to make the resulting conviction [or death sentence] a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868 (1974); Bennett, *supra*; Patterson, *supra*. “[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made.” Bennett, *supra*, quoting Nasim, *supra*.

Doctor Schwartz-Watts, Appellant’s witness, testified to the following regarding Appellant:

He reads. He - - is fluent. He has taught himself Arabic. He has taught himself Swahili. He is studying French. He reads. He reads scholars. He won’t read any books unless it’s a scholar that’s published for 15 years. He reports he has taught other inmates how to read. He teaches them to read using the book Alexander the Great, because he doesn’t want them reading books that aren’t well written. So he’s able to focus his attention.

(R. 1532, Tr. p. 1479, ll. 9-17). “I also discovered that he’s fluent in sign language, which I didn’t know. I saw him sign in court. So he’s taught himself many things.” (R. 1532, Tr. p. 1479, ll. 21-23). Actions Doctor Tora Brawley, another defense witness, described as Owens “..bettering

²⁸By engaging in this analysis, Respondent does not concede the Solicitor’s comments were improper. Instead, the record reflects they were proper given the testimony introduced in the case by both the state and the defense.

himself..". (R. 1480, Tr. p. 1427, l. 21).

Additionally, in Owens' confession to the murder of Christopher Lee, Owens refers to he and other cellmates in his cell block watching the news on *television*. (R. 1388, Tr. p. 1336, ll. 24-25). Owens then states in his confession: "I then *worked out* and *took a shower*." (R. 1389, Tr. p. 1337, l. 1). Owens talks about *sleeping in his bed*. (R. 1389, Tr. p. 1337, ll. 1-2). Owens talks about being brought *breakfast* the morning after he killed Lee. (R. 1340, Tr. p. 1338, ll. 22-23). The prison disciplinary records admitted in evidence also reveal that Appellant was allowed to *shower*, was *given food*, and *coffee* and had a *mattress* to sleep on. (R. 1442-43, Tr. p. 1390, l. 11-p. 1391, l. 13). Albeit, Appellant abused all these privileges.²⁹ The record is clear Freddie Owens had these privileges. And, a shank found in his cell was manufactured from fencing on the *recreation yard*. (R. 1442, 1443, Tr. p. 1390, l. 18, p. 1391 ll. 19-22). In fact, most of the shanks found in Owens' cell were made from fencing material. (R. 1445, Tr. p. 1393, l. 13). If there was any question regarding Owens being allowed to have recreation it was cleared up by Doctor Cobb who stated he actually witnessed Owens being taken to the *recreation yard*. (R. 1494, Tr. p. 1441, ll. 6-8). The record also reflects that Owens received *visitors* while in prison and received *letters* from a friend. (R. 1473, Tr. p. 1420, ll. 7-13). Additionally, Freddie Owens has been *treated by doctors & a nurse* while in prison.³⁰ (R. 1487-1547, 1442, Tr. p. 1434, l. 17-p. 1494, l. 18, p. 1390, l. 10). And there is a psychiatrist currently working at Owens facility under Dr. Cobb's direction. (R. 1501, Tr. p. 1448, ll. 9-14). The Solicitor's comments were based in the record and the inferences therefrom.

²⁹ Appellant stabbed an inmate in the *shower*, threw the *food* tray and *coffee* on a guard and set fire to his *mattress*.

³⁰ He slapped the nurse in the face.

See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

The record also shows that Appellant had been incarcerated during his teenage years and almost all of his adult life. (R. 1458, Tr. p. 1405, ll. 7-8, 12-5). Life in prison would not be much more than a change of address for Appellant Owens. Appellant also told investigators after the murder "the only thing I'm here for is to eat, sleep, shit and piss. I don't give a shit. I was born to be in jail." (R. 1143, Tr. p. 1092, ll. 10-12). He also told the detectives: "If I go to jail, I go to jail, I don't give a shit." (R. 1143-44, Tr. p. 1092, l. 23-p. 1093, l. 1). The Solicitor's comments were appropriate given this record. If Owens' comments are to be believed, *life in prison doesn't mean anything to Appellant Freddy Owens*. Just more of the same. The Solicitor's comments were based in the record. A solicitor has a right to state his version of the testimony and comment on the weight to be given such testimony. Smith v. State, Shearhouse Advance Sheets, Opinion No. 26405, (filed December 10, 2007) *quoting* Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) *citing* State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999).

The challenged portion of the argument can now be viewed in light of the entire record:

Sure, you and I may think going to prison would be a serious thing and it would be, but what about Freddie Owens? (Tr. p. 1405, ll. 7-8, 12-15, p. 1092, ll. 10-12, p. 1092, l. 23-p. 1093, l. 1). Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, (Tr. p. 1441, ll. 9-13) but he will still have food to eat. (Tr. p. 1338, ll. 22-23, p. 1390-1391, p. 1092, ll. 10-12). They will provide him with clothes. He will have books to read. (Tr. p. 1479, ll. 9-17). He will be able to recreate and exercise. (Tr. p. 1390, l. 1 & 18, p. 1391, ll. 19-22, p. 1393, ll. 13-14, p. 1441, l. 8). He will have doctors to take care of him. (Tr. p. 1390, l. 10, p. 1434, l. 17 -p. 1494, l. 18). He will have the clothing they provide, and he will have contact with his family and loved ones (Tr. p. 1420, ll. 7-13) and TV at times (Tr. p. 1336, ll. 24-25) and he will have family business. (Tr. p. 1411, ll. 5-10, p. 1405, ll. 5-7). Not much more than a change of address for Freddie Owens. (Tr. p. 1405, ll. 7-8, 12-15). So don't

think putting Freddie Owens in prison for life is going to be a significant punishment for him. (Tr. p. 1092, ll. 10-12, p. 1092, l. 23-p. 1093, l. 1).

The death penalty is the appropriate punishment for him. (Tr., p. 1181, ll. 18-25, p. 1114, ll. 23-25, p. 1092, ll. 10-12, p. 1092, ln. 23-p. 1093, l. 1, p. 1093, ll. 12-13). Remember that Freddie could have made something of himself. He had...

Or stated another way:³¹

So he's not going to suffer with any memory in prison. He will go on with his self teaching and making himself better and reading his books, learning languages and doing things that he's doing. (Tr. p. 1479, ll. 9-23 & 1427, l. 21). There is nobody going to be there to remind him.

Sure, you and I may think going to prison would be a serious thing and it would be, but what about Freddie Owens? *I spoke to staff at DJJ who had known him when he was incarcerated there. /..I have read the records of his school records, SCDC records, and his Department of Corrections records. / He said "the only thing I'm here for is to eat, sleep, shit and piss. I don't give a shit. I was born to be in jail."/ "He said "if my mom says anything, tell her I said adios, to kiss her ass too. She can kiss my ass too. Tell Ian and the rest of them assholes to fuck themselves. If I go to jail, I go to jail. I don't give a shit."* Big prison is like a little city. In prison he will have all of the necessities of life. Sure, he will be in solitary. *Freddie was in a cell, which was also inside a cage, which is a little bit different than all the other cells on the cell block.* But he will still have food to eat. *I woke up when Hefner opened the door to bring in breakfast. / August 17, 2002, throws a food tray and hits officer Guess in the head. / January 13, 2006 throws feces on officer Williams hitting him in the face. / May 20, 2006 throws coffee on officer Smith. / "[T]he only thing I'm here for is to eat, sleep, shit and piss."* They will provide him with clothes. He will have books to read. *He reads. He—he is fluent. He has taught himself Arabic. He has taught himself Swahili. He is studying French. He reads. He reads scholars. He won't read any books unless it's a scholar that's been published for 15 years. He reports he has taught other*

³¹Bold type entries are from the record cites in the preceding paragraph. A / indicates a break in testimony.

inmates how to read. He teaches them to read using the book Alexander the Great, because he doesn't want them reading the books that aren't well written. He will be able to recreate and exercise. May 27, 2001, had a six and a half inch shank made from fencing and toothbrush. / December 22, 2002, shank made from fencing. / A shank is a homemade weapon within the penitentiary. The two that -- say push rod actually comes out of the cell. The rest are predominantly made from fencing material off the rec field. / Did you ever witness any incidents or treatment of Freddie by the correctional staff? Not other than transporting him to the recreation yard. He will have doctors to take care of him.³² August 5, 2002 slaps a male nurse in the face. / He seemed to enjoy my counseling and talking about his difficulties he was having... / I diagnosed Freddie with impulse control disorder, not otherwise specified; and anxiety disorder, not otherwise specified, / Did you prescribe medication for him? Yes, I did. / Has Freddie been compliant with your treatment plan? Yes, he has. / Now, Dr. Cobb, even though you are not going to Leiber presently, is there a psychiatrist going to Leiber? Yes there is. And is that psychiatrist actually working under your control? Yes, he is. / Actually, I may be mistaken, but I think he's been -- he was under the care of Dr. Cusack, who is a psychiatrist there for a number of years, even before Dr. Cobb came.³³ He will have the clothing that they provide, and he will have contact with his family and loved ones. And have you continued to keep up with Freddie over the years? I have. My husband and I visited him when he was -- I can't think of the name of the prison down in Summerville. I'm sorry, I can't think of name of it. We did visit him. And then after my husband died in 2002, I did not correspond with Freddie any more. And T.V. at times. At eleven p.m., on 2-15-99, myself and other inmates in my cell block watched the news and saw that I was found guilty. And he will have family business. Freddie, I'm sorry, Masey, was -- is Freddie Owen's dad had very, very little contact with the family. ... Freddie

³²Defense counsel asked a defense witness the following: "Well, if Freddie were to get a life sentence, where could he be housed in the Department of Corrections that would take care of his mental health treatment?" The witness spent a page of the transcript answering this question. (R. 1535-36, Tr. p. 1482-1483). The Solicitor's comments were tied to the record and the reasonable inferences therefrom.

³³Respondent has not set forth all of the testimony referenced in the record regarding Appellant being treated by doctors, just a select portion. The testimony is too lengthy to include here. (R. 1487-1547, Tr. p. 1434, l. 17 - p. 1494, l. 19).

has had very little contact with him when he was growing up. There has been subsequent contact in recent years.³⁴ I interviewed the client, Freddie Owens. I interviewed his mother, his -- both of his sisters. I interviewed one of his brothers. I had the chance to talk to his stepfather, who was then stepfather.³⁵ Not much more than a change of address for Freddie Owens. I spoke to staff at DJJ who had known him when he was incarcerated there. / ..I have read the records of his school records, his SCDC records, and his Department of Corrections records. / He was in Burchwood Dorm, which is one of the more -- as Dr. Cobb was mentioning earlier, that was one of the dorms where juveniles were older and had more serious charges. So certainly he was in an environment that was more -- where the juveniles were considered maybe more dangerous than others, compared to other campuses. While in the Department of Corrections, I think it's been very fair to say that he's had a lot of write ups, even compared to other inmates. He's had, I believe I counted, about 56 write-ups over the years. Those write-ups have ranged from some things that are assaultive, to again, him still in his late twenties, now being disruptive at times, being very impulsive, but its certainly been characterized as a long disciplinary history. So don't think putting Freddie Owens in prison for life is going to be a significant punishment for him. He said "the only thing I'm here for is to eat, sleep, shit and piss. I don't give a shit. I was born to be in jail." / He said "if my mom says anything, tell her I said adios, to kiss her ass too. She can kiss my ass too. Tell Ian and the rest of them assholes to fuck themselves. If I go to jail, I go to jail. I don't give a shit."

The death penalty is the appropriate punishment for him. "I don't

³⁴Owens has been incarcerated since 1997. This testimony was received in 2006. It is certainly a reasonable inference that Owens has had contact with his father in the last several years while incarcerated.

³⁵Given the testimony that Owens has had visitors and corresponded with them while in prison, the jury could certainly infer that he could do the same with his family. Doctor Schwartz-Watts also testified "I think it's very fair to say he's attached to his mother. He's certainly attached to his teacher. And I think he's been attached to any -- Dr. Cobb, as well, any person that's provided help to him. And I think that's very fair to say. He's very attached to his family members, but overall, he's had very little chance for a relationship." (R. 1528, Tr. p. 1475, ll. 4-9). The jury could reasonably infer their was contact with his family and Owens was aware of family issues. (See also R. 1495, Tr. p. 1442, ll. 3-7). This referenced conversation took place sometime after 2005. (R. 1492, Tr. p. 1439).

give a shit. I was born to be in jail." / "If I go to jail, I go to jail. I don't give a shit." / "She kept throwing up her hands and said she couldn't open the safe, so he just said 'I just shot the bitch.'" / "[S]he wasn't opening the safe, so he shot the whore." / Yeah, I want to be remembered as the one who killed the most people in Greenville. I'm a real menace. Remember Freddie could have made something of himself. He had a mother who did the best she could for him. That's

The Solicitor's closing argument was tied to the record and the reasonable inferences therefrom. The Solicitor's closing argument focused on Owen's character, his background and the nature of the crime. See Bennett, *supra*; State v. Reed, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987)(overruled on other grounds by State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)). Wide latitude and freedom of counsel in arguments to the jury are allowed so long as the arguments are based on facts in the record or inferences from those facts. Edwards v. Lawton, 244 S.C. 276, 136 S.E.2d 708 (1964).

The challenged portion of the argument must be reviewed in the context of the entire record and the entire closing argument. Patterson, *supra*. In essence, the Solicitor was arguing Owens should be put to death for the brutal murder of Irene Graves, given the circumstances of the crime, evidence of his character, inability to adapt to prison life, and future dangerousness. Owens should not be allowed the privilege of living, eating, sleeping, and breathing which a life sentence for Owens would entail. Those privileges that normally come with the privilege of being alive. Given the evidence, life in prison is not a significant punishment for Owens. He's been in jail before, look how he acted. His statements admitted during the trial indicate that prison means nothing to him. This Court has never prevented the Solicitor from making such a contrast in the appropriateness of punishment given the evidence in the case, as long as the evidence deals with a particular defendant. See Burkhart, *supra*; Bowman, *supra*. As this Court stated in Burkhart:

We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*. We note, however, that evidence of defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions.

Id. at 488 (*italics in original*). Likewise, in Bowman, *supra*, this Court stated:

We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that *particular defendant*.

Id., at 488-499 (*emphasis added*).

The State did not introduce any evidence regarding whether other inmates had escaped or attempted to escape from prison. The State did not introduce any evidence of how other inmates are treated in prison other than Owens. Appellant mistakenly alleges the State violated this Court's holdings in Burkhart and Bowman. Appellant is wrong. The State followed those holdings by tying its closing argument directly to Appellant Freddie Owens, his behavior while incarcerated, and whether life in prison was the appropriate punishment for him.

Likewise, the Solicitor in his closing argument, only referred to how Freddie Eugene Owens would be confined and treated if the jury chose to sentence him to life and whether that was an appropriate punishment, or whether in contrast the death penalty was the more appropriate punishment for the murder of Irene Graves, given the circumstances of the crime, the evidence of Owens' character, and his actions in jail. *See Reed, supra* (argument must be confined to the record and its reasonable inferences and center on the characteristics of the defendant and nature of the crime). This case is not Burkhart or Bowman. There was no testimony regarding conditions of

prison life *in general*. The conditions of *Owens' confinement* and how he behaved in them were testified to in the record over and over and were all that was offered. Appellant concedes in his brief there was no testimony of general prison conditions. (See B. O A., p. 21). Instead, Appellant argues the Solicitor's closing argument was one of general prison conditions. This reasoning is incorrect as pointed out above. While admitting there was no testimony regarding general conditions of confinement, in his argument on this issue Owens fails to mention or discuss at all the extensive evidence admitted without objection regarding his own personal conditions of confinement and behavior therein. (B.O.A. pp. 21-23). This omission was necessary, because discussing this evidence would be an admission that the Solicitor's argument was supported by the record and the reasonable inferences therefrom.

Owen's boasted that prison life meant nothing to him. Prison was no punishment at all; he was born to be in jail. The Solicitor's statements were reasonable given Owen's callous disregard for law and order, and incarceration as a form of punishment.

The Solicitor's argument was one of retribution and punishment. The central theme of the argument was that Owens deserved the death penalty because of the heinousness of this murder and the evidence of Owens character and future dangerousness. As shown above, the Solicitor's argument was tied to evidence in the record that was admitted without objection or admitted through defense witnesses.³⁶ This Court has never held that a Solicitor cannot argue that the death penalty is a more appropriate punishment for the Defendant than life in prison. The Solicitor argued Owens should be put to death, not allowed to live under the *conditions he, Freddie Owens, was now*

³⁶Perhaps this is the reason there was no objection to any portion of the Solicitor's closing argument, nor was any post trial motion made to the trial judge regarding any portion of the Solicitor's closing argument.

confined under. Appellant would also have this Court limit the Solicitor from arguing in favor of the death penalty by contrasting death with the privileges of life itself, waking, sleeping, breathing, eating, etc. This would be a ridiculous result. Irene Graves and Christopher Lee no longer enjoy these privileges. This was a proper retributive argument given Owens' crimes, his actions inside jail, and his statements to police that prison meant nothing to him. The argument was tied to Freddie Owens, his crimes, the conditions of Freddie Owen's confinement, his actions in those conditions, and the evidence in the record, not general conditions of confinement. Freddie Owens actions and conduct and what punishment he deserved for those actions and conduct was the central focus of the Solicitor's closing argument. The argument was not improper. The argument was not calculated to arouse the juror's passions or prejudices, and its content stayed within the record and the reasonable inferences therefrom. *See Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). It did not introduce an arbitrary factor into the jury's deliberations.

Owens has the burden of proof of proving he did not receive a fair trial because of the alleged improper comments. *Humphries v. State*, 351 S.C. 362, 570 S.E.2d 160 (2002); *Simmons v. State*, *supra*. Improper comments, if made, do not automatically require reversal if they are not prejudicial to the defendant. *Id.* "[I]t is not enough that the remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 168, 181, 106 S.Ct. 2464, 2471 (1986); *State v. Tubbs*, 333 S.C. 316, 509 S.E.2d 815 (1990). Owens bears the burden of establishing the argument was so improper it infected the sentencing proceeding with unfairness to the extent that the death sentence was a denial of due process. *Wiggins, supra, citing State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996). Owens must show prejudice. *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996) *citing State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975). Owens has failed to meet this burden.

Harmless Error

Even assuming *arguendo* that the Solicitor's comments were inappropriate, they were harmless beyond a reasonable doubt. See Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992)(acknowledging appropriateness of harmless error analysis in capital cases where constitutional rights are violated); See also State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985)(finding harmless error in admission during penalty phase of defendant's confession to other crimes). They did not so infect the trial with unfairness as to make the resulting death sentence a denial of due process. State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000); State v. Davis, 309 S.C. 326, 422 S.E.2d 133, 146 (1992); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). Even noting the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury, this limited portion of the argument alleged to be erroneous was not prejudicial. State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979); State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998). The currently challenged portion of the Solicitor's argument only took up one paragraph in an argument that took up fifteen (15) pages of trial transcript. See Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2003)(objected to argument only took up ten lines in transcript); Tucker, supra (challenged comment allegedly necessitating mistrial was one isolated event in whole argument) *citing* State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984)("momentary lapse of good taste will rarely constitute prejudicial error"), *overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). This small portion of a lengthy argument in no way approaches the "overly zealous" argument disapproved of in State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007)(holding solicitor sought to inflame passions of jury with argument, improperly

injected his own personal beliefs into the case, and staged a funeral procession before the jury).

Given the overwhelming evidence the death penalty was appropriate, including Owens' senseless murder of Irene Graves because she could not open the safe, his brutal torture and murder of Christopher Lee while in jail, his cavalier attitude toward prison life, and his assaultive behavior against guards, inmates, and medical personnel even in the most secure of prison environments, this challenged portion of the argument was harmless. See Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2005)(applicant failed to show result of sentencing proceeding would have been different where challenged comment of solicitor did not so infect the trial with unfairness as to make the result a denial of due process); Humphries, *supra* (death sentence affirmed where solicitor's closing argument in penalty phase did not prejudice petitioner); State v. Tubbs, 333 S.C. 316, 509 S.E.2d (1999)(solicitor's isolated references to defendant as Cobra were harmless where they did not infect entire trial with unfairness) *citing* Arnold v. Evatt, 113 F.3d 1352 (4th Cir. 1997)(solicitor's occasional use of nickname "Mad Dog," during guilt and re-sentencing proceedings did not deny defendant due process of law).

This issue was simply not preserved for appellate review, because Owens made absolutely no objection at any time to any portion of the Solicitor's closing argument, much less the portion he now challenges. Furthermore, there is no merit to this issue, because the Solicitor's challenged comments were tied directly to Freddie Owens, the evidence and the reasonable inferences therefrom, not general conditions of confinement. Finally, even if the challenged comments were somehow improper, they were harmless given the overwhelming evidence in this case that the death penalty was appropriate.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the sentence of death should be affirmed.

Respectfully submitted,

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By: 
J. ANTHONY MABRY
ATTORNEY FOR RESPONDENT

March 18, 2008

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

Appeal from Greenville County
Larry Patterson, Circuit Court Judge

THE STATE,

Respondent,

v.

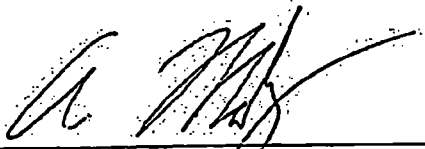
FREDDIE EUGENE OWENS,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with SCACR
211(b).

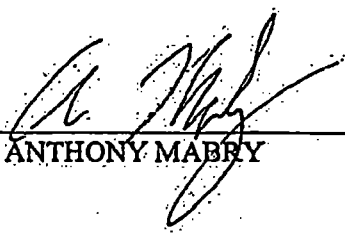
This 18th day of March, 2008.



J. ANTHONY MABRY
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the *Final Brief of Respondent* in the foregoing action by depositing copies in the Interagency Mail to Joseph L. Savitz, III, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 18th day of March, 2008.



J. ANTHONY MABRY

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

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant,

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26520
Heard June 12, 2008 – Filed July 14, 2008

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, and Appellate Defender LaNelle C. DuRant, both of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry, all of Columbia, and Robert Mills Ariail, of Greenville, for Respondent.

JUSTICE PLEICONES: Appellant appeals his death sentence following a second resentencing proceeding. This opinion consolidates his appeal and the mandatory proportionality review. We affirm.

Appellant was convicted of murder, armed robbery, using a firearm during the commission of a violent crime, and conspiracy to commit armed robbery, and received a death sentence for murder, thirty years for armed robbery, and five years for each of the other two offenses. On his first appeal, the convictions were affirmed, but his death sentence reversed and his five year sentence for firearm possession vacated.¹ State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Following a bench resentencing proceeding, appellant again received a death sentence. This Court vacated that sentence, finding the trial judge's comments to appellant in regard to his right to a jury trial constituted reversible error. State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004).

This second resentencing was tried to a jury which returned a death sentence, finding two aggravating circumstances: (1) the murder was committed in the commission of robbery while armed with a deadly weapon and (2) the murder was committed while in the commission of larceny with use of a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) and (e). Appellant raises three issues on appeal.

ISSUES

- 1) Whether the trial judge erred in disqualifying a juror?
- 2) Whether the solicitor's closing argument was improper?
- 3) Whether the trial judge erred in admitting redacted prison disciplinary records?

¹ Under S.C. Code Ann. § 16-23-490(A), no firearm sentence may be imposed where the defendant receives a death sentence or life sentence without parole for the violent crime. The vacation of appellant's sentence was conditional: if appellant were ultimately to receive a life sentence for murder, then the five year sentence would be reimposed.

ANALYSIS

Appellant conceded at oral argument that there was no objection at trial to the juror disqualification or to the closing argument. Without an objection, neither of these issues is properly preserved for appellate review. E.g., State v. Stone, 376 S.C. 32, 655 S.E.2d 487 fn. 1 (2007) (“South Carolina’s strict error preservation rules are no less applicable in death penalty cases”). Under these circumstances, we do not reach the merits of either issue.

One issue is preserved for review: Appellant contends the trial court erred in admitting a list of disciplinary infractions allegedly committed by appellant while in the Department of Corrections because its admission violated the prohibition against hearsay, appellant’s Confrontation Clause rights, and his due process rights. Neither the Confrontation Clause nor due process was raised to the trial court, and accordingly neither constitutional claim is preserved for our review. State v. Stone, *supra*. We address only the hearsay issue.

The trial judge permitted the State to introduce a redacted version of appellant’s prison offenses pursuant to the business records exception to the rule against hearsay. In so doing, he required the State to omit from the list all details of the incidents, and all incidents not witnessed by a prison guard or staff member. These rulings reduced the number of incidents to 28, which were presented to the jury in this format²:

1. April 13, 2001, breaks toilet, sink and sprinkler
2. May 26, 2001, throws hot water on another inmate
3. May 27, 2001, had a six and a half inch shank made from fencing and toothbrush
4. June 14, 2001, spat on a correctional officer
5. February 8, 2002, a 14 inch solid brass shank
6. March 29, 2002, stabs correctional officer in the face with a shank
7. June 12, 2002, stabs an inmate in the shower

² We have made one minor alteration in choosing to omit the names of the victims from the list.

8. June 15, 2002, kicks an inmate who is restrained in a restraint chair
9. August 5, 2002, slaps a male nurse in the face
10. August 17, 2002, throws a food tray and hits an officer in the head
11. August 23, 2002, struck an officer in the face with his fist
12. October 22, 2002, hits an officer in the face with his fist
13. October 23, 2002, sets fire to cell
14. December 22, 2002, shank made from fencing
15. December 30, 2002, a ten inch shank made from a push rod of the sink
16. July 17, 2005, spits in the face of an officer
17. August 26, 2005, slaps an officer in the face
18. August 31, 2005, sets fire to cell
19. September 11, 2005, threatens an officer
20. January 1, 2006, a 12 inch homemade knife
21. January 3, 2006, breaks cell door window with broom stick
22. January 13, 2006, throws feces on an officer, hitting him in the face
23. February 3, 2006, spits in the face of another inmate
24. February 4, 2006, orally threatens an officer
25. February 28, 2006, a 12 inch weapon hidden between the mattresses
26. April 4, 2006, an eight and a half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage
27. May 1, 2006, sets fire to his mattress
28. May 20, 2006, throws coffee on an officer

Appellant contends the records are inadmissible hearsay because they are not trustworthy under Rule 803(6), SCRE. We find no abuse of discretion in the trial judge's decision finding trustworthy those incidents witnessed by prison staff. *E.g.*, State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (admission of evidence with trial judge's discretion); cf. Ohio v. Roberts, 448 U.S. 56 (1980) *overruled on other grounds* Crawford v. Washington, 541 U.S. 36 (2004) (properly administered, Rule 803(6) exceptions are among the safest against a confrontation-clause challenges).

Moreover, appellant has not asked to argue against the precedent of State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) which held that these types of prison disciplinary records are admissible at the sentencing phase of a capital trial under the Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510 (the Act). Id. cited with approval in State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004) *vacated and remanded on other grounds* Holmes v. South Carolina, 547 U.S. 319 (2006). Appellant contends that the continuing validity of Whipple is in doubt as that decision predates the adoption of the SCRE, and alleges that Rule 803(6) added a veracity requirement to the admissibility requirements for a business record. Contrary to appellant's position, trustworthiness is an issue under the Act, not a new condition created by Rule 803(6). Kershaw County Dep't of Soc. Servs. v. McCaskill, 276 S.C. 360, 278 S.E.2d 771 (1981); see also State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007).

Appellant failed to show an abuse of discretion in the trial judge's decision to admit the redacted prison disciplinary incidents. State v. Pittman, *supra*; State v. Whipple, *supra*.

PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(c) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that appellant's sentence was neither excessive nor disproportionate. See State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996) (murder of convenience store operator in the commission of attempted armed robbery); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996) (murder of convenience store operator in the commission of armed robbery).

CONCLUSION

Appellant's capital sentence is

AFFIRMED.

TOAL, C.J., MOORE, WALLER and BEATTY, JJ., concur.

ATTORNEY GENERAL

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7-25-08

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

V.

FREDDIE EUGENE OWENS,

APPELLANT

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

Opinion No. 26520

PETITION FOR REHEARING

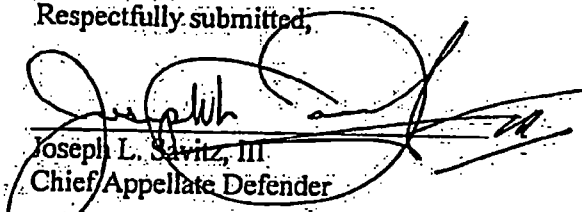
Counsel for Freddie Eugene Owens petition the Court for rehearing pursuant to *Rule 221(a), SCACR*, as the Court has misapprehended Owens' position on the precedential value of *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996).

The Court observes that counsel did not ask to argue against the precedent of *Whipple*, which, the Court writes, "held that these types of prison disciplinary records are admissible at the sentencing phase of a capital trial under the Uniform Business Records as Evidence Act, S.C. Code Ann. §19-5-510." In actuality, counsel merely pointed out in their brief that *Section 19-5-510* was enacted "before the *South Carolina Rules of Evidence* became effective." Brief of Appellant, p. 15. Counsel did not argue – nor did their argument require – that *Whipple* should be overruled, *unless*:

the Court is now interpreting that case to hold that any and all hearsay – regardless of its inherent unreliability - becomes admissible simply because an agent of the prosecution has designated the matter a “business record.”

For this reason, the Court should grant rehearing and reexamine this issue. Then, it should either grant Owens resentencing or, if not, clarify its holding on the scope of *Whipple* within the broader prohibition against hearsay, *Rule 802, SCRE*.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Joseph L. Savitz, III', is written over the typed name and title.

Joseph L. Savitz, III
Chief Appellate Defender

LaNelle C. DuRant
Appellate Defender

This 24th day of July, 2008.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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August 8, 2008

Chief Appellate Defender Joseph L. Savitz, III
Appellate Defender LaNelle C. DuRant
South Carolina Commission on Indigent Defense
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Re: The State v. Owens, Freddie Eugene

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Justice James E. Moore,
not participating.

August 8, 2008."

The remittitur is today being forwarded to the lower court.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 08-7189

FREDDIE EUGENE OWENS,

Petitioner,

-vs.-

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

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CAPITAL CASE

QUESTION PRESENTED

WHETHER THE SOUTH CAROLINA SUPREME COURT'S HOLDING THAT PETITIONER'S CONFRONTATION CLAUSE CHALLENGE TO THE ADMISSION OF TESTIMONIAL HEARSAY CONTAINED IN PRISON DISCIPLINARY RECORDS WAS PROCEDURALLY BARRED IS AN ADEQUATE AND INDEPENDENT STATE GROUND GIVEN THAT A) TRIAL COUNSEL OBJECTED AND CHALLENGED THE TRUSTWORTHINESS AND RELIABILITY OF THE EVIDENCE, WHICH ARE THE PRECISE VALUES EMBODIED THE CONFRONTATION CLAUSE; AND B) THE TRIAL COURT CLEARLY UNDERSTOOD THAT COUNSEL'S OBJECTION RAISED A FEDERAL CONSTITUTIONAL ISSUE?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2008

No.

FREDDIE EUGENE OWENS,

Petitioner,

-vs.-

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

Petitioner, Freddie Eugene Owens, prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina.

CITATION TO OPINIONS BELOW

The decision of the South Carolina Supreme Court affirming petitioner's sentence is published at *State v Owens*, 664 S.E.2d 80 (S.C. 2008), and is attached to this petition as Appendix A (cited herein as "App. A"). The order of the South Carolina Supreme Court denying rehearing is attached to this petition as Appendix B (cited herein as "App. B").

JURISDICTION

The Supreme Court of South Carolina affirmed petitioner's death sentence on July 14, 2008, *State v Owens*, 664 S.E.2d 80 (S.C. 2008), and denied a timely petition for rehearing on August 8, 2008. See App. B. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY 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 be confronted with the witnesses against him."

This case also involves the Fourteenth Amendment to the United States Constitution, which applies the Sixth Amendment to the States and provides, in pertinent part: "No state may deprive any person of life [or] liberty ... without due process of law"

STATEMENT OF THE CASE

Petitioner, Freddie Eugene Owens, was convicted and sentenced to death in connection with the November 1, 1997 armed robbery of a convenience store and the fatal shooting of the store's clerk, Irene Graves. *State v Owens*, 552 S.E.2d 745 (S.C. 2001). On direct appeal, the South Carolina Supreme Court affirmed Mr. Owens's conviction, but reversed his death sentence and remanded for resentencing. *Id.* After a bench sentencing proceeding, Mr. Owens received a death sentence, which was again reversed by the South Carolina Supreme Court. *State v Owens*, 607 S.E.2d 78 (S.C. 2004).

The second resentencing was heard by a jury, which returned a death verdict. *State v Owens*, 664 S.E.2d 80 (S.C. 2008). At that trial, the judge admitted into evidence a list of 28 disciplinary infractions allegedly committed by the petitioner while in the custody of the South Carolina Department of Corrections (SCDC). *Id.* at 81-82 (reproducing list). Mr. Owens's trial counsel objected to this evidence, stating that he believed the evidence was inadmissible under state hearsay rules.¹ Counsel also raised concerns about the trustworthiness of the evidence, ROA

¹Counsel stated, in part:

Your Honor, the defense would object to the testimony of Mr. Nettles to the extent that he intends to talk about records, any SCDC records regarding incidents or behavior. Our understanding of the law is that – and I'm looking at this case, is *Ex Parte Department of Health and Environmental Control v the State*, or *State v John Doe*, and I can give you the cite of it, but they have to prove in order to get

1406, and further stated that the records were not reliable because, in many instances, they purported to document assaults on guards, such that the alleged victim of the assault and the person reporting the incident were one and the same. ROA 1406-07. The trial judge acknowledged that the objection raised constitutional concerns, characterizing it at one point as "an important matter from the Constitutional standpoint," ROA 1434, but ultimately allowed the prosecution to present summaries of incidents allegedly witnessed by SCDC employees.

On appeal, Mr. Owens argued that admission of the records violated the rule against hearsay, his Confrontation Clause rights and his due process rights. *Owens*, 664 S.E.2d at 81. The South Carolina Supreme Court held, however, that neither of the constitutional claims were properly raised at trial, and only addressed the merits of the hearsay issue. *Id.* Its ruling on the constitutional issues was confined to a single sentence: "[n]either the Confrontation Clause nor due process claims was raised to the trial court, and accordingly neither constitutional claim is preserved for our review." *Id.* (citing *State v. Stone*, 655 S.E.2d 487 (S.C. 2007)).

business records in, which I assume that's what they are trying to get them into, or the venue they are trying to get into, they have to prove the record in themselves trustworthy.

My problem with these records are I do not believe they are trustworthy.

In a lot of these occasions, Your Honor, they are talking about attacks on guards. So the person filling out the record would be the victim. It would be extremely difficult for me to think that a victim's testimony without any other inquiry whatsoever, would be trustworthy.

In addition, they also talk about incidents of him assaulting other inmates. If that is to be believed, the only - I mean, if it is to be believed that an independent third party viewed these incidents, we would have to believed that a corrections officer sat there, watched Mr. Owens begin to assault another inmate, did nothing, and just watched it happen.

Now, from my viewpoint, it would be the same as the police trying to enter an incident report in a regular General Sessions trial.

Record on Appeal (ROA) 1406-07.

REASONS THE WRIT SHOULD BE GRANTED

I. THE SOUTH CAROLINA SUPREME COURT'S FINDING THAT THE CONFRONTATION CLAUSE ISSUE WAS PROCEDURALLY BARRED WAS NOT ADEQUATE UNDER THIS COURT'S PRECEDENTS.

While "firmly established and regularly followed" state procedural rules are ordinarily sufficient to prevent federal review of a claim, *James v. Kentucky*, 466 U.S. 341, 348 (1984), "exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee v. Kemna*, 534 U.S. 362, 376 (2002). A federal court's inquiry into the adequacy of a state procedural bar "is itself a federal question." *Id.* at 375 (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)). When resolving this federal question, the Court asks not whether the state rule at issue "is facially valid," but whether "its application in [the] particular case . . . satisf[ies] constitutional requirements of due process of law" or the other criteria of adequacy. *Spencer v. Kemp*, 781 F.2d 1458, 1470 (11th Cir. 1986) (citing *Reece v. Georgia*, 350 U.S. 85 (1955)).

The exorbitance or manifest unfairness which renders a particular application of a state rule inadequate to bar federal review can have a range of sources. In *Lee v. Kemna*, for example, the Court found the application of state rules requiring a written motion for a continuance inadequate to prevent habeas review of the petitioner's due process challenge to the trial court's denial of his oral continuance motion. After emphasizing that this basis for denying a continuance had been raised for the first time on the state appellate court's own motion some two and one-half years after the trial, 534 U.S. at 380, the Court found "[t]hree considerations [which], in combination, [placed Lee's] case within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim." *Id.* at 381. First, the rationale relied upon by the trial judge for denying Lee's continuance motion – that the judge was simply unavailable to be present for trial the next day – "could not have been countered by a perfect motion for continuance." *Id.* Second, "no published [state court] decision direct[ed]

flawless compliance with [the relevant procedural rules] in the unique circumstances [Lee's] case present[ed]." *Id.* at 382. And, "[t]hird and most important, given the realities of trial, Lee substantially complied with [the state's] key Rule." *Id.* (internal quotation marks and citation omitted).

As discussed below, the South Carolina Supreme Court's application of its procedural default rule in this case provides multiple grounds demonstrating that its procedural default holding is not adequate to bar review of petitioner's claims.

A. The South Carolina's Supreme Court's application of its procedural default rule did nothing to further a legitimate state interest.

A state court's application of a state procedural rule is not adequate to foreclose federal review unless that application furthers a legitimate state interest. *James v. Kentucky*, 466 U.S. 341, 349 (1984). Where no legitimate state interest exists, or where the objective underlying the procedural rule is substantially served notwithstanding a prisoner's technical non-compliance with the letter of a rule, a state court's reliance on that non-compliance to reject a claim for relief will not bar federal merits review. *Lee v. Kemna*, 534 U.S. at 385 (rejecting state's procedural bar theory because the state court rule's "essential requirements . . . were substantially met in this case"); *Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (merits review was appropriate notwithstanding trial counsel's failure to comply with contemporaneous objection requirement since, "under the circumstances, nothing would be gained by requiring [counsel] to object a second time . . ."); *James*, 466 U.S. at 349 (quoting *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958)) ("To insist on a particular label for [counsel's request] would 'force resort to an arid ritual of meaningless form,' and would further no perceivable state interest"); *Reynolds v. Berry*, 146 F.3d 345, 347 (6th Cir. 1998) (adequacy of a state rule "is determined by examining the state's legitimate interests in the procedural rule in light of the federal interest in considering federal claims").

To properly assess the adequacy of a state court's procedural bar determination, it is necessary both to gauge the value the state court actually attaches to the interest ostensibly served by the rule, and to examine whether, as a practical matter, that interest was sufficiently served under the circumstances of the particular case. Here, the answers to both inquiries establish that the South Carolina's Supreme Court's application of its contemporaneous objection rule in this case was inadequate to bar federal review.

South Carolina admittedly has a legitimate interest in requiring defense counsel to lodge a reasoned contemporaneous objection; however, no legitimate state interest is furthered by enforcing the rule in this case. The South Carolina Supreme Court justified its rule in *State v. Torrence*, 406 S.E.2d 315, 327 (S.C. 1991), stating that "[a] contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition."² In this case, trial counsel gave the trial judge all the information needed to make a reasoned decision by making both a state hearsay objection and by challenging the trustworthiness and reliability of the evidence the prosecution intended to offer, thus invoking the precise values embodied in the Confrontation Clause. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004), ("the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence. . . . It commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination"). This was not lost on the trial judge, who clearly understood that there were federal constitutional issues at stake

² South Carolina has the strictest, most unforgiving procedural default rules in the nation. In addition to many hyper-technical preservation rules, see, e.g. *State v. Holmes*, 605 S.E.2d 19, 25 (2004), *rev'd on other grounds*, *Holmes v. South Carolina*, 547 U.S. 319 (2006) (holding that an objection to solicitor's closing argument were defaulted where trial counsel objected at trial, but only after the solicitor had finished his entire closing argument); *State v. Hudgins*, 460 S.E.2d 388, 390 (S.C. 1998) (issue procedurally barred where defense counsel objected to solicitor's throwing a ski mask at defendant during cross-examination, but the trial judge did not rule on the objection and counsel did not object further or request curative instructions), it is the only death penalty jurisdiction without a plain error rule permitting consideration of issues not properly preserved at trial. John H. Blume and Pamela A. Wilkins, *Death by Default: State Procedural Default Doctrine in Capital Cases*, 50 SCLR 1, 32 (1998).

when considering the objection. It would not have made any difference to the trial judge's reasoning if trial counsel had uttered the phrase "Confrontation Clause," and therefore, it does not serve a legitimate state interest to refuse review based on counsel's failure to do so.

B. All three of the factors identified in *Lee v. Kemna* factors are present in this case, mandating reversal.

As discussed above, *Lee* identified "[t]hree considerations [which], in combination, [placed Lee's] case within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim." 534 U.S. at 381. First, the rationale relied upon by the trial judge for denying Lee's motion "could not have been countered by a perfect motion for continuance." *Id.* Second, "no published [state court] decision direct[ed] flawless compliance with [the relevant procedural rules] in the unique circumstances [Lee's] case present[ed]." *Id.* at 382. And, "[t]hird and most important, given the realities of trial, Lee substantially complied with [the state's] key Rule." *Id.* (internal quotation marks and citation omitted). All three of those factors are present in this case.

1. Perfect compliance with South Carolina's preservation rule would not have altered the trial court's decision.

Trial counsel's objection identified for the judge the values embodied by the Confrontation Clause by stating that counsel did "not believe [the prison records] are trustworthy" and that the records included just one side of the story, without any way to verify or discredit it. ROA 1407. The trial judge recognized that the objection raised "an important matter from the Constitutional standpoint." ROA 1434. Given these circumstances, a specific invocation of the Confrontation Clause would not have altered the trial court's reasoning or ruling in any way. The South Carolina Supreme Court, in finding the issue defaulted, did not (because it could not) point out any way in which the trial court would have benefited from hearing the words "Confrontation Clause," and dismissed the issue in one terse sentence. *Owens*, 664 S.E.2d at 638-39. In doing so, the state court ran afoul of this Court's decision in *Osborne*, which concluded that "an

objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here.” *Osborne*, 495 U.S. at 125 (quoting *Douglas*, 380 U.S. at 422 (internal quotation marks omitted)).

2. No state court decision mandated flawless compliance in this specific case.

At the time of Mr. Owens’s resentencing in November, 2006, there was no settled law informing trial counsel what was required to preserve a Confrontation Clause issue. In fact, conflicting authority existed as to whether a hearsay objection preserves a confrontation claim, but no cases addressed an objection that raised the core concerns of the Confrontation Clause without invoking it by name. *See State v. Price*, 629 S.E.2d 363 (S.C. 2006) (holding hearsay objection insufficient); *State v. Staten*, 610 S.E.2d 823 (S.C. App. 2005) (reaching the Confrontation Clause merits even though objection at trial was only to hearsay). Furthermore, after Mr. Owens’s resentencing, but before his appeal was decided, the South Carolina Supreme Court held that an objection, though not phrased “in the exact terms used in the issues on appeal,” “provided a meaningful objection with sufficient specificity to allow the trial court to rule on the issue.” *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 641 S.E.2d 903, 907 (S.C. 2007). A panel of the South Carolina Court of Appeals relied on *First Carolina Corp* to hold that a Confrontation Clause claim was preserved “even though [the defendant’s] attorneys did not cite *Crawford* during trial.” *State v. Mitchell*, 662 S.E.2d 493, 498 (S.C. App. 2008). Trial counsel’s objection in *Mitchell* argued that the statement at issue was “a blanket statement that there’s some culpability of my client” that he had “no opportunity to test [the declarant’s] credibility.” *Id.* at 496. Collectively, these decisions reveal that at the time of Mr. Owens’s trial, an objection that did not explicitly invoke the Confrontation Clause was sufficient to preserve the issue for appeal.

3. **Considering the realities of trial, Owens substantially complied with the rule.**

This Court has recognized that, given “the realities of trial,” perfect compliance with rules of procedure is often impossible. *Lee*, 534 U.S. at 382. This is such a situation. Because, as noted above, the objection at trial raised the principles underlying the Confrontation Clause, and the judge understood that a federal constitutional question was at issue, there is no state interest in requiring perfect compliance with South Carolina’s error preservation rules. Trial counsel’s performance substantially complied with the rule, because he raised the basic problem of the trustworthiness and reliability of the hearsay evidence the state intended to present.

II. HAD THE SOUTH CAROLINA SUPREME COURT REACHED THE MERITS OF THE ISSUE, THEY WOULD HAVE FOUND A CLEAR VIOLATION OF THE CONFRONTATION CLAUSE.

Crawford v. Washington, 541 U.S. 36 (2004), unequivocally held that the admission of testimonial hearsay violated the Confrontation Clause. In this case, Mr. Owens was not provided an opportunity to cross-examine the prison officials who purportedly witnessed the alleged misconduct he was accused of committing in the prison records admitted over his objection. The only remaining issue then, is whether the statements contained in the prison documents were “testimonial.”

Crawford “leave[s] for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Id.* at 68. One thing that is clear is that business records, as they were defined at the time of the framing, are not testimonial.³ 541 U.S. at 56. However, the majority in *Crawford* approvingly cited one definition: “*ex parte* in-court testimony or its functional equivalent—that is,

³ This Court is currently considering a case, *Melendez-Diaz v. Massachusetts*, 128 S.Ct. 1647 (May 17, 2008) (order granting certiorari), which may clarify the interaction between the Confrontation Clause and the business and government records exceptions. Thus, it may be appropriate to hold this case until *Melendez-Diaz* is decided. However, even if this Court rules that the records in that case (police lab reports) are non-testimonial, the Court should still hold that prison disciplinary records are testimonial. While lab reports might arguably be characterized as non-accusatory, the prison records at issue in this case serve only one purpose: to accuse the prisoner of misconduct or criminal activity in preparation for prison disciplinary proceedings and/or subsequent criminal prosecutions.

material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” 541 U.S. at 51 (citing petitioner’s brief) (emphasis added).

Prison disciplinary records are kept with the expectation that they will be used in upcoming proceedings against the prisoner, either administrative or criminal. In *Rousseau v State*, 171 S.W.3d 871, 881 (Tex. Crim. App. 2005), the Texas Court of Criminal Appeals held that prison reports detailing disciplinary offenses “amounted to unsworn, *ex parte*, affidavits of government employees and were the very type of evidence the [Confrontation] Clause was intended to prohibit.” In *United States v. Mills*, 466 F.Supp.2d 1115, 1137 (C.D. Cal 2006) (quoting *Crawford*, 541 U.S. at 52), a federal district court barred the admission of prison discipline reports because they were “made ‘under circumstances which would read an objective witness reasonably to believe that [they] would be available for use at a later trial.’” In addition, the Seventh Circuit has found that prison employees in some instances fill out incident reports with the intent of protecting themselves from civil liability. *Bracey v Herring*, 466 F.2d 702, 704 (7th Cir. 1972). For these reasons, there can be no question that prison records of the sort admitted at Mr. Owens’s capital sentencing proceeding are testimonial.

In the case of a prison disciplinary record kept about a prisoner who is facing the death penalty and has an upcoming resentencing, there is another reason why records of this sort are testimonial. Prosecutors in death penalty sentencing often argue that the defendant would be dangerous, even in confinement, and that therefore the death penalty is the only acceptable option. See, e.g., *Kelly v. South Carolina*, 534 U.S. 246 (2002). Prison officials in this case would have known that the records they were creating could be used as evidence in Mr. Owens’s upcoming resentencing. For these reasons, the evidence in this case cannot be considered to have been created in the normal course of business, and Mr. Owens had a right to confront the prison employees who offered evidence against him.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should grant the writ of certiorari. Alternatively, the Court should hold this case pending its decision in *Melendez-Diaz v. Massachusetts*.

Respectfully submitted,

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BY: 
COUNSEL FOR PETITIONER

*Counsel of Record

November 5, 2008.

Appendix A

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

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26520
Heard June 12, 2008 – Filed July 14, 2008

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, and Appellate Defender LaNelle C. DuRant, both of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry, all of Columbia, and Robert Mills Ariail, of Greenville, for Respondent.

JUSTICE PLEICONES: Appellant appeals his death sentence following a second resentencing proceeding. This opinion consolidates his appeal and the mandatory proportionality review. We affirm.

Appellant was convicted of murder, armed robbery, using a firearm during the commission of a violent crime, and conspiracy to commit armed robbery, and received a death sentence for murder, thirty years for armed robbery, and five years for each of the other two offenses. On his first appeal, the convictions were affirmed, but his death sentence reversed and his five year sentence for firearm possession vacated.¹ State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Following a bench resentencing proceeding, appellant again received a death sentence. This Court vacated that sentence, finding the trial judge's comments to appellant in regard to his right to a jury trial constituted reversible error. State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004).

This second resentencing was tried to a jury which returned a death sentence, finding two aggravating circumstances: (1) the murder was committed in the commission of robbery while armed with a deadly weapon and (2) the murder was committed while in the commission of larceny with use of a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) and (e). Appellant raises three issues on appeal.

ISSUES

- 1) Whether the trial judge erred in disqualifying a juror?
- 2) Whether the solicitor's closing argument was improper?
- 3) Whether the trial judge erred in admitting redacted prison disciplinary records?

¹ Under S.C. Code Ann. § 16-23-490(A), no firearm sentence may be imposed where the defendant receives a death sentence or life sentence without parole for the violent crime. The vacation of appellant's sentence was conditional: if appellant were ultimately to receive a life sentence for murder, then the five year sentence would be reimposed.

ANALYSIS

Appellant conceded at oral argument that there was no objection at trial to the juror disqualification or to the closing argument. Without an objection, neither of these issues is properly preserved for appellate review. E.g., State v. Stone, 376 S.C. 32, 655 S.E.2d 487 fn. 1 (2007) ("South Carolina's strict error preservation rules are no less applicable in death penalty cases"). Under these circumstances, we do not reach the merits of either issue.

One issue is preserved for review: Appellant contends the trial court erred in admitting a list of disciplinary infractions allegedly committed by appellant while in the Department of Corrections because its admission violated the prohibition against hearsay, appellant's Confrontation Clause rights, and his due process rights. Neither the Confrontation Clause nor due process was raised to the trial court, and accordingly neither constitutional claim is preserved for our review. State v. Stone, *supra*. We address only the hearsay issue.

The trial judge permitted the State to introduce a redacted version of appellant's prison offenses pursuant to the business records exception to the rule against hearsay. In so doing, he required the State to omit from the list all details of the incidents, and all incidents not witnessed by a prison guard or staff member. These rulings reduced the number of incidents to 28, which were presented to the jury in this format²:

1. April 13, 2001, breaks toilet, sink and sprinkler
2. May 26, 2001, throws hot water on another inmate
3. May 27, 2001, had a six and a half inch shank made from fencing and toothbrush
4. June 14, 2001, spat on a correctional officer
5. February 8, 2002, a 14 inch solid brass shank
6. March 29, 2002, stabs correctional officer in the face with a shank
7. June 12, 2002, stabs an inmate in the shower

² We have made one minor alteration in choosing to omit the names of the victims from the list.

8. June 15, 2002, kicks an inmate who is restrained in a restraint chair
9. August 5, 2002, slaps a male nurse in the face
10. August 17, 2002, throws a food tray and hits an officer in the head
11. August 23, 2002, struck an officer in the face with his fist
12. October 22, 2002, hits an officer in the face with his fist
13. October 23, 2002, sets fire to cell
14. December 22, 2002, shank made from fencing
15. December 30, 2002, a ten inch shank made from a push rod of the sink
16. July 17, 2005, spits in the face of an officer
17. August 26, 2005, slaps an officer in the face
18. August 31, 2005, sets fire to cell
19. September 11, 2005, threatens an officer
20. January 1, 2006, a 12 inch homemade knife
21. January 3, 2006, breaks cell door window with broom stick
22. January 13, 2006, throws feces on an officer, hitting him in the face
23. February 3, 2006, spits in the face of another inmate
24. February 4, 2006, orally threatens an officer
25. February 28, 2006, a 12 inch weapon hidden between the mattresses
26. April 4, 2006, an eight and a half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage
27. May 1, 2006, sets fire to his mattress
28. May 20, 2006, throws coffee on an officer

Appellant contends the records are inadmissible hearsay because they are not trustworthy under Rule 803(6), SCRE. We find no abuse of discretion in the trial judge's decision finding trustworthy those incidents witnessed by prison staff. *E.g., State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (admission of evidence with trial judge's discretion); cf. *Ohio v. Roberts*, 448 U.S. 56 (1980) *overruled on other grounds* *Crawford v. Washington*, 541 U.S. 36 (2004) (properly administered, Rule 803(6) exceptions are among the safest against a confrontation-clause challenges).

Moreover, appellant has not asked to argue against the precedent of State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) which held that these types of prison disciplinary records are admissible at the sentencing phase of a capital trial under the Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510 (the Act). Id. cited with approval in State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004) *vacated and remanded on other grounds* Holmes v. South Carolina, 547 U.S. 319 (2006). Appellant contends that the continuing validity of Whipple is in doubt as that decision predates the adoption of the SCRE, and alleges that Rule 803(6) added a veracity requirement to the admissibility requirements for a business record. Contrary to appellant's position, trustworthiness is an issue under the Act, not a new condition created by Rule 803(6). Kershaw County Dep't of Soc. Servs. v. McCaskill, 276 S.C. 360, 278 S.E.2d 771 (1981); see also State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007).

Appellant failed to show an abuse of discretion in the trial judge's decision to admit the redacted prison disciplinary incidents. State v. Pittman, *supra*; State v. Whipple, *supra*.

PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(c) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that appellant's sentence was neither excessive nor disproportionate. See State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996) (murder of convenience store operator in the commission of attempted armed robbery); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996) (murder of convenience store operator in the commission of armed robbery).

CONCLUSION

Appellant's capital sentence is

AFFIRMED.

TOAL, C.J., MOORE, WALLER and BEATTY, JJ., concur.

Appendix B



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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August 8, 2008

Chief Appellate Defender Joseph L. Savitz, III
Appellate Defender LaNelle C. DuRant
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Owens, Freddie Eugene

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Placones J.

s/ Donald W. Beatty J.

Justice James E. Moore,
not participating.

August 8, 2008."

The remittitur is today being forwarded to the lower court.

CAPITAL CASE

No. 08-7189

**IN THE
SUPREME COURT OF THE UNITED STATES**

FREDDIE EUGENE OWENS,

PETITIONER,

v.

THE STATE OR SOUTH CAROLINA,

RESPONDENT.

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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PETITIONER'S QUESTION PRESENTED

- I. WHETHER THE SOUTH CAROLINA SUPREME COURT'S HOLDING THAT PETITIONER'S CONFRONTATION CLAUSE CHALLENGE TO THE ADMISSION OF TESTIMONIAL HEARSAY CONTAINED IN PRISON DISCIPLINARY RECORDS WAS PROCEDURALLY BARRED IS AN ADEQUATE AND INDEPENDENT STATE GROUND GIVEN THAT A) TRIAL COUNSEL OBJECTED AND CHALLENGED THE TRUSTWORTHINESS AND RELIABILITY OF THE EVIDENCE, WHICH ARE THE PRECISE VALUES EMBODIED IN THE CONFRONTATION CLAUSE; AND B) THE TRIAL COURT CLEARLY UNDERSTOOD COUNSEL'S OBJECTION RAISED A FEDERAL CONSTITUTIONAL ISSUE?**

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No. 08-7189

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THE STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

The State of South Carolina respectfully presents this Brief in Opposition to the Petition for a Writ of Certiorari. The initial basis for the opposition is simple - the Petitioner did not properly raise and preserve any of the federal constitutional claims in his appeal before the South Carolina Supreme Court as a matter of state procedure. Any ambiguity which may be asserted concerning that deficiency was conclusively resolved as a matter of state procedure in the Order of the South Carolina Supreme Court on September 5, 2008 in addressing the earlier stay request. Because the Petitioner has not preserved the federal constitutional claims in the state court, the petition for a writ of certiorari must be denied. Under 28

U.S.C. § 1257(a) and Rule 14(g) of the Rules of the Supreme Court of the United States, the certiorari must be denied because no jurisdiction exists for certiorari due to the failure to properly raise a substantial federal question in the state court. See Adams v. Robertson, 520 U.S. 83, 86-87 (1997).

CITATION TO OPINIONS AND ORDERS BELOW

The July 12, 2008 decision of the South Carolina Supreme Court affirming the death sentence is published at *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (S.C. 2008). The August 8, 2008 order of the South Carolina Supreme Court denying rehearing is unpublished. *State v. Owens*, Order, (S.C.S.Ct. August 8, 2008)(order denying rehearing). The September 5, 2008 order of the South Carolina Supreme Court denying the motion for a stay of execution is unpublished and was attached to the State's earlier opposition for stay. *State v. Owens*, Order (S.C.S.Ct. September 5, 2008) (order of denial of stay).

JURISDICTION

The Petitioner claims to have jurisdiction of his petition pursuant to 28 U.S.C. § 1257(a). Respondent assert, as stated more fully below, that there is no jurisdiction under § 1257(a) because the underlying federal constitutional claim was neither preserved nor ruled upon in the state court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner asserts that the 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 be confronted with the

witnesses against him.”

The Petitioner also contends that the case involves the Fourteenth Amendment to the United States Constitution, which applies to the States and provides in pertinent part: “No state may deprive any person of life [or] liberty . . . without due process of law.”

RESPONDENT'S STATEMENT OF THE CASE

Freddie Owens was initially convicted of murder, armed robbery, using a firearm during the commission of a violent crime and conspiracy to commit armed robbery after a trial before the Honorable Alexander MacCauley and a jury. *State v. Owens*, 346 S.C. 637, 552, S.E.2d 745 (2001). The jury sentenced Owens to death for the murder of Irene Graves. *Id.* On his first appeal, the South Carolina Supreme Court affirmed his convictions, but reversed his death sentence on the basis that defense counsel did not have sufficient time to investigate Owens' confession to the murder of his cell-mate which occurred during the statutory twenty-four (24) hour waiting period. *Id.*

Following a bench re-sentencing proceeding before the Honorable John Kittredge, Owens was again sentenced to death. The South Carolina Supreme Court vacated the death sentence finding the trial judge's comments to Owens regarding his right to a jury trial constituted reversible error. *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004).

At his third sentencing proceeding, this time before a jury, Owens was sentenced to death for the third time. Owens was represented in this appeal before

the South Carolina Supreme Court by Chief Appellate Defender Joseph Savitz and Assistant Appellate Defender LaNelle DuRant of the South Carolina Office of Indigent Defense. The South Carolina Supreme Court affirmed his death sentence on July 14, 2008. *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008). On July 24, 2008, appellate counsel Savitz and DuRant made a petition for rehearing requesting the state court asserting the court had misinterpreted its position on the precedential value of *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996). The Court denied Owens' petition for rehearing on August 8, 2008.

The Petitioner, through present counsel John H. Blume and Keir M. Weyble, made a Motion for A Stay of Execution on August 12, 2008 before the South Carolina Supreme Court. In that motion, new counsel asserted that it intended to raise in a certiorari petition, the following claims:

- I. Whether the admission of certain prison disciplinary records under the state hearsay exception violated the Confrontation Clause of the United States Constitution?
- II. Whether the South Carolina Supreme Court's finding that the Confrontation Clause claim was procedurally barred is an adequate and independent state ground given that trial counsel a) objected to the admission of the admission, and b) challenged the trustworthiness and reliability of the evidence, which are the precise values embodied in the Confrontation Clause?
- III. Whether the South Carolina Supreme Court's holding that the Petitioner's Due Process Clause challenge to the prosecutor's sentencing phase argument was procedurally defaulted for want of a contemporaneous objection is inconsistent with *Darden v. Wainwright*, 477 U.S. 185 (1985) and its progeny which make an objection relevant to, but not determinative of the issue whether a prosecutor's argument rendered the proceeding fundamentally unfair?

Motion for Stay, p. 2. The State of South Carolina opposed the motion on August 18, 2008 asserting that the issues sought to be raised were not preserved in the for review based upon procedural defaults. On September 5, 2008, the South Carolina Supreme Court denied the motion for a stay. *The State v. Freddie Eugene OWENS*, Order (S.C.S.Ct. September 5, 2008). The state supreme court in that order relied upon its procedure set out in In Re Stays of Execution, 321 S.C. 544, 471 S.E.2d 140 (1996) and Rule 23.3 of this Court (*"as long as one of the federal questions asserted has been adequately preserved under state law so that it can be reviewed by the USSC, this Court will grant a stay"*). The state court then reviewed the particular claims he asserted that he intended to raised and concluded as a matter of state law that they had not been preserved. Particularly, the South Carolina Supreme Court concluded:

We find the issues appellant intends to raise to the USSC are not preserved for review. Appellant's argument that the admission of the disciplinary records violated the Confrontation Clause was not raised in the trial court. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). Appellant's two remaining issues were never raised to this Court, which appellant had the opportunity to do so by way of a reply brief or in the petition for rehearing. [n. 2. The State argued in it brief that the issue regarding the solicitor's closing argument was not preserved for review. Appellant did not file a reply brief setting forth the Darden argument he now makes.] See U.S. Sup.Ct. Rule 19 (g)(when seeking review of a state court judgment, a petitioner must specify the stage of the proceedings, both in the court of the first instance and in the appellate court, when the federal questions sought to be reviewed were raised, the method or manner of raising them, and the way they were passed on by the courts so as to show that the federal question was timely and properly raised and that the USSC has jurisdiction to

review the judgment on a writ of certiorari). The petition for a stay is therefore denied.

Order, September 5, 2008, p. 1-2. On the same date, the Supreme Court issued its Order to the Director of the Department of Corrections pursuant to S.C. Code § 17-25-370 (1976) setting the fourth Friday after service of the order for Mr. Owens execution. This ministerial act set the date of the execution for October 3, 2008 and the scheduled time is 6:00 P.M.

The Petitioner, through present counsel made a petition for stay before this Court on September 24, 2008. The State opposed the stay. On September 30, 2008, Chief Justice Roberts entered a stay of execution pending the timely filing and disposition of a petition for writ of certiorari.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. The Court Lacks Jurisdiction To Hear The Constitutional Claims.

If the opinion of the South Carolina Supreme Court addressing the issues is independently based upon state procedural grounds that even the South Carolina court had no authority to grant the relief, the United States Supreme Court lacks jurisdiction to consider certiorari. *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. *Coleman v. Thompson* 501 U.S. 722, 729, 111 S.Ct. 2546, 2554 (U.S.Va., 1991). See *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). The Court lacks jurisdiction to review matters of state law under Article III of the United States Constitution and Section

1257. Accord, *Kunkle v. Texas*, 125 S.Ct. 2898 (U.S. 2004)(Stevens, A.J. On denial of certiorari).

It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496- 497, 101 S.Ct. 1889, 1891-1892, 68 L.Ed.2d 392 (1981). With very rare exceptions, *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), the Court has adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). See *Heath v. Alabama*, 474 U.S. 82, 87, 106 S.Ct. 433, 436-437, 88 L.Ed.2d 387 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-219, 103 S.Ct. 2317, 2321-2322, 76 L.Ed.2d 527 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed. 849 (1940).

The Court has stated many times that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 175 (8th ed. 2002), citing *Street v. New York*, 394 U.S. 576, 582(1969); *Chicago, I. & L.R. Co. V. McGuire*, 196 U.S. 128, 131-33 (1905); *Bailey v.*

Anderson, 326 U.S. 203, 206-207 (1945); *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987); *Exxon Corp. V. Eagerton*, 462 U.S. 176, 181 n. 3 (1983).

Former Chief Justice Rehnquist, in writing a dissent in *Chambers*, opined that the constitutional claims raised at that time on third party guilt had not been properly presented in the Mississippi court under its procedural rules. *Chambers v. Mississippi*, 410 U.S. 284, at 308-314 (dissenting opinion of Rehnquist, J.).

Recognizing the limitations imposed by Congress upon the Court's authority to review judgments of state courts as a jurisdictional limitation, he recognized that the constitutional claim must be brought to the attention of the state court "with fair precision and in due time", citing *Street v. New York*, 394 U.S. 576, 584, n.3 (1969). He reiterated that "even the most lenient construction of 28 U.S.C. § 1257 that requires that the title, right privilege or immunity' be 'specially set up or claimed' could not aid petitioner that this point properly raised a federal constitutional issue." *Id.*, 410 U.S. at 313. As set forth below, it is extraordinarily doubtful that the South Carolina appellate court would ignore its own procedures and expand its consideration to unarticulated federal constitutional claims which were never specifically presented to in the briefing before that Court when the Petitioner was arguing his issues in reliance on state evidentiary law and standards.

The litigant must follow state procedure in raising the federal question.

Howell v. Mississippi, 543 U.S. 440 (2005). R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 177 (8th ed. 2002). Any failure to do so should prove fatal to Supreme Court review. *In re Lampkin*, 355 U.S. 59 (1957). "A state procedural rule which forbids the raising of federal questions at late stages in the case or by any other than a prescribed method has been recognized as a valid exercise of state power." *Williams v. Georgia*, 349 U.S. 375, 382-83 (1955). See, e.g., *Adams v. Robertson*, 520 U.S. 83, 89, n. 3, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) (per curiam) (concluding that "passing invocations of 'due process' " that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a federal claim was presented"); *Webb v. Webb*, 451 U.S. 493, 496, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) (finding a reference to "full faith and credit" insufficient to raise a federal claim without a reference to the U.S. Constitution or to any cases relying on it); *New York Central R. Co. v. New York*, 186 U.S. 269, 273, 22 S.Ct. 916, 46 L.Ed. 1158 (1902) ("[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth"); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655, 17 S.Ct. 709, 41 L.Ed. 1149 (1897) (a party's intent to invoke the Federal Constitution must be "unmistakably" declared, and the statutory requirement is not met if "the purpose of the party to assert a Federal right is left to mere inference"). In *Beck v. Washington*, 369 U.S. 541, 553 (1962), the Court found the waiver of a

constitutional claim that was merely mentioned in one sentence in the 125 page brief in the state court.¹

However, the commentators note that in each of these case, the aggrieved party made some kind of effort, such as filing a petition for rehearing to bring the federal claim to the attention of the state court. R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 183 (8th ed. 2002) Here, there was no showing that the decision in state court was either a surprise or could not have been reasonably anticipated from its prior decisions. *Herndon v. Georgia*, supra.

A. The Particular Confrontation Clause Issue Was Not Preserved Under State Procedures.

Owens is not entitled certiorari. The issue underlying his claim before the United States Supreme Court was procedurally defaulted at the trial level. In fact, the South Carolina Supreme Court, in its unanimous opinion affirming Owens' death sentence, found that all of the issues Owens raised on direct appeal were procedurally barred, except Owens' challenge to the admissibility of prison disciplinary records on state evidentiary grounds. *Owens* (III.), supra. Certiorari can be granted where the matter is not preserved.

The Petitioner before this Court asserts that under *Lee v. Kemna*, 534 U.S.

¹In addition, this Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-678, 50 S.Ct. 451, 453, 74 L.Ed. 1107 (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320, 50 S.Ct. 326, 327, 74 L.Ed. 870 (1930); *Saunders v. Shaw*, 244 U.S. 317, 320, 37 S.Ct. 638, 640, 61 L.Ed. 1163 (1917).

362, 376 (2002), he is authorized to avoid the state procedural bar. In *Lee*, this Court held that a federal court's inquiry into the adequacy of a state procedural bar is itself a federal question." He asserts that *Lee* stands for the proposition there was no legitimate state interest in the procedural bar, that there was no published opinion directing flawless compliance with the court rule and third that there was substantial compliance with the Rule.

Contrary to the claims, *Lee* provides no sanctuary from the trial omissions and correct application by the South Carolina Supreme Court of its own procedural requirements. Owens seeks certiorari concerning whether he properly preserved in state court the issue of whether the admission of prison disciplinary records under the hearsay exception violated the Confrontation Clause of the United States Constitution to the United States Supreme Court. In the original opinion of the South Carolina Supreme Court affirming Owens' death sentence, the state court *sua sponte* clearly stated that the procedural bar precluded its consideration of the same because it was not presented as a federal constitutional "Confrontation Clause" claim at trial as required:

One issue is preserved for review: Appellant contends the trial court erred in admitting a list of disciplinary infractions allegedly committed by appellant while in the Department of Corrections because its admission violated the prohibition against hearsay, appellant's Confrontation Clause rights, and his due process rights. **Neither the Confrontation Clause nor due process was raised to the trial court, and accordingly neither constitutional claim is preserved for our review.** *State v. Stone, supra*. We address only the hearsay issue.

Id. (emphasis added).

At no time during the trial did defense counsel ever assert that the evidence violated either the Confrontation Clause of the Sixth Amendment specifically or even the federal constitution. ROA 1406-1419. ² The entirety of the argument at trial was whether the records were admissible under South Carolina Rules of Evidence, Rule 803(6) and the business records act, S.C. Code Section 19-5-510. The

²At trial, defense counsel Gibson asserted the following objection to the proffered use of prison records in sentencing:

Mr. Gibson : Your Honor, the defense would object to the testimony of Mr. Nettles to the extent he intends to talk about records, any SCDC records regarding incidents or behavior. Our understanding of the law – and I'm looking at Ex Parte Department of Health and Environmental Control v. The State, or State v. John Doe, and I can give you the cite on it, but they have to prove in order to get business records in, which I assume that's what they are trying to get them into , or the venue they are trying to get them into, they have to prove the record in themselves trustworthy. My problem with these records are I do not believe they are trustworthy. In a lot of these occasions, Your Honor, they are talking about attacks on guards. So the person filling out the record would be the victim. It would be extremely difficult for me to think that a victim's testimony without any other inquiry whatsoever would be trustworthy.

 In addition, they also talk about incidents of him assaulting other inmates. If that is to be believed that an independent third party viewed these incidents, we would have to believe that a corrections officer sat there , watched Mr. Owens begin to assault another inmate, did nothing, and just watched it happen.

 Now from my viewpoint it would be the same as the police trying to enter an incident report in a regular general sessions trial.

R.p. 1406-1407. The State argued that these records were admissible under South Carolina Rules of Evidence, Rule 806 (c) and the Business Record Act. ROA, p. 1407-1408.

argument concerning trustworthiness was a direct reference to Rule 803. ROA 1406-1408, 1419, 1427-1427. More particularly, his reliance was upon *Ex Parte D.H.E.C.*, 350 S.C. 243, 565 S.E.2d 293 (2002), a state evidentiary law case grounded solely on the state rules of evidence.³

When Owens attempted to re-assert it as a basis for the stay in the state supreme court, the South Carolina Supreme Court re-affirmed its state procedural bar of the same claim.

We find the issues appellant intends to raise to the USSC are not preserved for review. Appellant's argument that the admission of the disciplinary records violated the Confrontation Clause was not raised in the trial court. *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

State v. Owens, Order, September 5, 2008.

South Carolina procedure is clear and consistent. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *In the Interest of Michael H.*, 360 S.C. 540, 602 S.E.2d 729 (2004) (trial court must be given an adequate opportunity to resolve the issue). This rule also applies to constitutional arguments. *Glover v. County of Charleston*, 361 S.C. 634, 606 S.E.2d 773 (2004) (equal protection argument not preserved for review); *Durlach*

³The Petitioner, in his Final Brief of Appellant, raised the issue for the first time concerning the admission of selective prison disciplinary records as a Confrontation Clause issue *Final Brief of Appellant*, p. 10-20. As noted by the Supreme Court, this presentation came too late as a matter of state court preservation procedure.

v. Durlach, 359 S.C. 64, 596 S.E.2d 908 (2004)(due process claim raised for first time on appeal not preserved); *In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001); *Wachovia Bank v. Player*, 341 S.C. 424, 535 S.E.2d 128 (2000); *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997). An objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge. *State v. Johnson*, 363 S.C. 53, 609 S.E.2d 520 (2005)(objection should be addressed to trial court in sufficiently specific manner that brings attention to exact error); *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003)(party need not use exact name of legal doctrine in order to preserve issue for appeal, but it must be clear that the argument has been presented on that ground); *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989) (a party cannot argue one ground below and then argue another ground on appeal); *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) (“[T]his Court has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.”); *State v. Nichols*, 325 S.C. 111, 120-121, 481 S.E.2d 118, 123 (1997) (“An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review.”).

Unlike *Lee*, there was a legitimate basis to give the state trial court the opportunity to rule on the federal constitutional issue rather than on a pure state law ground. Ignoring any Confrontational Clause claim, counsel at trial based his

claim in reliance upon a civil case and state evidentiary law. Furthermore as noted above, South Carolina precedent has clearly required the same claim to be raised at trial as in the appeal by defense counsel. Here, the mere use of the terms trustworthy and reliable do not evidence any intent to assert the claim violates the Confrontation Clause of the U.S. Constitution.

The Petitioner seeks to rely upon certain South Carolina decisions to suggest that the South Carolina Supreme Court was wrong in its plainly stated conclusion that the state rule objection did not preserve the Confrontation Clause claim. In *State v. Price*, 629 S.C. 363 (S.C. 2006), the South Carolina Supreme Court, the highest court arbiter of state procedure, conclusively held the hearsay objection did not preserve for appeal any Confrontation Clause claim.⁴ The Petitioner, while recognizing this axiomatic authority from the highest state court attempts to create the impression that it is not of value by relying upon an earlier decision by a panel of the South Carolina Court of Appeals in *State v. Staten*, 610 S.E.2d 823 (S.C. App. 2005). However, he ignores that the South Carolina Supreme Court vacated the

⁴ The Court stated:

Appellant also argues Richardson's testimony violated his right to confront witnesses under the Sixth Amendment to the United States Constitution and Article 1, § 14, of the South Carolina Constitution. This issue is not preserved for appellate review because Appellant did not properly raise the issue in the trial court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

State v. Price, 368 S.C. 494, 500, 629 S.E.2d 363, 366 (S.C., 2006)

portion of the Court of Appeals decision related to *Crawford v. Washington*. In *Staten*, the South Carolina Supreme Court stated:

We vacate that portion of the opinion discussing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), as unnecessary to the disposition of this case and dismiss the writ of certiorari.

State v. Staten, 374 S.C. 9, 647 S.E. 2d 207 (S.C.,2007).

Similarly, he cites a recent non-final panel opinion by the South Carolina Court of Appeals in *State v. Mitchell*, 378 S.C. 305, 662 S.E.2d. 498 (S.C Ct. App. 2008) (cert. pending). However, he fails to point out that certiorari is presently pending in the South Carolina Supreme Court raising the following the following question:

DID THE COURT OF APPEALS ERR IN REVERSING FOR AN ALLEGED CONFRONTATION CLAUSE VIOLATION, WHERE (1) THE ISSUE CLEARLY WAS NEITHER APPROPRIATELY PRESERVED FOR NOR PRESENTED ON APPEAL; (2) THERE WAS NO VIOLATION AS THE WITNESS WAS SWORN AND GAVE TESTIMONY BUT THE DEFENSE DID NOT TIMELY COMPLAIN ABOUT THE OPPORTUNITY FOR CROSS-EXAMINATION; AND (3) ANY ERROR WAS HARMLESS GIVEN THAT UNDER THE CIRCUMSTANCES OF THIS CASE THE POINT OF CROSS-EXAMINATION WAS OTHERWISE SATISFIED BY THE WITNESS'S COMPLETE AND ABSOLUTE REPUDIATION OF THE STATEMENT.

State v. Mitchell, State's Petition for Writ of Certiorari, July 25, 2008, p. 1. Within the petition, the State cited *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (a party cannot argue one basis in support of motion at trial and another ground on appeal, and a constitutional argument is not preserved for appeal where appellant

failed to argue the constitutional basis for his request at trial) and *State v. Caldwell*. 378 S.C. 268, 662 S.E.2d 474 (Ct. App. 2008) (objection only that probative value was outweighed by prejudice did not fairly raise issue under Rule 404(b), SCRE,; even though counsel briefly mentioned character, it was made in the context of a relevance argument and neither Rule 404(b) nor the Nelson case was mentioned). He has failed to show that axiomatic contemporaneous objection rule on a specific ground has been revised based upon an earlier corrected and partially vacated lower appellate court decision and a subsequent decision which is now on certiorari before the highest appellate court.

The Petitioner further asserts that defense counsel "substantially complied" with the specific contemporaneous objection rule. This is incorrect. As stated above, his reliance was solely upon the application of *Ex Parte D.H.E.C.*, 350 S.C. 243, 565 S.E.2d 293 (2002) and state evidentiary law. A review of *Ex Parte D.H.E.C.* reveals the limitation of the actual objection that Owens raised at trial because the case is purely dealing with the application of the South Carolina Business Records Act and also spoke of "trustworthiness" which grounds much of the claim exception that Owens now seeks. In addition, Rule 803(6)(c) South Carolina Rules of Evidence includes the language "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."⁵ Here, the trial was

⁵"SCRE 803(6) is substantially the same as former South Carolina law as Section 19-5-510 of the *Code of Laws of South Carolina* has been interpreted." Danny R. Collins, South Carolina Evidence (2nd Ed. 2000), South Carolina Bar, *emphasis in the original*. The case law interpreting Section 19-5-510 also required that the record be trustworthy

in 2006, well after *Crawford* had been decided in 2004, yet no mention was made of either *Crawford* or the Confrontation Clause. It remains difficult to envision how this is "substantial compliance" with the South Carolina preservation rules. He must fail in his showing under *Lee*.

II. The trial judge properly admitted the limited prison disciplinary records summary as business records; however, even if their admission was erroneous, it was harmless given the other evidence in aggravation presented in this case.

Owens alleged below that the trial court improperly admitted evidence of his bad prison behavior under the business records exception to the hearsay rule. Owens has been incarcerated in the South Carolina Department of Corrections since his first conviction and death sentence. During his incarceration, the South Carolina Department of Corrections recorded the following incidents in their disciplinary records that were offered by the State in the sentencing phase of his 3rd trial:

- April 13, 2001, breaks toilet, sink and sprinkler.
- May 26, 2001, throws hot water on another inmate.
- May 27, 2001, had a six and a half inch shank made from fencing and toothbrush.
- June 14, 2001, spat on a correctional officer.
- February 8, 2002, a 14 inch solid brass shank.
- March 29, 2002, stabs correctional officer Smith in the face with shank.
- June 12, 2002, stabs Undra Golden in the shower.

in the opinion of the court. *Id.* at 603, *citing Jenkins v. Dixie Specialty, Co.*, 284 S.C. 425, 326 S.E.2d 658 (1985); *State v. Duncan*, 274 S.C. 379, 264 S.E.2d 421 (1980).

- June 15, 2002, kicks an inmate who is restrained in a restraint chair.
- August 5, 2002, slaps a male nurse in the face.
- August 17, 2002, throws a food tray and hits officer Guess in the head.
- August 23, 2002, struck an officer in the face with his fist.
- October 23, 2002, hits officer Eaton in the face with the fist.
- October 23, 2002, sets fire to cell.
- December 22, 2002, shank made from fencing.
- December 30, 2002, a ten inch made from a push rod of the sink.
- July 17, 2005, spits in the face of officer Jones.
- August 26, 2005, slaps officer Henley in the face.
- August 31, 2005, sets fire to cell.
- September 11, 2005, threatens officer Jones.
- January 1, 2006, a 12 inch homemade knife.
- January 3, 2006, breaks cell door window with broom stick.
- January 13, 2006, throws feces on officer Williams hitting him in the face.
- February 3, 2006, spits in the face of another inmate.
- February 4, 2006, orally threatens officer Jones.
- February 28, 2006, a 12 inch weapon hidden between the mattresses.
- April 4, 2006, an eight an a half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage.
- May 1, 2006, sets fire to his mattress.
- May 20, 2006, throws coffee on officer Smith.

(R. 1441-43, Tr. p. 1389-1391).

The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Evidence which would ordinarily be inadmissible in the guilt phase of trial may be introduced during the penalty phase. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180

91986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1592 (1987). During the sentencing phase, the trial judge may permit the introduction of additional evidence of aggravation in order to aid the jury in determining whether to recommend a death sentence. *Id.* See also, State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003).

Certainly the records were relevant to Owen's future adaptability in prison, a matter which was clearly proper for the sentencing jury. See State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988); State v. Riddle, 291 S.C. 232, 353 S.E.2d 138 (1987), *overruled in part on other grounds*, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The records were also relevant, because they demonstrated the character of the accused. Owens, *supra*.

There were a total of 56 disciplinary violations of Owens while in the Department of Corrections. (Tr. p. 1486, ll. 8-15). The State did not introduce all 56 violations. After an *in limine* ruling by the trial judge, the state only offered the short summary above of the 28 violations in which an officer was involved and *required* or had a *business duty* to report the incident. The trial judge carefully considered this issue and had even researched the issue before the trial. (R. 1409, Tr. p. 1357). The court limited the State to the above summary under the business records exception. After the trial court's ruling *in limine*, the State did not offer nor would the court allow each individual disciplinary record, because the court felt it contained subjective matter. (R. 1406-1437, Tr. p. 1354-1385). The limited summary was all that was admitted.

Rule 803(6)(c) South Carolina Rules of Evidence provides that even though the declarant is available to testify as a witness:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996), the Court specifically decided this issue and held that prison disciplinary records were admissible under the Uniform Business Records as Evidence Act. S.C. Code Ann. § 19-5-510 (1985).⁶ The Whipple court specifically cited as authority State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987)(parole records admissible) and State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988)(police fingerprint records admissible). Petitioner attacked the Whipple decision on the basis that it was decided under Section 19-5-510 and not SCRE 803(6). As a matter of state law, the South Carolina Supreme Court in

⁶Section 19-5-510 provides:

A record of an act, condition, or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event and if, the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

the instant case alternately concluded that the records were admissible under Rule 803(6):

Appellant contends the records are inadmissible hearsay because they are not trustworthy under Rule 803(6), SCRE. We find no abuse of discretion in the trial judge's decision finding trustworthy those incidents witnessed by prison staff. E.g., *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (admission of evidence with trial judge's discretion); cf. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) overruled on other grounds *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (properly administered, Rule 803(6) exceptions are among the safest against a confrontation-clause challenges).

State v. Owens. Accord, *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2004) reversed on other grounds *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727 (2006). This state law evidentiary conclusion is unassailable in these proceedings. It is well established "that it is not the province of a federal [habeas] court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).⁷

⁷ Other states are in agreement. In *People v. Jackson*, 182 Ill.2d 30, 230 Ill. Dec. 901, 692 N.E.2d 391 (1998), the court rejected an assertion similar to the one raised by Owens in this case. In *Jackson*, the court held that prison incident reports were admissible in a capital sentencing proceeding through the custodian, even when the author did not testify. In addressing these issues in *People v. Casillas*, 749 N.E.2d 864 (Ill. 2001), the court noted that it had previously rejected such a claim by an appellant, holding that the contents of prison incident reports are admissible during the penalty phase of a sentencing hearing so long as they are relevant and reliable. *People v. Armstrong*, 183 Ill.2d 130, 233 Ill. Dec. 252, 700 N.E.2d 960 (1998); *People v. Jackson*, *supra*.

Similarly, in *U.S. v. Chong*, 98 F. Supp.2d 1110 (D. Hawaii. 1999), the court held disciplinary reports covering the defendant while in prison were admissible in the penalty phase of a capital proceeding, under the business records exception to the hearsay rule under Federal Rules of Evidence 803(6). In *Chong*, the defendant, like Owens, contended that these records are inherently untrustworthy and, hence,

The trial court in the present case directed Petitioner's attorney to examine each record, and the court determined he would only allow the admission of the report of an incident by an officer who was under a duty to report the same. (R. 1435, 1436-37, Tr. p. 1383, ll. 4-23, p. 1384, l. 23 -p. 1385, l. 17). He would not allow details of the incident or hearsay within hearsay. (R. 1413-15, Tr. p. 1361, ll. 16- p. 1363, l. 2). Petitioner's trial counsel reviewed each underlying record and agreed that 28 were officer reported as required by the judge. (R. 1436-37, Tr. p. 1384, ll. 1-11, p. 1385, ll. 7-17). The trial court found the records to be trustworthy. (R. 1436-37, Tr. p. 1384, l. 24-p.1385, ll. 1-17). Furthermore, the records which were introduced have special indicia of reliability. The Solicitor only offered a summary of those particular business records of which there was an administrative hearing

inadmissible. The defendant also argued the correctional officers were motivated to make unfavorable records, because they were involved in the proceedings and this fact erodes their reliability. The defendant further argued the reports were not generated with sufficient regularity to qualify for this hearsay exception. The court ruled otherwise, finding the records were reliable because the officers were required to report these incidents.

The Nevada court has similarly held these types of prison records admissible. In Thomas v. State, 114 Nev. 1127, 967 P.2d 1111 (Nev. 1999), the court held prison documents pertaining to the defendant were properly authenticated, and thus were properly admitted during the penalty phase of a murder trial pursuant to the business records hearsay exception. The court, based on persuasive federal and California authority, concluded the proper foundation was laid for the documents to fall under the business records hearsay exception. Other courts have similarly allowed the admission of the prison disciplinary records under a business or public records 803(8) exception. See Hall v. State, 650 P.2d 893 (Okla. Cr. 1982)(prison records containing information about an inmate's history of misconduct within the system fell within the business records exception to the hearsay rule found at 12 O.S. 1981 § 2803(8), and were not excluded under 2803(8)(a)-(e)). See also Frazier v. State, 874 P.2d 1289, 1292 (Okla. Cr. 1994)("pen-pack" falls squarely within 2803).

in the Department of Corrections, which resulted in a conclusion by that body that the incident or infraction actually occurred, or Petitioner waived his right to such a hearing. (R. 1434, Tr. p. 1382, ll. 12-25).

Disciplinary reports are admissible under the common law of this state in capital sentencing proceedings under the business records exception of § 19-5-510. Without question, the underlying records are relevant, because they address Petitioner's adaptability to prison based on his past conduct and his future dangerousness and character.

Second, the submitted summary was reliable. The prison system is obligated as a matter of state law to keep records concerning prisoner's habits and deportment. S.C. Code Ann. §§ 24-1-130, 24-1-140, 24-21-60, 24-21-70. See, Rayfield v. South Carolina Dep't. Of Corrections, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988)(discussing state statute requiring prison and parole officials to keep records of prisoners' habits and deportment and to prepare adequate reports concerning parole candidates). The custodian of the records testified that the records were kept in the regular course of business and were timely reported. Further, it has been generally held that such public records "have circumstantial guarantees of trustworthiness." *Accord*, State v. Pearson, 223 S.C. 377, 76 S.E.2d 151 (1953). Since the evidence is both relevant and reliable it was properly admitted.

The evidence was admissible under S.C.R.E. 803(6). Rule 803(6) SCRE provides that memorandum, reports, records, etc. in any form, of acts, events

conditions, or diagnosis, are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court. Rule 803(6); S.C. Code Ann. § 19-5-510 (Supp. 2001). *Accord*, Ex Parte D.H.E.C., 350 S.C. 243, 565 S.E.2d 293 (2002).

1. Record prepared at or near the time of the event recorded.

The evidence before the court revealed the underlying correctional officer disciplinary reports were prepared at or near the time of the incident and in fact were made contemporaneously. (R. 1440, 1412, Tr. p. 1388, ll. 18-20 & p. 1360, ll. 10-17). Major Nettles testified the summary accurately reflected the records themselves. (R. 1441, Tr. p. 1389, ll. 3-5).

The federal courts, applying this rule, have recognized that the record of the transaction need not be contemporaneous with the event, but should be recent enough to be reliable as evaluated by the court. *Accord*, U.S. v. Goodchild, 25 F.3d 55 (1st Cir. 1994)(computer printouts of collection memos containing records of phone statements allowed as business records since underlying data recorded during conversation or immediately thereafter); Wheeler v. Sims, 951 F.2d 123 (7th Cir. 1992)(11 day lapse between observation and production of the record allowed). The records in this case satisfy this requirement.

2. Record prepared by or from information by a person with

knowledge.

The record conclusively reveals that the summary admitted in this case was based upon disciplinary reports prepared by a correctional officer with knowledge of the incident. (R. 1412, 1435, 1436-37, Tr. p. 1360, ll. 21-23, p. 1383, ll. 4-7, p. 1384, l. 1-p. 1385, l. 17). Judge Patterson would not allow evidence of any other records into evidence but those prepared by a correctional officer with knowledge. (R. 1426, 1433, 1435, 1436-37, Tr. p. 1374, ll. 10-25, p. 1381, ll. 14-18, p. 1383, ll. 4-7, p. 1384, l. 1 - p. 1385, l. 17). It is not necessary to have the person who prepared the report present at trial. U. S. v. Moore, 923 F.2d 910 (1st Cir. 1991). The trustworthiness of the source was enhanced by the fact that it was reported through the prison disciplinary process. (R. 1434, Tr. p. 1382, ll. 12-25). A sufficient foundation is laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base the incident report upon transmission from a person with knowledge. (R. 1412-13, Tr. p. 1360, l. 10-p. 1361, l. 9). This was satisfied.

3. *Record prepared in the regular course of business.*

The record custodian testified that this data was prepared or recorded in the regular course of business. (R. 1412-13, Tr. p. 1360, l. 10-p. 1361, l. 6). As stated above, South Carolina statutory law requires that prisoner records be maintained and provided to another state agency to assist in its decision-making process. It cannot be seriously disputed that these records qualify. Records which are drafted during regularly conducted business and not in response to isolated or unusual

events are admissible. Courts have held that the regular practice requirement should be generously construed to favor admission, and stringent standards including requirements of careful checking and habits of precision were rejected in In re Japanese Electronic Antitrust Litigation, 723 F.3d 238 (3rd Cir. 1983). See Blondie v. Bic, Corp., 947 F.2d 15321 (6th Cir. 1991)(social worker's report on what fire victims said about cause of fire admissible as business record inasmuch as made in scope of employment and as part of regularly conducted activity). Here the practice of providing accurate information of the prison incidents for parole reasons, to enhance safety and make the appropriate housing assignments requires the prison guards to timely report, making this an essential link in the trustworthiness chain.

4. *Qualified witness identifies the record.*

An actual custodian of the records of the South Carolina Department of Corrections, Major Thierry Nettles, the custodian at Lieber Correctional where Petitioner was housed, was the witness who presented and identified the records. (R. 1413, Tr. p. 1361, ll. 7-9). And Major Nettles is aware of what happens at other facilities with regards to how records are maintained. (R. 1416, 1418, Tr. p. 1364, ll. 8-12, p. 1366, ll. 7-13). And the record establishes that how the records are kept, the process for reporting incidents, and making a record of that, is standardized throughout the Department of Corrections. So, the same policy regarding making of the disciplinary record and the keeping of it is the same at each institution, not just at Lieber. (R. 1418, Tr. p. 1366, ll. 7-13). Under Connelly v. Wometco Enterprises,

314 S.C. 188, 442 S.E.2d 204 (S.C. App. 1994), the appropriate custodian testified. As stated in U.S. v. Reese, 568 F.2d 1246 (6th Cir. 1977), it is not required that the custodian have actual knowledge of actual data contained in the business record. See Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999). Major Nettles was certainly a qualified witness under Rule 803(6). The trial court found he was qualified to testify under the Rule. (Tr. p. 1358, ll. 18-20, p. 1375, ll. 12-14, p. 1379, l. 18-p. 1380, l. 1). He had custody of Petitioner's file since Petitioner was housed at his facility. (R. 1431-32, 1433, 1439-1441, Tr. p. 1379, l. 18-p. 1380, l. , p. 1381, ll. 13-20, p. 1387, l. 10 - p. 1389, l. 5). Who better to testify to the contents of Owens' disciplinary file than the custodian of records at the facility at which Petitioner was housed and the person responsible for the supervision of Petitioner Owens' housing. (R. 1444, 1431-32, Tr. p. 1392, ll. 13-15, p. 1379, l. 23-p. 1380, l. 1).

5. *Record is trustworthy in the opinion of the court.*

Judge Patterson found these prison records trustworthy.⁸ (R. 1410, 1436-37, Tr. p. 1358, ll. 9-22, p. 1384, l. 24-p. 1385, l. 17). The lower court reviewed the underlying incident reports for the summary and found the portions he admitted had an indicia of trustworthiness, because they were reported by an employee of the

⁸Judge Patterson in his final decision did not use the exact word "trustworthy", however a reading of the record dealing with this issue can lead to no other conclusion but that the judge found the offered portion of the records trustworthy, since Judge Patterson was clearly familiar with the requirements of Rule 803 and admitted the summary into evidence. (See R. 1406-1441, Tr. p. 1354-1389). In fact, Judge Patterson pointed to the fact that the officers were required to report the incidents recorded, in deciding to admit the summary.

Department of Corrections who was under a duty to report the incidents and the Department kept a record on incidents involving inmates. (R. 1436-37, Tr. p. 1384, l. 24-p. 1385, l. 17). Further, this summary is purely a factual recording of the incident which eventually had a disciplinary result. (R.1434, Tr. p. 1382, ll. 12-25). It was properly admitted. See State v. Key, 277 S.C. 214, 284 S.E.2d 781 (1981). Further, the summary is admissible, because the underlying records were (1) kept pursuant to a routine procedure designed to assure accuracy; 2) created for motives that end to assure accuracy; and (3) they are not merely accumulations of hearsay. See Rosenburg v. Collins, 624 F.2d 659 (5th Cir. 1980). (R. 1413, 1427, 1433, 1436-37, Tr. p. 1361, ll. 16-22, p. 1375, ll. 21-22, p. 1381, ll. 14-17, p. 1384, l. 24- p. 1385, l. 17).

6. The Prison Records are admissible under either 803(6) or 803(8).

At trial, the State proffered this evidence under Rule 803(6). As set forth above, this evidence meets the conditions precedent to its admission under this Rule. In addition to the cases cited above, prison disciplinary records have been held to be admissible under Rule 803(8) in Games v. State, 743 N.E.2d 1132 (Ind. 2001), a capital case in which similar underlying reports were admitted. Also, in Combs v. Wilkinson, 315 F.3d 548 (6th Cir. 2002), the court found that the report prepared by a use of force committee was admissible under Rule 803(8), even though the committee lacked personal knowledge and its report was based upon 123 interviews and numerous documents, including staff and inmate incident reports, as well as an investigative report.

Petitioner has asserted the summary contains "subjective opinions and judgements." Petitioner reads this exclusionary phrase too broadly. The summary is based upon the factual recitation of the incident and includes the disciplinary result. It is not a listing of subjective opinion, i.e. "proceeding from taking place within the mind." but rather an objective statement of a factual result. Under Petitioner's theory, the business records exception to the hearsay rule would be eviscerated, since factual representations with an indicia of trustworthiness are the reasoning for its existence.⁹

A. The Admitted Sentencing Phase Evidence of Prison Disciplinary Summaries do not violate the Confrontation Clause.

Petitioner asserts that even if the records are admissible as an exception to the hearsay rule, they violate the Confrontation Clause under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). Petitioner's reliance upon Crawford is misplaced. First, the Court in Crawford specifically excepted the contents of business records from a Confrontation Clause challenge. Id.

⁹At trial, the prosecution did not assert admissibility under Rule 803(8). As an additional sustaining ground, Respondent submitted this evidence could be admitted under this alternate rule. Rule 220(c) SCAR. Although S.C.D.C. employees are "peace officers", disciplinary reports do not involve necessarily criminal case matters observed by police and law enforcement personnel. Instead, this information is maintained for correctional purposes to evaluate the deportment of the inmate and the safety of the institution. Respondents submit the excluded data was to exclude observations made by law enforcement at a crime scene, because such observations were made in an adversarial setting which were deemed less reliable than observations made by public officials in other settings. Here, the disciplinary records were not necessarily crimes, but prison violations. As such, Respondents submit the exclusion does not apply and the reports are admissible under Rule 803(8).

Hearsay evidence contains sufficient indicia of reliability to satisfy the Confrontation Clause when the evidence either falls within "a firmly rooted hearsay exception" or "contains particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to the statements reliability." Lilly v. Virginia, 527 U.S. 116, 124-125, 119 S.Ct. 1887 (1999), (quoting Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531 (1980) *see also* Idaho v. Wright, 497 U.S. 805, 815, 110 S.Ct. 3139 (1990)). A defendant's right to confrontation is not absolute. Lilly, *supra* at 123-24, Ohio, *supra* at 65-66, Christian v. Rhode, 41 F.3d 461, 467 (9th Cir. 1994).

The South Carolina Supreme Court recognized subsequent to Holmes, *supra* that business records do not implicate the Confrontation Clause. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005) ("Finally, in Crawford v. Washington, 541 U.S. 36, 54, 124 S.Ct. 1354 (2004), the United States Supreme Court noted the hearsay exception for business records and observed that business records are not 'testimonial' and therefore do not implicate the Confrontation Clause."). In Cutro, *supra*, this Court held public records do not implicate the Confrontation Clause.¹⁰

¹⁰In pre-Crawford decisions, business records were introduced in criminal cases in state and federal courts and determined not to violate the Confrontation Clause. See Manocchio v. Moran, 919 F.2d 770, 776-80 (1st Cir. 1990) (autopsy report admitted to prove cause of death without medical examiner did not violate the Confrontation Clause). "The admission of evidence under a firmly rooted exception to the hearsay rule that does not require unavailability of a witness, such as the public records exception, does not violate the Confrontation Clause, and the public record recognition to the hearsay rule is firmly rooted." Roberts, 448 U.S. at 66 n.8, 100 S.Ct. At 2539 n.8; United States v. Contreras, 63 F.3d 852, 857 (9th Cir. 1995) (citations omitted); United States v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1990),

B. The Confrontation Clause and Crawford Have No Applicability in Sentencing.

Respondent would further assert that certiorari is not warranted because the Confrontation Clause does not apply to sentencing proceedings, particularly concerning evidence not relevant to showing the existence of a statutory aggravating eligibility factor required for an enhanced or death sentence, but merely presented to show the character of the defendant. *See, e.g., United States v. Fields*, 483 F.3d 313 (5th Cir. 2007) (confrontation clause does not operate to bar admission of hearsay evidence to show defendant's past violent conduct and future dangerousness); *United States v. Higgs*, 353 F.3d 281, 324 (4th Cir. 2003) (noting

cert. denied, 498 U.S. 1124, 111 S.Ct. 1084 (1991). "Properly administered, the business and public records exceptions would seem to be among the safest of the hearsay exceptions." *Contreras*, 63 F.3d at 857. *See Sherman v. Scott*, 62 F.3d 136 (5th Cir. 1995) (testimony of supervisor demonstrated lab report finding cocaine had particular guarantees of trustworthiness and because cross-examination of chemists who prepared report would have been of little use to petitioner, admission of the report did not violate the Confrontation Clause.); *Minner v. Kirby*, 30 F.3d 1311 (10th Cir. 1994) (admission of chemists lab notes through chemist's supervisor was proper under the Confrontation Clause"); *United States v. Baker*, 855 F.2d 1353, 1360 (8th Cir. 1988) (lab reports of controlled substances did not violate Confrontation Clause); *Reardon v. Manson*, 806 F.2d 39, 41-43 (2^d Cir. 1986) (chemists' reports admitted through supervisor did not violate Confrontation Clause); *United States v. Simmons*, 773 F.2d 1455, 1460 (4th Cir. 1985) (no Confrontation Clause violation because utility of confronting ATF record-keepers at trial was negligible); *People v. Hall*, 114 Ill.2d 376, 416-17, 102 Ill. Dec. 322, 499 N.E.2d 1335 (1986) (admission of prison records at sentencing hearing did not violate defendant's right of confrontation). *See also People v. Ward*, 154 Ill.2d 272, 328030, 181 Ill. Dec. 884, 609 N.E.2d 252 () (court did not abuse discretion in allowing prison record to be introduced in sentencing hearing); *See State v. Dennis*, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999) (since there is an adequate indicia of trustworthiness, adversarial testing would add little, there is no Confrontation Clause violation).

that "[i]t is far from clear that the Confrontation Clause applies to a capital sentencing proceeding"); *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir.2002) (citing *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), for the proposition that the Confrontation Clause does not apply to capital sentencing and noting that the Supreme Court "has never questioned the precise holding of" *Williams*). But see *U.S. v. Brown*, 441 F.3d 1330, 1361 (11th Cir. 2006).

C. The Admission of Prison Records Were Harmless Error Where Similar Evidence Was Presented Without Objection And Evidence of Owens Violent Character Was Extensively Presented Independent of the Challenged Records.

Even if this Court were to assume *arguendo* that the state trial court committed error in admitting the limited records under the business records exception or had violated Owens' rights under the Confrontation Clause by admitting the disciplinary summary, the Court must conclude that such error was harmless beyond a reasonable doubt. See *State v. Bell*, 302 S.C. 18, 393 S.E.2d 362 at 372 (1990); See also *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1988)("assuming without deciding that the case summaries and disciplinary records were improperly admitted", the court held its examination of the record in its entirety lead it to conclude the alleged error did not affect a substantial right of the appellant).¹¹ Likewise in the present case there was overwhelming evidence of

¹¹While the *King* court relied on *Kotteakos v. U.S.*, 328 U.S. 750 (1946) harmless error standard rather than that set forth in *Chapman v. California*, 386 U.S. 18 (1967), the court's decision is still persuasive, because it found harmless error in light of other properly admitted evidence of future dangerousness.

Petitioner's future dangerousness, character, and inability to adapt to prison life outside of the business records.

The violation of a defendant's right of confrontation is also subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431(1986). A violation of the Confrontation Clause is not *per se* reversible error. *State v. Dinkins*, 345 S.C. 412, 548 S.E.2d 217 (2001), citing *State v. Dinkins*, 339 S.C. 597, 529 S.E.2d 557 (Ct. App. 2000); *State v. Jenkins*, 322 S.C. 360, 364, 474 S.E.2d 812, 815 (Ct. App. 1996). Also *Bell*, 302 S.C. 18, 393 S.E.2d at 372 (1990).

The Court must consider several factors to determine whether the alleged error is harmless or requires reversal. These factors include the importance of the challenged evidence to the State's case, whether the evidence was cumulative, whether the evidence was materially corroborated or contradicted by other evidence introduced at trial, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. *Van Arsdall*. On this issue, these factors conclusively weigh towards a conclusion of harmless error since the factors reveal: 1) The summary is similar to testimony of Major Thierry Nettles who stated Owens was the worst inmate in his custody and he houses problem inmates, and this statement came from personal knowledge of the witness, 2) the evidence is cumulative to other evidence of his inability to adapt in prison, i.e. the murder of Christopher Lee,¹² 3) the exhibit was corroborated by a defense witness, Dr. Donna

¹²Dr. David Brunetti, a psychologist, also testified that Owens has antisocial personality disorder which is primarily characterized by repeated disregard for the

Schwartz Watts, and not contradicted in the record, 4) cross examination clarified the record, defense counsel was able to clarify for the jury exactly what was meant by each entry if he so chose, 5) the strength of the state's case in developing Owens' character was overwhelming without the challenged summary.¹³ The disciplinary records were clearly cumulative to other evidence in aggravation. Likewise, the evidence that he would be a predator in prison was firmly established without

rights and safety of others. (R. 1341, Tr. p. 1289, ll. 1-14). Brunetti stated Owens was likely to be an individual who is hostile in his relationship with others, very quick to experience anger, and had learned the way to deal with anger is aggressively, as well as with the use of weapons. (R. 1342, Tr. p. 1290, ll. 3-18). After reviewing Owens' confession to the Lee murder, Dr. Brunetti's opinion changed from Owens being an impulsive actor "to that this was a much more predatory type of aggression."

(R. 1348-49, Tr. p. 1296, l. 16- p. 1297, l. 18). Brunetti also testified he reviewed all of Owen's records from the D.O.C. since 1999 and in his opinion even in maximum solitary confinement Owens continues to harm others. (1350-51, Tr. p. 1298, l. 11- p. 1299, l. 8). This testimony was admitted without objection.

¹³In addition to the evidence of the robberies and brutal murder committed by Petitioner, the jury heard testimony that Petitioner was adjudicated delinquent as a juvenile for burglary (two counts), assault with intent to kill, and unlawful possession of a pistol. (R. 1547, Tr. p. 1494, ll. 3-17). The jury also heard Petitioner's confession to the murder of his cellmate in the Greenville County detention center along with the testimony of the pathologist who performed the autopsy on Christopher Lee, who described the savage beating that resulted in Lee's death. @. 1359-1391, 1393-1405, Tr. p. 1307-1339, 1341-1353). The jury also heard testimony that Owens, because of his prison conduct, was required to be housed "in a cell inside a cage" and that of the worst inmates in his cellblock, he was the most problematic inmate. (R. 1444, Tr. p. 1392, ll. 11-20). The jury also heard testimony from officer Joe Wood who testified Petitioner bragged about selling lots of drugs and stated he wanted to be remembered as the one "who killed the most people in Greenville." (R. 1144, Tr. p. 1093, ll. 10-13). Owens also told his girlfriend he wanted to go down in history for committing the most murders in Greenville County without getting caught. (R. 1167, Tr. p. 1116, ll. 1-4).

reference to the records. (R. 1444, Tr. p. 1392, ll. 11-20). The admission of the records, was harmless beyond a reasonable doubt.

Furthermore, the record is clear that Petitioner's own experts reviewed and relied on Department of Corrections disciplinary records in rendering their opinions. (R. 1457-58, Tr. p. 1404, l. 16-p. 1405, l. 15). These witnesses included Marjorie Hancock and Doctor Thomas Cobb. (R. 1457-58, 1502, Tr. p. 1404, l. 16-p. 1405, l. 15 & Tr. p. 1449, ll. 12-16). Doctor Cobb testified Owens was in maximum security at Lieber Correctional Facility and Owens was getting in a lot of trouble. (R. 1490, Tr. p. 1437, ll. 1-6). Cobb testified Owens was kept "in a cell, inside of a cage" which was different than all the other cells on the cell block. (R. 1494, Tr. p. 1441, ll. 9-13). Cobb also testified Owens was found with a shank in his cell. (R. 1505, Tr. p. 1452, ll. 8-16). Cobb also testified Owens made things [weapons] for protection. (R. 1506, Tr. p. 1453, ll. 19-21).

And Dr. Donna Schwartz-Watts relied on the DOC records as well. (R. 1514, Tr. p. 1461, ll. 2-5). Dr. Schwartz-Watts testified without objection that she was "...aware of many of his disciplinaries since he's been confined in the Department of Corrections." (R. 1514, Tr. p. 1461, ll. 2-5). Schwartz-Watts told the jury Petitioner had horrible behavior in the Department of Juvenile Justice which included write ups for fighting and being disruptive in school, among other things. (R. 1523, Tr. p. 1470, ll. 17-23). Schwartz-Watts testified Petitioner's behavior in the juvenile correction facilities was at times "aggressive". (R. 1525, Tr. p. 1472, ll. 12-19). Schwartz-Watts testified that upon Owens' release from Turbeville

Correctional Institute, Owens accrued a number of armed robbery and assault charges. (R. 1524-25, Tr. p. 1471, l. 24-p. 1472, l. 7). Schwartz-Watts testified Owens had about 56 write-ups in the adult correctional system, including assaultive behavior. (R. 1525-26, Tr. p. 1472, l. 35-p. 1473, l. 7). She also stated he had a "long disciplinary history". (R. 1526, Tr. p. 1473, ll. 6-7). Dr. Schwartz-Watts testified Owens "has a long history of illegal behaviors." (R. 1534, Tr. p. 1481, ll. 13-14). She also testified Owens set fire to his cell and threw coffee in an officer's face. (R. 1541-42, Tr. p. 1488, l. 16- p. 1489, l. 2). Schwartz-Watts admitted Owens was caught with a 12 inch weapon and a 8 inch shank on two different occasions in 2006. (R. 1540-41, Tr. p. 1487, l. 16-p. 1488, l. 10). And Dr. Schwartz-Watts testified that she was aware of the records, reviewed the records and relied upon them in coming to her conclusion in her written report and testified that he had substantial infractions from 2001 - 2005. (R. 1538-40, Tr. p. 1485, l. 12 - p.1487, l. 8).

In summary, Dr. Schwartz-Watts and others testified without objection that Petitioner had a lengthy disciplinary history including a history of assaultive behavior and possession of illegal weapons while incarcerated. In fact, the defense' witnesses testified to more disciplinary violations than the State offered into evidence. All of this evidence was before the jury without reference to the presently challenged summary. Additionally, Dr. Schwartz-Watts testified that the State's summary admitted into evidence was in fact a summary of the very documents she

relied upon in reaching her opinion.¹⁴ The summary could have been properly admitted through Doctor Schwartz-Watts if it had not already been entered as a matter of state law.

Even assuming *arguendo* that the admission of the records was error, their admission was harmless beyond a reasonable doubt. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003)(admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); *see also* State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996)(instructing that error in admission of evidence is harmless where it is cumulative to other evidence which was properly admitted); State v. Douglas, 367 S.C. 498, 520, 626 S.E.2d 59, 71 (Ct. App. 2006)(“The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence”).

The jury, without regard to the summary, was aware Owens had a lengthy record of assaultive behavior while in confinement, including murder, and a history of making weapons or “shanks”. And, within his housing unit he was considered “assaultive”, “destructive”, and “damaging”, the “most problematic inmate”. (R. 1444, Tr. p. 1392, 18-20). Even in maximum solitary confinement “he continues to

¹⁴In fact, Dr. Brunetti, a former defense expert, testified on behalf of the State that after reviewing the very same records, Owens continues to harm others while in maximum solitary confinement. This testimony was admitted without objection. (R. 1350-51, Tr. p. 1298, l. 22- p. 1299, l. 8). Brunetti testified before Major Nettles and before the records themselves were offered by the state. This evidence was also before the jury.

harm others." (R. 1351, Tr. p. 1299, ll. 1-8). The admission of the summary was harmless beyond a reasonable doubt. State v. Motley, 251 S.C. 568, 164 S.E.2d 569 (1968)(no prejudice shown where a different witness testified to the same matter without objection).

CONCLUSION

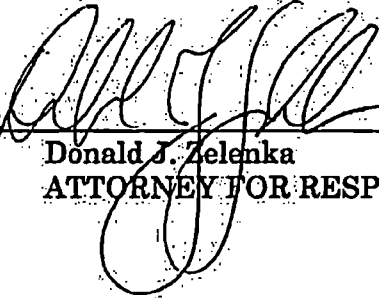
Since the issue Owens wishes to raise to the United States Supreme Court were preserved under state law, Owens' petition for writ of certiorari must be denied.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General
P.O. Box 11549
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By: 

Donald J. Zelenka

ATTORNEY FOR RESPONDENT

December 10, 2008

CAPITAL CASE

No. 08-7189

**IN THE
SUPREME COURT OF THE UNITED STATES**

FREDDIE EUGENE OWENS,

PETITIONER,

v.

THE STATE OR SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

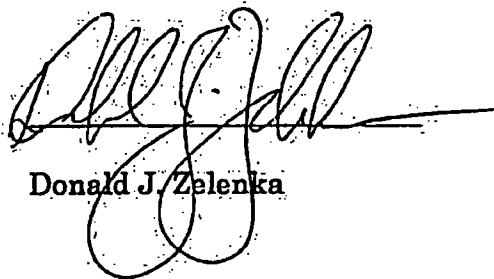
I, Donald J. Zelenka, do declare that on this date, December 10, 2008, as required by Supreme Court Rule 29, I have served the enclosed **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** on counsel of record, by depositing an envelop containing the above documents in the United States mail with postage prepaid and properly addressed to:

JOHN H. BLUME
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

KEIR M. WEYBLE
PO Box 11744
Columbia, S.C. 29211

I declare under perjury that the foregoing to true and correct.

Executed on December 10, 2008.



Donald J. Zelenka

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

January 21, 2009

William K. Suter
Clerk of the Court
(202) 479-3011

Mr. Donald J. Zelenka
Assistant Deputy Attorney General
Office of the Attorney General
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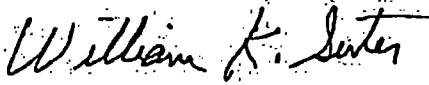
Re: Freddie Eugene Owens
v. South Carolina
No. 08-7189

Dear Mr. Zelenka:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,


William K. Suter, Clerk

STATE OF SOUTH CAROLINA

County of Greenville

Freddie Eugene Owens, #5065,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2009-CP-23-

0741

APPLICATION FOR

POST-CONVICTION RELIEF

1. Place of detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Name and location of Court which imposed sentence: Greenville County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any): Stephen Andra Golden
4. The indictment number or numbers upon which and the offenses for which sentence was imposed:
 - (a) Murder:
 - (b) Armed robbery:
 - (c) Use of firearm in commission of violent crime:
 - (d) Conspiracy to commit armed robbery:
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on February 17, 1999.
 - (b) Murder: death.
 - (b) Armed robbery: thirty years.
 - (c) Use of firearm in commission of violent crime: five years.
 - (d) Conspiracy to commit armed robbery: five years.
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and imposition of sentence.
8. (a) The Courts to which Applicant appealed:

- (i) Applicant appealed his conviction and sentence to the South Carolina Supreme Court.
 - (ii) Applicant appealed his death sentence upon his first re-sentencing proceeding to the South Carolina Supreme Court.
 - (iii) Applicant appealed his death sentence upon his second-re-sentencing proceeding to the South Carolina Supreme Court.
- (b) The result in each Court to which applicant appealed.
- (i) Applicant's convictions were affirmed. His death sentence was vacated, and his five year sentence for possession of a weapon during the commission of a violent crime was reversed.
 - (ii) Applicant's death sentence was vacated.
 - (iii) Applicant's death sentence was affirmed.
- (c) The date of each result.
- (i) Applicant's convictions were affirmed on September 4, 2001. His first death sentence was vacated, and his five year sentence for possession of a weapon during the commission of a violent crime were reversed on September 4, 2001.
 - (ii) Applicant's death sentence following his first re-sentencing proceeding was vacated on December 20, 2004.
 - (iii) Applicant's death sentence following his second re-sentencing proceeding was affirmed on July 14, 2008.
- (d) Citations of any written opinion or orders entered pursuant to such results:
- (i) *State v. Owens*, 346 S.C. 637, 522 S.E.2d 745 (2001).
 - (ii) *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004).
 - (iii) *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008).

9. Not applicable.

10. & 11. **GROUNDS FOR RELIEF WITH SUPPORTING FACTS.**

- 10(a) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution by trial counsel's failure to object when the**

trial judge erred in disqualifying a juror and by trial counsel's failure to object to the solicitor's improper closing argument.

11(a) The ground for relief states the relevant facts. *See Strickland v. Washington*, 466 U.S. 668 (1984).

10(b) Applicant was denied the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when trial counsel failed to preserve the state and federal constitutional issues related to the admission of a list of disciplinary infractions by failing to object on the basis of the Confrontation Clause and due process.

11(b) The ground for relief states the relevant facts. *See Strickland v. Washington*, 466 U.S. 668 (1984).¹

12. & 13. Applicant appealed directly to the South Carolina Supreme Court as specified in (7) and (8), *supra*. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.

14. The grounds set forth in (10) have not been previously presented to this or any other court, state or federal, in any petition, motion or application which Applicant has filed.

15. Not applicable.

16. The grounds set forth in (10) have not been previously presented because they were not appropriate issues for direct appeal or for a petition for a writ of certiorari to the United States Supreme Court. Furthermore, these grounds rely on additional facts outside the record before the previous courts.

17. Applicant was represented by counsel during the trial and appeal, during the first re-sentencing and appeal, and during the second-re-sentencing and appeal.

18. Appointed trial counsel were:

John M. Rawlins, Jr.
219 Randall Street
Greer, SC 29651

Karl B. Allen

¹ I do not have post-conviction counsel at this time. Further, I do not have trial counsel's file or any ability to conduct an investigation. Given those limitations, I cannot provide any further information regarding additional claims that I may raise in my post-conviction application, although I believe there are other viable post-conviction claims available to me.

108 Lavinia Avenue
Greenville, SC 29601

On appeal, Applicant was represented by:

Katherine Carruth Link
Assistant Appellate Defender
South Carolina Office of Appellate Defense
1205 Pendleton Street
Columbia, SC 29201
(803) 734-1330

Appointed re-sentencing counsel were:

Alex Kinlaw, Jr.
309 Mills Avenue
Greenville, SC 29605

Steve Sumner
114 Manly Street
Greenville, SC 29602

On appeal, Applicant was represented by:

Joseph L. Savitz, III
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11433
Columbia, SC 29211
(803) 734-1343

Appointed second resentencing counsel were:

Everett P. Godfrey
Godfrey Law Firm, LLC
10 East Ave.
Greenville, SC 29601

Kenneth C. Gibson
The Law Office of Kenneth Gibson
P.O. Box 5536
Greenville, SC 29606

On appeal, Applicant was represented by:

Joseph L. Savitz, III
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Division of Appellate Defense
P.O. Box 11433
Columbia, SC 29211
(803) 734-1343

19. Applicant seeks relief from his convictions and sentence.
20. Applicant is not under sentence from any other court.

STATE OF SOUTH CAROLINA)

County of Dorchester)

VERIFICATION

I, Freddie Eugene Owens, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

x Freddie E. Owens

SWORN to and subscribed before me this 23rd
day of January, 2009.

Dwain A. Glan
Notary Public

My Commission Expires: 2-7-2010

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
County of Greenville	)	
	)	
Freddie Eugene Owens, #5065,	)	Case No.: 09-CP-23-0741
Applicant,	)	
	)	
vs.	)	FIRST AMENDED APPLICATION FOR
	)	POST-CONVICTION RELIEF
State of South Carolina,	)	
Respondent.	)	

1. Place of detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Name and location of Court which imposed sentence: Greenville County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any): Stephen Andra Golden
4. The indictment number or numbers upon which and the offenses for which sentence was imposed:
 - (a) Murder: 98-GS-23-5220
 - (b) Armed robbery: 98-GS-23-5218
 - (c) Use of firearm in commission of violent crime: 98-GS-23-5220
 - (d) Conspiracy to commit armed robbery: 98-GS-23-5222
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on February 17, 1999.
 - (b) Murder: death.
 - (b) Armed robbery: thirty years.
 - (c) Use of firearm in commission of violent crime: five years.
 - (d) Conspiracy to commit armed robbery: five years.
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and imposition of sentence.
8. (a) The Courts to which Applicant appealed:
 - (i) Applicant appealed his conviction and sentence to the South Carolina Supreme Court.

- (ii) Applicant appealed his death sentence upon his first re-sentencing proceeding to the South Carolina Supreme Court.
- (iii) Applicant appealed his death sentence upon his second-re-sentencing proceeding to the South Carolina Supreme Court.
- (b) The result in each Court to which applicant appealed.
 - (i) Applicant's convictions were affirmed. His death sentence was vacated, and his five year sentence for possession of a weapon during the commission of a violent crime was reversed.
 - (ii) Applicant's death sentence was vacated.
 - (iii) Applicant's death sentence was affirmed.
- (c) The date of each result.
 - (i) Applicant's convictions were affirmed on September 4, 2001. His first death sentence was vacated, and his five year sentence for possession of a weapon during the commission of a violent crime was reversed on September 4, 2001.
 - (ii) Applicant's death sentence following his first re-sentencing proceeding was vacated on December 20, 2004.
 - (iii) Applicant's death sentence following his second re-sentencing proceeding was affirmed on July 14, 2008.
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) *State v. Owens*, 346 S.C. 637, 522 S.E.2d 745 (2001).
 - (ii) *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004).
 - (iii) *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008).

9. Not applicable.

10. & 11. **GROUNDS FOR RELIEF WITH SUPPORTING FACTS**

10(a): Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during jury selection for his capital trial.¹

¹ With the exception of information "necessary" to respond to the specific claims raised in this First Amended Application For Post-Conviction Relief, applicant does not waive the

11(a): **Supporting Facts:** Trial counsel's performance during jury selection was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included the following:

- 1) Counsel failed to object when the trial judge erred by disqualifying a potential juror, Sonya Ables (Juror Number 1), solely because she "went to [her] pastor and talked to him about [the death penalty]," as the trial judge incorrectly believed "there is a case right on point, that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law."

10(b): **Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during the guilt-or- innocence phase of his capital trial.**

11(b): **Supporting Facts:** Trial counsel's performance during the guilt-or-innocence phase was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included the following:

- 1) Counsel failed to object to and otherwise challenge improper and inadmissible opinion testimony from Officer Larry Bellew and others that Applicant's co-defendant, Steven Andra Golden, could not have shot the victim because of the trajectory of the bullet, the placement of the victim's wounds, the manner in which Golden was holding the gun in a video of the crime, and the supposed lack of "muzzle flash" in the video. Bellew testified that he and others arrived at this conclusion simply by looking at the video and that the state had not used SLED or other forensic experts to determine the trajectory of the bullet or any other aspect of their theory. Counsel further failed to consult with a crime scene reconstruction expert, a video expert, or others with relevant expertise concerning the accuracy of the State's theory.

10(c): **Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during the sentencing phase of his capital trial.**

11(c): **Supporting facts:** Trial counsel's performance during the sentencing phase was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included the following:

attorney-client privilege to any extent. *See S.C. Code § 17-27-30*. Applicant requests that his prior counsel not disclose any other portion of his files to respondent or discuss any aspect of his representation outside the scope of this limited waiver.

- 1) Counsel failed to preserve the state and federal constitutional issues related to the admission of a list of disciplinary infractions by failing to object on the basis of the Confrontation Clause and due process. On appeal, the South Carolina Supreme Court held that counsel's objection was inadequate to preserve the federal constitutional issues and thus, the issue was procedurally barred. *See State v. Stone*, 655 S.E.2d 487, 488–89 (S.C. 2007). Counsel's failure to lodge an appropriate objection was deficient and prejudicial.
- 2) Counsel failed to object to the solicitor's improper and prejudicial closing argument. For example, counsel failed to object to the solicitor's statements that the prosecution seeks death only rarely, even in eligible cases, and this case was one of those rare cases: "Only limited circumstances are allowed for us to seek the death penalty, and rarely do we seek the death penalty in all those cases that are eligible. In only certain cases do we seek the death penalty." *2006 Tr. at 1552*; *see also*, *2006 Tr. at 1555* ("There are mean and evil people in the world who do not deserve to continue to live with the rest of us, regardless of how confined they may be. The law limits the right to seek the death penalty to a very select number of cases, very few, and we seek the death penalty only in a few, but the circumstances where we seek it is available mean and evil people who commit atrocious acts of murder; the worst of the worst. That is what the death penalty is reserved for. Those whose behavior sets them apart even from the criminal world, and that is Freddie Owens, and this murder and his behavior are one of those cases"). Counsel further failed to object when the solicitor argued that the jury should sentence Applicant to death because his life would be easy in prison. *See, e.g., 2006 Tr. at 1561* ("[b]ig prison is like a little city. In prison he will have all the necessities in life. . . . He will have clothing that they provide, and he will have contact with his family, and TV at times, and he will have family business. Not much more than a change of address for Freddie Owens. So don't think putting Freddie Owens in prison for the rest of his life is going to be a significant punishment for him"). Counsel also failed to object when the solicitor told the jury that he personally wanted the death penalty and would not be "satisfied with a life sentence." *2006 Tr. at 1555*. Counsel thus failed to preserve for appeal whether the improper arguments violated the Sixth, Eighth and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law.
- 3) Counsel failed to object to victim impact testimony regarding the effect of the victim's death on the victim outreach coordinator. *2006 Tr. at 1274*. Counsel also failed to object to hearsay testimony from the victim outreach coordinator concerning statements that the victim's children made to her after the victim's death. *2006 Tr. at 1268-1271*. Such testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial.
- 4) Counsel failed to object to improper and prejudicial opinion testimony from Officer Joe Wood that Applicant gave him "cold chills," and the solicitor's reliance on that testimony in closing argument. *2006 Tr. at 1093 and 1559*.

12. & 13. Applicant appealed directly to the South Carolina Supreme Court as specified in (7) and (8), *supra*. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.
14. The grounds set forth in (10) have not been previously presented to this or any other court, state or federal, in any petition, motion or application which Applicant has filed.
15. Not applicable.
16. The grounds set forth in (10) have not been previously presented because they were not appropriate issues for direct appeal or for a petition for a writ of certiorari to the United States Supreme Court. Furthermore, these grounds rely on additional facts outside the record before the previous courts.
17. Applicant was represented by counsel during the trial and appeal, during the first re-sentencing and appeal, and during the second-re-sentencing and appeal.
18. Appointed trial counsel were:

John M. Rawlins, Jr.
219 Randall Street
Greer, SC 29651

Karl B. Allen
108 Lavinia Avenue
Greenville, SC 29601

On appeal, Applicant was represented by:

Katherine Carruth Link
Assistant Appellate Defender
South Carolina Office of Appellate Defense
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(803) 734-1330

Appointed re-sentencing counsel were:

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309 Mills Avenue
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Greenville, SC 29601

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P.O. Box 11433
Columbia, SC 29211
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19. Applicant seeks relief from his convictions and sentence.
20. Applicant is not under sentence from any other court.

Respectfully submitted,

By: Keir M. Weyble (s)

KEIR M. WEYBLE
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EMILY C. PAAVOLA
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Post Office Box 11311
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(803) 765-1044

Counsel for Applicant

May 26, 2009

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

FREDDIE EUGENE OWENS, SK5065
Applicant,

v.

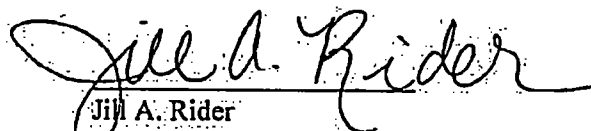
THE STATE OF SOUTH CAROLINA.
Respondent.

IN THE COURT OF COMMON PLEAS
CA No. 09-CP-23-0741

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Amended Application for Post-Conviction Relief was served by first class United States mail, postage prepaid, this 26th day of May, 2009, upon the following:

Anthony Maybry
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
County of Greenville	)	
	)	
Freddie Eugene Owens, #5065,	)	Case No.: 09-CP-23-0741
Applicant,	)	
	)	
vs.	)	SECOND AMENDED APPLICATION
	)	FOR POST-CONVICTION RELIEF
State of South Carolina,	)	
Respondent.	)	

1. Place of detention: Licber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Name and location of Court which imposed sentence: Greenville County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any): Stephen Andra Golden
4. The indictment number or numbers upon which and the offenses for which sentence was imposed:
 - (a) Murder: 98-GS-23-5220
 - (b) Armed robbery: 98-GS-23-5218
 - (c) Use of firearm in commission of violent crime: 98-GS-23-5220
 - (d) Conspiracy to commit armed robbery: 98-GS-23-5222
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on November 11, 2006.
 - (b) Murder: death.
 - (c) Armed robbery: thirty years.
 - (d) Use of firearm in commission of violent crime: five years.
 - (e) Conspiracy to commit armed robbery: five years.¹

¹ Applicant was originally convicted and sentenced to death on February 17, 1999. His death sentence was overturned by the South Carolina Supreme Court on September 4, 2001 (*See State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001)). Applicant was sentenced to death again on September 2, 2003, following a bench re-sentencing proceeding in February 2003. Applicant's second death sentence was overturned by the South Carolina Supreme Court on December 20, 2004 (*See State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004)). Applicant was sentenced to death again by a jury at his second re-sentencing proceeding on November 11, 2006. The sentences set forth in subsections (c) through (e) were not at issue at either of Applicant's re-sentencing proceedings.

6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and imposition of sentence.
8. (a) The Courts to which Applicant appealed:
 - (i) Applicant appealed his conviction and sentence to the South Carolina Supreme Court.
 - (ii) Applicant appealed his death sentence upon his first re-sentencing proceeding to the South Carolina Supreme Court.
 - (iii) Applicant appealed his death sentence upon his second-re-sentencing proceeding to the South Carolina Supreme Court.
- (b) The result in each Court to which applicant appealed.
 - (i) Applicant's convictions were affirmed. His death sentence was vacated, and his five year sentence for possession of a weapon during the commission of a violent crime was reversed.
 - (ii) Applicant's death sentence was vacated.
 - (iii) Applicant's death sentence was affirmed.
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 - (i) Applicant's convictions were affirmed on September 4, 2001. His first death sentence was vacated, and his five year sentence for possession of a weapon during the commission of a violent crime was reversed on September 4, 2001.
 - (ii) Applicant's death sentence following his first re-sentencing proceeding was vacated on December 20, 2004.
 - (iii) Applicant's death sentence following his second re-sentencing proceeding was affirmed on July 14, 2008.
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) *State v. Owens*, 346 S.C. 637, 522 S.E.2d 745 (2001).
 - (ii) *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004).
 - (iii) *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008).
9. Not applicable.

10(a): Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during jury selection at his 2006 capital re-sentencing proceeding.²

11(a): **Supporting Facts:** Trial counsel's performance during jury selection was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included the following:

- 1) Counsel failed to object to statements by the solicitor, and similar instructions by the trial court, that the State may only seek death where aggravating circumstances are present, which improperly suggested to potential jurors that the aggravating circumstances had already been found.
- 2) Counsel failed to object when the trial judge erred by disqualifying a potential juror, Sonya Ables (Juror Number 1), solely because she "went to [her] pastor and talked to him about [the death penalty]," as the trial judge incorrectly believed "there is a case right on point, that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law."

10(b): Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during his 2006 capital sentencing proceeding.

11(b): **Supporting facts:** Trial counsel's performance during the sentencing phase was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included the following:

- 1) Counsel failed to object and/or request proper instructions from the court when the State played a crime scene video without further explanation or analysis. *2006 Tr. at 1076*. The crime scene video shows two masked men, but their faces are not identifiable. One of the masked men is primarily shown in the video. He stands behind the counter, points a gun at the clerk, and appears to shoot the clerk before the two men run out of the convenience store. Applicant's co-defendant, Steven Golden, testified at Applicant's previous trials that it was he (Golden) who is primarily visible in the video. The State then offered an analysis as to why it

² With the exception of information "necessary" to respond to the specific claims raised in this First Amended Application For Post-Conviction Relief, applicant does not waive the attorney-client privilege to any extent. *See S.C. Code § 17-27-30*. Applicant requests that his prior counsel not disclose any other portion of his files to respondent or discuss any aspect of his representation outside the scope of this limited waiver.

believed that the fatal shot came from the other man standing off-camera. The jury at Applicant's 2006 re-sentencing heard no analysis about who appears in the video. They were simply instructed that Applicant had already been found guilty of murder, and then they were shown the video without explanation. The trial judge at the 2006 re-sentencing instructed the jurors that they could consider whether Applicant had "minor participation" in the crime as a mitigating circumstance. *2006 Tr. at 1592*. But, without further instruction, the video misled the jury to believe that there was conclusive video-graphic evidence that Applicant fired the fatal shot, thereby foreclosing consideration of both the "minor participation" mitigating circumstance, and the related possibility that Applicant, though perhaps present, had not been the triggerman.

- 2) Counsel failed to object to improper and prejudicial opinion testimony from Officer Joe Wood that Applicant gave him "cold chills," and the solicitor's reliance on that testimony in closing argument. *2006 Tr. at 1093 and 1559*.
- 3) Counsel failed to object to victim impact testimony regarding the effect of the victim's death on the victim outreach coordinator. *2006 Tr. at 1274*. Such testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial. Counsel also failed to object to hearsay testimony from the victim outreach coordinator concerning statements that the victim's children made to her after the victim's death. *2006 Tr. at 1268-1271*. These statements violated the evidentiary rules of South Carolina, as well as the confrontation and the due process clauses of the state and federal constitutions.
- 4) Counsel failed to preserve the state and federal constitutional issues related to the admission of a list of disciplinary infractions by failing to object on the basis of the Confrontation Clause and due process. On appeal, the South Carolina Supreme Court held that counsel's objection was inadequate to preserve the federal constitutional issues and thus, the issue was procedurally barred. Counsel's failure to lodge an appropriate objection was deficient and prejudicial.
- 5) Counsel failed to present readily available mitigating evidence that had already been developed at Applicant's previous trial and first re-sentencing proceeding. Ms. Marjorie Hammock previously testified in much greater detail to Applicant's life history and background. Further, Dr. Jim Evans previously testified that Applicant has brain dysfunction and difficulties with attention and impulse control. Counsel failed to have Ms. Hammock testify to all of the details that were available concerning Applicant's life history, and counsel failed to call Dr. Evans to testify at all.
- 6) Counsel failed to investigate and present mitigating evidence of Applicant's experiences while incarcerated in the Department of Juvenile Justice, and the impact of those experiences upon his character, conduct, and psychological condition.

- 7) Counsel failed to ensure that jurors did not see Applicant in restraints.
- 8) Counsel failed to object to the solicitor's improper and prejudicial closing argument. For example, counsel failed to object to the solicitor's statements that the prosecution seeks death only rarely, even in eligible cases, and this case was one of those rare cases: "Only limited circumstances are allowed for us to seek the death penalty, and rarely do we seek the death penalty in all those cases that are eligible. In only certain cases do we seek the death penalty." *2006 Tr. at 1552*; *see also, 2006 Tr. at 1555* ("There are mean and evil people in the world who do not deserve to continue to live with the rest of us, regardless of how confined they may be. The law limits the right to seek the death penalty to a very select number of cases, very few, and we seek the death penalty only in a few, but the circumstances where we seek it is available mean and evil people who commit atrocious acts of murder; the worst of the worst. That is what the death penalty is reserved for. Those whose behavior sets them apart even from the criminal world, and that is Freddie Owens, and this murder and his behavior are one of those cases"). Counsel further failed to object when the solicitor argued that the jury should sentence Applicant to death because his life would be easy in prison. *See, e.g., 2006 Tr. at 1561* ("[b]ig prison is like a little city. In prison he will have all the necessities in life. . . . He will have clothing that they provide, and he will have contact with his family, and TV at times, and he will have family business. Not much more than a change of address for Freddie Owens. So don't think putting Freddie Owens in prison for the rest of his life is going to be a significant punishment for him"). Counsel also failed to object when the solicitor told the jury that he personally wanted the death penalty and would not be "satisfied with a life sentence." *2006 Tr. at 1555*. Counsel thus failed to preserve for appeal whether the improper arguments violated the Sixth, Eighth and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law, including S.C. Code Ann. § 16-3-25(C) (2003).

10(c): Applicant's death sentence was obtained in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of South Carolina law, because the jurors saw Applicant in restraints.

11(c): The above ground states the relevant facts.

10(d): Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during the appellate phase of his 2006 re-sentencing proceeding.

11(d): Supporting facts: Appellate counsel's performance on appeal was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel failed to assert that it was error for the trial court to deny Applicant's request to ask potential jurors if they would have a bias in favor of police officers because of their previous work in that field.

12. & 13. Applicant appealed directly to the South Carolina Supreme Court as specified in (7) and (8), *supra*. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.
14. The grounds set forth in (10) have not been previously presented to this or any other court, state or federal, in any petition, motion or application which Applicant has filed.
15. Not applicable.
16. The grounds set forth in (10) have not been previously presented because they were not appropriate issues for direct appeal or for a petition for a writ of certiorari to the United States Supreme Court. Furthermore, these grounds rely on additional facts outside the record before the previous courts.
17. Applicant was represented by counsel during the trial and appeal, during the first re-sentencing and appeal, and during the second-re-sentencing and appeal.
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Assistant Appellate Defender
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114 Manly Street
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Greenville, SC 29601

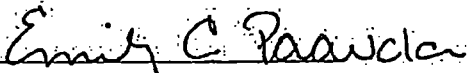
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Columbia, SC 29211
(803) 734-1343

19. Applicant seeks relief from his convictions and sentence.
20. Applicant is not under sentence from any other court.

Respectfully submitted,

By: 

KEIR M. WEYBLE
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853-4901
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(607) 255-3805

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
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Columbia, SC 29211
Emily@deathpenaltyresource.org
(803) 765-1044

Counsel for Applicant

June 15, 2010

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

FREDDIE EUGENE OWENS, SK5065

Applicant,

v.

THE STATE OF SOUTH CAROLINA.

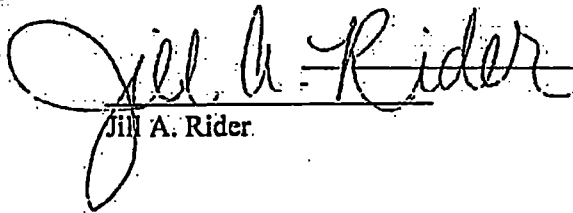
Respondent.

IN THE COURT OF COMMON PLEAS
CA No. 09-CP-23-0741

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Applicant's Second Amended Application for Post-Conviction Relief and Motion for Summary Judgment was served by first class United States mail, postage prepaid, this 15th day of June, 2010, upon the following:

J. Anthony Mabry
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider



HENRY MCMASTER
ATTORNEY GENERAL

April 2, 2009

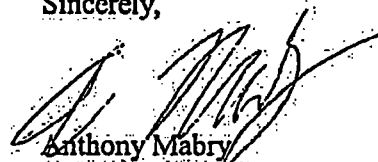
Honorable Paul B. Wickensimer
Clerk of Court, Greenville County
305 E. North Street
Greenville, SC 29601

Re: Freddie Eugene Owens v. State
09-CP-23-0741

Dear Mr. Wickensimer:

Enclosed please find the *Respondent's Return and Motion to Dismiss* in the above-referenced matter, along with attachments, for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,



Anthony Mabry
Assistant Attorney General

AM/lbb
Enclosures

cc: Keir M. Weyble, Esquire
Emily C. Paavola, Esquire
Honorable Edward W. Miller

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C/A No. 09-CP-23-0741

Applicant,

y.

RESPONDENT'S RETURN AND MOTION TO DISMISS

Respondent.

crimes of murder, armed robbery, conspiracy to commit armed robbery, and possession of a weapon during a violent crime. The charges arose from the November 1, 1997 shooting death of Irene Graves at the Speedway convenience store, formerly located at I-85 and Laurens Road in Greenville, South Carolina, and the armed robbery of that store. The State served a notice of intent to seek the death penalty on Owens. Owens was appointed John M. Rollins, Esq. and Karl B. Allen, Esq., to represent him on the charges. The State was represented by Solicitor Robert Arial and Deputy Solicitor Betty Strom.

On February 11, 1999 through February 15, 1999, Owens was tried by a jury for the indicted charges before the Honorable Alexander Macaulay, Circuit Court Judge. The jury found Owens guilty of all charges.

During the twenty-four (24) hour waiting period, Owens murdered his cell-mate, Christopher Lee, at the Greenville County Detention Facility. Owens confessed to this murder.

After the required statutory twenty-four (24) hour waiting period, the sentencing phase began on February 17, 1999, and ended the same date. The jury found the State had proven the following aggravating circumstances (1) the murder was committed in the commission of robbery while armed with a deadly weapon; (2) the murder was committed while in the commission of larceny with the use of a deadly weapon. On the murder charge, the jury recommended a sentence of death. Judge Macaulay upheld the sentence and followed the jury's recommendation and sentenced Owens to death. Judge Macaulay also sentenced Owens to thirty (30) years for armed robbery, five (5) years for conspiracy to commit armed robbery, and five (5) years for possession of a weapon during a violent crime.

Owens appealed his convictions and sentences to the South Carolina Supreme Court. Owens

was represented in this appeal by Katherine Carruth Link, Assistant Appellate Defender. Respondent was represented by Assistant Attorney General, Tracey Colton Green. Owens raised eight (8) issues in his final brief:

1. Did the trial court lack subject matter jurisdiction of the murder charge because the indictment failed to set forth all the essential elements of the offense of murder?
2. Did the trial court err in ruling that evidence of Owens' alleged involvement in other crimes October 31 and November 1 was admissible in the guilt phase of his trial?
3. Did the trial court err in admitting Owens' February 16 statement in the sentencing phase, where the investigation into the death of his cellmate at the detention center was not yet complete and the facts of that incident had not yet been fully developed, and in not granting a continuance on the same basis once it was determined that evidence related to that incident would be admitted, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, Article I, Section 3 of the South Carolina Constitution, and Rule 403 of the South Carolina Rules of Evidence?
4. Did the trial Court err in admitting Owens' February 16 statement in the sentencing phase, where this evidence was not within the ambit of the state's initial notice of evidence of aggravation and where the state's supplemental notice was not filed and served within the time allowed by S.C. Code Ann. Section 16-3-20?
5. Did the trial court err in admitting Owens' February 16 statement in the sentencing phase, where that statement was the product of a representation by state officials that it would not be used in this proceeding, in violation of Owens' rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 12 of the South Carolina Constitution?
6. Did the trial judge err in admitting Owens' February 16 statement in the sentencing phase, where that statement was obtained in violation of Owens' right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the South Carolina Constitution?
7. Did the trial court err in denying the defense motion for a new trial based on after-discovered evidence, where information learned after the sentencing proceeding revealed that the statement of Owens admitted in that proceeding was not accurate?
8. Did the trial court err in sentencing Owens for possession of a firearm in the commission of a violent crime, where South Carolina law expressly prohibits imposition of such sentence in a case in which the death penalty is imposed.

(See Final Brief of Appellant, pp. vii.- viii.). In this appeal, the South Carolina Supreme Court affirmed Owens' convictions, but reversed his death sentence on the basis that defense counsel did not have sufficient time to investigate Owens' confession to the murder of his cell-mate which occurred during the statutory twenty-four (24) hour waiting period. State v. Owens, 346 S.C. 637, 552, S.E.2d 745 (2001). The case was remanded to the circuit court for re-sentencing.

Upon remand, Owens waived his right to have a jury determine his sentence, and his second sentencing proceeding was conducted by the Honorable John Kittredge, Circuit Court Judge. Following the bench re-sentencing proceeding from February 10-14, 2003, Owens was again sentenced to death.

Owens appealed his second death sentence to the South Carolina Supreme Court. Owens was represented in this appeal by Joseph L. Savitz, III., acting Chief of Appellate Defense. Respondent was represented by Assistant Attorney General Derrick McFarland. On appeal, Owens raised only one issue in his brief:

The judge erred during the jury waiver colloquy by informing Owens that his best hope for a life sentence might ultimately depend on lying jurors who would "claim to support the death penalty in hopes of getting on the jury" when "in reality such a juror is opposed to the death penalty and . . . when they're selected and the time comes, they refuse to vote for the death penalty and will only vote for life."

(See Final Brief of Appellant, the Honorable John Kittredge). The South Carolina Supreme Court vacated the death sentence finding the trial judge's comments to Owens regarding his right to a jury trial at re-sentencing constituted reversible error. State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004). The case was remanded to the circuit court for another re-sentencing proceeding.

Upon remand, Owens elected to have a jury determine his sentence. At his third sentencing

proceeding, this time before a jury, Owens was sentenced to death for the third time on November 11, 2006. The Honorable Larry R. Patterson, Circuit Court Judge, upheld the sentence and followed the jury's recommendation and sentenced Owens to death.

Owens appealed his third death sentence to the South Carolina Supreme Court. Owens was represented in this appeal by Chief Appellate Defender Joseph L. Savitz and Assistant Appellate Defender LaNelle DuRant as appointed counsel. Respondent was represented by Assistant Attorney General J. Anthony Mabry. In this appeal, Owens raised three issues in his brief:

1. The trial judge abused his discretion when he summarily disqualified a potential juror, Sonya Ables (Juror Number 1), solely because she "went to [her] pastor and talked to him about [the death penalty]," as he incorrectly believed "there is a case right on point, that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law."
2. The trial judge committed reversible error by admitting Owens prison disciplinary records, as they violated the rule against hearsay, as well as the Sixth and Fourteenth Amendments.
3. The trial judge committed reversible error by allowing the Solicitor to argue in closing that the conditions of life imprisonment in general justified a death sentence for Owens, as this argument injected an arbitrary factor into the jury sentencing considerations in violation of S.C. Code Section 16-3-25(C)(1).

The South Carolina Supreme Court affirmed Owens' third death sentence on July 14, 2008. State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008). Owens filed a Petition for Rehearing. The South Carolina Supreme Court denied the petition for rehearing on August 8, 2008.

Owens, through retained counsel, John H. Blume and Keir M. Weyble, made a Motion for a Stay of Execution on August 12, 2008 to appeal to the United States Supreme Court. The State opposed the Stay of Execution. On September 5, 2008, the South Carolina Supreme Court denied the Stay of Execution pursuant to In Re Stays of Execution, 321 S.C. 544, 471 S.E.2d 140 (1996)

and Rule 23.3 of the South Carolina Supreme Court finding the issues Owens alleged he wanted to raise to the United States Supreme Court were not preserved for review. Owens, through attorneys Blume and Weyble, made a petition for stay before the United States Supreme Court. On September 30, 2008, Chief Justice Roberts entered a stay of execution pending the timely filing and disposition of a petition for certiorari. Owens, through counsel, subsequently filed a Petition for Writ of Certiorari. The State opposed the grant of certiorari through its Brief in Opposition to the Petition for Writ of Certiorari. Respondent was represented in this matter by Deputy Attorney General Donald Zenlenka. On January 21, 2009, the United States Supreme Court denied Owens' Petition for Writ of Certiorari.

Owens subsequently filed a Petition for a Stay of Execution so that he may pursue post-conviction relief (PCR) remedies. The State did not oppose this request, however the State did oppose other issues regarding discovery Owens raised in his Petition for Stay of Execution. On March 5, 2009, the South Carolina Supreme Court granted Owens request for a stay of execution to pursue post-conviction relief (PCR) remedies, however, the Court denied Owens other requests in his Petition for a Stay of Execution. Owens PCR Application (09-CP-23-0741) is now before this Court. Respondent moves to dismiss the Application on the basis there is no merit to any of the issues raised therein.

Respondent attaches and incorporates herein by reference the following materials:

1. Record on Appeal, the Honorable Alexander Macaulay (7 Volumes)
2. Final Brief of Appellant
3. Final Brief of Respondent
4. Final Reply Brief of Appellant

5. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001)
6. Record on Appeal, the Honorable John Kittredge (2 Volumes)
7. Final Brief of Appellant
8. Final Brief of Respondent
8. State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004)
9. Record on Appeal, the Honorable Larry R. Patterson (4 Volumes)
10. Final Brief of Appellant
11. Final Brief of Respondent
12. State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008)
13. Petition for Rehearing
14. Order of the South Carolina Supreme Court denying Petition for Rehearing
15. Remittitur
16. Execution Order
17. Petition for Stay of Execution (to appeal to the United States Supreme Court)
18. State's Response to Request for Stay of Execution
19. Order of the South Carolina Supreme Court Denying the Request for a Stay of Execution
20. Petition for Stay of Execution to the United States Supreme Court
21. Order of Chief Justice John Roberts Staying the Execution
22. Petition for Writ of Certiorari to the United States Supreme Court
23. State's Brief in Opposition to the Petition for Writ of Certiorari
24. Order of the United States Supreme Court Denying Petition for Certiorari
25. Petition for Stay of Execution to Pursue PCR Relief

26. State's Response to Stay of Execution Request

27. Order of the South Carolina Supreme Court Granting Stay to Pursue PCR

28. Owens' PCR Application

*Factual Summary*²

Freddie Owens brutally murdered Irene Graves on November 1, 1997. (R. 1111, 1113, Tr. p. 1060, ll. 11-14, p. 1062, ll. 11-17). Owens shot Graves in the right side of the head with a .32 caliber pistol. (R. 1239, 1255, 1106, Tr. p. 1188, ll. 16-24, p. 1204, ll. 8-20, p. 1055, ll. 1-13). The bullet went through Graves' brain and ricocheted back off of the inside of her skull to the other side of her head. (R. 1106, Tr. p. 1055, ll. 7-21). Ms. Graves was a single mother of one adult and two small children at the time of her murder. (R. 1156, Tr. p. 1105, ll. 18-25). She worked three jobs at the time of her death. (R. 1153, Tr. p. 1102, ll. 9-17). If she had survived, Ms. Graves was scheduled to take her two small children to cheerleading camp the following day.

Ms. Graves was operating a convenience store on Lauren's Road in Greenville during the early morning hours of November 1st, just after Halloween night. (R. 1148, Tr. p. 1097, ll. 5-16). Appellant and three of his friends had been on a crime spree on Halloween afternoon and into Halloween night. (R. 1194-1224, Tr. p. 1143, l. 21-p. 1173, l. 2). Owens and his three co-defendants cased several stores and eventually robbed Prestige Cleaners on Lauren's Road and the Conoco Hot Spot on Augusta Road prior to the robbery of Ms. Graves' business. (R. 1194-1224, Tr. p. 1143, l. 21-p. 1173, l. 2). During each robbery, the assailants wore ski masks or panty hose over their heads and carried handguns. (R. 1210-11, 1214-15, 1222-23, 1209-11, 1220, 1260, 1277,

²The record citations are from the Record on Appeal (4 Volumes) from the third sentencing proceeding before the Honorable Larry R. Patterson.

Tr. p. 1159, l. 21- 1160, l. 20, p. 1163, l. 13- p. 1164, l. 17, p. 1171, l. 16- p. 1172, l. 19, p. 1158, l. 18- 1160, l. 20, p. 1169, ll. 8-24, p. 1209, ll. 5-13, p. 1226, ll. 2-12). After midnight, the four men met again on Owens' front porch and discussed robbing two stores near the intersection of Lauren's Road and I-85. (R. 1224-27, Tr. p. 1173, l. 2 - p. 1176, l. 3). One of the stores was the Speedway convenience store at which the victim worked. (R. 1226-27, Tr. p. 1175, l. 15-p. 1176, l. 8).

Ms. Graves was murdered for money. Appellant and one of his co-defendants, Stephen Andre Golden, entered the store again wearing disguises over their faces. (R. 1126, Tr. p. 1075, ll. 2-16). Upon Appellant initially entering the store, Ms. Graves was accosted and cash was removed from one register. (R. 1126, Tr. p. 1075, ll. 10-24). At gun point, Ms. Graves was then taken to the area of the store safe. (R. 1126, Tr. p. 1075, ll. 24-25). She was then shot in the head. (R. 1126, Tr. p. 1075, ll. 24-25). Surveillance video captured the robbery and her murder. Another employee, who had stepped out of the store to obtain ice for the store's drink machine shortly before Owens and Golden entered, found Ms. Graves' lifeless body in front of the safe. (R. 1127, Tr. p. 1076, ll. 4-11). Appellant bragged to his girlfriend the next morning that he shot the victim, because she would not open the safe.³ (R. 1165, Tr. p. 1114, ll. 8-25). Appellant also bragged to another co-defendant, not Golden, that he shot Ms. Graves for the same reason.⁴ (R. 1232, Tr. p. 1181, 14-25). After the robbery, when the cash register was totaled up by store personnel, \$37.29 was missing from the store. (R. 1180, Tr. p. 1129, ll. 1-2).

³Ms. Graves, as a cashier, could not open the safe. She did not have the combination. (R. 1180, Tr. p. 1129, ll. 7-18).

⁴Owens told Nikko Vance when he got back in the car that "He shot that bitch in the head", and "she wasn't opening the safe, so he shot the whore." (R. 1232, Tr. p. 1181, ll. 18-25). Owens' girlfriend testified Owens told her "[s]he kept throwing up her hands and said she couldn't open the safe, so he just said 'I shot the bitch'". (R. 1165, Tr. p. 1114, ll. 23-25).

As previously stated, Owens was convicted by a Greenville County jury of Murder, Possession of a Weapon During a Violent Crime, Armed Robbery and Conspiracy.⁵ The night after Owens was convicted, Owen's cellmate, Christopher Lee, was beaten to death in the cell he shared with Owens in the Greenville County Detention Center. S.L.E.D. agents questioned Owens, and he confessed to the murder of Lee. (R. 1388-1391, Tr. p. 1336, l. 9 - p. 1339, l. 6). Owens admitted he beat, strangled, slammed, and kicked Lee, jabbed the victim with a ballpoint pen, and then stuffed the pen up Lee's nose. (R. 1388-1391, Tr. p. 1336, l. 9 - p. 1339, l. 6). Owens also confessed to burning Lee with a cigarette lighter after he beat him unconscious. (R. 1388-1391, Tr. p. 1336, l. 9- p. 1339, l. 6). The findings at Lee's autopsy were consistent with Owens' confession including the fact that Lee's chin hair was singed. (R. 1404, Tr. p. 1352, ll. 1-21).

In addition to the murder of Christopher Lee, in the penalty phase of the trial, the State introduced Owens' record of prison disciplinary infractions. Owens had accumulated approximately fifty-six (56) prison disciplinary infractions of which the State only offered a summary of twenty-eight (28). These included stabbing his co-defendant Andre Golden and assaulting prison guards, fellow inmates, and prison staff.

II.

On January 29, 2009, Owens, with the assistance of counsel Emily Paavola and Keir Weible,

⁵In addition to Appellant's girlfriend Aisha Austin, Andre Golden testified in the guilt phase of Petitioner's first trial and also identified Petitioner as the person who shot Ms. Graves. *State v. Owens, infra (Owens I.)*. Nikko Vance, another co-defendant, who did not enter the store, testified at Petitioner's first trial and identified Appellant as the shooter based on statements Appellant and Golden made when they returned to the getaway vehicle. Detectives Wood and Willis testified Appellant initially denied involvement but later admitted he shot Ms. Graves. *Id.*

filed an application for post-conviction relief (2009-CP-23-0741).⁶ In the Application, Owens alleged only two grounds:

10 (a) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution by trial counsel's failure to object when the trial judge erred in disqualifying a juror and by trial counsel's failure to object to the solicitor's improper closing argument.

10(b) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when trial counsel failed to preserve the state and federal constitutional issues related to the admission of a list of disciplinary infractions by failing to object on the basis of the Confrontation Clause and due process.⁷

III.

There is patently no merit to any issue raised in the Application. Both grounds allege ineffective assistance of trial counsel in failing to object. Ineffective assistance of counsel claims based on failure to object are tied to the admissibility of the underlying evidence. Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001). If the evidence admitted without objection was admissible, then the complaint fails both prongs of the Strickland test, as it was neither deficient not to object nor prejudicial. Id.

Owens alleged in his direct appeal brief from his third sentencing proceeding that the trial judge erred in excusing Juror #1, Sonya Ables, because the trial judge stated on the record that the

⁶Owens stated at the counsel appointment hearing that he would prefer attorneys Paavola and Weible to represent him because they had helped him with among other things his PCR application.

⁷Under sections 11(a) and 11(b) of the Application (Supporting Facts), Owens alleges that the grounds for relief (10(a) and 10(b) above) state the relevant facts. Referencing Strickland v. Washington, 466 U.S. 668 (1984).

juror had to be excused for consulting with her pastor or priest because there was a case directly on point when in fact there was no such case. (See Final Brief of Appellant, the Honorable Larry R. Patterson). Owens now alleges counsel was ineffective for failing to object to the trial judge's dismissal of the juror for this reason. Counsel could not have been ineffective in failing to object to the disqualification of the juror because she was properly disqualified by the trial judge.

Standard of Review

In a capital case, a defendant has no right to a trial by any particular jury, only a right to a trial by a competent and impartial jury. State v. Caldwell, 300 S.C. 494, 338 S.E.2d 816 (1990); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). It is the duty of the trial judge to see that a jury of unbiased, fair and impartial jurors are impaneled. State v. Mathews, 291 S.C. 339, 353 S.E.2d 444 (1986). A determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and not reversible on appeal unless wholly unsupported by the evidence. State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985). The voir dire examination of a juror must be viewed in its entirety to determine whether the trial judge erred in his qualification or disqualification of a prospective juror. State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987). 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. State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990).

The Merits

1. Disqualification Due to Failure To Follow Instructions.

The trial judge's decision regarding Juror Ables was correct based on precedent of the South Carolina Supreme Court. In State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179 (1982), it was held that a trial judge properly excused a prospective juror, who, despite the court's instructions, revealed to her priest that she might be serving in a capital case and solicited his opinion as to the Catholic Church's stance on capital punishment. The Court reasoned that the possible seating of this juror would have introduced an outside influence into the deliberations of the jury.⁸ The same is true in the present case. Juror Ables testified during the voir dire by the court regarding the death penalty: "I just don't think that I can do it and live okay. It's just too deep within me. I have battled it since you told us that in October. I have thought about it a lot. *I went to my pastor and talked to him about it.* I really don't think I could do it." (R. 5258-29, Tr. p. 482, l. 24 - p. 483, l. 5). The trial judge was correct in stating on the record: "Ladies and gentlemen, there's a case right on point that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law. (R. 529, Tr. p. 483, ll. 10-13). The trial judge properly disqualified the juror. Juror Ables, if qualified and seated on this case, would have introduced an outside influence into the jury's deliberations. Gilbert, 277 S.C. at 57. This would be improper.

Additionally, even if counsel had objected, the result of the proceeding would not have been different. The trial judge would have disqualified the juror under Gilbert, just as he did, and would have attached the juror's summons and letter from the court as a court's exhibit evidencing the fact

⁸Owens argued in his brief that the trial judge was wrong in stating that there was *a case directly on point* on this issue. Owens failed to mention or discuss State v. Gilbert, which is on point, anywhere in his brief. (See Brief of Appellant, the Honorable Larry R. Patterson).

that the juror talked to an outside source about the case and the issues therein after being summoned for jury service.⁹ Further questioning of the juror would not change these facts. The juror was properly disqualified by the trial court. *Id.* The trial judge did not abuse his discretion and his decision was not wholly unsupported by the record. Plemmons. Petitioner cannot show prejudice from counsel's failure to object to the excusal of Juror Ables.

It is also clear from the record that further examination of the juror would have been unlikely to reveal she could subordinate her views and apply the law of this state. Juror Ables clearly stated during thorough examination by the trial judge that she would be unable to impose a death sentence, because she would be unable to go forward with her life or live if she did so. (R. 525-29, Tr. p. 479-483). A juror may be excluded for cause when her views on capital punishment are such as would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." State v. Sapp, 366 S.C. 283, 291 (2005) *quoting* Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844 (1985).¹⁰ A juror may be excused in a death penalty case if her beliefs or attitudes against capital punishment would render her unable to return a verdict according to the law. Sapp, *supra*. The record shows Juror Ables' beliefs rendered her unable to return a verdict according to the law. She clearly stated an unwillingness to impose the death penalty and could properly have been disqualified. Witherspoon, *supra*; State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007); State v. Jones, 288 S.C. 1, 340 S.E.782 (1985); State v. Copeland, 278 S.C. 572,

⁹This is obviously what the juror (Juror Ables) was referring to when she said "I have battled this since you told us that in October." Voir dire of the jury did not begin until November 7, 2006 (See Tr. Nov. 7, 2006, p. 1).

¹⁰In Sapp, this Court also dealt with an alleged Witherspoon violation. *Id.*, at 287-292. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

300 S.E.2d 63 (1982). Her disqualification, even if based on her views regarding the death penalty, which it was not, was proper. An objection to her excusal would have been frivolous.

Owens also appeared to argue in his brief on appeal that there was an Atkins¹¹ violation, because defense counsel did not conduct individual voir dire of Juror Ables. This argument, if made here, is also erroneous for two reasons. First, the juror was not excused for cause because of her views regarding the death penalty, but was disqualified because she had spoken to her pastor regarding the case, the death penalty, and her service as a juror. (Tr. p. 483, ll. 10-14). The record is clear on this point. Atkins is simply not implicated. State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004)(holding Atkins was distinguishable when the juror was disqualified for reason other than jurors personal views regarding the death penalty). Juror Ables was *disqualified*, because she had contact with an outside source regarding the case after she was summoned for jury service. If she had been seated on the jury she would have introduced an outside influence into the jury's deliberations. Gilbert, *supra*.

"Second, it is clear from this record that further examination of [the] Juror would have been unlikely to reveal she could subordinate her views and apply the law of the state." Wise, *supra* at 26. As previously stated, Juror Ables clearly stated she would not be able to live or go on with her life if she sentenced someone to death. (R. 528-29, Tr. p. 482, l. 24 - p. 483, l. 6). The record reflects she stated an unwillingness to impose the death penalty.

In fact, Owens' attorneys were not denied the right to question Juror Ables, they simply did not request to ask any questions given her clear testimony. They did not suggest or offer any

¹¹State v. Atkins, 293 S.C. 294, 360 S.E.2d 302 (1987). See also State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1998); State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995); State v. Owens, 277 S.C. 189, 284 S.E.2d 584 (1981).

additional questions to the trial judge. *See Wise, supra* at 26. As previously stated, no objection was made to the Judge's voir dire of the juror nor did trial counsel request to ask any further questions. (R. 529-530, Tr.p. 483-484). There was no need to. The juror could simply could not impose a death sentence.

While this Court made clear in *Wise* that it was not diluting the mandate of Section 16-3-20(D) as expressed in *Atkins, supra*, it also made clear the following:

When the record reveals a juror plainly is not qualified, after thorough examination by the trial judge, to serve and it does not reasonably appear further examination would likely reveal the juror could subordinate his views and apply the law of the state, a reasonable basis exists for excusal for cause of the juror without further examination by defense counsel.

There was no *Atkins* violation in this case. Nor would there have been one even if the juror was excused because of her views on the death penalty, which she was not. Counsel could not have been ineffective in failing to object to the trial judge's excusal of Juror Ables.

Harmless Error

Even assuming *arguendo* Juror Ables was improperly disqualified, her disqualification was harmless. *Holmes, supra* (holding disqualification of juror was harmless where juror was placed on alternate list and alternates were never called). Owens cannot show prejudice from counsel's failure to object to the excusal of Juror Ables.

In the present case, if Juror Ables had been qualified, she would have been the seventeenth (17th) juror qualified. The jurors were struck in order of their qualification. (R. 1064-69, Tr. p. 1014-1019). Juror Ables voir dire occurred after the 16th juror qualified, Juror Fawn Norton. (R. 524-25, Tr. p. 478-479). Juror Ables would have been the seventeenth (17th) juror presented at the

jury strike. (R. 1067-68, Tr. p. 1017-1018). At the time she would have been presented, the State had exercised only two of its five (5) peremptory challenges. (R. 1064-68, Tr. p. 1014-1018). The State had excused Jurors Cassandra Carrol and Fawn Norton. (R. 1066, 1067-68, Tr. p. 1016, ll. 20-21, p. 1017, l. 25-p. 1018, l.1). There can be no question, based on Juror Ables' testimony that she could not live or go on with her life if she imposed the death penalty, that the State would have struck Juror Ables with its third strike. Furthermore, this is supported by the fact that the State exercised only one more of its peremptory challenges, Juror Rebecca Hunter, and that occurred during alternate juror selection. (R. 1069, Tr. p. 1019, l. 23). The State only exercised a total of two (2) peremptory challenges during the petit jury panel selection. (R. 1064-69, Tr. p. 1014-1019). After all twelve (12) jurors were seated on this case, the State still had three (3) of its five (5) peremptory challenges remaining. Even if Juror Ables had been qualified, she would not have been seated on this jury, because the State would have exercised *at least one* of its *three* remaining peremptory challenges to excuse Juror Ables.¹² Any error in Juror Ables disqualification was harmless.

Since there was no error in the disqualification of Juror Ables, counsel could not have been ineffective in failing to object to the juror's disqualification. Furthermore, Owens cannot establish prejudice on this issue. Juror Ables was properly disqualified under Gilbert, and would have been disqualified based on her inability to follow the law of this state and impose a death sentence under the appropriate facts. Additionally, the disqualification of Juror Ables was harmless where the State

¹²Owens will certainly argue in reply that this analysis is merely speculative, however it strains credulity to argue the State would have allowed Juror Ables to be seated on the jury when she stated she could not give someone the death penalty and "...be able to go forward with my life then and then—I just don't think that I can do it and live okay. Its just too deep within me." (R. 528-29, Tr. p. 482, l. 24 -p. 483, l. 2).

would clearly have exercised one of its three (3) remaining peremptory challenges to excuse the juror had she been qualified. This portion of ground 10(a) of this Application must be dismissed with prejudice.

Owens also alleges in ground 10(a) of this Application that counsel was ineffective in failing to object to the Solicitor's closing argument. Owens alleged in his direct appeal that trial counsel should have objected to the Solicitor's closing argument because the Solicitor was arguing general conditions of confinement. Trial counsel could not have been ineffective for failing to object to the Solicitor's closing argument because the closing argument of the Solicitor was entirely proper given the evidence introduced in the case regarding Owens incarceration, his conditions of confinement, and his behavior therein. The argument was not improper, because the Solicitor's closing argument was tied directly to applicant, Freddie Eugene Owens. Additionally, the matters discussed in this portion of the Solicitor's closing argument were tied to the record and the reasonable inferences from the record. The central theme and focus of the Solicitor's closing argument was that the death penalty was the appropriate punishment for Owens, not life in prison, because of the heinousness of the murder of Irene Graves, the evidence of Owens bad character, and his assaultive conduct while incarcerated. (See R. 1600-1617, Tr. p. 1546-1563). The following is the portion of the Solicitor's argument Owens alleges was improper (*in italics*) in the context that it was made:¹³

Even in that environment of the cell inside a cage his assaultive behavior still exists. Dr. Cobb told you yesterday, and I don't know if you caught this, but he said "when I talked to him, I go inside the cage. When I talk to him through the window." He doesn't even go inside the cell with Freddie Owens.

¹³In his direct appeal brief, Owens only presented the portion of the argument to which he *now* objects, and did not present the Supreme Court with the context in which the argument was made.

He is still planning. He is still making shanks. He is still planning for assaultive behavior. He has those shanks under his mattress and he has them in his possession after he's been on medication.

But what we really have, Freddie Owens is playing a game. Halloween night was a game. Ride around and rob and then kill Irene Graves, because she wouldn't open the safe or cash register fast enough, because it was in grocery order mode. He has no respect for life. His statement was "I shot the bitch. I shot the whore." The mother of three children working three jobs, he called her a bitch. He has no respect for life. He has no respect for other people. In fact, his disrespect is so apparent that it put chills on the neck of Joe Wood, who said he had been a detective for over 25 years, and he was only one of two people, Freddie Owens, who put chills on his neck. And that's the reason, because Freddie is a unique person. He killed Irene Graves and he went home and went to bed. He killed Christopher Lee. Hands on, horrific predator killing; beat him the whole time he was unconscious; rammed his head into the floor; kicked him; stomped his chest; twisted his neck until he ripped the skin off of him, broke two ribs; rammed the pen up his nose to make him stop moaning; kicked him; burned him. Then he threw his lifeless body up on a bunk like a sack of potatoes and went to sleep. He could care less. He's cold. He's unfeeling. And in the Department of Corrections he continues to manifest that: Cold; assaultive; planning for assaults; shanks; stabbing. He continues as a predator.

Freddie wanted to be a person in Greenville who killed the most people and got by with it. He said it best what he is when he told Joe Wood "I'm a real menace." And Major Nettles summed it up for you when he said "he's still at this date my most problematic inmate in the population of the worst of the worst inmates in this state."

The greater the extent of his culpability, the greater the punishment. So what is the appropriate sentence to fit this crime and hold him responsible for his actions? Life imprisonment is not appropriate. You can't put him in prison for life and expect him to suffer, because he has to think about it everyday? He's not going to give another thought for Irene Graves. He's not going to give another thought for her two children. He's not going to give another thought for Christopher Lee. He's not going to give another thought to any of those correctional officer's that he assaults. Nobody is going to be there to talk to him and say "do you remember the murder you did?" So he's not

going to suffer with any memory in prison. He will go on with his self teaching and making himself better and reading his books, learning languages and doing things that he's doing. There is nobody going to be there to remind him.

Sure, you and I may think going to prison would be a serious thing, and it would be, but what about Freddie Owens? Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, but he will still have food to eat. They will provide him with clothes. He will have books to read. He will be able to recreate and exercise. He will have doctors to take care of him. He will have clothing that they provide, and he will have contact with his family and loved ones, and TV at times, and he will have family business. Not much more than a change of address for Freddie Owens. So don't think putting Freddie Owens in prison for the rest of his life is going to be a significant punishment for him.

The death penalty is the appropriate punishment for him. Remember Freddie could have made something of himself. He had a mother who did the best she could by him. That's what was testified by the psychiatrists. A teacher who cared about him, beyond normal expectations, gave him special help. He had average intelligence, IQ, has increased over the years. He was artistic. He was athletic, but he chose another route. He chose a route to be a predator and he chose a route to be a killer.

Remember, Irene Graves was a living, breathing human being, who had a right to continue to live. She had never harmed a soul. A good sweet person. She loved her children and she deserved to live, but he invaded her workplace and he took her life. And when you consider the punishment, want you to consider the extent of the crime and extent of his culpability. Killing Ms. Graves was a horrible crime and it deserves the most severe punishment. It was a senseless crime. Killing Christopher Lee was the same. Senseless, unnecessary, brutal predator. His behavior in prison has been the same. Correctional officers don't deserve the continuing abuse of Freddie Owens. He should be held accountable.

(R. 1612-16, Tr. p. 1558, l. 20- p. 1562, l. 13). Given the record in this case, and the context that the argument was made, it was not improper, but entirely proper.

In keeping with the South Carolina Supreme Court's previous decision in State v. Bowman, 366 S.C. 485, 623 S.E.3d 328 (2005), the State did not offer an expert witness or testimony regarding general conditions of confinement.¹⁴ Testimony regarding how *Freddie Eugene Owens* was confined, and how he behaved in those conditions, came from his own psychologist and psychiatrists and the state's custodian of records who testified to Owens' record of disciplinary infractions and from the officer's own personal experience with Mr. Owens. See State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007)(how inmates other than the defendant at trial are treated in prison is inappropriate, evidence should be connected to particular defendant)(citation omitted). The record reflects that the Solicitor's comments were not only *not* improper, but also were *entirely proper*.

Our appellate courts review an argument in the context of the entire record. State v. Patterson, 324 S.C. 5, 482 S.E.2d (1997); State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007), *citing Patterson*.¹⁵ Considerable latitude is generally allowed in matters of drawing and arguing inferences and deductions from evidence. Johnson v. Life Ins. Co. of Ga., 227 S.C. 351, 88 S.E.2d 260 (1955). A lapse of good taste will rarely constitute prejudicial error nor will robust language introduce an arbitrary factor. State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984). Arguments must be confined to the evidence in the record and reasonable inferences therefrom, although failure to do so will not automatically result in reversal. State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997). A new trial will not be granted unless the comments so infected the trial with

¹⁴The Solicitor also complied with this Court's subsequent decision in State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007) decided approximately 2 months after this sentencing proceeding.

¹⁵By engaging in this analysis, Respondent does not concede the Solicitor's comments were improper. Instead, the record reflects they were proper given the testimony introduced in the case by both the state and the defense.

unfairness so as to make the resulting conviction [or death sentence] a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868 (1974); State v. Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006); State v. Patterson, 324 S.C. 5, 482 S.E.2d (1997). “[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made.” Bennett, supra, quoting South Carolina State Highway Dep’t v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1971).

Doctor Schwartz-Watts, Owens’ witness, testified to the following before the jury regarding Owens:

He reads. He - - is fluent. He has taught himself Arabic. He has taught himself Swahili. He is studying French. He reads. He reads scholars. He won’t read any books unless it’s a scholar that’s published for 15 years. He reports he has taught other inmates how to read. He teaches them to read using the book Alexander the Great, because he doesn’t want them reading books that aren’t well written. So he’s able to focus his attention.

(R. 1532, Tr. p. 1479, ll. 9-17). “I also discovered that he’s fluent in sign language, which I didn’t know. I saw him sign in court. So he’s taught himself many things.” (R. 1532, Tr. p. 1479, ll. 21-23). Actions Doctor Tora Brawley, another defense witness, described as Owens “..bettering himself..” (R. 1480, Tr. p. 1427, l. 21).

Additionally, in Owens’ confession to the murder of Christopher Lee, Owens refers to he and other cellmates in his cell block watching the news on *television*. (R. 1388, Tr. p. 1336, ll. 24-25). Owens then states in his confession: “I then *worked out* and *took a shower*.” (R. 1389, Tr. p. 1337, l. 1). Owens talks about *sleeping in his bed*. (R. 1389, Tr. p. 1337, ll. 1-2). Owens talks about being brought *breakfast* the morning after he killed Lee. (R. 1340, Tr. p. 1338, ll. 22-23). The prison disciplinary records admitted in evidence also reveal that Owens was allowed to *shower*, was *given*

food, and coffee and had a *mattress* to sleep on. (R. 1442-43, Tr. p. 1390, l. 11-p. 1391, l. 13). Albeit, Owens abused all these privileges.¹⁶ The record is clear Freddie Owens had these privileges. And, a shank found in his cell was manufactured from fencing *on the recreation yard*. (R. 1442, 1443, Tr. p. 1390, l. 18, p. 1391 ll. 19-22). In fact, most of the shanks found in Owens' cell were made from fencing material. (R. 1445, Tr. p. 1393, l. 13). If there was any question regarding Owens being allowed to have recreation it was cleared up by Doctor Cobb who stated he actually witnessed Owens being taken to the *recreation yard*. (R. 1494, Tr.p. 1441, ll. 6-8). The record also reflects that Owens received *visitors* while in prison and received *letters* from a friend. (R. 1473, Tr. p. 1420, ll. 7-13). Additionally, Freddie Owens has been *treated by doctors & a nurse* while in prison.¹⁷ (R. 1487-1547, 1442, Tr. p. 1434, l. 17-p. 1494, l. 18, p. 1390, l. 10). And there is a psychiatrist currently working at Owens facility under Dr. Cobb's direction. (R. 1501, Tr. p. 1448, ll. 9-14). The Solicitor's comments were based in the record and the inferences therefrom. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

The record also shows that Owens had been incarcerated during his teenage years and almost all of his adult life. (R. 1458, Tr. p. 1405, ll. 7-8, 12-5). Life in prison would not be much more than a change of address for Freddie Owens. Owens also told investigators after the murder "the only thing I'm here for is to eat, sleep, shit and piss. I don't give a shit. I was born to be in jail." (R. 1143, Tr. p. 1092, ll. 10-12). He also told the detectives: "If I go to jail, I go to jail, I don't give a shit." (R. 1143-44, Tr. p. 1092, l. 23-p. 1093, l. 1). The Solicitor's comments were appropriate

¹⁶Owens stabbed an inmate in the *shower*, threw the *food* tray and *coffee* on a guard and set fire to his *mattress*.

¹⁷He slapped the nurse in the face.

given this record. If Owens' comments are to be believed, *life in prison doesn't mean anything to Freddy Owens*. Just more of the same. The Solicitor's comments were based in the record. A solicitor has a right to state his version of the testimony and comment on the weight to be given such testimony. Smith v. State, Shearhouse Advance Sheets, Opinion No. 26405, (filed December 10, 2007) *quoting* Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) *citing* State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999).

The challenged portion of the argument can now be viewed in light of the entire record:

Sure, you and I may think going to prison would be a serious thing and it would be, but what about Freddie Owens? (*Tr. p. 1405, ll. 7-8, 12-15, p. 1092, ll. 10-12, p. 1092, l. 23-p. 1093, l. 1*). Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, (*Tr. p. 1441, ll. 9-13*) but he will still have food to eat. (*Tr. p. 1338, ll. 22-23, p. 1390-1391, p. 1092, ll. 10-12*). They will provide him with clothes. He will have books to read. (*Tr. p. 1479, ll. 9-17*). He will be able to recreate and exercise. (*Tr. p. 1390, l. 1 & 18, p. 1391, ll. 19-22, p. 1393, ll. 13-14, p. 1441, l. 8*). He will have doctors to take care of him. (*Tr. p. 1390, l. 10, p. 1434, l. 17 -p. 1494, l. 18*). He will have the clothing they provide, and he will have contact with his family and loved ones (*Tr. p. 1420, ll. 7-13*) and TV at times (*Tr. p. 1336, ll. 24-25*) and he will have family business. (*Tr. p. 1411, ll. 5-10, p. 1405, ll. 5-7*). Not much more than a change of address for Freddie Owens. (*Tr. p. 1405, ll. 7-8, 12-15*). So don't think putting Freddie Owens in prison for life is going to be a significant punishment for him. (*Tr. p. 1092, ll. 10-12, p. 1092, l. 23-p. 1093, l. 1*).

The death penalty is the appropriate punishment for him. (*Tr., p. 1181, ll. 18-25, p. 1114, ll. 23-25, p. 1092, ll. 10-12, p. 1092, ln. 23-p. 1093, l. 1, p. 1093, ll. 12-13*). Remember that Freddie could have made something of himself. He had...

Or stated another way:¹⁸

¹⁸Bold type entries are from the record cited in the preceding paragraph. A / indicates a break in testimony.

So he's not going to suffer with any memory in prison. He will go on with his self teaching and making himself better and reading his books, learning languages and doing things that he's doing. (Tr. p. 1479, ll. 9-23 & 1427, l. 21). There is nobody going to be there to remind him.

Sure, you and I may think going to prison would be a serious thing and it would be, but what about Freddie Owens? *I spoke to staff at DJJ who had known him when he was incarcerated there. / ..I have read the records of his school records, SCDC records, and his Department of Corrections records. / He said "the only thing I'm here for is to eat, sleep, shit and piss. I don't give a shit. I was born to be in jail."/ "He said "if my mom says anything, tell her I said adios, to kiss her ass too. She can kiss my ass too. Tell Ian and the rest of them assholes to fuck themselves. If I go to jail, I go to jail. I don't give a shit."* Big prison is like a little city. In prison he will have all of the necessities of life. Sure, he will be in solitary. *Freddie was in a cell, which was also inside a cage, which is a little bit different than all the other cells on the cell block.* But he will still have food to eat. *I woke up when Hefner opened the door to bring in breakfast. / August 17, 2002, throws a food tray and hits officer Guess in the head. / January 13, 2006 throws feces on officer Williams hitting him in the face. / May 20, 2006 throws coffee on officer Smith. / "[T]he only thing I'm here for is to eat, sleep, shit and piss."* They will provide him with clothes. He will have books to read. *He reads. He—he is fluent. He has taught himself Arabic. He has taught himself Swahili. He is studying French. He reads. He reads scholars. He won't read any books unless it's a scholar that's been published for 15 years. He reports he has taught other inmates how to read. He teaches them to read using the book Alexander the Great, because he doesn't want them reading the books that aren't well written.* He will be able to recreate and exercise. *May 27, 2001, had a six and a half inch shank made from fencing and toothbrush. / December 22, 2002, shank made from fencing. / A shank is a homemade weapon within the penitentiary. The two that -- say push rod actually comes out of the cell. The rest are predominantly made from fencing material off the rec field. / Did you ever witness any incidents or treatment of Freddie by the correctional staff? Not other than transporting him to the recreation yard.* He will have doctors to take care of him.¹⁹ August

¹⁹Defense counsel asked a defense witness the following: "Well, if Freddie were to get a life sentence, where could he be housed in the Department of Corrections that would take care of

5, 2002 slaps a male nurse in the face. / He seemed to enjoy my counseling and talking about his difficulties he was having... / I diagnosed Freddie with impulse control disorder, not otherwise specified; and anxiety disorder, not otherwise specified. / Did you prescribe medication for him? Yes, I did. / Has Freddie been compliant with your treatment plan? Yes, he has. / Now, Dr. Cobb, even though you are not going to Leiber presently, is there a psychiatrist going to Leiber? Yes there is. And is that psychiatrist actually working under your control? Yes, he is. / Actually, I may be mistaken, but I think he's been -- he was under the care of Dr. Cusack, who is a psychiatrist there for a number of years, even before Dr. Cobb came.²⁰ He will have the clothing that they provide, and he will have contact with his family and loved ones. And have you continued to keep up with Freddie over the years? I have. My husband and I visited him when he was -- I can't think of the name of the prison down in Summerville. I'm sorry, I can't think of name of it. We did visit him. And then after my husband died in 2002, I did not correspond with Freddie any more. And T.V. at times. At eleven p.m., on 2-15-99, myself and other inmates in my cell block watched the news and saw that I was found guilty. And he will have family business. Freddie, I'm sorry, Masey, was -- is Freddie Owen's dad had very, very little contact with the family. ... Freddie has had very little contact with him when he was growing up. There has been subsequent contact in recent years.²¹ I interviewed the client, Freddie Owens. I interviewed his mother, his -- both of his sisters. I interviewed one of his brothers. I had the chance to talk to his stepfather, who was then stepfather.²² Not much more

his mental health treatment?" The witness spent a page of the transcript answering this question. (R. 1535-36, Tr. p. 1482-1483). The Solicitor's comments were tied to the record and the reasonable inferences therefrom.

²⁰Respondent has not set forth all of the testimony referenced in the record regarding Owens being treated by doctors, just a select portion. The testimony is too lengthy to include here. (R. 1487-1547, Tr. p. 1434, l. 17 - p. 1494, l. 19).

²¹Owens has been incarcerated since 1997. This testimony was received in 2006. It is certainly a reasonable inference that Owens has had contact with his father in the last several years while incarcerated.

²²Given the testimony that Owens has had visitors and corresponded with them while in prison, the jury could certainly infer that he could do the same with his family. Doctor Schwartz-Watts also testified "I think it's very fair to say he's attached to his mother. He's certainly attached to his teacher. And I think he's been attached to any -- Dr. Cobb, as well, any person

than a change of address for Freddie Owens. *I spoke to staff at DJJ who had known him when he was incarcerated there. / ..I have read the records of his school records, his SCDC records, and his Department of Corrections records. / He was in Burchwood Dorm, which is one of the more - - as Dr. Cobb was mentioning earlier, that was one of the dorms where juveniles were older and had more serious charges. So certainly he was in an environment that was more - - where the juveniles were considered maybe more dangerous than others, compared to other campuses. While in the Department of Corrections, I think it's been very fair to say that he's had a lot of write ups, even compared to other inmates. He's had, I believe I counted, about 56 write-ups over the years. Those write-ups have ranged from some things that are assaultive, to again, him still in his late twenties, now being disruptive at times, being very impulsive, but its certainly been characterized as a long disciplinary history. So don't think putting Freddie Owens in prison for life is going to be a significant punishment for him. He said "the only thing I'm here for is to eat, sleep, shit and piss. I don't give a shit. I was born to be in jail." / He said "if my mom says anything, tell her I said adios, to kiss her ass too. She can kiss my ass too. Tell Ian and the rest of them assholes to fuck themselves. If I go to jail, I go to jail. I don't give a shit."*

The death penalty is the appropriate punishment for him. *"I don't give a shit. I was born to be in jail." / "If I go to jail, I go to jail. I don't give a shit." / "She kept throwing up her hands and said she couldn't open the safe, so he just said 'I just shot the bitch.'" / "[S]he wasn't opening the safe, so he shot the whore." / Yeah, I want to be remembered as the one who killed the most people in Greenville. I'm a real menace.* Remember Freddie could have made something of himself. He had a mother who did the best she could for him. That's

The Solicitor's closing argument was tied to the record and the reasonable inferences therefrom. The Solicitor's closing argument focused on Owen's character, his background and the

that's provided help to him. And I think that's very fair to say. He's very attached to his family members, but overall, he's had very little chance for a relationship." (R. 1528, Tr. p. 1475, ll. 4-9). The jury could reasonably infer their was contact with his family and Owens was aware of family issues. (See also R. 1495, Tr. p. 1442, ll. 3-7). This referenced conversation took place sometime after 2005. (R. 1492, Tr. p. 1439).

nature of the crime. See Bennett, supra; State v. Reed, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987)(*overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)). Wide latitude and freedom of counsel in arguments to the jury are allowed so long as the arguments are based on facts in the record or inferences from those facts. Edwards v. Lawton, 244 S.C. 276, 136 S.E.2d 708 (1964).

The challenged portion of the argument must be reviewed in the context of the entire record and the entire closing argument. Patterson, supra. In essence, the Solicitor was arguing Owens should be put to death for the brutal murder of Irene Graves, given the circumstances of the crime, evidence of his character, inability to adapt to prison life, and future dangerousness. Owens should not be allowed the privilege of living, eating, sleeping, and breathing which a life sentence for Owens would entail. Those privileges that normally come with the privilege of being alive. Given the evidence, life in prison is not a significant punishment for Owens. He's been in jail before, look how he acted. His statements admitted during the trial indicate that prison means nothing to him. This Court has never prevented the Solicitor from making such a contrast in the appropriateness of punishment given the evidence in the case, as long as the evidence deals with a particular defendant.

See Burkhart, supra; Bowman, supra. As this Court stated in Burkhart:

We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*. We note, however, that evidence of defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions.

Id. at 488 (*italics in original*). Likewise, in Bowman, supra, this Court stated:

We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison,

is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that *particular defendant*.

Id., at 488-499(*emphasis added*).

The State did not introduce any evidence regarding whether other inmates had escaped or attempted to escape from prison. The State did not introduce any evidence of how other inmates are treated in prison other than Owens. Owens mistakenly alleges the State violated this Court's holdings in Burkhart and Bowman. Owens is wrong. The State followed those holdings by tying its closing argument directly to Freddie Eugene Owens, his behavior while incarcerated, and whether life in prison was the appropriate punishment for him.

Likewise, the Solicitor in his closing argument, only referred to how Freddie Eugene Owens would be confined and treated if the jury chose to sentence him to life and whether that was an appropriate punishment, or whether in contrast the death penalty was the more appropriate punishment for the murder of Irene Graves, given the circumstances of the crime, the evidence of Owens' character, and his actions in jail. See Reed, *supra* (argument must be confined to the record and its reasonable inferences and center on the characteristics of the defendant and nature of the crime). This case is not Burkhart or Bowman. There was no testimony regarding conditions of prison life *in general*. The conditions of *Owens' confinement* and how he behaved in them were testified to in the record over and over and were all that was offered. Owens concedes in his brief there was no testimony of general prison conditions. (See B. O A., p. 21, the Honorable Larry Patterson). Instead, Owens argues the Solicitor's closing argument was one of general prison conditions. This reasoning is incorrect as pointed out above. While admitting there was no

testimony regarding general conditions of confinement, in his argument on this issue Owens fails to mention or discuss at all the extensive evidence admitted without objection regarding his own personal conditions of confinement and behavior therein. (B.O.A. pp. 21-23, the Honorable Larry R. Patterson). This omission was necessary, because discussing this evidence would be an admission that the Solicitor's argument *was supported by the record and the reasonable inferences therefrom*.

Owens boasted that prison life meant nothing to him. Prison was no punishment at all; he was born to be in jail. The Solicitor's statements were reasonable given Owens' callous disregard for law and order, and incarceration as a form of punishment.

The Solicitor's argument was one of retribution and punishment. The central theme of the argument was that Owens deserved the death penalty because of the heinousness of this murder and the evidence of Owens' character and future dangerousness. As shown above, the Solicitor's argument was tied to evidence in the record that was admitted without objection or admitted through defense witnesses.²³ The South Carolina Supreme Court has never held that a Solicitor cannot argue that the death penalty is a more appropriate punishment for the Defendant than life in prison. The Solicitor argued Owens should be put to death, not allowed to live under the *conditions he, Freddie Owens, was now confined under*. Owens would also have this court and every other trial court limit the Solicitor from arguing in favor of the death penalty by contrasting death with the privileges of life itself, waking, sleeping, breathing, eating, etc. This would be a ridiculous result. Irene Graves and Christopher Lee no longer enjoy these privileges. This was a proper retributive argument given Owens' crimes, his actions inside jail, and his statements to police that prison meant nothing to him.

²³Perhaps this is the reason there was no objection to any portion of the Solicitor's closing argument, nor was any post trial motion made to the trial judge regarding any portion of the Solicitor's closing argument.

The closing argument was tied to Freddie Owens, his crimes, the conditions of Freddie Owen's confinement, his actions in those conditions, and the evidence in the record, not general conditions of confinement. Freddie Owens' actions and conduct and what punishment he deserved for those actions and conduct was the central focus of the Solicitor's closing argument. The argument was not improper. The argument was not calculated to arouse the juror's passions or prejudices, and its content stayed within the record and the reasonable inferences therefrom. See Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). It did not introduce an arbitrary factor into the jury's deliberations.

Owens has the burden of proof of proving he did not receive a fair trial because of the alleged improper comments. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002); Simmons v. State, *supra*. Improper comments, if made, do not automatically require reversal if they are not prejudicial to the defendant. *Id.* "[I]t is not enough that the remarks were undesirable or even universally condemned." Darden v. Wainwright, 477 168, 181, 106 S.Ct. 2464, 2471 (1986); State v. Tubbs, 333 S.C. 316, 509 S.E.2d 815 (1990). Owens bears the burden of establishing the argument was so improper it infected the sentencing proceeding with unfairness to the extent that the death sentence was a denial of due process. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998), *citing* State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Owens must show prejudice. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) *citing* State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). Owens has failed to meet this burden.

Harmless Error

Even assuming *arguendo* that the Solicitor's comments were inappropriate, they were harmless beyond a reasonable doubt. See Arnold v. State, 309 S.C. 157, 420 S.E.2d 834

(1992)(acknowledging appropriateness of harmless error analysis in capital cases where constitutional rights are violated); *See also State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985)(finding harmless error in admission during penalty phase of defendant's confession to other crimes). They did not so infect the trial with unfairness as to make the resulting death sentence a denial of due process. *State v. McClure*, 342 S.C. 403, 537 S.E.2d 273 (2000); *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133, 146 (1992); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). Even noting the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury, this limited portion of the argument alleged to be erroneous was not prejudicial. *State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990); *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559 (1979); *State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209 (1998). The currently challenged portion of the Solicitor's argument only took up one paragraph in an argument that took up fifteen (15) pages of trial transcript. *See Randall v. State*, 356 S.C. 639, 591 S.E.2d 608 (2003)(objected to argument only took up ten lines in transcript); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996)(challenged comment allegedly necessitating mistrial was one isolated event in whole argument) *citing State v. Chaffee*, 285 S.C. 21, 328 S.E.2d 464 (1984)("momentary lapse of good taste will rarely constitute prejudicial error"), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). This small portion of a lengthy argument in no way approaches the "overly zealous" argument disapproved of in *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007)(holding solicitor sought to inflame passions of jury with argument, improperly injected his own personal beliefs into the case, and staged a funeral procession before the jury).

Given the overwhelming evidence the death penalty was appropriate, including Owens'

senseless murder of Irene Graves because she could not open the safe, his brutal torture and murder of Christopher Lee while in jail, his cavalier attitude toward prison life, and his assaultive behavior against guards, inmates, and medical personnel even in the most secure of prison environments, this challenged portion of the argument was harmless. See Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2005)(applicant failed to show result of sentencing proceeding would have been different where challenged comment of solicitor did not so infect the trial with unfairness as to make the result a denial of due process); Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002) (death sentence affirmed where solicitor's closing argument in penalty phase did not prejudice petitioner); State v. Tubbs, 333 S.C. 316, 509 S.E.2d (1999)(solicitor's isolated references to defendant as Cobra were harmless where they did not infect entire trial with unfairness) citing Arnold v. Evatt, 113 F.3d 1352 (4th Cir. 1997)(solicitor's occasional use of nickname "Mad Dog," during guilt and re-sentencing proceedings did not deny defendant due process of law).

Owens cannot show prejudice from these limited comments. Owens cannot show that but for counsel's failure to object to this small portion of the closing argument, the result of his sentencing proceeding would have been different. Especially where Owens admitted to police and others that he murdered the victim Irene Graves, admitted he murdered his cell-mate during his first trial, and had a lengthy history of assaultive behavior in the department of corrections. Even assuming *arguendo* that the challenged comments were inappropriate, given this record and all the evidence of aggravation admitted against Owens, the Solicitor's comments were harmless. Petitioner cannot establish prejudice under Strickland. This portion of ground 10(a) must be dismissed with prejudice.

In Ground 10(b) of his Application, Owens alleges trial counsel was ineffective for failing

to properly object to the admission of his prison disciplinary records in the penalty phase of his third sentencing proceeding. Counsel was not ineffective because the prison disciplinary records were admissible under the business records exception to the hearsay rule and did not violate the Confrontation Clause or the due process clause.²⁴ Since the evidence was admissible and did not violate any right of Owens, counsel could not have been ineffective in failing to properly object to this evidence. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001)(ineffective assistance of counsel claims are tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails both prongs of the Strickland test, as it was neither deficient nor prejudicial.

Owens has been incarcerated in the South Carolina Department of Corrections since his first conviction and death sentence. During his incarceration, the South Carolina Department of Corrections recorded the following incidents in their disciplinary records that were offered by the State in the 3rd sentencing proceeding:

April 13, 2001, breaks toilet, sink and sprinkler.

May 26, 2001, throws hot water on another inmate.

May 27, 2001, had a six and a half inch shank made from fencing and toothbrush.

June 14, 2001, spat on a correctional officer.

February 8, 2002, a 14 inch solid brass shank.

March 29, 2002, stabs correctional officer Smith in the face with shank.

June 12, 2002, stabs Undra Golden in the shower.

June 15, 2002, kicks an inmate who is restrained in a restraint chair.

August 5, 2002, slaps a male nurse in the face.

August 17, 2002, throws a food tray and hits officer Guess in the head.

²⁴Respondent cannot determine from the Application what due process violation Owens is asserting. Respondent is having to assume it is the same issue raised in his last direct appeal brief.

August 23, 2002, struck an officer in the face with his fist.
October 23, 2002, hits officer Eaton in the face with the fist.
October 23, 2002, sets fire to cell.
December 22, 2002, shank made from fencing.
December 30, 2002, a ten inch made from a push rod of the sink.
July 17, 2005, spits in the face of officer Jones.
August 26, 2005, slaps officer Henley in the face.
August 31, 2005, sets fire to cell.
September 11, 2005, threatens officer Jones.
January 1, 2006, a 12 inch homemade knife.
January 3, 2006, breaks cell door window with broom stick.
January 13, 2006, throws feces on officer Williams hitting him in the face.
February 3, 2006, spits in the face of another inmate.
February 4, 2006, orally threatens officer Jones.
February 28, 2006, a 12 inch weapon hidden between the mattresses.
April 4, 2006, an eight an a half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage.
May 1, 2006, sets fire to his mattress.
May 20, 2006, throws coffee on officer Smith.

(R. 1441-43, Tr. p. 1389-1391).

The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court, and a ruling will be disturbed only upon a showing of an abuse of discretion. State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999).

The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Evidence which would ordinarily be inadmissible in the guilt phase of trial may be introduced during the penalty phase. State v. Kornabrens, 290 S.C. 281, 350 S.E.2d 180 (1986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1592 (1987). During the sentencing phase, the trial

judge may permit the introduction of additional evidence of aggravation in order to aid the jury in determining whether to recommend a death sentence. Id. See also, State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003).

Certainly the prison disciplinary records were relevant to Owens' future adaptability in prison, a matter which was clearly proper for the sentencing jury. See State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988); State v. Riddle, 291 S.C. 232, 353 S.E.2d 138 (1987), *overruled in part on other grounds*, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The records were also relevant, because they demonstrated the character of the accused and his future dangerousness. Owens, *supra*.

There were a total of fifty-six (56) disciplinary violations by Owens while in the Department of Corrections. (Tr. p. 1486, ll. 8-15). The State did not introduce all fifty-six (56) violations. After an *in limine* ruling by the trial judge, the State only offered the short summary above of the twenty-eight (28) violations in which an officer was involved and *required* or had a *business duty* to report the incident. The trial judge carefully considered this issue and had even researched the issue before the trial. (R. 1409, Tr. p. 1357). The court limited the State to the above summary under the business records exception. After the trial court's ruling *in limine*, the State did not offer nor would the court allow each individual disciplinary record, because the court felt it contained subjective matter. (R. 1406-1437, Tr. p. 1354-1385). The limited summary was all that was admitted.

Rule 803(6)(c) South Carolina Rules of Evidence provides that even though the declarant is available to testify as a witness:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge,

if kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996), the South Carolina Supreme Court specifically decided this issue and held that prison disciplinary records were admissible under the Uniform Business Records as Evidence Act. S.C. Code Ann. § 19-5-510 (1985).²⁵ The Whipple court specifically cited as authority State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987)(parole records admissible) and State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988)(police fingerprint records admissible). On direct appeal, Owens attacked the Whipple decision on the basis that it was decided under Section 19-5-510 and not SCRE 803(6). This reasoning is incorrect.

In State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004) *reversed on other grounds* Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006), decided after the enactment of SCRE 803(6), the South Carolina Supreme Court specifically cited Whipple as controlling authority on the issue of whether prison disciplinary records are admissible under the Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510 (1985). Clearly, § 19-5-510 was not obviated by the

²⁵Section 19-5-510 provides:

A record of an act, condition, or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event and if, the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Rules of Evidence. Otherwise, the South Carolina Supreme Court would not have recognized that statute as controlling in Holmes, a 2004 decision. In fact, in Holmes, the trial judge admitted the prison disciplinary records in the penalty phase of the trial under both § 19-5-510 and Rule 803(6).²⁶ Appellant Holmes raised the same objections Owens raised in his appeal and they were emphatically denied by the South Carolina Supreme Court as having no merit. Holmes, supra.²⁷

Regardless, "SCRE 803(6) is substantially the same as former South Carolina law as Section 19-5-510 of the *Code of Laws of South Carolina* has been interpreted." Danny R. Collins, South Carolina Evidence (2nd Ed. 2000), South Carolina Bar, *emphasis in the original*. The case law interpreting Section 19-5-510 also required that the record be trustworthy in the opinion of the court. Id. at 603, *citing Jenkins v. Dixie Specialty, Co.*, 284 S.C. 425, 326 S.E.2d 658 (1985); State v. Duncan, 274 S.C. 379, 264 S.E.2d 421 (1980). The prison disciplinary records were admissible under either 19-5-510 or SCRE 803(6).

In State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008)(*Owens III.*), our Supreme Court unanimously rejected Owens' contention that the prison disciplinary records as admitted in this case in the penalty phase were not admissible under the business records exception. The unanimous Court cited Whipple and Holmes as authoritative on this issue.

This issue has been decided by our Supreme Court three times now. Owens; Whipple; Holmes. Furthermore, the summary used by the State was appropriate under South Carolina Law. Rule 1006, SCRE (contents of voluminous records may be presented in the form of a summary provided underlying data are admissible in evidence). Holmes, supra (same).

²⁶See brief of Respondent from Holmes, supra.

²⁷Appellant Owens fails to mention the Holmes decision anywhere in his brief.

Other states are in agreement. In People v. Jackson, 182 Ill.2d 30, 230 Ill. Dec. 901, 692 N.E.2d 391 (1998), the court rejected an assertion similar to the one raised by Owens on appeal. In Jackson, the court held that prison incident reports were admissible in a capital sentencing proceeding through the custodian, even when the author did not testify. In addressing these issues in People v. Casillas, 749 N.E.2d 864 (Ill. 2001), the court noted that it had previously rejected such a claim by an appellant, holding that the contents of prison incident reports are admissible during the penalty phase of a sentencing hearing so long as they are relevant and reliable. People v. Armstrong, 183 Ill.2d 130, 233 Ill. Dec. 252, 700 N.E.2d 960 (1998); People v. Jackson, *supra*.

Similarly, in U.S. v. Chong, 98 F. Supp.2d 1110 (D. Hawaii. 1999), the court held disciplinary reports covering the defendant while in prison were admissible in the penalty phase of a capital proceeding, under the business records exception to the hearsay rule under Federal Rules of Evidence 803(6).²⁸ In Chong, the defendant, like Owens, contended that these records are inherently untrustworthy and, hence, inadmissible. The defendant also argued the correctional officers were motivated to make unfavorable records, because they were involved in the proceedings and this fact erodes their reliability. The defendant further argued the reports were not generated with sufficient regularity to qualify for this hearsay exception. The court ruled otherwise, finding the records were reliable because the officers were required to report these incidents.

The Nevada court has similarly held these types of prison records admissible. In Thomas v. State, 114 Nev. 1127, 967 P.2d 1111 (Nev. 1999), the court held prison documents pertaining to the defendant were properly authenticated, and thus were properly admitted during the penalty phase of

²⁸Federal Rule 803(6) does not exclude subjective opinions or judgments as does 19-5-510 and SCRE 803(6), however Respondent still believes the reasoning in Chong is apposite.

a murder trial pursuant to the business records hearsay exception. The court, based on persuasive federal and California authority, concluded the proper foundation was laid for the documents to fall under the business records hearsay exception. Other courts have similarly allowed the admission of the prison disciplinary records under a business or public records 803(8) exception. See Hall v. State, 650 P.2d 893 (Okl.Cr.1982)(prison records containing information about an inmate's history of misconduct within the system fell within the business records exception to the hearsay rule found at 12 O.S. 1981 § 2803(8), and were not excluded under 2803(8)(a)-(e)). See also Frazier v. State, 874 P.2d 1289, 1292 (Okl.Cr. 1994)("pen-pack" falls squarely within 2803).

The trial court in the present case directed Owen's attorney to examine each record, and the court determined he would only allow the admission of the report of an incident by an officer who was under a duty to report the same. (R. 1435, 1436-37, Tr. p. 1383, ll. 4-23, p. 1384, l. 23 -p. 1385, l. 17). He would not allow details of the incident or hearsay within hearsay. (R. 1413-15, Tr. p. 1361, ll. 16- p. 1363, l. 2). Owens' trial counsel reviewed each underlying record and agreed that twenty-eight (28) were officer reported as required by the judge. (R. 1436-37, Tr. p. 1384, ll. 1-11, p. 1385, ll. 7-17). The trial court found the records to be trustworthy. (R. 1436-37, Tr. p. 1384, l. 24-p.1385, ll. 1-17). Furthermore, the records which were introduced have special indicia of reliability. The Solicitor only offered a summary of those particular business records of which there was an administrative hearing in the Department of Corrections, which resulted in a conclusion by that body that the incident or infraction actually occurred, or Owens waived his right to such a hearing. (R. 1434, Tr. p. 1382, ll. 12-25).

Respondent submits the disciplinary summary was properly admissible first under Holmes; Whipple; and now Owens (*Owens III*). Disciplinary reports are admissible under the common law

of this state in capital sentencing proceedings under the business records exception of § 19-5-510 and now the Rules of Evidence. Without question, the underlying records are relevant, because they address Owens' adaptability to prison based on his past conduct and his future dangerousness and character.

Second, the submitted summary was reliable. The prison system is obligated as a matter of state law to keep records concerning prisoner's habits and deportment. S.C. Code Ann. §§ 24-1-130, 24-1-140, 24-21-60, 24-21-70. *See, Rayfield v. South Carolina Dep't. Of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988)(discussing state statute requiring prison and parole officials to keep records of prisoners' habits and deportment and to prepare adequate reports concerning parole candidates). The custodian of the records testified that the records were kept in the regular course of business and were timely reported. Further, it has been generally held that such public records "have circumstantial guarantees of trustworthiness." *Accord, State v. Pearson*, 223 S.C. 377, 76 S.E.2d 151 (1953). Since the evidence is both relevant and reliable it was properly admitted.

The evidence is admissible under S.C.R.E. 803(6). Owens (*Owens III*). Rule 803(6) SCRE provides that memorandum, reports, records, etc. in any form, of acts, events conditions, or diagnosis, are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court. Rule 803(6); S.C. Code Ann. § 19-5-510 (Supp. 2001). *Accord, Ex Parte D.H.E.C.*, 350 S.C. 243, 565 S.E.2d 293 (2002). The evidence was properly admitted under this Rule, recognized as the business records exception.

1. Record prepared at or near the time of the event recorded.

The evidence before the trial court revealed the underlying correctional officer disciplinary reports were prepared at or near the time of the incident and in fact were made contemporaneously. (R. 1440, 1412, Tr. p. 1388, ll. 18-20 & p. 1360, ll. 10-17). Major Nettles testified the summary accurately reflected the records themselves. (R. 1441, Tr. p. 1389, ll. 3-5).

The federal courts, applying this rule, have recognized that the record of the transaction need not be contemporaneous with the event, but should be recent enough to be reliable as evaluated by the court. *Accord, U.S. v. Goodchild*, 25 F.3d 55 (1st Cir. 1994)(computer printouts of collection memos containing records of phone statements allowed as business records since underlying data recorded during conversation or immediately thereafter); *Wheeler v. Sims*, 951 F.2d 123 (7th Cir. 1992)(11 day lapse between observation and production of the record allowed). The records in this case satisfy this requirement.

2. Record prepared by or from information by a person with knowledge.

The record conclusively reveals that the summary admitted in this case was based upon disciplinary reports prepared by a correctional officer with knowledge of the incident. (R. 1412, 1435, 1436-37, Tr. p. 1360, ll. 21-23, p. 1383, ll. 4-7, p. 1384, l. 1-p. 1385, l. 17). Judge Patterson would not allow evidence of any other records into evidence but those prepared by a correctional officer with knowledge. (R. 1426, 1433, 1435, 1436-37, Tr. p. 1374, ll. 10-25, p. 1381, ll. 14-18, p. 1383, ll. 4-7, p. 1384, l. 1 - p. 1385, l. 17). It is not necessary to have the person who prepared the report present at trial. *U. S. v. Moore*, 923 F.2d 910 (1st Cir. 1991). The trustworthiness of the source was enhanced by the fact that it was reported through the prison disciplinary process. (R. 1434, Tr. p. 1382, ll. 12-25). A sufficient foundation is laid if the party seeking to introduce the

evidence is able to show that it was the regular practice of the activity to base the incident report upon transmission from a person with knowledge. (R. 1412-13, Tr. p. 1360, l. 10-p. 1361, l. 9). This was satisfied.

3. Record prepared in the regular course of business.

The record custodian testified that this data was prepared or recorded in the regular course of business. (R. 1412-13, Tr. p. 1360, l. 10-p. 1361, l. 6). As stated above, South Carolina statutory law requires that prisoner records be maintained and provided to another state agency to assist in its decision-making process. It cannot be seriously disputed that these records qualify. Records which are drafted during regularly conducted business and not in response to isolated or unusual events are admissible. Courts have held that the regular practice requirement should be generously construed to favor admission, and stringent standards including requirements of careful checking and habits of precision were rejected in In re Japanese Electronic Antitrust Litigation, 723 F.3d 238 (3rd Cir. 1983). See Blondie v. Bic. Corp., 947 F.2d 15321 (6th Cir. 1991)(social worker's report on what fire victims said about cause of fire admissible as business record inasmuch as made in scope of employment and as part of regularly conducted activity). Here the practice of providing accurate information of the prison incidents for parole reasons, to enhance safety and make the appropriate housing assignments requires the prison guards to timely report, making this an essential link in the trustworthiness chain.

4. Qualified witness identifies the record.

An actual custodian of the records of the South Carolina Department of Corrections, Major Thierry Nettles, the custodian at Lieber Correctional where Owens was housed, was the witness who presented and identified the records. (R. 1413, Tr. p. 1361, ll. 7-9). And Major Nettles is aware of

what happens at other facilities with regards to how records are maintained. (R. 1416, 1418, Tr. p. 1364, ll. 8-12, p. 1366, ll. 7-13). And the record establishes that how the records are kept, the process for reporting incidents, and making a record of that, is standardized throughout the Department of Corrections. So, the same policy regarding making of the disciplinary record and the keeping of it is the same at each institution, not just at Lieber. (R. 1418, Tr. p. 1366, ll. 7-13). Under Connelly v. Wometco Enterprises, 314 S.C. 188, 442 S.E.2d 204 (S.C. App. 1994), the appropriate custodian testified. As stated in U.S. v. Reese, 568 F.2d 1246 (6th Cir. 1977), it is not required that the custodian have actual knowledge of actual data contained in the business record. See Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999). Major Nettles was certainly a qualified witness under Rule 803(6). The trial court found he was qualified to testify under the Rule. (Tr. p. 1358, ll. 18-20, p. 1375, ll. 12-14, p. 1379, l. 18-p. 1380, l. 1). He had custody of Owens's file since Owens was housed at his facility. (R. 1431-32, 1433, 1439-1441, Tr. p. 1379, l. 18-p. 1380, l. 1, p. 1381, ll. 13-20, p. 1387, l. 10 - p. 1389, l. 5). Who better to testify to the contents of Owens' disciplinary file than the custodian of records at the facility at which Owens was housed and the person responsible for the supervision of Owens' housing. (R. 1444, 1431-32, Tr. p. 1392, ll. 13-15, p. 1379, l. 23-p. 1380, l. 1).

5. Record is trustworthy in the opinion of the court.

Judge Patterson found these prison records trustworthy.²⁹ (R. 1410, 1436-37, Tr. p. 1358,

²⁹Judge Patterson in his final decision did not use the exact word "trustworthy", however a reading of the record dealing with this issue can lead to no other conclusion but that the judge found the offered portion of the records trustworthy, since Judge Patterson was clearly familiar with the requirements of Rule 803 and admitted the summary into evidence. (See R. 1406-1441, Tr. p. 1354-1389). In fact, Judge Patterson pointed to the fact that the officers were required to report the incidents recorded, in deciding to admit the summary.

ll. 9-22, p. 1384, l. 24-p. 1385, l. 17). The lower court reviewed the underlying incident reports for the summary and found the portions he admitted had an indicia of trustworthiness, because they were reported by an employee of the Department of Corrections who was under a duty to report the incidents and the Department kept a record on incidents involving inmates. (R. 1436-37, Tr. p. 1384, l. 24-p. 1385, l. 17). Further, this summary is purely a factual recording of the incident which eventually had a disciplinary result. (R. 1434, Tr. p. 1382, ll. 12-25). It was properly admitted. *See State v. Key*, 277 S.C. 214, 284 S.E.2d 781 (1981). Further, the summary is admissible, because the underlying records were (1) kept pursuant to a routine procedure designed to assure accuracy; 2) created for motives that end to assure accuracy; and (3) they are not merely accumulations of hearsay. *See Rosenberg v. Collins*, 624 F.2d 659 (5th Cir. 1980). (R. 1413, 1427, 1433, 1436-37, Tr. p. 1361, ll. 16-22, p. 1375, ll. 21-22, p. 1381, ll. 14-17, p. 1384, l. 24- p. 1385, l. 17).

6. The Prison Records are admissible under either 803(6) or 803(8).

At trial, the State proffered this evidence under Rule 803(6). As set forth above, this evidence meets the conditions precedent to its admission under this Rule. In addition to the cases cited above, prison disciplinary records have been held to be admissible under Rule 803(8) in *Games v. State*, 743 N.E.2d 1132 (Ind. 2001), a capital case in which similar underlying reports were admitted. Also, in *Combs v. Wilkinson*, 315 F.3d 548 (6th Cir. 2002), the court found that the report prepared by a use of force committee was admissible under Rule 803(8), even though the committee lacked personal knowledge and its report was based upon 123 interviews and numerous documents, including staff and inmate incident reports, as well as an investigative report.

Owens has asserted the summary contains "subjective opinions and judgements." Owens reads this exclusionary phrase too broadly. The summary is based upon the factual recitation of the

incident and includes the disciplinary result. It is not a listing of subjective opinion, i.e. "proceeding from taking place within the mind." but rather an objective statement of a factual result. Under Owens' theory, the business records exception to the hearsay rule would be eviscerated, since factual representations with an indicia of trustworthiness are the reasoning for its existence.³⁰

The Evidence does not violate the Confrontation Clause

Owens next alleges that even if the records are admissible, counsel should have objected on the grounds they violate the Confrontation Clause under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). This objection would have been baseless and would have been overruled. Owens' reliance on Crawford is misplaced. The Supreme Court in Crawford specifically excepted the contents of business records from a Confrontation Clause challenge. Id. In fact, this exact issue regarding prison disciplinary records, was also decided by our Supreme Court in Holmes, *supra*. Id. ("properly administered the business and public records exceptions are among the safest against a Confrontation Clause challenge of the hearsay exception") *citing* Crawford, *supra*.

The Court in Holmes was correct. Hearsay evidence contains sufficient indicia of reliability to satisfy the Confrontation Clause when the evidence either falls within "a firmly rooted hearsay exception" or "contains particularized guarantees of trustworthiness such that adversarial testing

³⁰At trial, the prosecution did not assert admissibility under Rule 803(8). Respondent would submit this evidence can be admitted under this alternate rule. Although S.C.D.C. employees are "peace officers", disciplinary reports do not involve necessarily criminal case matters observed by police and law enforcement personnel. Instead, this information is maintained for correctional purposes to evaluate the deportment of the inmate and the safety of the institution. Respondent submits the excluded data was to exclude observations made by law enforcement at a crime scene, because such observations were made in an adversarial setting which were deemed less reliable than observations made by public officials in other settings. Here, the disciplinary records were not necessarily crimes, but prison violations. As such, Respondents submit the exclusion does not apply and the reports are admissible under Rule 803(8) as well.

would be expected to add little, if anything, to the statements reliability.” Lilly v. Virginia, 527 U.S. 116, 124-125, 119 S.Ct. 1887 (1999), (quoting Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531 (1980) *modified by Crawford*, see also Idaho v. Wright, 497 U.S. 805, 815, 110 S.Ct. 3139 (1990)). A defendant’s right to confrontation is not absolute. Lilly, *supra* at 123-24, Ohio, *supra* at 65-66, Christian v. Rhode, 41 F.3d 461, 467 (9th Cir. 1994).

The South Carolina Supreme Court has recognized subsequent to Holmes, that business records do not implicate the Confrontation Clause. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005)(“Finally, in Crawford v. Washington, 541 U.S.36, 54, 124 S.Ct. 1354 (2004), the United States Supreme Court noted the hearsay exception for business records and observed that business records are not ‘testimonial’ and therefore do not implicate the Confrontation Clause.”). In Cutro, our Supreme Court held public records do not implicate the Confrontation Clause.³¹ There is

³¹In pre-Crawford decisions, business records were introduced in criminal cases in state and federal courts and determined not to violate the Confrontation Clause. See Manocchio v. Moran, 919 F.2d 770, 776-80 (1st Cir. 1990)(autopsy report admitted to prove cause of death without medical examiner did not violate the Confrontation Clause). “The admission of evidence under a firmly rooted exception to the hearsay rule that does not require unavailability of a witness, such as the public records exception, does not violate the Confrontation Clause, and the public record recognition to the hearsay rule is firmly rooted.” Roberts, 448 U.S. at 66 n.8, 100 S.Ct. At 2539 n.8; United States v. Contreras, 63 F.3d 852, 857 (9th Cir. 1995)(citations omitted); United States v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1990), cert. denied, 498 U.S. 1124, 111 S.Ct. 1084 (1991). “Properly administered, the business and public records exceptions would seem to be among the safest of the hearsay exceptions.” Contreras, 63 F.3d at 857. See Sherman v. Scott, 62 F.3d 136 (5th Cir. 1995)(testimony of supervisor demonstrated lab report finding cocaine had particular guarantees of trustworthiness and because cross-examination of chemists who prepared report would have been of little use to petitioner, admission of the report did not violate the Confrontation Clause.); Minner v. Kirby, 30 F.3d 1311 (10th Cir. 1994)(admission of chemists lab notes through chemist’s supervisor was proper under the Confrontation Clause”); United States v. Baker, 855 F.2d 1353, 1360 (8th Cir. 1988)(lab reports of controlled substances did not violate Confrontation Clause); Reardon v. Manson, 806 F.2d 39, 41-43 (2d Cir. 1986)(chemists’ reports admitted through supervisor did not violate Confrontation Clause); United States v. Simmons, 773 F.2d 1455, 1460 (4th Cir. 1985)(no Confrontation Clause violation because utility of confronting ATF record-keepers at trial was negligible); People v. Hall, 114 Ill.2d 376, 416-

absolutely no merit to this allegation of ineffective assistance of counsel. Since the prison disciplinary summary was admissible under the business records exception, Owens (*Owens III*), there was not Confrontation Clause violation. Cutro, citing Crawford v. Washington. Counsel could not have been deficient in failing to raise this objection and Owens could not have been prejudiced by any failure to raise such an exception.

Finally, even if the prison disciplinary summary qualified as testimonial hearsay, which it does not, courts have stated recently that it is “far from clear” whether the Confrontation Clause even applies at sentencing or capital sentencing proceedings and several have stated that it does not. *See Wilson v. Simmons*, 536 F.3d 1064, 1111-1112 (10th Cir. 2008)(not clear Confrontation Clause even applies at capital sentencing proceedings); United States v. Barrett, 496 F.3d 1079, 1099 (10th Cir. 2007)(same) *quoting* United States v. Higgs, 353 F.3d 281, 324 (4th Cir. 2003)³²(which cited the 11th Circuits’ decision in Proffitt v. Wainwright, 685 F.2d 1227, 1254-55 (1982) to the contrary as being contrary to Fourth Circuit law); United States v. Brown, 441 F.3d 1330, 1361 (11th Cir. 2006)(declining to decide because statements were not testimonial but hinting it may extend right); Szabo v. Walls, 313 F.3d 392, 398 (7th Cir. 2002)(the Confrontation Clause does not apply to capital sentencing); United States v. Katzopoulos, 437 F.3d 569, 576 (6th Cir. 2006); United States v. Fields,

17, 102 Ill. Dec. 322, 499 N.E.2d 1335 (1986)(admission of prison records at sentencing hearing did not violate defendant’s right of confrontation). *See also* People v. Ward, 154 Ill.2d 272, 328030, 181 Ill.Dec. 884, 609 N.E.2d 252 () (court did not abuse discretion in allowing prison record to be introduced in sentencing hearing); *See* State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999)(since there is an adequate indicia of trustworthiness, adversarial testing would add little, there is no Confrontation Clause violation).

³²In Higgs, a 2003 case, the Fourth Circuit Court of Appeals stated “[i]t is far from clear that the Confrontation Clause applies to a capital sentencing proceeding”. 353 F.3d at 324.

483 F.3d 313 (5th Cir. 2007)(6th Amendment Confrontation Clause does not apply to operate in a capital sentencing proceeding as a bar to admission of testimony only admissible as to issue of whether to give sentence within statutory frame work not to prove aggravating circumstance). *See also United States v. Beydown*, 469 F.3d 102, 108 (5th Cir. 2006); *United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir. 2005); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005); *United States v. Martinez*, 413 F.3d 239, 243 (2d Cir. 2005).

Simply put, the rule in *Crawford* has not been uniformly extended to sentencing hearings. *United States v. Fields*, 483 F.3d 313,, 330 (2007)(finding wholly unpersuasive the 11th Circuits' extension of the 6th Amendment confrontation right through the entirety of the capital sentencing process, noting that it the 11th Circuit is the only federal circuit to have done so, and noting that the 7th Circuit, relying on *Williams*, has ruled that the Confrontation Clause does not apply at capital sentencing proceedings); *Higgs*; *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002)(citing *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079 (1949), for the proposition that the Confrontation Clause does not apply to capital sentencing and noting that the Supreme Court "has never questioned the precise holding of" *Williams*).³³ *See also United States v. Jordan*, 357 F.Supp.2d 889, 901-04 (E.D. Va. 2005)(Confrontation Clause does not apply to penalty phase after assuming without deciding that it does at the eligibility phase in a bifurcated penalty phase); *United States v. Brown*, 441 F.3d 1330, 1361 (11th Cir. 2006)(wherein the Court noted that it was not deciding *Crawford* applied at the penalty phase of a federal capital trial precisely because the challenged evidence offered in the case was so clearly non-testimonial). *See also Maynard v. Dixon*, 943 F.2d 407, 414, 414 n. 5 (4th Cir.

³³*See also United States v. Martinez*, 274 Fed. Appx. 291,293 (4th Cir. 2008) (UNPUBLISHED); *United States v. Debreus*, 255 Fed. Appx. 725, (4th Cir. 2007)(UNPUBLISHED)

1991)(discussing the State's reliance on the Williams v. New York and Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421 (1959) holdings in contrast to the defendants reliance on *dicta* in Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852 (1981)(which stated relying on Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209 (1967) that the right to confront witnesses is available at a sentencing hearing at which the sentence may be imposed based upon a new finding of fact that was not an ingredient of the offense charged³⁴); Bassette v. Thompson, 915 F.2d 932, 939 (4th Cir. 1990)(citing Williams v. New York, the court suggested that even in capital cases a defendant does not have right under due process clause to confront and cross-examine at the sentencing phase all witnesses as to his prior record); Simpson v. Polk, 129 Fed. Appx. 782, 791 (4th Cir. 2005)(habeas review)(*UNPUBLISHED*). But see State v. Holmes, 355 N.C. 719, 565 S.E.2d 154 (2002); State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1, 19 (1995), Call v. Branker, 254 Fed. Appx. 257 (4th Cir. 2007)(*UNPUBLISHED*)(discussing N.C. law).

The Evidence did not violate the Due Process Clause

Owens also alleges counsel was ineffective in failing to object to the introduction of the prison disciplinary summary on due process grounds. First, it cannot be determined from reviewing the Application what due process violation Owens is alleging. Therefore, Respondent moves to dismiss this specific allegation with prejudice on the grounds that it is vague and ambiguous and fails to state a claim upon which relief may be granted. SCRCP 12(b)(6).

To the extent that Owens is raising the same due process claim that he raised on direct appeal from this 3rd sentencing proceeding, there is absolutely no merit to this claim or issue. Due process

³⁴The evidence in question in this case, the prison disciplinary summary, was not evidence used to establish a statutory aggravating circumstance, but was evidence of Owens' character, future dangerousness, and lack of ability to adapt to prison.

involves notice and an opportunity to be heard. Owens was certainly on notice that his prison misconduct would be introduced in his penalty phase re-sentencing before Judge Patterson, his 3rd sentencing proceeding. (See Final Brief of Appellant, the Honorable Larry R. Patterson, p. 18, wherein Owens notes that in his second resentencing the state relied heavily on his conduct while in prison). Owens and his attorneys knew that the State was going to attempt to introduce his prison disciplinary violations in the 3rd sentencing proceeding. The records were provided to defense counsel by the State. (Tr. p. 1368, ll. 3-14). The Solicitor also provided a summary of the disciplinary violations and provided those to defense counsel. (Tr. p. 1368, ll. 23-25). The record shows defense counsel was thoroughly prepared to object, and did object, although not on the grounds Owens now alleges they should have objected. (Tr. pp. 1354-1394). The notice requirement of the due process clause was certainly met.

In his Final Brief from his 3rd sentencing hearing, Owens argued his due process rights were violated because the admission of the disciplinary summary violated the requirements of Gardner v. Florida, 430 U.S. 349 (1977). (See Final Brief of Appellant, the Honorable Larry R. Patterson p. 20). Owens reliance on Gardner is misplaced. Gardner held that a capital defendant is denied due process when the death penalty was imposed, at least in part, on the basis of information which *he had no opportunity to deny or explain*. 430 U.S. at 362; State v. Riddle, 291 S.C. 232, 353 S.E.2d 138 (1987). Gardner is simply not applicable to the facts of this case.

In Gardner, the defendant was prohibited from denying or rebutting the evidence in question that was admitted and considered by the trial judge in rejecting the jury's recommendation of a life sentence and ultimately sentencing the defendant to death. The evidence in question was *confidential information in a pre-sentence report* that the defendant and his counsel were not

allowed to see or respond to.

What occurred in Gardner did not occur in this case. Owens had an opportunity to deny or explain the prison disciplinary infractions, he simply chose not to. Owens could have testified himself, or called any prison guards, prison staff, medical personnel, or fellow inmates to testify regarding the details of his prison disciplinary violations or to explain why they occurred. Owens simply chose not to. Owens was not prohibited from testifying in the penalty phase or calling any witnesses that he would like to call to rebut or explain the disciplinary violations. There simply was no due process violation. This portion of ground 10(b) must be dismissed with prejudice.

Furthermore, to the extent Petitioner is alleging the evidence violated due process because it was not trustworthy, this assertion has no merit. As previously discussed in extensive detail, the records were trustworthy. Furthermore, a sentencing court may consider any relevant information, including hearsay evidence, provided the information has "sufficient indicia of reliability to support its probable accuracy." See United States v. Uwaeue, 975 F.2d 1016, 1021 (4th Cir. 1992). As our Supreme Court pointed out in its decision affirming Owens' third death sentence, trustworthiness is a condition of 803(6). Owens (*Owens III.*), *supra*. Owens contended at trial and on appeal that the prison disciplinary summary was not trustworthy under Rule 803(6). Our Supreme Court specifically found "no abuse of discretion in the trial judge finding trustworthy those incidents witnessed by prison staff." Owens (*Owens III.*). Similarly, the Supreme Court pointed out that it had previously held that these type records were admissible in the sentencing phase of a capital trial under the Business Records as Evidence Act and that trustworthiness was an issue under the Act, not a new addition by the Rules of Evidence. *Id.* Clearly, the admitted summary had sufficient indicia of reliability to support its probable accuracy. This issue, if raised, has absolutely no merit.

This ground must be dismissed with prejudice.

Harmless Error/Lack of Prejudice

Even if this Court were to assume *arguendo* that the state trial court committed error in admitting the records under the business records exception or violated Owens' rights under the Confrontation Clause or due process clause by admitting the disciplinary summary, this Court must conclude that such error was harmless. See State v. Bell, 302 S.C. 18, 393 S.E.2d 362 at 372 (1990); See also King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1988) ("assuming without deciding that the case summaries and disciplinary records were improperly admitted", the court held its examination of the record in its entirety lead it to conclude the alleged error did not affect a substantial right of the appellant).³⁵ Likewise, in the present case there was overwhelming evidence of Petitioner's future dangerousness, character, and inability to adapt to prison life outside of the business records. Petitioner cannot show prejudice under Strickland given the record in this case.

The violation of a defendant's right of confrontation is also subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431(1986). A violation of the Confrontation Clause is not *per se* reversible error. State v. Dinkins, 345 S.C. 412, 548 S.E.2d 217 (2001), citing State v. Dinkins, 339 S.C. 597, 529 S.E.2d 557 (Ct. App. 2000); State v. Jenkins, 322 S.C. 360, 364, 474 S.E.2d 812, 815 (Ct. App. 1996). Also Bell, 302 S.C. 18, 393 S.E.2d at 372 (1990).

This Court must consider several factors to determine whether the alleged error is harmless

³⁵While the King court relied on Kotteakos v. U.S., 328 U.S. 750 (1946) harmless error standard rather than that set forth in Chapman v. California, 386 U.S. 18 (1967), the court's decision is still persuasive, because it found harmless error in light of other properly admitted evidence of future dangerousness.

or requires reversal. These factors include the importance of the challenged evidence to the State's case, whether the evidence was cumulative, whether the evidence was materially corroborated or contradicted by other evidence introduced at trial, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. *Jenkins, supra* at 364-65, 474 S.E.2d at 815. On this issue, these factors conclusively weigh towards a conclusion of harmless error since the factors reveal: 1) The summary is similar to testimony of Major Thierry Nettles who stated Owens was the worst inmate in his custody and he houses problem inmates, and this statement came from personal knowledge of the witness, 2) the evidence is cumulative to other evidence of his inability to adapt in prison, i.e. the murder of his cell-mate Christopher Lee,³⁶ 3) the exhibit itself was corroborated by a defense witness, Dr. Donna Schwartz Watts, and not contradicted in the record, 4) cross examination clarified the record; defense counsel was able to clarify for the jury exactly what was meant by each entry if he so chose, and 5) the strength of the state's case in developing Owens' character was overwhelming without the challenged summary.³⁷

³⁶Dr. David Brunetti, a psychologist, also testified that Owens has antisocial personality disorder which is primarily characterized by repeated disregard for the rights and safety of others. (R. 1341, Tr. p. 1289, ll. 1-14). Brunetti stated Owens was likely to be an individual who is hostile in his relationship with others, very quick to experience anger, and had learned the way to deal with anger is aggressively, as well as with the use of weapons. (R. 1342, Tr. p. 1290, ll. 3-18). After reviewing Owens' confession to the Lee murder, Dr. Brunetti's opinion changed from Owens being an impulsive actor "to that this was a much more predatory type of aggression." (R. 1348-49, Tr. p. 1296, l. 16- p. 1297, l. 18). Brunetti also testified he reviewed all of Owens' records from the D.O.C. since 1999 and in his opinion even in maximum solitary confinement Owens continues to harm others. (1350-51, Tr. p. 1298, l. 11-p. 1299, l. 8). This testimony was before the jury.

³⁷In addition to the evidence of the robberies and brutal murder committed by Owens, the jury heard testimony that Owens was adjudicated delinquent as a juvenile for burglary (two counts), assault with intent to kill, and unlawful possession of a pistol. (R. 1547, Tr. p. 1494, ll. 3-17). The jury also heard Owens' confession to the murder of his cellmate in the Greenville County detention center along with the testimony of the pathologist who performed the autopsy

The disciplinary records were clearly cumulative to other evidence in aggravation. Likewise, the evidence that he would be a predator in prison was firmly established without reference to the records. (R. 1444, Tr. p. 1392, ll. 11-20). The admission of the records summary, was harmless beyond a reasonable doubt.

Furthermore, the record is clear that Owens' own experts reviewed and relied on Department of Corrections disciplinary records in rendering their opinions. (R. 1457-58, Tr. p. 1404, l. 16-p. 1405, l. 15). These witnesses included Marjorie Hancock and Doctor Thomas Cobb. (R. 1457-58, 1502, Tr. p. 1404, l. 16-p. 1405, l. 15 & Tr. p. 1449, ll. 12-16). Doctor Cobb testified Owens was in maximum security at Leiber Correctional Facility and Owens was getting in a lot of trouble. (R. 1490, Tr. p. 1437, ll. 1-6). Cobb testified Owens was kept "in a cell, inside of a cage" which was different than all the other cells on the cell block. (R. 1494, Tr. p. 1441, ll. 9-13). Cobb also testified Owens was found with a shank in his cell. (R. 1505, Tr. p. 1452, ll. 8-16). Cobb also testified Owens made things [weapons] for protection. (R. 1506, Tr. p. 1453, ll. 19-21).

And Doctor Donna Schwartz-Watts relied on the DOC records as well. (R. 1514, Tr. p. 1461, ll. 2-5). Dr. Schwartz-Watts, a defense witness, testified that she was "...aware of many of his disciplinaries since he's been confined in the Department of Corrections." (R. 1514, Tr. p. 1461, ll.

on Christopher Lee, who described the savage beating that resulted in Lee's death. (R. 1359-1391, 1393-1405, Tr. p. 1307-1339, 1341-1353). The jury also heard testimony that Owens, because of his prison conduct, was required to be housed "in a cell inside a cage" and that of the worst inmates in his cellblock, he was the most problematic inmate. (R. 1444, Tr. p. 1392, ll. 11-20). The jury also heard testimony from officer Joe Wood who testified Owens bragged about selling lots of drugs and stated he wanted to be remembered as the one "who killed the most people in Greenville." (R. 1144, Tr. p. 1093, ll. 10-13). Owens also told his girlfriend he wanted to go down in history for committing the most murders in Greenville County without getting caught. (R. 1167, Tr. p. 1116, ll. 1-4).

2-5). Schwartz-Watts told the jury Owens had horrible behavior in the Department of Juvenile Justice which included write-ups for fighting and being disruptive in school, among other things. (R. 1523, Tr. p. 1470, ll. 17-23). Schwartz-Watts testified Owens' behavior in the juvenile correction facilities was at times "aggressive". (R. 1525, Tr. p. 1472, ll. 12-19). Schwartz-Watts testified that upon Owens' release from Turbeville Correctional Institute, Owens accrued a number of armed robbery and assault charges. (R. 1524-25, Tr. p. 1471, l. 24-p. 1472, l. 7). Schwartz-Watts testified Owens had about fifty-six (56) write-ups in the adult correctional system, including assaultive behavior. (R. 1525-26, Tr. p. 1472, l. 35-p. 1473, l. 7). She also stated he had a "long disciplinary history". (R. 1526, Tr. p. 1473, ll. 6-7). Dr. Schwartz-Watts testified Owens "has a long history of illegal behaviors." (R. 1534, Tr. p. 1481, ll. 13-14). She also testified Owens set fire to his cell and threw coffee in an officer's face. (R. 1541-42, Tr. p. 1488, l. 16- p. 1489, l. 2). Schwartz-Watts admitted Owens was caught with a 12 inch weapon and a 8 inch shank on two different occasions in 2006. (R. 1540-41, Tr. p. 1487, l. 16-p. 1488, l. 10). And Dr. Schwartz-Watts testified to the following:

Q: And I don't want to belabor this point, but in your report it talks that you referred to the disciplinary reports of the South Carolina Department of Corrections from 2001 through 2006?

A: Yes, sir.

Q: You had copies of all those infractions, incident reports?

A: Yes, sir. I would have had a list of them and then I think for probably the majority of them, there would have been a narrative to describe what happened.

Q: Right, the internal report –

A: Yes.

Q: - - that describes all that.

A: Yes.

Q: Now, I don't want to stand up here and read or have you read all those reports, but you did consider and use those reports as part of your review and diagnosis?

A: Absolutely, yes.

Q: And I assume you also used the material contained in the report as to who said what and who did what?

A: Yes, sir.

Q: All right. So if we needed to, we could go through those with you, but I just want to summarize in the end your comments were that Mr. Owens had substantial disciplinary infractions during his course of incarceration?

A: That is very fair to say.

Q: In fact, I believe you said he had something more than ordinary?

A: I counted 56, and - - of course, in the course of my career I look at - - its very common in doing evaluations I'll look at the list of assaultive disciplinaries, and it was a lengthy list.

Q: And we have - - and you may have been in the courtroom. We put in, through Mr. Nettles, a summary, very brief summary, of each one of those events, 28 of them to be exact we put in, and were you in the courtroom when we - -

A: No, sir.

Q: Okay, Well, there is a summary or a list of those that I would like to show you, State's Exhibit 30.

A: Thank you.

Q: And just so you will understand what that is, that is a summary of all of - - of 28 of those reports that - - you had the whole report. That's just a summary of what the heading of it was.

A: Yes, these all look familiar. Each one of these I have some recollection of reading the reports that went with them.

(R. 1538-40, Tr. p. 1485, l. 12 - p.1487, l. 8).

In summary, Dr. Schwartz-Watts and others testified that Owens had a lengthy disciplinary history including a history of assaultive behavior and possession of illegal weapons while incarcerated. In fact, the defense' witnesses testified to more disciplinary violations than the State offered into evidence. All of this evidence was before the jury without reference to the challenged summary. Additionally, Dr. Schwartz-Watts testified that the State's summary admitted into evidence was in fact a summary of the very documents she relied upon in reaching her opinion.³⁸ The summary could have been properly admitted through Doctor Schwartz-Watts if it had not already been entered. Petitioner cannot establish prejudice from counsel's failure to *properly object* to the admission of his prison disciplinary records.

Even assuming *arguendo* that the admission of the records was error, their admission was harmless beyond a reasonable doubt. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003)(admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); *see also* State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996)(instructing that error in admission of evidence is harmless where it is cumulative to other evidence which was properly admitted); State v. Douglas, 367 S.C. 498, 520, 626 S.E.2d 59, 71 (Ct. App. 2006)("The admission of improper evidence is harmless where the evidence is merely cumulative to other

³⁸In fact, Dr. Brunetti, a former defense expert, testified on behalf of the State that after reviewing the very same records, Owens continues to harm others while in maximum solitary confinement. Brunetti testified before Major Nettles and before the records themselves were offered by the state. This evidence was also before the jury.

evidence").³⁹

The jury, without regard to the summary, was aware Owens had a lengthy record of assaultive behavior while in confinement, including murdering a cell-mate, and a history of making weapons or "shanks". And, within his housing unit he was considered "assaultive", "destructive", and "damaging", the "most problematic inmate". (R. 1444, Tr. p. 1392, 18-20). Even in maximum solitary confinement "he continues to harm others." (R. 1351, Tr. p. 1299, ll. 1-8). The admission of the summary was harmless beyond a reasonable doubt. State v. Motley, 251 S.C. 568, 164 S.E.2d 569 (1968)(no prejudice shown where a different witness testified to the same matter without objection).⁴⁰

Since the prison disciplinary records were admissible and did not violate the Confrontation Clause or due process, and their admission was merely cumulative to other extensive evidence of Owens' prison behavior, Owens cannot show deficient performance on the part of his counsel or prejudice under Strickland. Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001)(ineffective assistance of counsel claims based on failure to object are tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the claim fails *both prongs* of the Strickland test, as it was neither deficient nor prejudicial). This ground on Owens' Application, ground 10(b), must be dismissed with prejudice.

Since there is no genuine issue of material fact which would necessitate an evidentiary

³⁹See also State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007)(admission of business records was harmless where records were cumulative to other evidence).

⁴⁰Owens also ignores the fact that if the trial judge had kept the disciplinary summary out of evidence for some reason, the State could have called each officer or victim to testify to each incident or assault before the jury.

hearing, Respondent moves for summary dismissal pursuant to S.C. Code Ann. Section 17-27-70.

IV.

Each and every allegation contained within the Application not hereinbefore either expressly admitted, qualified or explained is hereby denied, and strict proof required thereof.

WHEREFORE, having made Return, the Respondent moves and requests that the Application be dismissed with prejudice.

Respectfully submitted,

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April 2, 2009

CERTIFICATE FOR SERVICE

I, Anthony Mabry, hereby certify that I have served the *Respondent's Return and Motion to Dismiss* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

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This 2nd day of April, 2009.



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Assistant Attorney General

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Freddie Eugene Owens,

Plaintiff,

-VS-

State of South Carolina,

Defendant.

) COURT OF COMMON PLEAS

) Case No(s) : 2009CP2300741.

) TRANSCRIPT OF RECORD

July 19 - 20, 2010
Greenville, South Carolina

B E F O R E:

HONORABLE EDWARD W. MILLER, Judge.

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Records are
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produced via



CAT 7

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D-11	DSS records	7	360
D-12	Family Criminal Records	7	360
D-13	Freddie Massey's SCDC records	7	360
D-14	Alex Mason's SCDC records	7	360
D-15	Mary Mingo's SCDC records	7	360
D-16	Satai Owens' SCDC records	7	360
D-17	Donald Owens' DJJ records	7	360
D-18	Lorenzo Owens' DJJ records	7	360
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EXHIBITS PAGE

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u> <u>EV</u>

RESPONDENT'S EXHIBITS

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COURT'S EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON. Defendant's Exhibits 1 through 19 are premarked for identification purposes.)

(WHEREUPON, the proceedings begin on the 19th day of July, 2010 at approximately 9:48 a.m.)

THE COURT: I got a phone call from, I guess, a State's witness, Donna Schwartz-Watts.

MR. MABRY: Yes, sir.

THE COURT: And she apparently -- we all know who Donna is -- apparently is starting a new job. You subpoenaed her this week. She requested -- I've got a message. I haven't spoken to her. She requested or inquired as to whether or not she can appear for testimony telephonically.

MR. MABRY: I don't have any objections.

MR. WEYBLE: Your Honor, we wouldn't have an objection to that.

THE COURT: All right. Well, then I'll tell her that we will try to organize that whenever you -- just let me know when it looks like we're going to do it.

MR. MABRY: Yes, sir.

THE COURT: All right. Anything we need to take up now?

MR. WEYBLE: Your Honor, we do have a few

1 preliminary matters. First of all, we've got
2 three documents, exhibits that we have obtained
3 from the federal district court file that was
4 created in connection with the class action
5 lawsuit against the Department of Juvenile Justice
6 that continued through the 90's. There are three
7 documents that we think are sort of
8 self-authenticating, admissible without, uh, the
9 need for a foundation or testimony from a witness.
10 I would like to offer those.

11 **MR. MABRY:** I don't know what they are,
12 Judge. I haven't seen them.

13 **MR. WEYBLE:** The first one we marked as
14 Exhibit 7. It is a report prepared by DHEC on
15 basically the levels of violence in the Department
16 of Juvenile Justice. It was published in December
17 of 1995. We think they would be admissible as an
18 official publication under 9025.

19 (WHEREUPON, there is a pause.)

20 **MR. MABRY:** I apologize, Judge. I haven't
21 seen this because they served me with a disk drive
22 that had over 9000 documents on it. We tried to
23 scan through it. There was so much material. My
24 first objection to the admission to this is on the
25 grounds of relevancy. The conditions of

1 confinement at DJJ in general are not admissible.
2 They've got to somehow tie to Mr. Owens, when he
3 was there, what dorm he was in and what he was
4 subjected to, not what happened to other inmates.
5 This is just like a statement that is put in in
6 the penalty phase to show what the general
7 condition of confinement will be for a Defendant
8 that gets a life sentence. We would object to it
9 on that grounds. Also under the rule of
10 completeness, if we're going to put in one of the
11 records from the federal court lawsuit, we need to
12 put them all in for this court to look at all of
13 them to get the full picture of what occurred in
14 federal court.

15 **MR. WEYBLE:** Your Honor, on the question of
16 relevancy, there's no doubt in my mind that the
17 relevance of this will become obvious as we go
18 forward. If the court would like to accept it and
19 withhold the final determination as to whether or
20 not it actually becomes part of the record, until
21 the relevance becomes more clear, we would be
22 comfortable with that.

23 **THE COURT:** Okay. You can mark it for
24 identification purposes.

25 **MR. WEYBLE:** In terms of Mr. Mabry's

1 objection or request that all 9000 or so pages
2 come in, we don't have any objection to that. It
3 could be fairly cumbersome to deal with going
4 forward. But if the court wants to do that, we
5 certainly would have no objection to it.

6 **THE COURT:** I'm not sure that Mr. Mabry's
7 objection was well thought through. He will have
8 time to think about this as we proceed in the
9 case. I would not be inclined to accept 9000
10 documents.

11 **MR. WEYBLE:** The next one, Your Honor, which
12 we pre-marked as Exhibit 8 is an interim order
13 that was entered by the United States District
14 Court, Judge Anderson, I believe, on February
15 16th, 1996. For our purposes, the relevance is it
16 contains a number of findings about the conditions
17 at the Department of Juvenile Justice during the
18 period that is relevant to us. Our position would
19 be that this would be admissible under Rule 9024
20 as a public -- well, under the combination of 9024
21 and 9017. It was a public record that was
22 authorized to be filed and actually was filed in
23 an official public office, namely, the Clerk of
24 Court for the United States District Court for
25 South Carolina.

1 **MR. MABRY:** Same objection at this time.

2 **THE COURT:** Relevancy. Mark it as an
3 exhibit.

4 **MR. WEYBLE:** The final one is, we pre-marked
5 it as number 6, I believe. It is the Findings of
6 Fact Conclusions of Law from, again, the South
7 Carolina -- the United States District Court for
8 the District of South Carolina. This one is dated
9 January 25th, 1995. The basis for offering it
10 would be the same.

11 **MR. MABRY:** Same objection.

12 **THE COURT:** Okay. Same ruling. Mark it for
13 ID.

14 **MR. WEYBLE:** All right. Your Honor, next
15 we, uh, I guess it was next week or maybe the very
16 end of the week before, we filed a motion to
17 admit, in lieu of her live testimony, the
18 affidavit of Drucy Glass. Mr. Mabry, uh, -- while
19 this was done via e-mail, Mr. Mabry opposed it.
20 We responded to the opposition. I'm not aware
21 that there was ever a ruling on the motion. At
22 this time, we would go ahead and renew that and
23 try to get that settled.

24 **MR. MABRY:** Judge, we do object to that for
25 several reasons. The first being on the grounds

1 of relevance. The final application in this case
2 pursuant to the scheduling order was filed
3 approximately 30 days ago. There is not a single
4 allegation in that complaint that has anything to
5 do with what Ms. Glass asserts in her affidavit.
6 The affidavit is this is my file. Defense counsel
7 never obtained my -- the attorneys in the third
8 sentencing proceeding never obtained my file.

9 That has nothing to do with the allegations.
10 The only allegation that could have any attempt to
11 bring it under would be number five. If you read
12 that allegation, it is clear that counsel failed
13 to present readily available mitigating evidence
14 that had already been developed at applicant's
15 previous trial and first resentencing proceeding.
16 Ms. Hammock previously testified in much greater
17 detail as to applicant's life history and
18 background and Mr. Evans testified to brain
19 disfunction, difficulty with attention and impulse
20 control. Counsel failed to have Ms. Hammock
21 testify to all the details and also counsel failed
22 to call Mr. Evans at all.

23 There is nothing about Ms. Glass' file that's
24 alleged in this final application. You could look
25 at my return. I addressed the specific

1 allegations. Now they're trying to go outside the
2 allegations and bring up some other issue of
3 ineffective assistance that we were not noticed of
4 and did not have time to properly investigate.

5 **THE COURT:** Okay. He says you all haven't
6 noticed them.

7 **MR. WEYBLE:** Your Honor, I will disagree. I
8 think Mr. Mabry is taking an unnaturally narrow
9 reading of our allegations. The allegation in
10 subpart 5 he's talking about does include the
11 contention that Ms. Hammock did not testify and
12 all the details that were available concerning
13 applicant's life history. It was not our intent
14 to confine the allegation simply to what was
15 already in the prior record. I think, certainly
16 one fair reading, very fair reading and reasonable
17 reading of our allegations is that --

18 **THE COURT:** That doesn't concern me. What
19 concerns me is that they would have an opportunity
20 to cross-examine this witness. I don't know what
21 you intend to -- what else might be there. I
22 don't have any idea.

23 **MR. WEYBLE:** Your Honor, I think two things.
24 Number one, the affidavit is quite narrow. All we
25 were looking to do with the affidavit is have her

1 establish that this was her file. She created it.
2 She maintained it. She gave it to us when we
3 asked. If Mr. Mabry wants to cross-examine her,
4 we have absolutely no problem with that. Right
5 now, she is in New York. We could not subpoena
6 her and make her come down here. My understanding
7 is that she will be back in early August. If Mr.
8 Mabry wants to depose her, we would absolutely
9 have no objection. We'll do all we could to help
10 to facilitate that.

11 I would also add that the issue of using
12 affidavits in PCR is not at all uncommon. It
13 happens all the time. I'm sure the Court is
14 familiar with Simpson versus Moore, where I think
15 there were 20-some-odd affidavits and 40-something
16 depositions or vice versa. We're not talking
17 about that extreme here. We are talking about one
18 affidavit. I think given the narrow scope of the
19 testimony that we are trying to offer this way, it
20 makes more sense than the alternative of -- trying
21 to make us go through the alternative of
22 compelling her to be here under the circumstances.

23 **THE COURT:** Okay.

24 **MR. MABRY:** Judge, this is the allegation
25 that they're trying to bring that under. I'll

1 hand that to the court. It is number 5. That's
2 what we investigated. Now they want to introduce
3 this affidavit of Ms. Glass that says this is my
4 file that I created in the first and second trials
5 and the third lawyers didn't ask for it. The
6 problem with that is if she does not explain who
7 did have that file. They want to go outside the
8 allegations and now go into something else when
9 they've got a witness who was the mitigation
10 investigator in the first two trials.

11 Certainly, she turned those files over to Mr.
12 Rollins and Mr. Allen or Mr. Sumner or Judge
13 Kinlaw or she turned them over to Ms. Hammock.
14 But she's not here to say that. They want to
15 limit her testimony to just the third lawyers
16 didn't ask me for my files. And that's not fair
17 to us.

18 If they wanted to bring that in, they could
19 have deposed before this trial. This case has
20 been pending for over a year and a half. They
21 were appointed a year and three months ago. So we
22 object. We are not trying any issues by consent.
23 We object to the admission of her affidavit.

24 **THE COURT:** All right. We'll -- I'll take
25 that under advisement. There's no reason that I