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[PP. 3001-3500]

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
(Capital PCR: 2005-CP-18-1368)
The Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case No. 2014-000387

S.C. Supreme Court

Kenneth Simmons, #5066,

Respondent/Petitioner,

v.

State of South Carolina,

Petitioner/Respondent.

APPENDIX

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STATE’S EXHIBIT #18b (CD 2 OF 2) [VIDEO DEPOSITION]

1 THE COURT: YES, PLEASE; I APOLOGIZE.
2 YOU'RE CORRECT. IT'S PRESIDENT'S DAY. ON TUESDAY
3 MORNING, OR AS SOON AS Y'ALL OPEN THE MAIL ON
4 TUESDAY, COULD YOU -- IS THERE A PIGEON HOLE THAT
5 YOU CAN GIVE THE SOLICITOR HIS DOWNSTAIRS?

6 MR. BAILEY: JUDGE, WE HAVE TWO
7 SECRETARIES THAT LIVE UP HERE, SO WE CAN GET THEM
8 TO COME BY AND PICK IT UP.

9 THE COURT: WOULD YOU DO THAT? AND THEN,
10 JIM, WOULD YOU -- WHAT, BY TWELVE NOON YOU'D HAVE
11 YOUR MAIL PUT UP, MA'AM?

12 MS. FOOTMAN: YES, SIR.

13 THE COURT: SO BY TWELVE NOON, JIM, WOULD
14 YOU CHECK ON THAT? AND THEN YOU CAN FAX THEM ON TO
15 JERRY UNLESS Y'ALL CAN AGREE ON THEM, BECAUSE WHAT
16 I HAD ASKED Y'ALL TO DO IS TO LOOK AT THOSE TUESDAY
17 SO YOU CAN BE READY. AND WE'LL START AT TEN
18 O'CLOCK WEDNESDAY MORNING. BUT I'D LIKE FOR THE
19 LAWYERS TO BE HERE AT 9:30 AND SEE IF Y'ALL CAN
20 AGREE ON THEM. AND IF YOU CAN, THEN WE'LL JUST
21 DICTATE INTO THE RECORD WHAT YOU'VE AGREED UPON.
22 NOW, MICHAEL, LET ME GIVE TO YOU -- THESE ARE THE
23 LAST BATCH THAT WE STILL HAVE UNDER CONSIDERATION.
24 DO YOU KNOW WHERE YOU PUT THAT OTHER BATCH?

25 THE LAW CLERK: YES, SIR.

1 (AT THIS TIME OFF-THE-RECORD DISCUSSION IS HELD.)

2 THE COURT: ALL RIGHT, MADAM CLERK;
3 HOPEFULLY BY WEDNESDAY MORNING YOU OR SOMEBODY WILL
4 HAVE HAD A CHANCE TO PUT THESE NEW POCKET PARTS UP
5 SO WE CAN---

6 MRS. MCKISSICK: THEY JUST CAME THE OTHER
7 DAY.

8 THE COURT: I UNDERSTAND. SO, MR.
9 SOLICITOR, YOU HAD WANTED SOME MOTIONS HEARD
10 TODAY.

11 MR. BAILEY: YOUR HONOR, I HAVE THREE
12 MOTIONS. MR. THEOS ADVISED ME THAT HE HAS A
13 COMMITMENT. I CAN WAIT UNTIL WEDNESDAY IF IT SUITS
14 THE COURT.

15 THE COURT: MR. THEOS' COMMITMENT; HE
16 SAID HE NEEDED TO BE IN DOWNTOWN CHARLESTON AT SIX
17 O'CLOCK.

18 MR. BAILEY: YES, SIR. WELL, I'M READY
19 TO PROCEED, YOUR HONOR.

20 THE COURT: AND IT'S FOUR O'CLOCK NOW.

21 MR. BAILEY: YES, SIR. YOUR HONOR, THE
22 FIRST MOTION THAT I'VE HANDED UP, I BELIEVE, WAS A
23 MOTION IN LIMINE TO PROHIBIT---

24 MR. THEOS: EXCUSE ME FOR ONE SECOND. IF
25 I CAN BE HEARD WITH RESPECT TO THE MOTIONS. YOUR

1 HONOR, COMMITMENT ASIDE, NEITHER MR. BELL OR I ARE
2 PREPARED TO ARGUE THESE MOTIONS AT THIS TIME.

3 THE COURT: WHEN DID YOU RECEIVE THEM,
4 MR. THEOS?

5 MR. THEOS: (NO RESPONSE.)

6 THE COURT: MR. BELL, WE STILL NEED TO GO
7 OUR THESE PETITION-SEEKING AUTHORIZATION OF FUNDS.
8 I STUDIED THEM LAST NIGHT, AND I'M PREPARED TO
9 DISCUSS THEM WITH YOU. PLUS, MADAM CLERK, I NEED
10 TO SEE YOU WITH THE LAWYERS IN CHAMBERS ABOUT
11 CERTAIN THINGS TO BE DONE WITH THE JURY. WE'VE
12 STILL GOT WORK TO DO TODAY EVEN IF WE DON'T HEAR
13 THE MOTIONS.

14 MR. THEOS: YOUR HONOR, I CAN'T ANSWER
15 YOUR QUESTION WHEN THEY WERE RECEIVED. THEY'RE
16 DATED FEBRUARY THE THIRD. I ASSUME I GOT THEM---

17 THE COURT: WELL, ONE IS DATED JANUARY
18 THE 27TH.

19 MR. THEOS: I'M LOOKING AT PARTICULARLY
20 THE MOTION IN LIMINE REGARDING MENTIONING THE
21 POLYGRAPH, RELATED TO THE POLYGRAPH. THAT'S DATED
22 FEBRUARY THE THIRD. JANUARY THE 27TH IS
23 PROHIBITING MOTION IN LIMINE REGARDING THE LEGAL
24 EFFECT OF A DIVIDED VERDICT IN THE PENALTY PHASE.
25 AND THE OTHER DATED THE 27TH IS RELATED TO

1 PROHIBITING THE DEFENSE FROM ARGUING -- INJECTING
2 RELIGIOUS ARGUMENTS.

3 THE COURT: BUT YOU DON'T HAVE SOME
4 SYSTEM IN YOUR OFFICE, MR. THEOS, WHEN THINGS ARE
5 RECEIVED THAT YOU MARK WHEN THEY'RE RECEIVED AND A
6 CALENDAR SO YOU CAN KEEP UP WITH THEM?

7 MR. THEOS: I DO, YOUR HONOR. BUT I DID
8 NOT BRING THE CORRESPONDENCE SECTION OF THE FILE.
9 I ONLY BROUGHT THOSE MOTIONS IN THOSE FOLDERS. I
10 DID NOT BRING THAT SECTION. I DIDN'T KNOW THERE
11 WAS GOING BE AN ISSUE RELATED TO THE DATE THAT I
12 RECEIVED THESE MOTIONS.

13 THE COURT: WELL, THERE WOULDN'T BE AN
14 ISSUE AS TO THE DATE YOU RECEIVED THE MOTIONS IF
15 YOU WERE PREPARED TO GO FORWARD BECAUSE I'VE
16 EXCUSED YOU FROM ALL OTHER COURT APPEARANCES, MR.
17 THEOS, AND I EXPECT YOU TO GIVE YOUR FULL UNDIVIDED
18 ATTENTION TO THESE MATTERS. SO, ARE YOU PREPARED
19 TO GO FORWARD ON ANY OF THE THREE MOTIONS?

20 MR. THEOS: YOUR HONOR, I'VE BEEN GIVING
21 MY FULL UNDIVIDED ATTENTION TO THESE MATTERS SINCE
22 SOME TIME IN DECEMBER. SO I CERTAINLY TAKE ISSUE
23 WITH ISSUES RELATED TO THAT.

24 THE COURT: AND YOU HAVE NOT LOOKED AT
25 THESE MOTIONS?

1 MR. THEOS: I'VE LOOKED AT THE MOTIONS,
2 YOUR HONOR. WE'VE BEGUN OUR RESEARCH RELATED TO
3 THE MOTIONS. BUT THE LAST TWO WEEKS THAT I'VE HAD
4 THESE MOTIONS FOR THOSE DATES, IT'S BEEN PRIMARILY
5 SPENT WITH MR. SIMMONS IN HIS EVALUATIONS. A LARGE
6 PART OF THE TIME HAS BEEN SPENT RELATED TO OTHER
7 PREPARATION OF THESE MOTIONS.

8 THE COURT: ARE YOU READY ON ANY OF THE
9 THREE MOTIONS?

10 MR. THEOS: (NO RESPONSE.)

11 THE COURT: MR. BELL, ARE YOU READY ON
12 ANY OF THE THREE MOTIONS?

13 MR. BELL: NO, SIR.

14 THE COURT: I DIDN'T HEAR MR. THEOS'
15 RESPONSE.

16 MR. THEOS: YOUR HONOR -- NO, SIR, I'M
17 NOT.

18 THE COURT: WELL, I WOULD SET THEM FOR
19 MONDAY, BUT I DON'T WANT TO BOTHER A COURT REPORTER
20 ON A HOLIDAY. BUT PLEASE BE PREPARED ON WEDNESDAY
21 MORNING AT TEN O'CLOCK.

22 MR. THEOS: YOUR HONOR, I WILL BE. I
23 HAVE STARTED MY PREPARATION, BUT I HAVE NOT
24 COMPLETED IT. AND WE SHOULDN'T TAKE, I WOULDN'T
25 THINK, MORE THAN TEN TO FIFTEEN MINUTES TO ARGUE IT

1 IN TOTAL.

2 THE COURT: ALL RIGHT. ARE THERE ANY
3 MOTIONS BY THE DEFENDANT?

4 MR. THEOS: NOT AT THIS TIME, YOUR
5 HONOR.

6 THE COURT: ARE THERE ANY OTHER MOTIONS
7 BY THE STATE?

8 MR. BAILEY: NO, SIR, YOUR HONOR.

9 THE COURT: AND GENTLEMEN, LET ME GET
10 Y'ALL TO BE PREPARED ON WEDNESDAY TO PUT INTO THE
11 RECORD, MR. THEOS AND MR. BELL, YOUR SOUTH CAROLINA
12 BAR NUMBER, WHEN YOU WERE ADMITTED TO THE BAR,
13 YOUR NUMBERS, TO EXTOL YOUR VIRTUES AS TO YOUR
14 QUALIFICATION TO PROCEED IN A DEATH PENALTY. AND I
15 ASSUME, MR. THEOS, YOU ARE LEAD CHAIR QUALIFIED.
16 AND YOU NEED TO PUT ALL THAT IN THE RECORD,
17 PLEASE. SO BE PREPARED TO DO THAT ON WEDNESDAY.
18 AND PLEASE, GENTLEMEN, IF YOU COME UP WITH ANY
19 OTHER THOUGHTS ABOUT MOTIONS, PLEASE TRY AND GIVE
20 AS TIMELY A NOTICE AS POSSIBLE TO OPPOSING COUNSEL
21 SO THAT WE CAN DISPOSE OF AS MUCH AS WE CAN ON NEXT
22 WEDNESDAY BECAUSE I WILL HAVE A COURT REPORTER
23 STARTING AT TEN. IF Y'ALL WILL BE HERE AT 9:30 AND
24 TRY AND REVIEW THE NEW JURY INFORMATION TO BE
25 BROUGHT IN SO Y'ALL CAN DISCUSS IT AND ATTEMPT TO

1 ARRIVE AT A CONSENSUS WHICH THE COURT MUST
2 APPROVE. THE CLERK STILL IS -- ONLY THE COURT CAN
3 EXCUSE THE JURORS. AND I WON'T NEED THE SOLICITOR
4 TO TALK ABOUT THESE MOTIONS FOR EXPENSES EX PARTE.
5 BUT, GENTLEMEN, I'M GOING TO ASK Y'ALL TO GO TO
6 CHAMBERS AND LET ME GO OVER A NUMBER OF MATTERS
7 WITH YOU. I'VE GOT COPIES OF SOME THINGS I CAN
8 GIVE YOU TO LOOK AT SO WE CAN GET YOUR VIEW ON
9 WEDNESDAY, PLEASE. THANK YOU. AND, MADAM COURT
10 REPORTER, MAY I PLEASE THANK YOU. HOPEFULLY I'LL
11 SEE YOU WEDNESDAY.

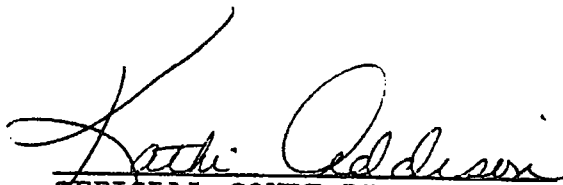
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14 * * *END OF TRANSCRIPT OF RECORD* * *
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C E R T I F I C A T E

I, THE UNDERSIGNED KATHI W. ADDISON, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD IN THE HEARING OF THE CAPTIONED CASE IN THE COURT OF GENERAL SESSIONS IN DORCHESTER COUNTY, ON THE 11TH AND 12TH DAYS OF FEBRUARY, 1999.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

JUNE 4, 2001


OFFICIAL COURT REPORTER

MY COMMISSION EXPIRES: 2/23/2008

3009 ORIGINAL

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF COLLETON)

COURT OF GENERAL SESSIONS
98 GS 18 75, 76, 77, 78, 79

4 STATE OF SOUTH CAROLINA)
5)
6)

versus

TRANSCRIPT OF RECORD

8 KENNETH SIMMONS,
9 Defendant.
10

11 Walterboro, South Carolina
12 April 30, 1998

13 B E F O R E:

14 HONORABLE RODNEY PEEPLES, Judge.

15 A P P E A R A N C E S :
16

17 For the State:

WALTER BAILEY, Esq.
Solicitor

18 MEG McDONALD, Esq.

19 For the Defendant:

JERRY THEOS, Esq.

20 GENE DUKES, Esq.

21 Reporter:

KAREN MULLINS

22 HARRIET P. BENNETT
23 Reporter, Ninth Judicial Circuit
24 P. O. Box 1575
25 Mt. Pleasant, S.C. 29465

1 (The within matter came before the Court on April
2 30, 1998)

3 THE COURT: Madam Court Reporter, please, maam, let the
4 record reflect that the Court is proceeding at this time in
5 regards to the various indictments of the State of South
6 Carolina versus Kenneth Simmons -- S I M M O N S.

7 Mr. Simmons is present with his Court-appointed counsel,
8 Messrs. Gene Dukes of the Dorchester County Bar and Jerry
9 Theos of the Charleston County Bar.

10 On behalf of the State are Solicitor Walter Bailey and
11 Deputy Solicitor Meg McDonald.

12 We also have present with us the victim advocate lady
13 whose name is Melanie Locklair.

14 We also have from the City of Summerville Chief Roy
15 -- last name?

16 CHIEF WHITEHEAD: Whitehead.

17 THE COURT: Thank you, and there are two members of the
18 victim's family who are present, and your name, maam, is . .

19 MS. WILSON: Virginia Wilson.

20 THE COURT: . . Ms. Virginia Wilson and, maam, your name
21 is . .

22 MS. SIMMONS: Blondell Simmons.

23 THE COURT: . . Blondell Simmons.

24 These proceedings involve Warrants Numbers F7192701234 and
25 then F719007, and there's an indictment number 98 GS 18 -- it

3011

1 couldn't be 75 dash 79. Solicitor, do you have that?

2 MR. BAILEY: Yes, sir, I think there are three of them.

3 THE COURT: Okay, I understand. Indictments 75, 76, 77,
4 78 and 79.

5 MR. BAILEY: Yes, sir.

6 THE COURT: That's why it printed out as it is on here.
7 I understand.

8 In any event, Madam Court Reporter, pursuant to the
9 Order of Chief Justice Finney, I have been appointed or as-
10 signed, you might say, to preside over the trial of this
11 case.

12 There are several matters that need to be discussed now
13 with counsel for Defendant relative to ex parte Orders for
14 expert witnesses and investigations, etcetera.

15 That matter will be handled outside the presence of the
16 Solicitor today, but at this time the matter for hearing be-
17 fore this Court -- and the date of the assignment of this
18 Court was February 19, 1998, and that Order provides that
19 Judge Peebles shall, pursuant to such assignment, have and
20 exercise all powers and duties of a Presiding Circuit Court
21 Judge of the First Judicial Circuit.

22 And there will be an Order forthcoming, gentlemen and
23 ladies, from the Court Administration from the Chief Justice,
24 while I don't deem it necessary, because that initial Order
25 covers the waterfront.

3012

1 To touch all bases, they will send an Order assigning
2 me to Dorchester County on the date of the -- although I
3 think the general Order would cover it.

4 The Court does not have a file or has not reviewed the
5 original file in this case, but there is a motion that was
6 filed on February 10, 1998, by Mr. Theos.

7 Gentlemen and ladies, may I dismiss with the formalities
8 and refer to you as Gene, Jerry, Walter and Meg, with your
9 permission?

10 In that Petition dated February 9 and motion dated Feb-
11 ruary 10, Mr. Theos moves on behalf of the Defendant, Kenneth
12 Simmons, for this Court to vacate the previous Order of this
13 Court for competency evaluation filed on January 30, 1998.

14 I don't have the original file. Who was the Judge that
15 signed that Order?

16 MR. THEOS: Judge Brown signed it.

17 THE COURT: Judge Luke Brown signed that, and I do not
18 have that Order, but I assume that Mr. Dukes had consented
19 to that.

20 I note here that you did -- this is a certified copy of
21 January 30th, and suffice it to say that it is the usual
22 Order for competency evaluation. The usual form that is
23 used, or it is the usual form Order for this evaluation.
24 I don't see anything that is unusual about the Order.

25 The Court was presented this morning with a motion to

3013

1 vacate the Order, and, again, let me thank each of you for
2 being here.

3 I would have heard this earlier -- Jerry, you were kind
4 enough to come to Walterboro at least a month ago, and be-
5 cause of my Court schedule and the Solicitor was involved in
6 a case that was tried, I believe, in Oconee County, and you
7 traveled to -- did you also try one in Cherokee?

8 MR. BAILEY: I attended the one in Oconee and tried
9 the one in Cherokee County.

10 THE COURT: And so last week when I was calling people,
11 I couldn't -- normally I would ask you to check your calen-
12 dar and let me know which were available, and because I had
13 this window of opportunity, I went ahead and set it without
14 checking your schedules.

15 In the future, obviously I will try to check with you
16 before we set another hearing.

17 So is there anything that you all wish to place on
18 the record before I hear you in support of the motions here?

19 MR. THEOS: I don't believe so, Judge.

20 THE COURT: May I please hear from you?

21 MR. THEOS: Yes, sir. Judge, I believe that my motion
22 reflects what procedurally took place, and that is that as
23 you stated there was an Order signed on January 22nd of 1998
24 and it was thereafter filed on January 30 of 1998.

25 Mr. Bailey is apparently the moving party, and Gene

3014

1 Dukes consent as an attorney for the Defendant, Mr. Simmons.

2 Judge, there are a number of grounds upon which we base
3 our motion to vacate. I'll start with the first, and all
4 these arguments are affected not only in the motion to vacate
5 but I think they are elaborated on. There is a memorandum
6 in support of it.

7 THE COURT: Let me interrupt you. Allen Toporek has
8 been excused, and you have been, or have you ever been
9 formally appointed?

10 MR. THEOS: Judge, Allen Toporek was initially appointed
11 in this case. I do all of our Firm's criminal trial work,
12 and when he got appointed he came to me and said, help, and
13 I said, quite frankly, rather than just helping you, Allen,
14 I think it would be more appropriate for me to be substituted.

15 THE COURT: Again, my question is, have you been formally
16 appointed?

17 MR. THEOS: Yes, sir. There is an Order of . .

18 THE COURT: That's all I was asking.

19 MR. THEOS: Judge, first of all, with respect to death
20 penalty cases, as you're aware, there is a statute that re-
21 quires the involvement of two attorneys, and that is Section
22 16 3 26B of the Code.

23 That code section requires two attorneys if the Defen-
24 dant is indeed indigent and cannot afford counsel. That stat-
25 ute requires . .

1 THE COURT: Can we address the indigency issue? I as-
2 sume there was a finding of indigency by Judge Brown, is
3 that right, Solicitor?

4 MR. BAILEY: I don't think there is a formal Order is-
5 sued. I think impliedly by making the appointments he found
6 the indigency.

7 THE COURT: Well, is it necessary to inquire at this
8 time requiring to his indigency? I assume he was arraigned
9 by the Clerk?

10 MR. BAILEY: Yes, sir, he's been arraigned and death
11 penalty notice was served.

12 THE COURT: And he filled out a form setting forth his
13 assets.

14 DEFENDANT: No.

15 THE COURT: Well, perhaps I should have the Clerk get
16 me the original file, and it might be necessary to have that
17 filled out.

18 Let me ask the Clerk to get me the original files on
19 98 GS files 75 through 79.

20 Thank you.

21 MR. THEOS: Judge, you want me to go ahead and proceed?

22 THE COURT: Yes, go ahead.

23 MR. THEOS: Your Honor, with respect to that code sec-
24 tion that I've handed you a copy of, 16 3 26B, and assuming
25 Mr. Simmons qualifies as an indigent and therefore is

1 entitled to appointment of two attorneys by the State, and
2 by the Court, . . .

3 THE COURT: Certainly we'll assume arguendo he's indi-
4 gent and the statute says shall appoint two attorneys.

5 MR. THEOS: Right, and in accordance with that, it's
6 my understanding, although I haven't seen all the Court's
7 Orders -- it's my understanding that in accordance with
8 that Mr. Dukes was appointed.

9 (The Court speaking to someone off the record)

10 THE COURT: Excuse me. Go ahead.

11 MR. THEOS: Judge, it's my assumption that in accordance
12 with that code section and the indigency of the Defendant that
13 Mr. Toporek was initially appointed to the case and Mr. Dukes.
14 I understand Mr. Dukes is a contract public defender with
15 Dorchester County.

16 MR. DUKES: Yes, the Public Defender Corporation.

17 MR. THEOS: I haven't seen an Order of appointment re-
18 lated to Mr. Dukes, but I don't know one is required in those
19 circumstances.

20 In any event, in accordance with that Code Section both
21 lawyers are appointed.

22 Now, Your Honor, this consent Order was not executed by
23 both attorneys for Mr. Simmons. The purpose of that
24 statute has to do . . .

25 THE COURT: Had Mr. Toporek been appointed then?

3017

1 MR. THEOS: Mr. Toporek was appointed, Your Honor, as
2 referenced . .

3 THE COURT: On what date? Before or after January 22nd?

4 MR. THEOS: Your Honor, I don't have the Court's file,
5 as you don't. The Court's file will reflect when it was.
6 I know that Mr. Toporek received a phone call initially
7 from the Clerk, and she advised him that he was being ap-
8 pointed, at which time we began our efforts on behalf of Mr.
9 Simmons.

10 I can't tell you what is the formal date that the writ-
11 ten Order was signed. Perhaps Mr. Bailey ..

12 THE COURT: We'll look at it in the file. Go on.

13 MR. THEOS: Your Honor, neither Mr. Toporek nor I were
14 placed on notice by the State that there was a desire to seek
15 the evaluation of Mr. Simmons which is required -- notice is
16 required to be given.

17 Neither Mr. Toporek nor I were consulted by either Mr.
18 Bailey or Mr. Dukes prior to the -- to Mr. Dukes consenting
19 to this Order.

20 THE COURT: Mr. Simmons has not been evaluated?

21 MR. THEOS: Mr. Simmons has not been evaluated.

22 THE COURT: No pain, no gain. No harm, no foul.

23 MR. THEOS: At this point I don't disagree with you,
24 Judge.

25 The problem that I see is that the Order itself reflects

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1 that, I have considered the showing made with respect to the
2 motion for such an Order, and am of the opinion -- as you
3 said, it's the normal form Order -- that the Defendant should
4 be so examined.

5 Judge, two things come to question. One is, was there a
6 hearing where a showing was made, and I doubt it?

7 Secondly, was there a motion that was filed that made
8 such a showing, and I doubt that as well?

9 Without a proper showing to the Court, without a motion
10 placing everybody on notice that the State was seeking it, I
11 don't think it was properly obtained, first of all.

12 Secondly, because two attorneys are required by the
13 statute, I don't believe the statute has been complied with.

14 Third, Your Honor, . . .

15 THE COURT: We're first going to have to see when he was
16 appointed, because if he had been appointed then he should
17 have consented, but if you hadn't been appointed that was a
18 moot issue.

19 MR. THEOS: Then, Your Honor, thereafter even if we as-
20 sume for argument sake that either Mr. Toporek had not been
21 officially appointed and Mr. Dukes may have had the author-
22 ity at that time, although I would argue that, even if Mr.
23 Toporek hadn't been appointed, then the statute still re-
24 quired the appointment of two lawyers, and I would argue,
25 Your Honor, that there still has to be a showing made to the

1 Judge considering the motion, and that is reflected in State
2 versus Evans, Your Honor, along with Section 44 23 410.

3 The statute itself states in part, and I quote, that
4 whenever a Judge of a Circuit Court -- I've got a copy of the
5 Code Section, Your Honor -- that whenever a Judge of a Cir-
6 cuit Court has reason to believe that a person on trial be-
7 fore him charged with the commission of a criminal offense
8 is not fit to stand trial because such person lacks the capa-
9 city to understand the proceedings against him or assist in
10 his own defense as a result of a lack of mental capacity --
11 and it goes on, but the brunt of it is that a Court or a
12 considering Judge has to have a reason to base this opinion
13 on that either a competency evaluation is required -- in
14 this case, apparently a number of things were requested.

15 A competency evaluation, a valuation for purposes of
16 the M'Naghten test for insanity, and the Order speaks for
17 itself, but it refers to mental retardation and mental disa-
18 bilities.

19 But without a proper showing to the Court and something
20 upon which the Court could base its decision, I'm not sure
21 how the Order was signed, but apparently with the agreement
22 of the two attorneys.

23 Now, that raises a number of other questions. On what
24 basis did Mr. Bailey and Mr. Dukes find that there was a
25 need for such an evaluation, when there wasn't anything in

1 in the record to indicate that there were issues of compe-
2 tency or incompetency at this point, sanity or insanity,
3 mental illness or not, mental retardation, anything.

4 There isn't anything in the record. There isn't any-
5 thing upon which it could have been based.

6 That doesn't mean, Your Honor, that at some point there
7 won't be, but the State hasn't been placed on notice of any
8 defenses pertaining to insanity or mental illness, or the
9 State hasn't been placed on notice that the Defendant sought
10 to assert -- Defendant's counsel sought to assert Mr.
11 Simmons was not competent.

12 Without anything to base it upon, it appears to me that
13 it was prematurely done, at best, and inappropriately done
14 at worst.

15 At some point, it may become . .

16 THE COURT: Well, now, Mr. Theos, let me -- let's -- you
17 are getting enamoured with the sound of your own voice, if
18 you will excuse my comment.

19 But twice now you have expressed that you doubt this
20 was done by Judge Brown and you doubt that, talking about
21 things inappropriate.

22 Let's just get to the bottom line with this thing, and
23 that is this. I'm satisfied that Judge Brown would not have
24 signed this Order -- the Order speaks for itself.

25 There is no need for you to attack the validity of the

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1 Order. Let's don't waste time.

2 I've been assigned this case and we'll just consider,
3 we ab initio beginning today. While I don't -- normally
4 one Circuit Judge can't overrule another Circuit Judge, and
5 we'll find out when we get the file, which you should have
6 done before you got in here, to find out when Mr. Toporek
7 was appointed.

8 You don't have that in your file?

9 MR. THEOS: Judge, there are a number of things from
10 the original file that we were not provided.

11 THE COURT: Well, surely Mr. Toporek was provided with
12 the Order, but let's get down to the bottom line of it, and
13 that is this, and I know nothing about the facts of this
14 case.

15 Mr. Solicitor, I note from this Order to the State Hos-
16 pital it states that on -- you want them to examine him to
17 see if he met the M'Naghten test, his actions on or about
18 September 1, 1996, so I assume that's on or about September
19 1, 1996 is when the alleged offense occurred.

20 Is that correct?

21 MR. BAILEY: Yes.

22 THE COURT: And when was the subject arrested?

23 MR. THEOS: Judge, if I can interject, there is a copy
24 of the Order before me that was signed and dated on January
25 22nd.

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1 THE COURT: The same date of Judge Brown's Order.

2 MR. THEOS: Same date it was signed.

3 THE COURT: I assume Mr. Toporek was not in Dorchester
4 at that time. Gene, do you know?

5 MR. DUKES: He was not.

6 THE COURT: He was not, and let me just say while it
7 is certainly the better rule where there are two attorneys
8 for both of them to sign the consent, I find nothing wrong
9 with Mr. Dukes having consented for him to be sent to the
10 hospital.

11 But if there was anything wrong with that, let me cor-
12 rect it now, but no need to cast aspersions on what Judge
13 Brown did. Let's just take where we are now and go forward.

14 So when was he arrested, Solicitor?

15 MR. BAILEY: December 9, 1997.

16 THE COURT: December 9 of 1997, and what is -- while
17 I don't want you to reveal anything about your prosecution
18 or him to reveal anything about your defense, I can read
19 here the indictments.

20 The one, 98 76, says he committed a crime of armed
21 robbery, criminal sexual conduct and kidnapping -- there's
22 an armed robbery, there's a murder, there's a CSC first degree
23 indictment, and there's a kidnapping indictment.

24 Briefly, tell me -- I'm just talking about several min-
25 utes, the gravamen of these offenses under the State's view.

1 MR. BAILEY: Your Honor, the victim, Lillie Belle Boyd,
2 was 89 years old; lived by herself in Summerville.

3 Someone entered her house during the darkness. She
4 was severely beaten. She was beaten in the face, several
5 ribs were broken, and she was bound. She was raped, and we
6 think the motive was robbery.

7 That's basically what occurred. Mr. Simmons was ar-
8 rested some months later, approximately 18 months later.

9 THE COURT: Okay, you've told me about it. I just did
10 not know what the alleged aggravating circumstances were,
11 and you've got a victim that's how old?

12 MR. BAILEY: Eighty-nine.

13 THE COURT: And she was killed at the time?

14 MR. BAILEY: Yes, sir, she was. She was found by
15 Ms. Wills, her sister, partially bound and on the floor in
16 her kitchen.

17 THE COURT: All right, and you've got to understand
18 that the State has an obligation to afford due process to
19 save sinners and all Defendants, and so, again, in defense
20 of Judge Brown signing this Order, or for Solicitor Bailey
21 asking for it, or for Mr. Dukes consenting to it, if the
22 subject didn't have the ability to meet the M'Naghten test
23 to conform his conduct and didn't know legal or moral right
24 from legal or moral wrong on the date of the offense, then
25 perhaps they couldn't proceed to trial on it, if there was

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1 permanent insanity.

2 So I see no problem with the Order having been entered
3 but let's just -- that water has passed under the bridge, and
4 let's just go from here, forward.

5 The bottom line is this, and I don't think it would be
6 any revelation or in any way detrimental to the Defendant
7 to share with -- on the record the fact that you have in your
8 request -- you have your ex parte funds. You have requested
9 funds so that a qualified psychiatrist and/or psychologist
10 can be obtained to conduct an evaluation of said mental con-
11 dition.

12 The bottom line is this. If you and Mr. Dukes tell this
13 Court that your client is mentally competent and there will
14 not at any time during the trial be an issue as to mental
15 illness or mental incapacity, or the ability to understand
16 the attorneys, or the court proceedings -- if the mental
17 capacity of the Defendant is not going to be in any way an
18 issue, that suits the Court fine.

19 You all plot your strategy and you plot your strategy,
20 but if that is going to be an issue, and I don't know if
21 it is or not -- I didn't know anything but the name of this
22 case until I looked at this file here this morning because
23 I don't read the News & Courier and I don't -- I know nothing
24 about when this thing happened or anything.

25 But it is as simple as that. If you feel that there is

1 going to be no need for a psychiatric evaluation, then I
2 will vacate this Order and say that shall not be done, and I
3 won't approve any money for a psychiatrist or psychologist.

4 You can't have your cake and eat it too, so you all --
5 I mean, you may want to confer with Mr. Dukes, and I'll be
6 glad to hear you in response to my suggestion to you.

7 But if . .

8 MR. THEOS: I'm prepared to respond.

9 THE COURT: If that's going to be an issue, then the
10 State is entitled to have the subject examined, and that's
11 the case law.

12 That's not just . .

13 MR. THEOS: I don't disagree with you, Judge, but at
14 this point in time the defense counsel has no idea whether
15 or not it is an issue or will become one, because we have
16 not had the Defendant evaluated.

17 We're not in a position, I will state with all due re-
18 spect, with regards to the ex parte motion that was made and
19 the revealing of it to the State, that we sought funds for
20 that, that I would object and take exception to that . .

21 THE COURT: No, sir, . .

22 MR. THEOS: . . revealing to the State, but since it's
23 been revealed, Your Honor, obviously we are not in a posi-
24 tion ourselves to advise the Court or the State, as we're
25 required to do, whether or not we seek -- we will be seeking

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1 to make any of those issues . .

2 THE COURT: An issue.

3 MR. THEOS: . . issues in the case, whether they be for
4 the defense of the crime itself or in mitigation.

5 And without our ability to make that decision, I believe
6 again it would be premature for the State to seek an evalua-
7 tion at this point.

8 I think once they are placed on notice that this is or
9 is not an issue, then I wouldn't disagree with that. I think
10 the case law is clear. I think the statute is clear.

11 THE COURT: Well, obviously if . .

12 MR. THEOS: I just think it's premature.

13 THE COURT: . . if the Court does direct him to be exam-
14 ined by the State, it would have to be with the clear under-
15 standing that any statement that he makes is
16 not going to be used as evidence in the trial by the State.

17 MR. THEOS: Well, that is . .

18 THE COURT: It would be with that clear admonition, but
19 a trial is a search for the truth, and obviously that is tem-
20 pered very strongly with the rights that every citizen has
21 under the Constitution and State Law, but I'll be glad for
22 you to call to my attention and share with me -- it's not a
23 matter of who comes up to bat first. Everybody is going
24 to have their turn at bat.

25 But as to any case that says that it's in violation of

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1 any rights of the Defendant for the State to have him exam-
2 ined before you have him examined -- are you aware of any
3 such case?

4 MR. THEOS: I'm not aware of any statutory or case law
5 but generally, Your Honor, the defense counsel rarely, if
6 ever, consents to evaluation by the State prior to seeking
7 their own, in order to determine whether there is a basis for
8 it.

9 That obviously was done in this case without the pro-
10 tective provision that you mentioned regarding inculpatory
11 statements.

12 That also was one of my concerns that I referenced in
13 my memorandum.

14 THE COURT: I'm speaking of exculpatory or inculpatory.
15 He just wouldn't be able to use it because if there's an
16 examination, Mr. Simmons has got to state the truth, and we
17 cannot have you gentlemen there to advise -- have you to ad-
18 vise him at the time of the examination unless you all ask
19 him that.

20 If you ask for it, I might give it to you, but I think
21 in order to have an appropriate evaluation it would have to
22 be with safeguards to protect the rights of the Defendant
23 so he could freely speak to the State examiners, if that be
24 done.

25 MR. THEOS: And, additionally, Your Honor, if Mr. Simmons

1 asserted his Fifth Amendment Right not to talk at all to
2 the examiners, if we had not had this hearing and he had
3 been whisked up to Columbia to do it, then the State could
4 have taken the position that we should not be allowed to
5 introduce any similar evidence.

6 And I don't -- I don't want to create that situation
7 either.

8 THE COURT: It didn't happen, so why worry about that?

9 MR. THEOS: Well, I don't want it to happen, Your
10 Honor, and I'm just concerned . .

11 THE COURT: Well, I have to tell you this now, subject
12 to any further research, that if you advise him to take the
13 Fifth Amendment during the psychiatric evaluation by the
14 State, then I'm not going to approve a psychiatric evalua-
15 tion for the Defendant.

16 So make your choice. I just don't understand your
17 strategy, but you make your own strategy.

18 MR. THEOS: Your Honor, this is premature to even con-
19 sider strategies, since we have not had funding approved. We
20 have not begun our investigation of the case because of it,
21 so it's entirely premature to even consider discussing strat-
22 egy or plotting it out as defense counsel.

23 So I am not toying with the Court, but I don't want
24 to have . .

25 THE COURT: I'll give you a chance to confer with your

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1 client.

2 MR. THEOS: Oh, I have conferred with my client, Your
3 Honor, but . .

4 THE COURT: Do your discussions appear to be rational
5 with him or . .

6 MR. THEOS: Your Honor, what my discussions are with
7 my client are privileged.

8 THE COURT: Mr. Theos, I'm not trying to find out what
9 you discussed with him. I'm just talking about his general
10 nature of his responses and his ability to answer your
11 questions, and things like that.

12 I obviously wouldn't want to know what you discussed
13 with your client. You know better than that. I obviously
14 wouldn't ask what you discussed with your client. You know
15 better than that.

16 I'm surprised you'd ever suggest I'd ask you that.

17 MR. THEOS: Your Honor, the nature of our discussions
18 is just as privileged as the contents of it, and, again,
19 I'm not toying with the Court but . .

20 THE COURT: I asked you about the nature of your discus-
21 sions.

22 MR. THEOS: Your Honor, and I don't want to air any
23 dirty laundry in this hearing, but Mr. Dukes consented to
24 this Order without having discussed this with the Defendant.

25 I'm not sure what it was based upon.

1 THE COURT: I said, just forget about that. We are
2 starting from square one.

3 You haven't conferred with Mr. Dukes? You've been
4 appointed since January 22nd, your firm, and today is April
5 30th, and you haven't conferred with Mr. Dukes?

6 MR. THEOS: I'd be happy outside of the presence of
7 these other individuals, Your Honor, to state on the record
8 exactly what I've done in an effort to confer with Mr.
9 Dukes, and I'm prepared to do that.

10 THE COURT: That's why I asked you to come down here
11 early this morning, did I not, on the phone, so you could
12 confer with Mr. Dukes before we got in this hearing so hope-
13 fully you all could be on the same song book?

14 MR. THEOS: I've attempted to do that, Your Honor.

15 THE COURT: Well, I'll be glad to excuse these people
16 if you feel there is something you need to share with me.

17 MR. THEOS: If we're not considering -- I'm not sure I
18 understand. Is this Order -- if we're not considering it
19 then, are we considering . .

20 THE COURT: I haven't ruled on it yet, but I told you
21 we would start this hearing ab initio today as if, you know
22 -- no need to debate whether Judge Brown properly signed
23 the Order or not.

24 The Order is there, but, I mean, I'll be glad to visit
25 it, so to speak.

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1 But, you know, it's just simple enough to me that if
2 -- if you think this is going to be an issue, I think it's
3 something that should be put out of the way. By that, I
4 mean for the safeguards and protections that your client has
5 as to any inculpatory or exculpatory statements, some decis-
6 ion must be made as to whether -- what his mental capacity
7 is now.

8 I mean, this is a capital case. Is the State going to
9 put somebody on trial that there is no determination of what
10 his mental capacity is?

11 You've got to see whether he meets the test of the
12 M'Naghten Rule, so they will know how to proceed and so will
13 you and Gene or whoever know how to proceed.

14 So, to me, I just -- even though other Judges have
15 told me that tried death penalty cases that if there is an
16 agreement between State and defense counsel that insanity
17 is not an issue, or mental capacity is not an issue, then
18 the law abhors a futile act and there would be no need --
19 if you're satisfied from your visits with your client that
20 -- not as to the nature of what was discussed but his ability
21 to articulate and to recall so that you as a general layman
22 think there is no need for mental evaluation and that's not
23 going to be an issue, then I'll be glad to rescind that
24 Order and direct that he not be evaluated by the State.

25 But I think the fair thing to do in his best interests,

1 and you and Mr. Dukes to decide what is in his best inter-
2 ests, is to go ahead and lay the cards up on the table as
3 to what his mental condition is, so you all can put that
4 issue behind you and move on to another one.

5 Or if that is an issue, then either side prepare to put
6 your best foot forward before the finders of the fact, that
7 being the jury at the trial of the case.

8 MR. THEOS: I understand your position and understand
9 your statements, and I don't disagree with it. We're not
10 in a position at this point in time to say whether it is or
11 is not going to be an issue.

12 THE COURT: Well, I repeat to you again . .

13 MR. THEOS: Whether it be in the guilt or the penalty
14 phase.

15 THE COURT: Sure. If the State is insistent upon this
16 examination, I will be glad to require them to make a show-
17 ing as to why they want it done, if you feel that is neces-
18 sary.

19 But I tell you again, you can't have your cake and eat
20 it too, and if he's not -- if you all don't conclude that
21 a mental examination, with afforded safeguards as to any-
22 thing he might reveal about the facts of the case, would not
23 be available to the State or admissible at trial -- if the
24 State doesn't have that opportunity to determine his mental
25 capacity, then the Court is not going to approve psychiatric

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1 or psychology expenses for him to be examined.

2 If you've concluded that's not necessary, and you're
3 not going to use it as a defense, I'm not going to -- it's
4 not a matter of who goes to bat first. Everybody is going
5 to get a turn at bat, if batting is an issue in this case.

6 MR. THEOS: I don't know that it is, Judge, but I think
7 we've both said the same things a couple of times in a
8 couple of different ways.

9 I understand your position, and I think I have articu-
10 lated ours, and given the fact that we are not in a posi-
11 tion to waive any potential defenses related to those issues
12 or pertaining to mitigation phase, we can't represent to the
13 Court we are not going to assert any of them.

14 If your ruling is that we're not prepared to so repre-
15 sent that to the Court that you're going to allow this eval-
16 uation to take place with certain safeguards that are not
17 now in effect, then . .

18 THE COURT: I can hold the evaluation in abeyance.

19 MR. THEOS: . . I understand your ruling.

20 THE COURT: I can hold the evaluation in abeyance. I
21 haven't heard from the State yet, but this subject has been
22 in jail since December 5, 1997, and today is April 30 of
23 1998, some four and a half months later, and I don't know
24 when it will be set for trial.

25 I understand -- the Solicitor told me while you were

1 conferring with Mr. Dukes that he has a trial set August
2 24 in Orangeburg.

3 MR. BAILEY: Yes, sir.

4 THE COURT: And then there is another case that Judge
5 Rawl has been assigned to, and Judge Rawl is requestig a
6 date be set in that case which may or may not come before
7 this one.

8 I just don't know yet, because before a date is set I
9 would ask the Solicitor and you all not to request a date
10 from the Chief Justice or Court Administration until all
11 four of us can confer; that is, State's counsel, defense coun-
12 sel and the Court, because everybody has other files and
13 other courts and other responsibilities, and I don't think
14 a date should be forced upon anyone until you make sure
15 the State and defense has had ample time to properly prepare,
16 and, depending upon my court assignments and whether I have
17 two other death penalty cases besides this one, and this is
18 the last one I was assigned to, not the first one.

19 MR. THEOS: Yes, sir. I would ask that if you are in-
20 clined not to vacate the Order, I would ask that you hold the
21 execution of it in abeyance for thirty days.

22 THE COURT: I'll be glad to hear from the State. Any
23 objection to the Court staying the efficacy of the Order for
24 30 days until the first of June?

25 MR. BAILEY: No, sir, not at all.

1 THE COURT: I have no problem in doing that. Do you
2 consent to that, Mr. Dukes?

3 MR. DUKES: Yes, sir.

4 MR. THEOS: June 30?

5 THE COURT: Well, thirty days, June first, give or take.

6 MR. THEOS: I don't want to deprive the State of what
7 they statutorily are entitled to pursuant to case law, but I
8 want to -- Your Honor, I want to make sure that those safe-
9 guards are in effect and I can draft an Order that supple-
10 ments this or to replace this with those safeguards in
11 effect, and I will fax a copy of it to Mr. Bailey and Mr.
12 Dukes before I submit it to you.

13 THE COURT: Is that the reason for the 30 day request,
14 that you want to do further and other research and confer
15 with co-counsel and your client, because I assume -- Solici-
16 tor, maybe you can tell me.

17 Assuming you all arrive at the safeguards and Mr.
18 Theos and Mr. Dukes agree that they don't have an objection
19 to it with the safeguards, how long does it take? Do you
20 have to get in line for a serious case such as this?

21 MR. BAILEY: In a serious case, they'll bump them ahead.
22 In fact, they had already set Mr. Simmons up for evaluation
23 after Judge Brown signed the Order.

24 THE COURT: All right.

25 MR. BAILEY: And Mr. Theos contacted us and said he was

1 going to object to it and asked me to hold off on the actual
2 evaluation until he could be heard, which I agreed to do.

3 So I can set it up almost any time. What I didn't want
4 to do, Judge, was to kind of get boxed in and not have suffi-
5 cient time if they had an evaluation before any trial date.

6 THE COURT: I understand.

7 MR. BAILEY: So 30 days is fine.

8 THE COURT: But, I mean, do you think within 30 days --
9 because we don't want to hurry anything and we don't want to
10 slow anything.

11 We want it to go at a pace that is fair to everyone
12 and within the confines and parameters of the other assign-
13 ments and duties and responsibilities.

14 So do you think 30 days -- if you contact them on June
15 first, do you think the evaluation could be completed within
16 30 days?

17 MR. BAILEY: They could start it within two weeks, and
18 unless they had a problem they could complete it within prob-
19 ably ten days.

20 THE COURT: And you could get a report . .

21 MR. BAILEY: Should be able to get a report within a
22 month after they see him.

23 THE COURT: So we're talking six to eight weeks from
24 the time you call them?

25 See, I have no way of . .

1 MR. BAILEY: It depends on which psychiatrist gets it,
2 but that would be fair, I think.

3 THE COURT: All right. So, gentlemen, is it your desire
4 that your motion to set aside or vacate the Order of Judge
5 Brown -- that I stay the Order until June first or such other
6 time as is appropriate -- June first of 1998 -- is that
7 sufficient?

8 MR. THEOS: Yes, Your Honor. I think what I stated,
9 since it seems to be your inclination, not to set it aside
10 in total, and understanding the case law and statutes, to
11 stay the execution of it.

12 THE COURT: The State doesn't object to that.

13 MR. THEOS: No, sir.

14 MR. BAILEY: No, sir.

15 MR. THEOS: And I will draft a proposed Order which says
16 things relating to the timing of it as well as the other
17 safeguards related to statements that he may or may not make.

18 THE COURT: Okay. Anything further today on the record,
19 gentlemen?

20 MR. BAILEY: Just to clarify the record, and I'm not
21 supposed to talk once you have ruled, but at the time that
22 I moved for this evaluation, Mr. Dukes was the only attorney
23 involved in it.

24 A death penalty notice was served on January 22nd. At
25 that time, Mr. Toporek was named as the second attorney, but

1 I had moved for evaluation prior to that and Mr. Dukes was
2 the only lawyer involved at that time.

3 I wasn't trying to leave anybody out.

4 THE COURT: I understand. Mr. Toporek was assigned
5 the same date the Order was signed by the Judge.

6 MR. BAILEY: Yes, sir.

7 THE COURT: January 22nd of 1998. I see the fax from
8 Dorchester County.

9 Anything else, Solicitor?

10 MR. BAILEY: The only other thing I had, Judge, and I
11 have mentioned this before and was trying to set the date
12 and handle this in conjunction with Judge Rawl's death pen-
13 alty case.

14 That case for Judge Rawl happened this year. It's a
15 newer case than this. He has asked me to get with the
16 defense attorneys and send a Scheduling Order to him, and I
17 can go ahead and set that date, if Judge Rawl and the de-
18 fense lawyers are okay on it, probably for November of
19 this year.

20 This would then push this case in 1998 so . .

21 THE COURT: You mean 1999.

22 MR. BAILEY: Yes, 1999. I'm sorry. As I understand
23 your schedule, you probably couldn't get to it until 1999
24 anyway.

25 THE COURT: I'm not sure. I might could get to it in

1 August or September or October, but you've got on in August,
2 and I assume you would want a month in between.

3 MR. BAILEY: I'd like a couple of months.

4 THE COURT: A couple of months because you have Calhoun,
5 Dorchester, Orangeburg, General Sessions, besides the death
6 penalty.

7 But I think this, that hopefully Messrs. Dukes and
8 Theos will get on the same hymn book today and -- I don't
9 know that we need a Scheduling Order, but I think they need
10 to confer and see what needs to be done and what a reason-
11 able time might be to get it done.

12 And you need to -- do you know of anything that needs
13 to be done on the State's side?

14 MR. BAILEY: No, sir.

15 THE COURT: In other words, if I asked you to set this in
16 July, you're ready to go?

17 MR. BAILEY: No, I've got my thirtieth wedding anniver-
18 sary in August, and we were going out of town for like two
19 weeks. My wife will divorce me if I don't do that. Other
20 than that, . .

21 THE COURT: But, I mean, if you tried the other one in
22 August, and if it suited their schedule and my schedule in
23 September or October, you could be ready by late October or
24 early November?

25 MR. BAILEY: That would be fine. I'd hate to try to do

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1 it any quicker than that.

2 THE COURT: I understand, and I'm not trying to push you.
3 I'm just trying to get an overview of where you stand, and,
4 of course, I will speak to them about the ex parte Order.

5 I'm going to make a record of the ex parte Order, but
6 ex parte outside to you, and I assume that the Clerk has
7 had other death penalty cases, and she will segregate or
8 isolate these ex parte Orders so they are not available to
9 anyone.

10 MR. BAILEY: I'll tell her to do that. I've never tried
11 to look at a file to see if . .

12 THE COURT: I don't want to tell her what to do. I just
13 want to ensure that that which should be done is done so
14 that we can keep everything clean and sterile and proper,
15 and it might be their responsibility to do that rather than
16 yours.

17 I'm going to put that on you, Gene. You've handled
18 three or four other death penalty cases.

19 MR. DUKES: Yes. Not as many as Walter, but I've hand-
20 led several.

21 THE COURT: Okay, and that's just a safeguard or precau-
22 tion, not in any way derogatory toward the Clerk. I just
23 want to assure that that which should be done is done.

24 MR. DUKES: Okay.

25 THE COURT: So is there anything else you need to have

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1 the Solicitors for?

2 MR. THEOS: Not that I'm aware of, Judge.

3 THE COURT: And your office is in Summerville?

4 MR. BAILEY: Summerville, and I've got one in Orange-
5 burg.

6 THE COURT: Meg, are you in Summerville?

7 MS. McDONALD: Yes, sir.

8 THE COURT: So are you leaving, or do you want to wait
9 about 30 minutes to see if . .

10 MR. BAILEY: We can stick around to see if something
11 comes up.

12 THE COURT: I don't believe it will, but just because
13 we have the choir here today and the Court Reporter and the
14 Defendant.

15 Do you mind standing by?

16 MR. BAILEY: We have nothing else to do.

17 THE COURT: I don't think it will take us more than
18 15 to 30 minutes to talk about these ex parte funding issues.

19 MR. BAILEY: Judge, if Judge Rawl wants to go ahead with
20 his case before we get together on a scheduling time for this
21 one, what -- I'm not sure which to do first, to try to nail
22 this down or get his first.

23 THE COURT: We should have our court assignments within
24 the next two weeks, and I would ask you to at least wait
25 until we get the court assignments and let me look at my
court assignments and look at -- they might have on that

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1 schedule -- it may put me in Dorchester or they may put me
2 in Lexington or Colleton.

3 MR. BAILEY: The rules seem to be changing for getting
4 judges appointed and getting terms for death penalty cases,
5 but I served three notices roughly at the same time and I
6 asked Court Administration to go ahead and set terms.

7 So my concern is they may set a term that's not conven-
8 ient for any of us.

9 THE COURT: We can't know that until we get the sche-
10 dules, so let's wait until we get the schedules, and if you
11 can hold Judge Rawl off.

12 MR. BAILEY: Right.

13 THE COURT: Tell him you've got the senior judge. I
14 might pull seniority on him or some foolishness like that.
15 Do you mind?

16 MR. BAILEY: No, sir.

17 THE COURT: You should know within 30 days.

18 MR. BAILEY: Yes.

19 THE COURT: I mean, if you know by the first of June,
20 isn't that soon enough?

21 MR. BAILEY: That's soon enough.

22 THE COURT: Because I've got to find out from them as
23 to what they think. Thank you.

24 (All parties excused from Courtroom except for the
25 Court, the Defendant and Mr. Theos and Mr. Dukes)

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1 THE COURT: Is there anything you all want to discuss
2 off the record before we go on the record, and let the re-
3 cord show that the Defendant, Mr. Simmons, is present, or
4 do you want all our discussions on the record?

5 Do you want to see if we can agree on certain things
6 and then put it on the record?

7 It matters not to me.

8 MR. THEOS: I think we ought to put all the issues per-
9 taining to the -- certainly to my request, ex parte request,
10 for funding on the record.

11 THE COURT: Sure.

12 MR. THEOS: I don't believe we ought to put anything
13 else on the record.

14 Probably if we could address something off the record
15 first, and it's not related to the funding.

16 THE COURT: Certainly.

17 (Discussion off the record between counsel and the
18 Court)

19 THE COURT: Madam Court Reporter, that has been an off
20 the record discussion in the presence of the Defendant, Mr.
21 Simmons, and Messrs. Dukes and Theos, in which both attorneys
22 have agreed to join hand in hand and cooperative each with
23 the other, and do everything necessary to give the very best
24 available defense and best preparation that might be avail-
25 able for the subject, and if they have any problem in the

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1 future they will contact me.

2 Are you satisfied with what I put on the record?

3 MR. THEOS: Yes, sir. I want to supplement it at this
4 time. There was a discussion related to some other issues
5 which I'd prefer not to put on the record.

6 Mr. Simmons will consider some of the things that were
7 discussed and then let me know what his feeling is, and I
8 will notify the Court and Mr. Dukes immediately.

9 THE COURT: All right, thank you, and that brings up the
10 ex parte Order which Mr. Theos has brought to me. I see it's
11 dated March 25th of 1998, and I would assume within a week
12 of that time you contacted me, early April, about this and
13 giving it to me.

14 And I communicated with you. I don't give a blank check
15 of the taxpayers' money to anyone, and just as I have in the
16 other death penalty cases that I've had, the Order -- the
17 motion speaks for itself and the affidavit.

18 Based on interview with Defendant following
19 his arrest and other actions by Defendant during
20 his incarceration, certain questions have arisen
21 regarding the Defendant's mental condition at the
22 time of the alleged offenses.

23 That's not something you all need to -- we need to dis-
24 cuss further today. I think we've covered that on the re-
25 cord.

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1 MR. THEOS: That's right.

2 THE COURT: Based on that, in paragraph five, you said
3 you deem it necessary and appropriate for an adequate defense
4 to have a qualified psychiatrist and/or psychologist to be
5 retained to conduct an evaluation of said mental condition.

6 Again, until you all investigate and confer further,
7 relative to the pending Order of evaluation by the State, we
8 will hold that in abeyance.

9 But then you went on to request that this case should
10 have a social assessment history of the Defendant relative
11 to the penalty phase, and that an expert would be needed
12 for that.

13 The Court certainly does not want to in any way suggest
14 to you strategy or which expert in a particular field should
15 be engaged. You go on to state, retain services of an exper-
16 ienced social worker to do a social history. I certainly
17 agree with that.

18 And that outside private investigative assistance is re-
19 quired in the guilt and innocence phase, as well as preliminary
20 mitigation.

21 I am satisfied that would certainly be appropriate,
22 and that private investigative assistance to assist in obtain-
23 ing a family history, personal background information to be
24 used by both the psychiatrist and/or social worker.

25 Then may require other expert witnesses such as DNA,

1 audio tape, forensic pathologist, experts in the field of
2 police interrogations -- that may be the case, and if it is
3 the Court will consider it.

4 But you're asking the Court to authorize the expendi-
5 ture of funds not to exceed \$25,000 from the office of In-
6 digent Defense, and this proposed Order states that -- I
7 note that Mr. Dukes hasn't joined in this motion -- that if
8 the Court finds it necessary, and it states in the Order,
9 to allow Mr. Theos, attorney for Defendant, upon submission
10 of appropriate vouchers, and upon documentation they shall
11 disburse not to exceed -- that Indigent Defense shall dis-
12 burse an amount not to exceed \$25,000 to the Law Firm of
13 Uricchio, Howe, Krell, Jacobsen, Toporek and Theos, for the
14 defense to retain the services of said experts and so on.

15 This Court will not authorize payment of a retainer to
16 anybody. This Court is not going to give a blank check to
17 anybody. This Court certainly will be reasonable as regards
18 engagement of the very best experts, but, as I said on the
19 telephone with Mr. Theos, it will be necessary that the Court
20 have a CV or curriculum vitae or a resume of the experience
21 of the person that is to be engaged and their hourly rate, as
22 well as statement of whether or not that is the normal going
23 rate in that field.

24 You can hire an investigator, I would presume, at \$35
25 an hour, or I have approved some at \$50. I have declined in

1 another pending death penalty case, State versus Brewer,
2 the sum of \$2,000 retainer to somebody. I have declined to
3 approve \$200 an hour for some social worker to delve through
4 five days of Family Court proceedings. You know, that's
5 \$8,000 to have someone review a Family Court file, and I
6 just don't feel that's necessary.

7 I think they could get a paralegal at \$25 an hour or
8 \$30 an hour, and that person could point out certain things
9 to an expert to review, but the Court is going to do every-
10 thing humanly possible to make these experts available but
11 the Court will not write a blank check in any case, includ-
12 ing this one.

13 So I will be glad to hear from you, sir.

14 MR. THEOS: Yes, sir. As you mentioned, I submitted
15 my motion to make available these case expenses in accord-
16 ance with the appropriate statute.

17 I also prepared a proposed Order making available up to
18 \$25,000. You, in chambers, and it was off the record, asked
19 me to do a couple of things.

20 One was to get a list of who our expert witnesses and
21 investigators might be, along with their CVs, as well as . .

22 THE COURT: Hourly rates.

23 MR. THEOS: . . hourly rates, and we have attempted to
24 give you a brief synopsis, in addition to that, of what their
25 credentials are and how they might be involved, and I have

1 a copy I will hand to you, and I will state to the Court
2 that all of these -- the expert witnesses that are listed have
3 been qualified in State Courts -- at least in State Courts.
4 I think they have actually been qualified in other Courts as
5 well.

6 But they have all been qualified as expert witnesses
7 in the fields that we represent in this list.

8 THE COURT: All right, this Dr. Morton, he's a professor
9 of pharmacy and an associate professor of psychiatry and
10 behavioral science.

11 May we hold that in abeyance until you all determine
12 if there is any issue of his mental competency, or meeting the
13 M'Naghten Rule?

14 MR. THEOS: Your Honor, Dr. Sarius, who is listed as
15 number two, is the licensed clinical psychologist who does
16 evaluations that need to be done first.

17 Dr. Morton's role may or may not be two-fold. He tes-
18 tified in the last death penalty trial that I had. He is
19 one of, I believe, about 40 experts in the world related to
20 pharmacology and effects of drugs on the human mind.

21 THE COURT: Is there an issue that drugs were involved
22 in . . .

23 MR. THEOS: Yes. The evidence reflects that there is,
24 and, of course, the statement that was given by the Defen-
25 dant upon his arrest or actually prior to his arrest, that

1 substance abuse -- that there was an addiction to crack and
2 there was substance abuse involved.

3 So Dr. Morton certainly will be a crucial witness re-
4 lated to that issue. Now, whether or not -- whether or not
5 that is in mitigation only, or whether or not that goes hand
6 in hand with something Dr. Sarius and Foxworth might offer
7 relating to state of mind at the time of commission of the
8 crime, I don't know.

9 THE COURT: You don't say hourly in-court rates for Dr.
10 Sarius but you do for Dr. Morton.

11 MR. THEOS: That is -- my understanding is that that
12 is his hourly rate, period.

13 THE COURT: So \$200 in and out?

14 MR. THEOS: Yes, sir, that is my understanding, and I
15 will correct that if I'm wrong. That's been my experience
16 with him in the past.

17 THE COURT: These are records that will be sealed, so I
18 am going to put in and out with a question mark.

19 MR. THEOS: That's fine.

20 THE COURT: Then Dr. Foxworth is \$200 an hour, so you
21 have three different people in the psychiatric field, each
22 at \$200 an hour.

23 I understand the pharmacologist, and you're aware of
24 State versus Vaughan, a case out of Charleston, where Justice
25 Rhodes wrote the Opinion that voluntary intoxication of

1 drugs and alcohol is no defense unless it causes permanent
2 insanity, and no less responsible for any action he might
3 commit while under . .

4 MR. THEOS: Right.

5 THE COURT: . . the influence of drugs or alcohol. You
6 are aware of that?

7 MR. THEOS: I'm aware of that.

8 THE COURT: Well, I'm going to have to wait and see on
9 your psychiatric things. I'm not sure you're going to need
10 three.

11 MR. THEOS: Well, Your Honor, Dr. Morton, as I told you,
12 is primarily -- I assume he will be related to Mr. -- to
13 what we know is Mr. Simmons' addiction and dependency on,
14 if nothing else, crack.

15 THE COURT: I understand, but you said that you had
16 Dr. Sarius before you got to Dr. Morton.

17 MR. THEOS: Dr. Sarius is the clinical psychologist who
18 will do the evaluation related to retardation, related to
19 mental abilities or restrictions.

20 Mr. Simmons was at Summerville High School and gradu-
21 ated from Summerville High School, played football for
22 them, but apparently was in special ed classes for some per-
23 iod of time, although not the entire time, and in fact grad-
24 uated which -- but cannot read.

25 I don't know what other restrictions there might be,

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1 what his intelligence quotient is, and there are all sorts
2 of questions that come up . .

3 THE COURT: You need to have that relative to any confes-
4 sions he might have signed, and I appreciate that, but, you
5 know, we've got some overlap here between Morton, Sarius and
6 Foxworth.

7 I understand Morton has to do with controlled substances.

8 MR. THEOS: Dr. Sarius will also, Your Honor, be involved
9 in development of -- what you've said would be appropriate,
10 and that is, the development of social history of the Defen-
11 dant.

12 And we don't just give them a bunch of records and say
13 go through these and charge us \$200 an hour. We do review
14 everything and pick and choose. I want to limit his . .

15 THE COURT: Social history on Sarius and substance
16 abuse on Morton.

17 MR. THEOS: Yes, sir.

18 THE COURT: And then what for Foxworth?

19 MR. THEOS: Foxworth, Your Honor, will . .

20 THE COURT: See, you've got the same statement on compe-
21 tency, insanity, mental illness, mental retardation and sub-
22 stance abuse for all three of them.

23 MR. THEOS: Right, because we're not quite sure exactly
24 how the cards will unfold. Dr. Foxworth would actually be
25 the last in line.

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1 I have used him in the past and, quite frankly, just
2 kind of hold him in abeyance to see what Drs. Morton and
3 Sarius have to say.

4 THE COURT: How many hours would you want the Court to
5 approve on Morton preliminarily?

6 MR. THEOS: Your Honor, I would say probably 20 hours,
7 and it's -- if nothing else, the travel time to and from
8 here and . . .

9 THE COURT: I'm not going to pay him \$200 for travel time
10 now. You might just as well understand that, and I'll be
11 glad to sit down with Dr. Morton or Dr. Sarius or Dr. Fox-
12 worth. I don't pay anybody \$200 an hour travel time. I'll
13 be glad to take it up with Dr. Edwards or with the head of
14 the psychiatric department. I'm just not going to do that.

15 They shouldn't expect it.

16 MR. THEOS: I can tell you they're going to expect it,
17 and they're going to request it, but I would ask for 20
18 hours for Dr. Morton and Dr. Sarius at this time.

19 THE COURT: Ten each?

20 MR. THEOS: No, 20 hours each. They're not going to
21 work hand in hand.

22 THE COURT: I'm going to approve ten at this time for
23 Morton and ten at this time for Sarius. That's \$2,000 apiece
24 and if you see that you need more -- I'm not giving them a
25 blank check.

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1 I want them to do a thorough, professional job, but I'm
2 not going to approve anything that I feel is exorbitant, and
3 you will have to show me what they do for the first \$2,000
4 to get the next \$2,000.

5 MR. THEOS: I will, Your Honor.

6 THE COURT: And Foxworth you will hold in abeyance?

7 MR. THEOS: I will hold him in abeyance until we see
8 what Dr. Saylor and Morton have to say, but, Your Honor, I
9 want to make sure that it's clear that what I've requested
10 in the Order is that that money be allotted to us, but I cer-
11 tainly am going to come to you at each phase when we feel
12 there is a need for additional funding.

13 THE COURT: I don't want them to think they come in with
14 banana pudding on the plate when it might not be there, so you
15 put in this Order that the Court is approving ten hours at
16 \$200 on Morton, ten hours at \$200 on Sarius, but the Court is
17 not paying travel time.

18 I mean, they've got to understand to begin with. If
19 they don't like it, I'll be glad to convene here and we'll
20 make a record on it.

21 MR. THEOS: Your Honor, I understand your ruling.

22 THE COURT: And you're holding Foxworth in abeyance until
23 you have decided that's necessary.

24 MR. THEOS: Yes, sir, and we'll get back with you if we
25 see that it is.

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1 Your Honor, since you're not approving travel time, I
2 assume you're going to approve some mileage.

3 THE COURT: Sure, but you're talking about 50 miles from
4 here to Charleston?

5 MR. THEOS: Yes, sir. I would like them to do this at
6 no cost, but I can hear their response to this. If we're not
7 going to get paid for travel time, we at least need to be
8 paid for the mileage.

9 THE COURT: I have no problem with mileage.

10 MR. THEOS: Okay.

11 THE COURT: But I'm not going to pay them \$200 an hour
12 for people to come here and eat lunch and \$200 an hour to
13 drive here.

14 This is the taxpayers' money.

15 MR. THEOS: Your Honor, how many -- this would apply to
16 all of these people -- what mileage -- I don't know what is
17 typically ..

18 THE COURT: I don't know, 31 or 35 -- whatever is the
19 going rate.

20 Gene, do you get paid mileage?

21 MR. DUKES: I don't get any mileage.

22 THE COURT: Let's just say 35 cent a mile. Is that rea-
23 sonable?

24 MR. THEOS: That's fine.

25 THE COURT: I mean, you go 100 miles for \$35. You could

1 go in a stretch limo cheaper than that.

2 MR. THEOS: Your Honor, the Investigative Associates
3 are two individuals -- it's a jointly owned company. They
4 are both retired NIS agents.

5 THE COURT: What is NIS?

6 MR. THEOS: Naval Intelligence. They perform interroga-
7 tions in literally thousands of cases and investigations,
8 both here and abroad.

9 This is a confession case, Judge. Mr. Simmons gave or
10 reportedly gave a confession, and that needs to be investi-
11 gated.

12 There's an audio tape of it that we need to listen to.
13 We need to get it and we need to determine based upon all
14 the facts and circumstances -- this kind of goes hand in hand
15 with Dr. Morton and Sarius -- but his ability to understand
16 what was going on because of his mental capacity, the effects
17 of drugs on him at the time he supposedly gave this statement,
18 and then what techniques may or may not have been employed
19 in order to get him to make the statement.

20 THE COURT: How many hours would you estimate? Let me
21 just tell you up front that I have approved \$40 and \$45 and
22 \$50, but I have not as yet approved a \$65 an hour for an inves-
23 tigator.

24 MR. THEOS: Well, they have been qualified -- they are
25 not listed -- they're listed in the expert section.

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1 THE COURT: How many hours? Be reasonable, Jerry.
2 Don't make it look . .

3 MR. THEOS: I am. I'm thinking . .

4 THE COURT: . . like I'm trying to limit your investi-
5 gation, nor am I.

6 MR. THEOS: They're not going to be involved in the in-
7 vestigation. Their purpose is limited to . .

8 THE COURT: You told me that, and you keep repeating
9 yourself. Stay on point, please.

10 MR. THEOS: Judge, I would say probably -- considering
11 what they need to do, probably 15 hours, 15 or 20 at the
12 most.

13 THE COURT: In the aggregate, together.

14 MR. THEOS: Together, because they won't duplicate the
15 work.

16 THE COURT: All right, let's say 15 hours combined at
17 this time, and you show me what they've done -- and I don't
18 want details of it or their findings, but I want to know
19 what they're going to spend 15 hours on.

20 I'll approve 15 hours at this time in the aggregate for
21 the two of them. Now, have you had judges in the past approve
22 investigators employed by your firm?

23 MR. THEOS: Yes, sir. Your Honor, we -- in fact, I have
24 found that I can kind of hold purse strings a little better
25 on the ones in my firm than the privately retained investigators.

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1 THE COURT: I can't understand why you want three inves-
2 tigators approved. I really will check with some other
3 judges, but, you know, in house -- you're telling me -- that's
4 \$400 a day in an eight hour day, five day week, or \$2,000 you
5 are telling me -- these fellows make \$104,000 a year paid by
6 your firm?

7 Because, what happens, is I get into this paralegal
8 situation, where the big insurance firms in Columbia want me
9 to approve a \$95 hour rate for a paralegal. Thinking about
10 it, they're using that to reduce their overhead and pay for
11 law books and whatever.

12 They might charge Aetna that, but they ain't going to
13 charge the State of South Carolina that. So I -- is that what
14 you're telling me, that these people are paid \$50 an hour,
15 or is your firm paid \$50 an hour?

16 MR. THEOS: Our firm is paid \$50 an hour and . .

17 THE COURT: What does your firm pay them?

18 MR. THEOS: Not \$50 an hour.

19 THE COURT: What are they paid? I know you've got
20 overhead.

21 MR. THEOS: We've got overhead associated with provid-
22 ing them cars and . .

23 THE COURT: I understand, but that's why I say . .

24 MR. THEOS: What it costs us and what we pay them are
25 two different things. I can't tell you the bottom line,

1 exactly what we pay them, but it's probably closer to what
2 we pay them after we get paid -- probably more in line with
3 about \$20 an hour, but, again, that -- they've got cars,
4 they've got phones, they've got insurance, they've got gas,
5 they've got . .

6 THE COURT: They make about \$40,000 a year.

7 MR. THEOS: They make between Forty and \$70,000 a year.

8 THE COURT: Why do you need two from your firm?

9 MR. THEOS: Judge, I don't need two to do the same thing
10 obviously, but sometimes what one can't do the other can. Mr.
11 Simpson is black. He is going to be able to do things, I
12 think, that Ms. Kelly Austin, who is white, cannot.

13 On the other hand, Ms. Kelly Austin was a detective for
14 eight hours and doesn't . .

15 THE COURT: I read that.

16 MR. THEOS: She does a great job, and she can do things
17 Mr. Simpson can't.

18 We don't use them combined. In other words, their
19 work does not overlap, and if it does we don't bill for it.

20 THE COURT: Then you've got a third investigator from
21 Trident Tech at \$50 an hour.

22 MR. THEOS: Your Honor, Mr. Hawkins was a police detec-
23 tive for 12 years.

24 THE COURT: I'm aware of that.

25 MR. THEOS: And he was with our firm . .

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1 THE COURT: Yes, sir.

2 MR. THEOS: I'm not repeating myself, Your Honor. I
3 haven't stated it.

4 THE COURT: You have given it to me and I have reviewed
5 it.

6 MR. THEOS: Mr. Hawkins worked for us for seven years
7 and does a good job. In the last -- sometimes I find in these
8 cases that our employees are not able to do what privately re-
9 tained investigators are. I don't anticipate using Mr.
10 Hawkins certainly like I would use the other two, and if we
11 don't need to we certainly won't.

12 But I wanted to give you everybody that we'd poten-
13 tially use, which is what I thought you wanted.

14 THE COURT: The last death penalty case you handled was
15 when? What county?

16 MR. THEOS: Berkeley County, and it went to trial last
17 March or April, Judge.

18 THE COURT: About a year ago?

19 MR. THEOS: Yes, sir.

20 THE COURT: And you used these same three people?

21 MR. THEOS: Your Honor, the same investigators were used,
22 and the reason in that case all three were used was because
23 Mr. Hawkins went into private practice about two months be-
24 fore the case went to trial and Ms. Austin joined us, and
25 we were stuck with using both.

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1 So we used all three.

2 THE COURT: And what rate was approved on that?

3 MR. THEOS: Judge, I don't have any idea. I'd have to
4 look and see. I think for Ms. Simpson and Ms. Austin . .

5 THE COURT: You can find out.

6 MR. THEOS: Either \$30 or \$35 an hour.

7 THE COURT: All right. Well, you send me a copy of
8 that invoice because it's not up to me to dictate to you
9 what you pay these people because they're your employees,
10 but just like in that case I have in Colleton, I will not
11 let lead counsel engage a second counsel from his firm. I
12 think you need two trains of thought and need somebody from
13 Walterboro to help with the jury, but I'm not going to approve
14 the first and second chair from the same firm.

15 How many hours do you anticipate you will need for each
16 of them or in the aggregate?

17 MR. THEOS: I think in the aggregate, Your Honor, we're
18 probably going to need -- let me just state this for the
19 record, and I'm not trying to belabor the point or say things
20 unnecessarily, but the State ended up forming a task force in
21 this case and investigated it for over a year, almost a year
22 and a half before Mr. Simmons was determined to be a suspect
23 and was arrested, and they put in hundreds and hundreds of hours.

24 I don't -- I can't tell you. We've got to follow up on
25 what they did. I would . .

1 THE COURT: Your best estimate, and this is always sub-
2 ject to change.

3 MR. THEOS: There were 25 other suspects we need to
4 follow up on. I would say, Your Honor, probably anywhere
5 from 100 to 200 hours -- in that range.

6 That's a broad range.

7 THE COURT: You're speaking in the aggregate?

8 MR. THEOS: In the aggregate, and I believe in the last
9 case that these three investigators worked -- the last death
10 penalty case, that -- I want to say the total expenses was
11 somewhere -- investigators' expenses were somewhere in the
12 range of \$8,000 to \$12,000, but I'll look and let you know.

13 THE COURT: And another case might run 25 or 30..

14 MR. THEOS: I wouldn't think any less than 100 hours,
15 and not knowing what that reveals -- we might not need them
16 any more than that. We may need another 100 or 200 hours. I
17 just can't tell you.

18 THE COURT: Well, the Court will go ahead and approve
19 100 hours at this time, and I'd say at this time not to exceed
20 \$40 an hour, but that's subject to review because I'm not
21 going to pay them until I get invoices from them, and I need
22 the invoices from the case a year ago where they were paid
23 \$30 to \$35 an hour. I think \$50 an hour is excessive, and you
24 have got 40 cent a mile for that, and I'm not going to ap-
25 prove more than 30 cent a mile.

1 This says plus out of pocket expenses -- I don't know
2 what he's talking about there. We'll have to see. Use your
3 good judgment and sound discretion and do everything humanly
4 possible, but don't waste money, because there are other
5 people that need money too.

6 MR. THEOS: I understand.

7 THE COURT: Other death penalty cases.

8 MR. THEOS: I'm not trying to do that, Your Honor.

9 THE COURT: I'm not saying we won't approve 300 hours,
10 but I'm saying to you until you get your feet wet you don't
11 know how deep the water is, and there may be other experts
12 that you need or you may need a forensic pathologist for the
13 entry in a wound of a knife. I don't know what was alleged
14 there.

15 MR. THEOS: A beating -- beating of the head.

16 THE COURT: So there are all kind of other experts that
17 you might need.

18 MR. THEOS: Your Honor, one expert that was left out,
19 and I don't have his CV -- there are two other experts. I
20 will get you that voucher related to our in-house investi-
21 gators.

22 With respect to our in-house investigators, we don't
23 charge mileage.

24 THE COURT: What other experts?

25 MR. THEOS: One is Dr. William Shields, and I hand you

1 his CV, and he is an expert in the field of DNA testing and
2 analysis.

3 He is the expert we employed in the last death penalty
4 case. He's testified all over the country and lectures all
5 over the world.

6 THE COURT: Is DNA going to be an issue in this case?

7 MR. THEOS: Well, there is an allegation that apparently
8 Ms. Boyd was raped. Yes, DNA is an issue.

9 The State conducted 25 or so other DNA tests.

10 THE COURT: Did you use DNA in the Berkeley case?

11 MR. THEOS: Yes, sir.

12 THE COURT: Did you use him?

13 MR. THEOS: Yes, sir.

14 THE COURT: I'm just -- you've got \$1200 a day plus ex-
15 penses.

16 MR. THEOS: That's only pertaining to the actual trial
17 itself.

18 THE COURT: So you need to put then how much an hour he
19 charges for trial, because I ain't going to give anybody a
20 blank check.

21 MR. THEOS: Your Honor, at this point . .

22 THE COURT: By trial time, you may or may not need him.

23 MR. THEOS: Correct. I want him at this point, Your
24 Honor, and all I'm seeking approval of is a sufficient amount
25 of money so that he can conduct a review of all the DNA evidence

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1 pertaining to Mr. Simmons.

2 THE COURT: Holding the travel time in abeyance?

3 MR. THEOS: Holding that in abeyance.

4 THE COURT: I'm not approving that now, but you've got
5 to satisfy me as to why you can't get a DNA expert from South
6 Carolina, North Carolina, Georgia, and why you need to go
7 to the State University of New York which I never heard of --
8 where is it located?

9 MR. THEOS: I can't tell you. When I used him, he was at
10 the University of Virginia as a visiting professor, and I'm
11 a member of the National Association of Criminal Defense Law-
12 yers. The DNA task force recommended him as an expert.

13 I talked -- I contacted him . .

14 THE COURT: I'm not giving you a carte blanche, but I'm
15 not giving you a yes. I'm asking you to satisfy yourself
16 and then share with the Court the basis of your satisfaction
17 that there is not an equally qualified DNA expert other than in
18 New York State.

19 MR. THEOS: I wasn't able to find one in the last case.
20 The Public Defender's Office recently tried, as you know, the
21 Proctor case, and it's my understanding they were not able to
22 find a local DNA expert. In fact, they consideredc Mr.
23 Sheilds.

24 THE COURT: You exhaust it and then I'll consider it, but
25 until I'm satisfied that you can't find someone equally as

24 MR. THEOS: General surgeon and the task he has performed
25 for me in other cases is to evaluate the medical evidence, to

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1 dispute or concur because of that in the nature of the injur-
2 ies, and in fact would qualify -- has been qualified in our
3 State Courts to do that.

4 THE COURT: He's not a pathologist?

5 MR. THEOS: Not a pathologist, so . . .

6 THE COURT: How many hours do you anticipate the evaluate
7 the medical evidence?

8 MR. THEOS: He probably needs five hours, Your Honor,
9 at the most, to evaluate and give a preliminary opinion, and
10 then at that point I will either seek to employ a forensic
11 pathologist -- I don't want to do so unnecessarily -- or not.

12 THE COURT: Well, but I'm not sure that you need a gen-
13 eral surgeon to evaluate something to tell you if you need a
14 forensic pathologist.

15 Why don't you go to a forensic pathologist to begin with?
16 MR. THEOS: We can do that.

17 THE COURT: I'm asking you to think about it. I don't
18 know.

19 MR. THEOS: I'll think about it.

20 THE COURT: I don't mind approving five hours at \$200 an
21 hour at this time, but I've got to have his resume and it's
22 got to be in this file. I assume you're going to send a pro-
23 posed Order and inform me what this totals.

24 MR. THEOS: I think I'm required to send something.

25 THE COURT: Because I'm not going to sign this approving

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1 \$25,000 at this time. I'd be amazed if the expenses don't
2 exceed \$25,000. I feel that they will but I don't know for
3 what and how much they charge.

4 So what else?

5 MR. THEOS: That's it, Your Honor. You want me to pre-
6 pare an Order that approves only this amount of funding or up
7 to that amount -- approving at this time the hours that you
8 have indicated, and an Order to obtain additional funding
9 to supplement it.

10 THE COURT: Exactly. Go ahead and prepare it, and then
11 proceed to do absolutely everything necessary to do a proper
12 investigation and preparation based on the understanding we
13 have here and on the understanding that the Court will be read-
14 ily available to consider further applications in a prompt
15 manner.

16 I don't want to delay the thing, and why don't I get
17 you to do this? Why don't you give this to the Clerk and ask
18 her to file it, so that you can ensure that she does it in a
19 proper manner where it is not available to anyone, and to
20 clock in your motion?

21 Clock in this proposed Order so we can keep the record
22 straight.

23 MR. THEOS: And the memorandum too?

24 THE COURT: Yes, and ask her to send me certified copies
25 of each of those documents. Here's the proposed Order. Where

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1 did I get that from?

2 MR. THEOS: From me.

3 THE COURT: Tell her to send me a copy of that too. Any-
4 thing further, gentlemen, we can talk about today?

5 MR. THEOS: Judge, the only other thing is what you asked
6 me to prepare because it's been a long time since we've had
7 anything together, and it was just a pre-trial conference, and
8 you wanted to know a little bit about me.

9 I've prepared an affidavit which you asked me to do.

10 THE COURT: File that with the record and ask her to send
11 me a copy of it.

12 Tell her which things are ex parte and which aren't.

13 -----END OF REQUESTED TRANSCRIPT OF RECORD-----
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CERTIFICATE

I, HARRIET P. BENNETT, Official Court Reporter for the Ninth Judicial Circuit, do hereby certify that the foregoing is a true, complete and accurate transcript of record in the captioned matter, prepared from the records of Karen Mullins, to the best of my ability, having been heard in the Court of General Sessions in Colleton County on April 30, 1998.

Further, I certify that I am neither of kin or counsel to any party to this action, nor do I have any interest in the outcome thereof.



March 16, 2000

STATE OF SOUTH CAROLINA,)
)
 Plaintiff,) TRANSCRIPT OF RECORD
)
 -versus-) PRETRIAL MOTIONS
)
 KENNETH SIMMONS,) February 17, 1999
)
 Defendant.) St. George, South Carolina

B E F O R E:
The Honorable Rodney A. Peeples

A P P E A R A N C E S:
Walter M. Bailey, Jr., Esquire
Maité Murphy, Esquire
For the State of South Carolina

Jerry N. Theos, Esquire
James A. Bell, Esquire
For Kenneth Simmons

Robin L. Keil, RMR
Resident Court Reporter
First Judicial Circuit
Post Office Box 3335
Summerville, SC 29484-3335

1 (Wednesday, February 17, 1999.)

2 THE COURT: Be seated, ladies and
3 gentlemen. Thank you for your patience.
4 Madam Court Reporter, please, ma'am, let the
5 record reflect that the defendant, Kenneth
6 Simmons, is present with his counsel, Messrs.
7 Theos and Bell. The state is represented by
8 Solicitor Bailey and his assistant solicitor,
9 Ms. Murphy. And of course, Ms. Keil, we
10 welcome you to these proceedings and thank you
11 for being here present with us today.

12 Gentlemen, shall we at this time
13 start with the jury, if you would pass up,
14 Michael, my jury list here, please. And as
15 we've previously mentioned in the record, and
16 ma'am, you have the caption and the case
17 number and so forth, that there is a sense of
18 urgency in regard to trying to notify these
19 jurors because of their work situation or
20 illness in the family or whatever it may be as
21 soon as we can.

22 And the clerk, Ms. Carn, stated to
23 me this morning that they had directly spoken
24 to these persons that were living outside of
25 the county or for whatever legal reasons were

1 to be not required to come to court, all of
2 which a record was made on last Friday,
3 February 12.

4 And, Madam Clerk, I apologize for
5 any inconvenience, but I do thank you kindly
6 for your efforts in notifying those persons.

7 Now, there were several additional
8 that were presented to the court, and some of
9 these they may be repetitive of last week.
10 For example, I have Number 297, a gentleman --
11 Deborah H. Stengel, S-t-e-n-g-e-l, and that
12 was a juror that the document or summons
13 mailed to them was returned to sender, was
14 turned over to the sheriff and the sheriff's
15 been unable to -- well, I beg your pardon,
16 now, I have a note on here, ma'am, says
17 sending to the sheriff's department 2-16-99,
18 and today is the 17th. So have we received
19 notice that that person cannot be located?

20 THE CLERK: Yes, sir.

21 THE COURT: And, gentlemen, are we in
22 agreement that Number 297 will not be expected
23 to be here for failure of the sheriff to be
24 able to find?

25 MR. BELL: Correct, Your Honor.

1 MR. BAILEY: Yes, sir.

2 THE COURT: So I'll just put FTL on my
3 notes here. And the state and the defendant,
4 Madam Court Reporter, have agreed to that.

5 Then we have Number 30, Robert L.
6 Boyd, please. And that was a failure to
7 locate, that it was agreed upon on last
8 Friday, the sheriff was unable to locate,
9 no one was known at that address in [REDACTED]

10 [REDACTED] -- I beg your pardon -- yes,
11 [REDACTED] in [REDACTED] that was unknown
12 so it's agreed by the state and the defense
13 that there was failure to locate.

14 MR. BAILEY: That's correct, Your Honor.

15 MR. BELL: Yes.

16 THE COURT: And then we have, lady and
17 gentlemen, Number 179 and Bruce E. Krentz,
18 K-r-e-n-t-z, [REDACTED] in [REDACTED] and
19 that is a person that is now living in North
20 Carolina, and as I understand it is agreed
21 that they're no longer a resident, they're not
22 eligible by the state, they will be excused by
23 the defense.

24 MR. BAILEY: Correct, Your Honor.

25 MR. BELL: Yes, sir.

1 THE COURT: Thank you. And then we have
2 Juror Number 237, there's a questionnaire that
3 was returned that we did not have on last
4 Friday when we last reviewed these, and that
5 person, that will be put in the list of those
6 persons who will appear.

7 There's a 265, there's a note on
8 there. What page are you on, ma'am?

9 THE CLERK: This says he's on probation.

10 THE COURT: The last page, question 30,
11 "Is there any additional information the court
12 should know?"

13 "I am on probation."

14 Does anyone have a criminal record
15 on Otto Norris?

16 MR. BAILEY: Yes, Your Honor, he has an
17 habitual traffic offender which I think
18 carries over a year.

19 THE COURT: I beg your pardon?

20 MR. BAILEY: He has a habitual traffic
21 offender which I believe carries over a year.

22 THE COURT: Yes, sir. And is he
23 confined, do you know?

24 MR. BAILEY: No, sir.

25 THE COURT: Can we agree with the prior

1 record that that would disqualify him, or do
2 you require him to come in? There's always
3 the prospect that he could have received
4 amnesty or a pardon.

5 MR. BELL: Supposed to be still on
6 probation, Your Honor, and I think that's
7 correct, too.

8 THE COURT: Okay. So Number 237 then
9 will be excused for a prior criminal record of
10 more than one year by agreement of the state?

11 MR. BAILEY: Yes, sir.

12 THE COURT: The defense?

13 MR. BELL: Yes, sir.

14 THE COURT: Thank you. Yes, I do have
15 this statement here on 265 next, gentlemen,
16 and that 265 while they had a failure to
17 locate last week we now have a statement here
18 from Dr. Charles E. Adams under date of
19 February 8, 1999. Ms. Lessie Richardson is a
20 patient, Summerville Family Practice
21 Associates, she is 78 years old with multiple
22 medical problems. Specifically she recently
23 had a minor knee surgery, is recuperating, in
24 his opinion she was not a good candidate for
25 jury duty. But in view of her age, which is

1 not mandatory disqualified, but is optional,
2 what say the state?

3 MR. BAILEY: She apparently wants off,
4 Your Honor, due to age so we have no
5 objection.

6 MR. BELL: None, Your Honor, from the
7 defense.

8 THE COURT: All right. Let the record
9 reflect Ms. Lessie Richardson and, ma'am, you
10 will notify her, please?

11 THE CLERK: Yes, sir. Yes, sir.

12 THE COURT: And then next we have Juror
13 Number 330, Carolyn G. Weathers, and there's a
14 statement "I do not live in Dorchester
15 County," but rather lives in Berkeley County.
16 Her brother's an Orangeburg City policeman,
17 her brother's with Greenwood Sheriff's
18 Department.

19 MR. BELL: We know she's out of the
20 county, Your Honor.

21 THE COURT: And is it agreeable by the
22 state that because this lady is not a resident
23 of Dorchester County that she should be
24 excused from appearing, Mr. Solicitor?

25 MR. BAILEY: Yes, sir.

1 THE COURT: And does the defense concur
2 in that, please?

3 MR. BELL: Yes, sir.

4 THE COURT: Now, Madam Court Reporter --
5 resident, Charleston County -- I am going to
6 hand to you these various documents in proof
7 in sustaining the reason why the jurors will
8 not be required to appear. And then those are
9 to be given to the Clerk of Court and made a
10 part of the permanent record.

11 And it might be helpful as you get
12 those, Ms. Margie, Madam Clerk, to put them in
13 chronological sequence so if anyone in the
14 future wants to look at them that they will
15 be....

16 Yes, ma'am. You have other
17 information, Madam Clerk?

18 THE CLERK: This is one that called about
19 her niece who has cancer and she doesn't have
20 anyone to be with her and she is going to be
21 put in the hospital and she's afraid that
22 she's not going to make it.

23 THE COURT: Juror Number 3, ladies and
24 gentlemen, the clerk received a call that
25 Shirley Atkins, that her niece has cancer and

1 she is in -- at death's door and is in the
2 hospital and doesn't think she's going to
3 survive.

4 MR. BAILEY: Your Honor, Mr. Bell and I
5 discussed that earlier, we would agree to
6 excuse her.

7 MR. BELL: That's correct, Your Honor.

8 THE COURT: And then Number 301, Fred
9 Stroble, states he's a retired U. S. marshal
10 and you gentlemen have agreed that he should
11 appear?

12 MR. BAILEY: Yes, sir.

13 MR. BELL: Yes, sir.

14 THE COURT: I will likewise place this
15 communication with the court reporter, Madam
16 Clerk.

17 Now, gentlemen, I will be available
18 tomorrow and Friday. As we had previously
19 discussed the jury reports on Monday,
20 February 22nd at 10:00 a.m., and I would ask
21 the lawyers to please be here at 9:00 a.m.,
22 the court reporter to be here at 9:00 a.m., in
23 the event that there's any matter that we need
24 to discuss at that time, particular in regard
25 to these juror notices, albeit we won't have

1 much time to notify them not to be here if we
2 don't start until nine o'clock.

3 Madam Clerk, suppose for those like
4 today's mail, I don't know if it's up yet or
5 you've had a chance to review it.

6 THE CLERK: We haven't.

7 THE COURT: So what time normally do you
8 get your mail?

9 THE CLERK: It's rather early, but we
10 have so much until probably a few hours, say
11 about eleven o'clock.

12 THE COURT: Well, let me just suggest to
13 you that if you would, I believe Ms. Flora
14 Footman is the lady that's handling the juror
15 communications.

16 THE CLERK: Yes.

17 THE COURT: That you might while we're
18 taking up these other motions, it's now 20 of
19 12:00, but if you would ask her to give them
20 priority to opening that mail and reviewing
21 them and if there are further juror
22 communications to go ahead and make three
23 copies of those, one for the state, one for
24 the defense, one for the court.

25 THE CLERK: All right.

1 **THE COURT:** Because, again, I would like
2 to accommodate these persons not only to save
3 the \$25 a day juror fee, and you do not pay
4 mileage now and that's -- I'm in accord with
5 that because the bookkeeping for mileage
6 gets -- in distances gets complex sometime,
7 but if you would see if she could give
8 priority or attention to that matter so that
9 before we leave here today, if there are any
10 further that we receive today that we can
11 share that information with the attorneys.

12 **THE CLERK:** All right.

13 **THE COURT:** And, gentlemen, do you have
14 any suggestions for those that come in
15 tomorrow and Friday? I would like the clerk
16 to call Jim Bell's office, he's locally in St.
17 George. And, Jim, you could fax that
18 information to Mr. Theos, or if he's in
19 Dorchester, give it to him of course, but --
20 and for the solicitor, your office is in
21 Summerville but they can fax you.

22 **MR. BAILEY:** We can have somebody pick it
23 up or they can fax it, and I can contact
24 Mr. Bell and we can see if we can agree on it.

25 **THE COURT:** And if you all can't agree

1 upon it, I'm going to still have to ask you to
2 call me to make sure that I concur in what
3 you've agreed upon, but I'd like permission
4 for the clerk after the two of you confer and
5 Mr. Theos, and of course Mr. Simmons, if you
6 all would like to confer with him, counsel,
7 not the state, but defense counsel, that you
8 call my office in Barnwell. You may wait
9 until midafternoon to give more time to
10 receive any communications. And if I concur
11 in the correctness of what you all agree upon,
12 ratify it, then I can call Ms. Margie and have
13 her notify them. Is that reasonable,
14 Mr. Solicitor?

15 MR. BAILEY: Yes, sir.

16 MR. BELL: Yes, sir.

17 THE COURT: And would we do the same
18 thing for Friday, for that which comes in
19 Friday? And if -- I may be in Lexington in a
20 hearing on a death penalty case Friday. If I
21 am, my secretary will have that number where I
22 can be reached, and I won't be dealing with a
23 jury, so I would invite you to interrupt me,
24 please.

25 So is there anything other further

1 at this time, ladies and gentlemen, relative
2 to the jury?

3 MR. BAILEY: Not from the state, Your
4 Honor.

5 MR. BELL: Nor from the defense, Your
6 Honor.

7 THE COURT: And I had suggested that
8 before we leave here today to have a
9 representative of the state, the defense, and
10 my law clerk and the clerk review the list to
11 see if all are in agreement as to those who
12 have been excused for whatever reason, those
13 who are expected to attend, and hopefully that
14 will help you gentlemen in your jury research
15 and consideration in dealing with a list that
16 we all can conclude is an accurate list.

17 And I believe on last Thursday,
18 Mr. Solicitor, February 11, you indicated you
19 had previously given the rap sheets, too, of
20 all the jurors that you had obtained to the
21 defense.

22 MR. BAILEY: Yes, sir.

23 THE COURT: Did you give that to them on
24 last Thursday or prior to last Thursday?

25 MR. BAILEY: Last Friday, I believe,

1 Judge.

2 THE COURT: Friday the 12th?

3 MR. BAILEY: Yes.

4 THE COURT: All right, sir. And you all
5 have received those, Mr. Bell, Mr. Theos? Can
6 you think of anything else the court can do to
7 aid and assist the defendant and the state in
8 preparing for the jury qualification?

9 MR. BELL: I know of nothing, Your Honor,
10 at this time.

11 THE COURT: All right, then. Gentlemen,
12 is it agreeable that we proceed with these
13 various motions that have been filed?

14 MR. BAILEY: Yes, sir.

15 THE COURT: Madam Court Reporter, there
16 was, it's a cover sheet of February 3rd from
17 Solicitor Bailey to Messrs. Theos and Bell and
18 a copy to the clerk, certificate of service
19 for filing in regard to these various motions
20 from the state. I won't reiterate that on
21 each motion, other than to tell you I'm
22 looking at them and they are filed with the
23 state.

24 The first motion was the state
25 requests an order, an in limine motion. And

1 let me make sure, I should for the record
2 inquire, is there any member of the press
3 present in the courtroom or news media? I
4 note other than the bailiffs and the
5 participants, the defendant and counsel, that
6 there's a deputy sheriff for security with the
7 defendant and then family members of the
8 deceased. And this is your victim advocate
9 with them?

10 MR. BAILEY: Yes, sir. She's in a role
11 as victim advocate, she's an investigator.

12 THE COURT: Sure. But there are no other
13 persons in the courtroom, so no prospective
14 jurors or members of the news media so we can
15 freely discuss on the record, even though
16 albeit this is an in limine, in camera motion
17 it is being heard in open court, but there's
18 no one present other than those mentioned.

19 The state requests an order
20 prohibiting the defendant from mentioning
21 polygraphs or eliciting information regarding
22 polygraphs at trial and cites for authority
23 the Wood v. Bartholomew, United States Supreme
24 Court opinion 116, Supreme Court page 7, 1995
25 opinion. And it would serve no useful purpose

1 for the court to articulate the various cases,
2 the court has read in regard to South Carolina
3 law on polygraph usage in both a civil and a
4 criminal trial, but what say the defendant in
5 regard to that motion, please?

6 **MR. THEOS:** Your Honor, we have no
7 intention of introducing any evidence or
8 testimony pertaining to any of the polygraph
9 tests that were conducted on the various
10 suspects prior to the arrest, or after, for
11 that matter, of Mr. Simmons.

12 **THE COURT:** Has the defendant been
13 subjected to a polygraph either voluntary or
14 otherwise?

15 **MR. THEOS:** Not that we're aware of.

16 **THE COURT:** All right.

17 **MR. THEOS:** We don't believe so.

18 **THE COURT:** And, gentlemen, let me, this
19 might be a time to inject into the record the
20 fact that the court cautioned both the state
21 and the defense counsel to please make a
22 concerted effort to counsel with your
23 witnesses prior to their being called and
24 sworn to testify about not mentioning matters
25 that are not admissible in the trial, whether

1 it be this matter about polygraphs or whether
2 it be alleged prior bad acts of the defendant
3 or whether it be character of the defendant,
4 before character is made an issue, which only
5 the defendant can do. And so please, and I'm
6 sure that the gentlemen will do that.

7 And if you feel the need for the
8 court to instruct any particular witness that
9 might be inclined to a spontaneous unsolicited
10 retort or testimony, that the court will be
11 glad to try a give a cautionary instruction to
12 a witness. I just want to minimize the
13 sending the jury in and out any more often
14 than absolutely imperatively necessary. And I
15 encourage you gentlemen to assist the court in
16 that regard.

17 The next matter, lady and gentlemen,
18 pertains to -- pertains to a motion -- well, I
19 suppose I'll hold the defendant's motions,
20 I'll take the state's motions up first. I
21 thought I might put on the record those that
22 were in agreement, but perhaps it would be
23 better to keep them in some sequence by
24 discussing the state's motions first.

25 The next motion of the state is an

1 in limine motion to an order prohibiting the
2 defendant from any manner either during voir
3 attempting to advise the jury as to the legal
4 effect of a divided verdict on the -- at the
5 penalty phase. And the state in its written
6 motion sets forth that 16-3-20 dash -- subpart
7 (c) in parens addresses legal effect given
8 existence of a divided jury to the trial judge
9 only and should not be divulged to the jury.
10 And it cites State v. Adams, and that was
11 Roman Numeral I, a 1981 State v. Copeland and
12 Roberts, State v. Dale Yates I, State v.
13 Sterling Spann, S-p-a-n-n, State versus
14 Raymond Patterson II, Roman Number II, ma'am,
15 and State versus Anthony Green.

16 This is a motion of January 27 of
17 1999, and the court has reviewed each of those
18 cases that the -- is cited by the state as
19 authority in support of their motion. The
20 court also received from the defendant a
21 memorandum of law in opposition to the state's
22 motion in limine seeking to preclude defense
23 counsel from arguing the 16-3-20 subpart (c).

24 And gentlemen, again, may I thank
25 you, please, not only for your filing of your

1 motions that either the state or defense felt
2 should be addressed by the court prior to the
3 commencement of the trial, but I thank you
4 also for your research and your memorandum and
5 the copies of cases which you presented to the
6 court. Obviously that's very helpful to the
7 court.

8 So, Mr. Bailey, that is your motion
9 and this is one over which there is a dispute,
10 so may I please afford you the opportunity to
11 be heard.

12 MR. BAILEY: Thank you, Your Honor.

13 THE COURT: Or Ms. Murphy, if you want
14 her to argue for you at any time, she's
15 admitted to practice and may do so.

16 MR. BAILEY: Yes, sir. Thank you. Your
17 Honor, as part of your instructions to the
18 jury in the penalty phase, if we reach the
19 penalty phase, you gave us a copy of that
20 Friday and I've been over it. And, of course,
21 you're going to advise the jury that whatever
22 their verdict, whether it's life without
23 parole or the death sentence, it has to be
24 unanimous. That's what -- according to the
25 cases that are in my memorandum, that's what

1 the jury is supposed to be told, and will be
2 told.

3 If the jury's also told that if
4 their verdict is not unanimous that it's going
5 to result in a life sentence, all they can do
6 is encourage the jury to ignore the court's
7 instructions and to bring back something other
8 than a unanimous verdict which is what the law
9 requires them to do.

10 And the fact that the defense is
11 opposing that motion leads me to conclude that
12 they are, in fact, or were, in fact, planning
13 to advise the jury that if you hang on the
14 penalty phase it's a life sentence. So in
15 effect what we're going to have is potentially
16 not a unanimous verdict, but 11 to 1.

17 And I think that can be headed off
18 by prohibiting either side from getting into
19 that and letting Your Honor instruct the jury
20 as to what you're supposed to instruct them,
21 that it has to be unanimous one way or the
22 other.

23 Now, the cases that I cited did not
24 say that the jury could not be told that, it
25 just said it was appropriate for the judge to

1 refuse to charge them about the legal effect
2 of the divided verdict. But I think in order
3 to avoid something less than unanimous verdict
4 one way or the other, they should simply be
5 told that their verdict has to be unanimous
6 and that's it.

7 **THE COURT:** Thank you. I would be glad
8 to hear from you gentlemen.

9 **MR. THEOS:** Thank you, Your Honor. Your
10 Honor, we do disagree on this issue, and I
11 think we even more so disagree on what the
12 case law holds. Your Honor, I think if you
13 looked at, and I know you did, our memorandum
14 of law related to the State versus Adams
15 decision and Justice Lewis's comments, his
16 exact words were that the -- "That portion of
17 the statute addressing the legal effect given
18 to the existence of an unalterably divided
19 jury is addressed to the trial judge only, and
20 need not be divulged to the jury."

21 Your Honor, the case does not hold
22 that the jury should not be advised, the case
23 does not hold that the judge should not
24 charge, the case does not hold that the jury
25 is not entitled to that information. Justice

1 Lewis wrote that they need not be, which leads
2 us to the conclusion, I think, cannot be
3 disputed, and that is it is a discretionary
4 matter left up to the trial judge.

5 And, Your Honor, in that it's a
6 discretionary matter, I know of cases in the
7 state and at least one that I could quote, and
8 I believe it's the State versus Susan Smith
9 wherein Justice Howard, now Justice Howard,
10 charged the jury as to the legal effect of the
11 unanimity issue in the penalty phase.

12 Now, I don't have a copy of that
13 transcript and I can't represent to the court
14 that I know for a fact, but in discussions
15 with the lawyer that was involved --

16 **THE COURT:** You have reason to believe
17 that?

18 **MR. THEOS:** I have reason to believe
19 that.

20 **THE COURT:** I accept that.

21 **MR. THEOS:** My understanding throughout
22 the state, Your Honor --

23 **THE COURT:** But that was not considered
24 on an appeal in that case, or wasn't the case
25 appealed? Because it was not a death penalty

1 there. I don't know if it was appealed.

2 MR. THEOS: I don't believe it was
3 appealed. But my understanding throughout the
4 state, Your Honor, is that it is left up to
5 the judge. The judges make a discretionary
6 ruling. And some judges charge it; some
7 don't. But I have not found any case
8 prescient that prohibits the defense counsel
9 from incorporating what is in fact the law.
10 Section 16-3-20 (c) is the law, and I found no
11 case that prohibits defense counsel from
12 utilizing that in its argument.

13 And, Your Honor, I believe that
14 we're not trying to keep -- we're certainly --
15 shouldn't be trying to keep that matter from
16 the jury. And I understand Mr. Bailey's
17 concern, but we're not encouraging the jury
18 not to reach a unanimous decision, we're
19 simply advising them that the law is this:
20 You must reach a unanimous decision with
21 respect to the penalty phase. If, however,
22 you don't, here is what the court will do. I
23 think it's important that the jury understand
24 that. And, Your Honor, we'd ask that we not
25 be precluded from presenting that to the jury.

1 **THE COURT:** Mr. Bell, when the jury's not
2 present I have no problem with hearing from
3 each of you rather than you reaching over and
4 whispering and explaining to Mr. Theos your
5 view. I just wanted to afford you an
6 opportunity to be heard if you wanted to add
7 to that.

8 **MR. BELL:** Thank you, Your Honor. When I
9 come to a point -- what he has said is what
10 our position is.

11 **THE COURT:** Sure. Thank you. Gentlemen,
12 I carefully read Adams several times and
13 reviewed the memorandum in other cases, one of
14 which I think is of interest, State versus
15 Yates where after 50 minutes -- this was a
16 1982 case, Y-a-t-e-s, 310 S.E. 2d at page 805.
17 After 50 minutes the jury reported to the
18 court that they were deadlocked and at that
19 time the trial judge, Judge Anthony Harris, in
20 a brief statement said to the jury, "I would
21 not conclude that after the length of time
22 that you have deliberated that you have given
23 due and thorough deliberation to the matter
24 before you, and I'm going to ask you return to
25 the jury room, continue your jury

1 deliberations." The jury complied, returned
2 approximately two and a half hours later with
3 a verdict recommending the death penalty.

4 Appellant on appeal contended the
5 trial judge should have told the jury that if
6 it was not capable of breaking the deadlock
7 the court would impose a life sentence. And
8 I'm reading verbatim. This same issue is
9 before the court and was settled in State
10 versus Adams, and then they cite Chief Justice
11 Lewis's pronouncement for the unanimous accord
12 in the State versus Adams.

13 And, gentlemen, I equate this
14 somewhat to the situation in a civil case,
15 albeit the burden of proof is more stringent
16 in a criminal case, beyond a reasonable doubt,
17 and also that in a death penalty because of
18 the irreversible consequences if the death
19 penalty were carried out, it's just of grave
20 and utmost importance that every consideration
21 of due process be afforded, more particularly
22 in a death penalty case, but I equate this to
23 the case law of Temple v. Powers in which the
24 workers' comp has been paid for an injured
25 party and then they're suing for damages. And

1 the court, as a matter of law, will offset any
2 comp award from any civil money damage award.

3 And just as in that case, you don't
4 tell the court that workers' comp has been
5 paid in this case and will be offset. I do
6 not see where it would be appropriate to
7 really invite the jury perhaps to have the
8 decisive jury to which there could not be give
9 and take and reasonable discussion, because as
10 Chief Justice Lewis stated, "The situation
11 implicitly envisioned here is that normally
12 the jury will unanimously either recommend
13 life or death and the undecided jury's an
14 exception."

15 But the way I read Adams, and I
16 recognize that the language there used was
17 "need not be divulged," that that is not
18 mandatory, it doesn't say shall not be
19 divulged to the jury. But my interpretation
20 of that and the subsequent cases is that it is
21 inappropriate for that to be shared with the
22 jury.

23 So, Mr. Solicitor, I do grant your
24 motion in limine to preclude the defense from
25 arguing contra to the court's interpretation

1 of State v. Adams and would ask you gentlemen,
2 please, not to argue that to the jury and the
3 court would not instruct the jury as to that,
4 barring any unforeseen developments or
5 circumstances that may arise in the case.
6 Because you gentlemen understand that normally
7 some, or most, of your in limine motions you
8 may have to have a foundation before the court
9 can properly rule on a motion such as this, so
10 any rulings of the court would be subject to
11 further testimony, developments, or rulings of
12 the various courts to which we all must
13 adhere.

14 So, and Madam Court Reporter, please
15 let the record reflect that the defendant's
16 objection to the court's ruling, let him be
17 protected in the record. I don't see any
18 useful purposes, gentlemen, at various stages,
19 to keep repeating the grounds for whatever,
20 whatever, and I just want to make sure you're
21 protected in the record.

22 MR. THEOS: Yes, sir. The only time I
23 could see just making sure that we've voiced
24 that for record purposes would be just prior
25 to those arguments.

1 THE COURT: Sure. Sure. I have no
2 problem. So the court so rules in regard to
3 that motion.

4 And, Mr. Solicitor, this that I have
5 is a copy, the original of this is intact in
6 the clerk's file; is it not?

7 MR. BAILEY: Yes, sir. Yes, sir.

8 THE COURT: And, Mr. Theos, you have
9 filed with the clerk your memorandum, that
10 which I have is not a copy?

11 MR. THEOS: Yes, sir. We filed our
12 memorandum in opposition.

13 THE COURT: I would ask, because I want
14 to keep mine intact, in case you want to
15 reargue that at some time I have it right here
16 in hand.

17 The next motion of the state, Madam
18 Court Reporter, is in limine for an order
19 prohibiting both the state and the defendant
20 from injecting religious arguments at any
21 stage during the trial of this case of State
22 versus Kenneth Simmons, and the solicitor sets
23 forth the basis for his motion as being State
24 versus Raymond Patterson, and Patterson was a
25 Lexington County case refiled February 28 of

1 1997 was the final opinion of our South
2 Carolina Supreme Court. I am unaware if that
3 is petition for cert to the U. S. Supremes or
4 other courts.

5 And, of course, in that case trial
6 judge, and I think the last judge that tried
7 that was Judge Shuler, it had been previously
8 tried by Judge Kennon, and by Judge Long. And
9 Judge Shuler ruled that he prohibited the
10 capital defendant from repeating Biblical
11 story during the closing argument, that that
12 did not result in fundamental unfairness where
13 the court permitted neither the solicitor nor
14 the defendant to argue about religion or God.

15 And I've read the Patterson case and
16 I've also read, and I commend you for your
17 research, there's a nine-page very nice
18 memorandum on behalf of the defendants and I
19 will be glad to hear from the state.

20 MR. BAILEY: Your Honor, there really
21 isn't a whole lot of law in this state on
22 religious arguments. I cited the Patterson
23 case and touched on a couple prior cases.
24 I've got that going up on appeal by the Tucker
25 case by the defense alleging that I shouldn't

1 have mentioned religion and I said I think
2 thank God something happened. But that's an
3 issue on appeal there.

4 THE COURT: That's all? That was the
5 extent of your reference to religion is thank
6 God something didn't happen?

7 MR. BAILEY: Thank God he didn't kill
8 this other couple that he hitched a ride with.

9 THE COURT: Gentlemen, I -- let me tell
10 both of you that what we're speaking of here
11 in regard to this motion, and certainly the
12 defendant's counsel or the state's counsel if
13 you made a statement thank God the sun's
14 shining or thank God it's not, I don't
15 consider that to be the prohibition that you
16 are asking for.

17 MR. BAILEY: No, sir. No, sir.

18 THE COURT: You agree with that,
19 Mr. Theos?

20 MR. THEOS: I agree with that. I wasn't
21 quite sure exactly what Mr. Bailey was asking
22 for though.

23 MR. BAILEY: Okay. Your Honor, what
24 I'm -- what I'm concerned about is getting in
25 a posture where the defense is arguing the New

1 Testament, turn the other cheek, and I'm
2 arguing an eye for an eye and the jury loses
3 sight of the court's instructions. You can
4 argue the death penalty, depending on what
5 part of the Bible you read, any way you want
6 to do it.

7 And, of course, the defense is
8 entitled to argue endlessly on any mitigating
9 circumstances they may have, and that the
10 focus should be on the aggravating and
11 mitigating circumstances, the characteristics
12 of the defendant and the circumstances of the
13 crime, but religion has nothing to do with any
14 of that, Your Honor. And I just think it has
15 the potential to inject an arbitrary factor
16 into the deliberations and turn this thing
17 into a religious debate, which it should not
18 be.

19 THE COURT: Bear with me one minute.

20 (Pause in proceedings.)

21 THE COURT: Thank you. I'll be glad to
22 hear from you please, gentlemen.

23 MR. THEOS: Yes, sir. May it please the
24 court. Your Honor, I wasn't quite sure what
25 Mr. Bailey -- what religious arguments he was

1 seeking to preclude. I understand now from
2 his statement to the court. Your Honor, we
3 certainly aren't intending to ask that the
4 jury apply religious precepts and religious or
5 canonical law rather than secular law.

6 It's not my habit, Your Honor, and
7 it's not really my style to quote the Bible to
8 begin with, so I never envisioned doing that
9 from the start. But since it was brought up,
10 Your Honor, I was an English major in college,
11 I read a good bit, and it seems that
12 everything --

13 THE COURT: Where did you get your degree
14 from?

15 MR. THEOS: Which degree, Judge?

16 THE COURT: Your English degree.

17 MR. THEOS: From Clemson.

18 THE COURT: Thank you.

19 MR. THEOS: So you may not put much
20 credence in that degree but, Judge, even when
21 I was in law school at Carolina it seems that
22 everything that we read, whether it be of
23 legal -- of a legal nature or of a religious
24 nature or of any other nature or strictly a
25 literary nature has some, some, some semblance

1 of foundation upon some of the concepts, some
2 of the illustrations and some of the stories
3 of the Bible.

4 And although we certainly don't
5 intend on quoting scripture asking the jury to
6 consider a New testament passage versus an Old
7 Testament passage, and whether or not
8 religiously, considering religious arguments,
9 whether or not the death penalty is a proper
10 punishment in this case.

11 We also, on the other hand, don't
12 want to be precluded --

13 (Interruption in proceedings.)

14 MR. THEOS: Your Honor, we also, as I
15 said, do not want to be precluded from making
16 arguments and weaving arguments into our
17 closing that may be steeped in religious
18 history, that may be steeped in stories coming
19 out of the Bible.

20 Judge Anderson, the district court
21 judge, I was at a seminar with him a few
22 months ago and he happened to talk about the
23 book that I quote in our opinion and he
24 talked -- the entire seminar was on the art of
25 advocacy. And as I read his book and as I

1 listened to him speak, I almost think it's
2 tantamount to ineffective assistance of
3 counsel or maybe not fulfilling our job
4 description if we don't attempt to use every
5 possible means of advocacy with the jury.

6 And to be precluded from -- from --
7 not from making a religious argument, because
8 certainly we're not going to do that, we would
9 hope that the solicitor wouldn't either, but
10 to be precluded from any reference to stories
11 or parables or illustrations arising out of
12 the Bible, I think, Your Honor, would be a
13 denial of effective assistance of counsel for
14 Mr. Simmons.

15 We should be entitled, Your Honor,
16 to argue anything and everything as Mr. Bailey
17 says in the mitigation phase, in the penalty
18 phase of this court without stepping over that
19 line. Your Honor, as Mr. Bailey said there
20 aren't any cases on point in South Carolina
21 that I'm aware of. I don't believe, I think
22 Mr. Bailey's will be the first that is decided
23 by our Supreme Court pertaining to the issue
24 of religious arguments.

25 Now, there's some that have

1 addressed specific arguments, specific
2 recitations during various portions of the
3 trial, during state's closing and defense's
4 closing, but I don't think there's any case
5 that addresses a strict ban or prohibition on
6 any religious related argument such as
7 Mr. Bailey is seeking to prohibit now.

8 And, Your Honor, we'd ask that the
9 court not grant his motion in limine, or at
10 the very least and in the alternative,
11 structure a prohibition so that it relates to
12 religious arguments or appeals to the jury,
13 not to base its decision on religious precepts
14 but certainly allow us to weave into our
15 argument things that may, in fact, be based
16 out of the Bible or other religious stories.

17 THE COURT: I'll hear any reply. I don't
18 have to hear from you, but I want to give you
19 that opportunity.

20 MR. BAILEY: Your Honor, just to
21 reiterate, I think that it's really going to
22 be impossible to weave in Biblical stories
23 without either directly or indirectly
24 encouraging that jury to make a decision on
25 life or death on a religious basis. I don't

1 see how you can avoid that, that's the only
2 reason they would want to weave these stories
3 in it in an arbitrary factor, encourage them
4 to make a decision based on something other
5 than the facts of that case, the
6 characteristics of the defendant, the
7 circumstances of the crime.

8 A religious argument is not in any
9 way conceivably mitigation evidence or
10 arguments on mitigation that would relate to
11 the lifestyle of the defendant or problems he
12 had in his upbringing, that nature. I just
13 think it's completely arbitrary and off the
14 wall.

15 THE COURT: All right. Mr. Theos, look
16 at page 2 of your brief.

17 MR. THEOS: Yes.

18 THE COURT: You'll see State versus
19 Patterson, a 1997 case, then look at page 5.

20 MR. THEOS: Yes, sir.

21 THE COURT: About five lines down you
22 cite State versus Holden, a North Carolina
23 case, 298 S.E.2d, a 1997 case.

24 MR. THEOS: Yes, sir.

25 THE COURT: And, of course, I have

1 Southeastern Digests in Barnwell in my office
2 and Sheppard's, but I believe that State v.
3 Holden might be a scrivener's error. It
4 couldn't be 298 S.E.2d for a 1997 case, which
5 is no big deal, I -- I -- other than the fact
6 that you may have used this another time and
7 you want to try and have it as correct as
8 possible.

9 Do you have a copy of judge -- I
10 have great respect for Judge Anderson, and I
11 was unable to attend that seminar. Do you
12 have his materials?

13 MR. THEOS: I have them in my office,
14 Your Honor. I did not bring them with me.

15 THE COURT: Do you mind on Monday
16 bringing them? And at night when I go home
17 maybe I'll have a chance to read that.

18 MR. THEOS: Yes, sir.

19 THE COURT: Do you mind?

20 MR. THEOS: No, I don't mind that at all.

21 THE COURT: If you'll just bring that
22 with you, and I'll read them.

23 Gentlemen, I'm not at this time
24 prepared to absolutely prohibit both the state
25 and the defendant from injecting religious

1 arguments. Obviously the concern is that the
2 jury's instructed that they have to follow the
3 law as given to them by the court as being the
4 correct and applicable law. And you should
5 stay away from trying to, as Mr. Theos had in
6 his brief, trying to invoke religious
7 authority to supplant the secular legal
8 principles the jury is sworn to apply.

9 Rather, at this time, I tell you
10 that just as you might make -- have a
11 reference to the Canterbury Tales or
12 Shakespeare or some other authority or
13 legal -- not legal, some other significant
14 writing, I'm going to just ask you to tread
15 carefully with trepidation and if -- if -- I
16 would hope there would not be any objections
17 during the argument of either the state or the
18 defendant. But if you feel that, or view that
19 opposing counsel, whether the state or the
20 defendant, is crossing the line in trying to
21 confuse the jury by having them adopt
22 religious law as being instrumental in
23 arriving at a verdict as opposed to the law
24 which the court shall give to them, then I
25 would hope that you would interrupt and I'll

1 have to excuse the jury and I'll have to rule
2 on that.

3 And you all offer me with Bruce
4 Littlejohn's saying, Once you ring the bell
5 it's difficult to get the ringing out of the
6 ears of the juror. And I hope that you will
7 not be distracted by objections during your
8 argument, either of you, but surely you do
9 what you need to do. I mean, I just have to
10 invite you to object if you feel it necessary.

11 But I'm not prepared at this time to
12 rule that, you know, you can't say "my God"
13 or, you know, things of that nature either, to
14 make a passing reference to a Biblical
15 situation, but I would encourage you all both
16 to stay away from your trying to equate the
17 law that should be followed as being the
18 religious law as opposed to what we call the
19 secular, as opposed to the ecclesiastical law.
20 Okay? And if you all find anything further
21 other that you want the court to consider,
22 please do.

23 MR. BAILEY: Yes, sir.

24 THE COURT: Yes, sir. You're on your
25 feet, Mr. Theos?

1 MR. THEOS: Yes, sir. Excuse me, Judge,
2 but I did find on page 5 it is a scrivener's
3 error and I've got the correct cite. It was
4 copied wrong from my notes.

5 THE COURT: And it is?

6 MR. THEOS: It is 488.

7 THE COURT: 488.

8 MR. THEOS: Instead of 298.

9 THE COURT: But it's still at page 514?

10 MR. THEOS: Yes, sir. Everything else is
11 correct.

12 THE COURT: Thank you. And I'll make
13 that correction on my copy, but if there's a
14 copy with the clerk, you know, you might -- I
15 had to proofread the legislative manual for
16 the six years that I worked at the state
17 house, and I didn't major in English but I
18 took all my electives in English, and things
19 like that just jump out at me. I don't know
20 why, it's no big deal. I hope you don't mind
21 my bringing that to your attention?

22 MR. THEOS: Oh, no, sir. I'm glad you
23 did.

24 THE COURT: So then, gentlemen, moving
25 on, I believe that covers yours?

1 MR. BAILEY: I believe so, Your Honor.

2 That's all I had.

3 THE COURT: There were several motions
4 that have been filed by the defendant, Madam
5 Court Reporter, and we start here with the
6 defendant's motion in limine that -- to
7 exclude any and all reference and/or testimony
8 or evidence regarding any and all reference by
9 the state to the death penalty as a deterrent,
10 d-e-t-e-r-r-e-n-t, on the grounds that the
11 prejudicial value of such subjects far
12 outweighs any probative or evidentiary value
13 in the instant case. And there's a memorandum
14 that is attached to that.

15 And, Madam Court Reporter, we had a
16 discussion in chambers about these motions and
17 if all were prepared to go forward and argue
18 them and needed more time for research.

19 And, Mr. Solicitor, I have a note
20 here that the state agreed that they generally
21 do not argue, but the case law does allow it.

22 MR. BAILEY: That's correct, Your Honor,
23 and I could cite those cases if Your Honor
24 desires.

25 THE COURT: I would be glad for you to

1 give me some cites.

2 MR. BAILEY: Yes, sir. Your Honor, the
3 following cases stand for the proposition that
4 it's not error for the solicitor to give his
5 opinion that the death penalty is a deterrent.
6 State versus Yates, 310 S.E.2d 805, 1982 case.

7 THE COURT: 805, 1992?

8 MR. BAILEY: Yes, sir.

9 THE COURT: 1982 or 19 --

10 MR. BAILEY: 1982.

11 THE COURT: '82, thank you.

12 MR. BAILEY: Thank you. State versus
13 Trusdale, and that's the third reported
14 opinion on Trusdale, 393 S.E.2d 168, 1990
15 case; State versus Jones, that's the second
16 Jones case, 378 S.E.2d, 594, 1989 case; State
17 versus George, 476 S.E.2d, 903, 1996 case.
18 And that case, Your Honor, stood for the
19 proposition that both sides could argue their
20 opinions on the deterrent effect of capital
21 punishment but could not produce any data at
22 trial to support a view one way or the other.
23 Finally, Your Honor, State versus Singleton,
24 326 S.E.2d, 153, 1985 case held it was not
25 error for the solicitor to argue deterrence.

1 All right. Your Honor, at this
2 point I don't plan on arguing deterrence, but
3 in view of the case law I would prefer not to
4 be prohibited from doing that in case, you
5 know, the door is opened in some manner during
6 the trial.

7 THE COURT: I'll be glad to hear from
8 you, please, gentlemen.

9 MR. THEOS: Yes, sir. Your Honor, we
10 don't intend on opening that door. And if I'm
11 hearing Mr. Bailey correctly, if we don't open
12 it he's not going to argue it, which would --
13 I believe that's his position.

14 Your Honor, although Mr. Bailey
15 cited these certain cases that stand for the
16 proposition that the state ought to be allowed
17 to make that argument, the case that you
18 have -- that we talked about before, State
19 versus Patterson, and then on the case of
20 State versus Plath dealt with that issue,
21 they're 1984 cases, and they're referenced in
22 my -- in our memorandum. But the court was
23 faced with that same issue, determining
24 whether the -- determining whether or not to
25 charge the jury as to whether a life sentence

1 or a death sentence would deter similar
2 crimes.

3 And the trial judge was upheld by
4 the court, and I'll quote, "The sole function
5 of the jury in a capital sentencing trial is
6 the individualized selection of one penalty,
7 the other based upon circumstances of the
8 crime and characteristics of the individual
9 defendant."

10 And I think, Your Honor, that really
11 that goes to the heart of our criminal justice
12 system, that juries should not be concerned
13 about what effect this sentence or this form
14 of punishment may have on others in the
15 community. Their sole consideration should be
16 what is the appropriate punishment for this
17 defendant that stands before us, and they
18 shouldn't be governed, they should not take
19 into consideration the impact or effect it may
20 have on society, on their community, or
21 society as a whole. And I think to do so,
22 Your Honor, would inject a factor into their
23 deliberations that would be inappropriate.

24 And we ask that -- again, I don't
25 envision opening the door in any way, and if I

1 don't I guess the point is -- the matter is --
2 will be moot. But we'd ask that you rule
3 favorably for us on this motion.

4 THE COURT: Well, Mr. Theos, I'm a little
5 concerned that these five cases, and I'm
6 generally familiar with them, but not
7 specifically for each stated therein, that you
8 don't crave reference to any of them in your
9 written memorandum, particularly where there's
10 a case as late as 1996, State versus George.

11 MR. THEOS: Well, Your Honor, I can only
12 cite those cases, those cases that support our
13 position. And I don't argue that there is
14 other case law authority out there that is
15 supportive of Mr. Bailey's position.

16 THE COURT: But clearly if there's
17 authority of the past, latest case you cite is
18 the 1988 case of Cockaham and, you know, if
19 there are cases here in 1989, 1990 and 1996
20 that stand for the proposition as articulated
21 by the solicitor, I feel it's incumbent on the
22 counsel to cite complete authority to let the
23 court look at the whole picture, not just
24 cases favorable to what you argue, please,
25 sir.

1 MR. THEOS: Your Honor, the only response
2 that I would have to that is I believe
3 Mr. Bailey cited all those cases that do stand
4 for that proposition, and would be simply --
5 without the lack of any favorable authority
6 past a certain date would argue that there are
7 always cases that just because a decision has
8 been made by some courts doesn't necessarily
9 mean that that decision cannot be changed.

10 THE COURT: Are you asking me to plow new
11 ground? Do you accept his contention that the
12 law is under Yates, Trusdale III, Jones II,
13 George and Singleton that the state is allowed
14 to argue deterrence?

15 MR. THEOS: Your Honor, I think that
16 there is case authority, more recent case
17 authority that allows it. We would ask that
18 you consider some of the --

19 THE COURT: Earlier ones?

20 MR. THEOS: -- earlier cases and the
21 arguments and discussions in those earlier
22 cases related to that issue.

23 THE COURT: All right. Well, gentlemen,
24 I'll -- and please understand that any ruling
25 I make is subject to any of you gentlemen

1 bringing to me further authority or the
2 advance sheet that I read Sunday night didn't
3 reflect any new death penalty helpful
4 information, but that, you know, while we
5 don't want to have too much verbiage in this,
6 we don't have to have any unnecessary renewal
7 of motions and argument time and time again,
8 but I invite you to bring to the court's
9 attention any new case law or authority that
10 you feel would be helpful to the court.

11 But at this time, Mr. Theos, based
12 upon my general understanding of the law I
13 concur with the position of the state and the
14 court declines at this time to preclude or
15 prohibit the solicitor commenting on the death
16 penalty as being a deterrent. Of course, you
17 move on the grounds that the prejudicial value
18 far outweighs any probative value. What is
19 that, Rule 402?

20 MR. THEOS: I believe it's 403, Your
21 Honor.

22 THE COURT: 403. In any event, I decline
23 to grant your motion at this time.

24 The next motion of the defendant is
25 to exclude all references and/or testimony or

1 evidence regarding any and all reference by
2 the state to the defendant as quote "Skinrat,"
3 one word, S-k-i-n-r-a-t, end quote, on the
4 grounds of prejudicial value of such subjects
5 far outweighs any probative or evidentiary
6 value in the instant case.

7 And as I understood from our
8 preliminary discussions in chambers,
9 gentlemen, that while the solicitor had sent
10 the audio and typed transcription of the audio
11 in which the officer or the SLED agent,
12 Kenneth Meers, had made inquiry as to if he
13 had a nickname, and the defendant said
14 Skinrat, that Mr. Theos is going to -- about
15 when are you going to be able to let him know
16 what you want redacted or excluded as not
17 being pertinent, relative, or germane from
18 that?

19 MR. THEOS: Your Honor, we've already
20 done that.

21 THE COURT: And did you ask him to
22 eliminate Skinrat?

23 MR. BAILEY: Yes, sir. Your Honor, we
24 had agreed on eliminating Skinrat from the
25 transcripts and the tapes. There's a two-page

1 handwritten statement up at the top that's got
2 a reference to Skinrat. I didn't know how to
3 delete that off the original without having
4 the jury wonder what's being whited out, so
5 I'd like to leave that in there. I'm not
6 going to reference it, I'm not going to
7 publish it to them out loud, but I don't want
8 to start tampering with the original paper,
9 especially if there's been an issue raised
10 that Kenny Meers dictated this thing to him,
11 spelled words and things like that.

12 MR. THEOS: Your Honor, I appreciate
13 Mr. Bailey's agreement to redact it out of the
14 transcript, that I assume the judge -- that I
15 assume you will hand over to them to go along
16 with the audio tape.

17 THE COURT: If you all have copies for
18 them.

19 MR. BAILEY: Yes, sir. Your Honor, while
20 we're on that, what I plan to do is run a copy
21 for each one of the jurors so they can follow
22 the tape as it's played.

23 THE COURT: Sure.

24 MR. THEOS: And assuming that's the case,
25 Your Honor, it seems to me that if we're going

1 to leave it out of all of them, all but one,
2 we defeat the purpose in leaving it in the
3 one. Clearly Skinrat, don't really know what
4 it means, but it just sure does have a
5 negative connotation and just sounds ugly.
6 And if there's no evidentiary purpose served
7 by leaving it in....

8 THE COURT: How are you going to get it
9 off the original without showing a white out,
10 other than having a duplicate original of the
11 original page, front page?

12 MR. THEOS: Your Honor, I don't see why
13 there can't be a duplicate of the original by
14 stipulation of the parties. I don't
15 understand.

16 THE COURT: Can you agree with that,
17 Mr. Solicitor?

18 MR. BAILEY: Judge, the only thing I'm
19 concerned about is creating questions in the
20 mind of the jury as to how come we don't have
21 the original if some question is being made as
22 to the authenticity or how that document came
23 about.

24 THE COURT: Is anybody raising the
25 authenticity or how it came about, Mr. Theos?

1 MR. THEOS: I mean, we --

2 THE COURT: Because the copies the jurors
3 will have will be duplicate originals, but
4 there's only going to be one of those that go
5 back to the jury room, I assume you're not
6 going to send those 14 copies or 12 copies
7 back.

8 MR. BAILEY: No, there's two -- we're
9 talking two different things. One will be the
10 tape, which is going to go out. The only
11 thing that we're talking about is that
12 two-page handwritten statement.

13 MR. THEOS: There's a two-page
14 handwritten statement that Detective SLED
15 Agent Meers testified that following the first
16 taped interview.

17 THE COURT: In his handwriting?

18 MR. THEOS: That he had Mr. Simmons write
19 this, Mr. Simmons conferred with him from time
20 to time about spellings, but that's it. We
21 don't intend on questioning the authenticity
22 of that or the authorship of it.

23 THE COURT: Well, I've got that in my
24 trial notebook.

25 Mr. Major?

1 MAJOR MOULTRIE: Yes, sir.

2 THE COURT: I don't know where Michael
3 went, but would you ask him to bring me my
4 three trial notebooks that I have in there?
5 Unless you all want to pass it up.

6 MR. BAILEY: I've got a copy. It's kind
7 of marked up, Judge.

8 THE COURT: I've got one from the other
9 day.

10 MR. THEOS: Your Honor, the only
11 objection that we had to it was pertaining to
12 its admissibility at the outset in our motion
13 to suppress it, but other than that we do not
14 intend on calling into question its
15 authenticity or the authorship of it.

16 THE COURT: Well, of course, the
17 solicitor stated that he did not intend to
18 emphasize his nickname is Skinrat but, you
19 know, there may be some witness that will, you
20 know, crave reference to him as that. So how
21 can you on this handwritten document, I was of
22 the opinion you were speaking of the
23 transcripts and of the tape, but I appreciate
24 better now what the solicitor says that this
25 is one that's allegedly in -- thank you so

1 much -- his handwriting. How are you going to
2 do that, Mr. Theos?

3 MR. THEOS: Your Honor, we don't intend
4 on calling into question, again, who authored
5 this or its authenticity. You've ruled that
6 it is, in fact, admissible, but we certainly
7 don't intend on calling any of those things
8 into question, so that I don't see any reason
9 why a duplicate copy cannot be substituted in
10 its place. I don't think the jurors are going
11 to question why they don't have an original.
12 They're going to be given so many copies of so
13 many different things, that I don't think they
14 will --

15 THE COURT: No, sir. I don't think
16 they're going to be given a lot of copies.
17 Other than the transcription, what will they
18 be given copies of?

19 MR. BAILEY: Judge, the only thing I can
20 think of is other than maybe some chain of
21 custody stuff, but most of that's going to be
22 originals also.

23 MR. THEOS: Your Honor, from an
24 evidentiary standpoint I don't -- I think to
25 substitute a copy in place of this does not

1 prejudice the state, does not impact --

2 THE COURT: Is the original in pencil or
3 pen?

4 MR. BAILEY: Judge, I don't know. Do you
5 have that? Okay. I think that was filed with
6 the clerk and I don't recall, Judge. I think
7 it's in pen.

8 THE COURT: I would think so, but again I
9 don't know.

10 MR. THEOS: And, Your Honor, again I
11 don't think that substituting an original by
12 stipulation effects the integrity of the
13 statement or its evidentiary value for the
14 state. Certainly to allow it in without
15 redacting Skinrat would fly in the face of --

16 THE COURT: Well, I don't know what skin
17 rat means and I don't know that that -- you
18 know, like a big fish or a small beaver or a
19 skin rat, I don't know the significance of
20 what skin rat means. Do you know why that
21 nickname came about?

22 MR. THEOS: Your Honor, I have no idea,
23 but it sure doesn't sound pretty, it just has
24 an ugly, negative connotation. And since
25 identity is not an issue in this case and the

1 nickname of Mr. Simmons is not an issue, it
2 certainly doesn't have any relevancy to any of
3 the evidence. And if it may tend to bias a
4 juror because of what they may perceive it
5 means, then why expose them to it?

6 **THE COURT:** And that was in the audio
7 that he responded his nickname was Skinrat,
8 that's the source of it?

9 **MR. BAILEY:** Yes, that's one source. And
10 we'd agreed to take that out at Mr. Theos'
11 request. I just can't see the jury basing
12 either guilt or penalty determination on that
13 nickname. I don't think it's that big of a
14 deal.

15 **THE COURT:** Well, if it said also known
16 as Satan's Disciple.

17 **MR. BAILEY:** Yes, sir. That would be
18 different.

19 **THE COURT:** Or Dirty Harry or .357
20 Magnum, you know, that's one thing. But I
21 just don't see where Skinrat has such a -- I
22 mean, a foot rat, a skin rat, a head rat, a
23 toe rat, a hair rat. I don't -- that just to
24 me, unless you can -- I don't know what the
25 street vernacular or the semantical

1 interpretation of that would be that's
2 detrimental.

3 MR. THEOS: Your Honor, I -- we all have
4 different perceptions of what it means.

5 THE COURT: Well, tell me yours.

6 MR. THEOS: To me it just -- it connotes
7 something that's real dirty and real ugly. It
8 connotes a rat. I mean, I'm used to those
9 rats down on Broad Street downtown that are
10 just as ugly and nasty as they can be. And --

11 THE COURT: You're talking about real
12 rats?

13 MR. THEOS: I'm talking about the real
14 rats, the sewer rats, the wharf rats. And to
15 me it's got an ugly connotation. I don't know
16 what it might have to these, it may be
17 nothing. But that's my point. If it doesn't
18 serve any evidentiary purpose, and it's not a
19 big deal as Mr. Bailey says, then why run the
20 risk of prejudicing a jury with that word? It
21 seems to me let's leave it out so that it's
22 absolutely clear and clean that it has no
23 effect and impact.

24 THE COURT: Mr. Solicitor, do you feel
25 that strong about it? If you do, I....

1 MR. BAILEY: I don't feel that strong one
2 way or the other.

3 THE COURT: I just don't know how to
4 redact it from the original.

5 MR. BAILEY: Yes.

6 THE COURT: But for sure whatever copies
7 you give to the jury must be in complete
8 conformity with the original introduced into
9 evidence.

10 MR. BAILEY: Yes, sir. And again, Judge,
11 I'm not going to beat him over the head and
12 call him Skinrat 26 times like with the Matt
13 Calvin Hawkins case but, you know, and I'm not
14 going to publish that portion to the jury of
15 it out loud, and I just don't think it's going
16 to be a factor with juries.

17 THE COURT: I decline to grant the motion
18 because the court doesn't view that the
19 nickname Skinrat has a derogatory connotation
20 thereto. And hopefully you all won't in the
21 trial, you said you're not going to emphasize
22 it or be repetitive of it.

23 MR. BAILEY: That's correct, Your Honor.

24 THE COURT: But that I trust that there
25 won't be any long narrative on skin rats.

1 MR. THEOS: Your Honor, so I can be clear
2 my motion is going to be denied for its -- are
3 you granting my motion with the exception of
4 the reference in that written -- in that
5 written statement that --

6 THE COURT: Well, subject to what may
7 come forward at the trial, the state, the
8 solicitor has -- as an officer of the court
9 says that he's not going to emphasize it and
10 say it 26 times or make it an issue, and
11 hopefully you won't make it an issue either.
12 And my ruling is that he does not have to
13 redact this alleged handwritten statement
14 where it just craves reference to it a/k/a
15 Skinrat at the top, which was gleaned or
16 derived from the audio recording which has
17 been transcribed. And the state's going to
18 delete it from the -- any mention of Skinrat
19 in the audio or the transcription. And so may
20 I please return that to the solicitor.

21 Then, gentlemen, the next motion is
22 by the defendant to exclude any and all
23 reference and/or testimony or evidence
24 regarding all photographs of the deceased on
25 the grounds of prejudicial value of such

1 subjects far outweighs any probative or
2 evidentiary value in the instant case.

3 In an informal conference in
4 chambers with all counsel, the solicitor
5 stated he does not intend to offer any
6 photographs of the deceased body during the
7 guilt phase unless there are unexpected issues
8 that arise, but he does intend to use it
9 during the penalty phase.

10 And your motion, Mr. Theos, relates
11 to the guilt or the penalty or both?

12 MR. THEOS: Your Honor, I think I
13 recognize in our memorandum that the case law
14 does allow -- that when it does allow
15 photographs, it does not allow them generally
16 in the guilt phase, which you just referenced
17 Mr. Bailey has offered to you and to us in
18 chambers that he will not seek to introduce
19 those.

20 We recognize that if the court, and
21 the case law holds that if the court allows it
22 and finds that they're not unduly burdensome
23 or gruesome that they would be allowed only in
24 the penalty phase.

25 THE COURT: May I see the photographs,

1 please, if they're readily available?

2 MR. BAILEY: Yes, sir. Your Honor, could
3 I ask that the family, she could take them out
4 in case they inadvertently look at the
5 photographs while I'm -- I don't....

6 THE COURT: Oh, I'm not going to let them
7 look at it.

8 MR. BAILEY: Yes, sir. I didn't know
9 whether they might catch a glimpse of them or
10 something.

11 THE COURT: They're welcome to leave, if
12 they like, but I'm not -- wouldn't expose you
13 ladies to that.

14 MR. BAILEY: I'm trying to figure out how
15 to get them out of here without them seeing
16 it.

17 THE COURT: You can come up here.

18 MR. THEOS: Your Honor, may I approach?

19 THE COURT: Sure. Without these bifocals
20 I can't see past five feet.

21 MR. BAILEY: Your Honor, I've also got
22 the Ellis Franklin photographs that were
23 allowed by our Supreme Court, that was an
24 issue in that case. Those are the photographs
25 that I think probably most closely resemble in

1 terms of what they're supposed to depict, is
2 these. If you want to look at those for
3 comparison purposes to see what our court let
4 in on that occasion.

5 THE COURT: And you -- these are five
6 photographs that aren't numbered, but we can
7 all... Yes, I would like to see those,
8 please, that might be insightful to the court.

9 MR. BAILEY: I've got a copy of the case
10 in here that refers to those particular
11 photographs. And there should be reference on
12 the back with the exhibit number.

13 (Pause in proceedings.)

14 MR. BAILEY: Judge, also the notebook I
15 handed up earlier had a memorandum addressing
16 both those penalty phase photographs citing
17 all the cases.

18 THE COURT: Let the record reflect that
19 the court and counsel reviewed the photographs
20 that the Supreme Court had ruled in State
21 versus Ellis Franklin, which was an opinion of
22 January 30, 1995. And the court has viewed
23 five separate photographs of the deceased.

24 Anything other further, Mr. Theos,
25 bearing in mind family members are present? I

1 can excuse them if you deem it necessary,
2 because I don't know what you're going to say.

3 **MR. THEOS:** Yes, sir. I don't think so.
4 Your Honor, our position would be as stated in
5 our memorandum, and that would be that unless
6 the photographs -- that we agree that the
7 photographs would be admissible in the
8 sentencing phase for purposes of attempting to
9 establish circumstances -- for purposes of
10 attempting to establish aggravating
11 circumstances, et cetera. But where they are
12 not needed for such purpose, Your Honor, it's
13 our position that the prejudicial effect of
14 those photographs would far outweigh the
15 probative value, and in this particular case
16 they would be, therefore, unnecessary.

17 Your Honor, and my argument would be
18 more so, more so related to the two
19 photographs that were not at the scene. They
20 were -- out of the five I believe that there
21 were three at the scene. And I think in all
22 fairness to the state that there is an
23 argument that those photographs from the scene
24 need to be introduced in order to assist in
25 establishing certain elements.

1 But certainly the other two
2 photographs are not of the scene, I don't
3 believe they were taken at the scene, they
4 were taken sometime afterwards.

5 **THE COURT:** You agree that two were not
6 at the scene?

7 **MR. BAILEY:** Two taken by Dr. Nichols
8 immediately prior to the autopsy, Your Honor.
9 One of our aggravating circumstances is
10 physical torture and, of course, that would
11 not come out until the penalty phase. And I
12 expect to -- anticipate calling Dr. Nichols to
13 testify on the physical torture and he would
14 need those photographs to corroborate some of
15 his testimony.

16 **THE COURT:** Anything further?

17 **MR. THEOS:** Your Honor, not knowing
18 exactly what Dr. Nichols' testimony is going
19 to be, I've met with him and interviewed him,
20 but not knowing exactly what Mr. Bailey will
21 attempt to introduce into evidence at that
22 stage or what his testimony would be, I would
23 ask that the court reserve ruling on those
24 photographs until that time. I don't know
25 based on his testimony whether it will be

1 necessary, I don't know how it correlates to
2 that testimony.

3 **THE COURT:** All right. The court is of
4 the opinion and rules that in the guilt phase
5 that the photographs of the body will not be
6 offered into evidence, allowed into evidence
7 unless unexpected issues arise, and if so
8 we'll have to address those as we are
9 confronted with them. But the court rules
10 that they would be admissible during the
11 penalty phase.

12 **MR. THEOS:** Your Honor, would that ruling
13 also apply to those other two photographs that
14 were taken?

15 **THE COURT:** All five, Mr. Theos. All
16 five.

17 The next motion is that the
18 defendant, Kenneth Simmons, seeks to prohibit
19 the state from arguing against a
20 recommendation of mercy by the jury. I'll be
21 glad to hear from you, Mr. Theos.

22 **MR. THEOS:** Your Honor, I don't have your
23 charge with me, but I think that your charge
24 includes some language to the effect that the
25 jury can base its decision in the penalty

1 phase on any reason or no reason at all --

2 THE COURT: That's correct.

3 MR. THEOS: -- including mercy. And,
4 again, I don't have it in front of me, but
5 certainly since mercy is something the jury
6 will be charged upon and it is a factor that
7 they can take into account during their
8 deliberations, certainly defense should be
9 allowed to argue that to the jury.

10 And I apologize, Your Honor, there
11 is memorandum of law attached to that, it's
12 simply our Notice of Motion and Motion in
13 Limine.

14 THE COURT: Yes, sir, Mr. Solicitor.

15 MR. BAILEY: Your Honor, of course once
16 the jury finds an aggravating circumstance,
17 once they pass that threshold they have pretty
18 much unfettered discretion to impose the death
19 penalty or life sentence. And Your Honor's
20 instruction will tell them they can impose a
21 life sentence at their discretion for any
22 reason or no reason at all purely as an act of
23 mercy, I think is pretty much the way the
24 charge is going to read. It's not going to
25 tell them they have to impose mercy, that's

1 something that they can do, is discretionary
2 with them.

3 I think it would be entirely
4 appropriate for the defense to ask that jury
5 for mercy, that's what they do in every
6 penalty phase closing argument. And on the
7 other hand, I think it would also be entirely
8 proper for me to ask them not to extend mercy,
9 that they can't do mercy and justice at the
10 same time.

11 THE COURT: And the defense, and/or the
12 defendant has the closing argument.

13 MR. BAILEY: They would have the final
14 closing argument.

15 THE COURT: Final closing argument in the
16 penalty phase.

17 MR. BAILEY: Yes, sir. But I think if
18 Your Honor's instructions were they had to
19 grant mercy, of course they couldn't tell them
20 don't grant mercy because you already told
21 them they had to, but if it's discretionary
22 they can or can not. And I think either side
23 can argue for or against mercy. There's
24 nothing that I know that would prohibit those
25 type arguments.

1 Your Honor, I don't have a
2 memorandum or anything because I just got
3 served this this morning.

4 **THE COURT:** I don't need your memorandum
5 on it, gentlemen, I was just....

6 Gentlemen, my charge that I had
7 proposed to you and shared with you on last
8 Friday, February the 12th: "The third element
9 you may consider if you should conclude that a
10 statutory aggravating circumstance exists, is
11 whether the defendant should be sentenced to
12 life imprisonment for any reason or for no
13 reason at all. This is what has been
14 traditionally referred to as a recommendation
15 of mercy, and should such be your decision you
16 would so indicate by..." so forth and so on.

17 And then the court goes on to say,
18 "In other words, you may choose to recommend
19 life imprisonment if you find the statutory or
20 non-statutory mitigating circumstance, or you
21 may choose to recommend life imprisonment as
22 an act of mercy." Those are the two instances
23 when mercy is mentioned. And then in
24 reviewing the forms it perhaps is mentioned
25 again, but the court declines to -- are you

1 saying, are you willing to concede, and I
2 don't want to give you a Hobson's choice,
3 Mr. Theos, that in your closing arguments you
4 or Mr. Bell or the defendant will not ask for
5 a recommendation of mercy so that he should be
6 precluded from arguing against a
7 recommendation of mercy?

8 I don't want to hamstring you, I
9 want you within the proper parameters and
10 rules to be allowed to argue as you deem fit
11 and proper, but it wouldn't be fair to the
12 state for him to argue -- not be allowed to
13 argue against a recommendation of mercy if in
14 your closing you're going to argue for a
15 recommendation of mercy, would it?

16 **MR. THEOS:** I don't know that I'd
17 necessarily agree with that statement, Your
18 Honor, but at this point your question was are
19 we willing to concede that we will not argue
20 it. And the answer to that is no, at this
21 point we're not willing to concede that.

22 **THE COURT:** And the court is not asking
23 you to. The court is not asking you or
24 encouraging you to do that, because if you
25 deem it proper in your argument to ask for a

1 recommendation of mercy, then feel free to do
2 so. And the court respectfully denies your
3 motion to prohibit the state from arguing
4 against it.

5 If this was a situation where the
6 state had closing argument in the penalty
7 phase and, you know, we could wait and see
8 what path you took to see whether he needed to
9 rebut or reply to the path that you took, but
10 that's not the case here because you have the
11 closing argument. So I respectfully deny that
12 motion, sir.

13 Then the next one is the defendant,
14 Kenneth Simmons, would preclude the solicitor
15 from arguing that a life sentence requires the
16 jury as taxpayers to support the defendant.
17 And in discussions in chambers it was my
18 recollection the solicitor said that he did
19 not plan to argue that a life sentence
20 requires a jury as taxpayers to support the
21 defendant. Is that correct, Mr. Solicitor?

22 MR. BAILEY: That's correct, Your Honor.
23 Unless he should argue it's economically more
24 feasible to do one than another, I'm certainly
25 not getting into that.

1 THE COURT: Well, but he gets the last
2 argument. How are you going to know?

3 MR. BAILEY: I'm going to guess. I won't
4 argue it, Judge. I'm going to guess he won't
5 get into that.

6 MR. THEOS: We'll concede at this point
7 we're not going to make an argument along
8 those lines.

9 THE COURT: All right. And so the state
10 has agreed that they will not argue that
11 barring unforeseen revelations, disclosures,
12 or visions.

13 MR. BAILEY: Yes, sir.

14 THE COURT: So I'm going to write here
15 I'm granting the motion subject to any new
16 considerations, we'll say.

17 Now, gentlemen, have I covered --
18 are there any other motions that you have on
19 behalf of the state at this time?

20 MR. BAILEY: Not on behalf of the state,
21 Your Honor, no.

22 THE COURT: And on behalf of the
23 defendant, did I overlook any of them? If I
24 did, I assure you it was unintentional.

25 MR. BAILEY: Mr. Theos has filed some

1 motions previously that haven't been heard. I
2 don't know whether you're abandoning those
3 motions, or...?

4 MR. THEOS: Your Honor, there were four
5 prior motions that were filed that I think
6 that they were more general in nature, motions
7 in limine, they were more general in nature,
8 and I think those motions in limine have --
9 put those issues properly before the court and
10 we see no need in going forward on those more
11 general motions in limine.

12 THE COURT: So neither the state or the
13 defendant at this time are aware of any other
14 or further motions?

15 MR. BAILEY: The state is not.

16 MR. THEOS: Neither is the defendant,
17 Your Honor, at this time.

18 THE COURT: All right. And, gentlemen --
19 Michael, would you check to see if they
20 received any other information relative to
21 jury requests or inability to find, locate, or
22 whatever? Is there anything else you can
23 think of today, Mr. Bailey, we could take up?

24 MR. BAILEY: Judge, a couple of things --

25 THE COURT: My next hearing is one

1 o'clock, it's five after 1:00, I'm on
2 schedule.

3 MR. BAILEY: Judge, you had given us some
4 material Friday, closing instructions.

5 THE COURT: We can talk about that in
6 chambers.

7 MR. BAILEY: Okay.

8 THE COURT: We don't need any of this on
9 the record, do we?

10 MR. BAILEY: No, sir.

11 THE COURT: I mean, we can put anything
12 on the record you like, don't misunderstand
13 me.

14 MR. BAILEY: I don't have anything on the
15 record, Judge.

16 THE COURT: Do you have anything else on
17 the record? Because if you do, let me get my
18 materials from the office so I can follow
19 along.

20 MR. THEOS: Your Honor, I don't have
21 anything else that involves the state. The
22 only thing you asked is that with respect to
23 the ex parte matters related to funding and
24 expenses.

25 THE COURT: Sure.

1 MR. THEOS: It probably would be prudent
2 from our standpoint for the record to publish
3 for the record what we presented you with of
4 late.

5 THE COURT: I have not had an opportunity
6 to review it. So until I have ruled upon it,
7 I don't see any need to put it in the record.
8 That shall -- you will be protected in the
9 record.

10 MR. THEOS: I just want to make sure
11 there's a protection here for Mr. Simmons.

12 THE COURT: You're going to be protected
13 in the record, have no fear on that. That's
14 my primary objective, besides giving a fair
15 trial to the state and the defendant, is
16 protect the record for the parties and
17 hopefully have a clean record.

18 Is there anything else?

19 MR. BAILEY: No.

20 THE COURT: We can talk in chambers, talk
21 about those -- some of them are the
22 housecleaning matters about the number of
23 panels, how many people you have, how soon you
24 bring them back. Anything we can talk about
25 today that so you all will know and not be

1 concerned about it Friday, Saturday, and
2 Sunday as you get to your -- or even Thursday,
3 not giving you the day off, I just left
4 Thursday out. But I'll be glad to discuss
5 that with you.

6 MR. BAILEY: All right, sir.

7 THE COURT: So may I excuse the court
8 reporter then?

9 MR. BAILEY: As far as I'm concerned,
10 yes, sir.

11 MR. THEOS: Yes, sir.

12 THE COURT: Better hang around, let me
13 make sure there are no further jury things.
14 You all come in chambers and we'll talk about
15 those things I gave you the other day, please.
16 (Pause in proceedings.)

17 THE COURT: Madam Court Reporter, let the
18 record reflect the defendant is present with
19 his counsel, the state's represented by the
20 solicitor. The clerk has received two
21 additional juror information sheets, one is
22 Juror Number 88 from Sharon M. Drews,
23 D-r-e-w-s, of Summerville street address. And
24 she states in there that "I am a college
25 student," and of course she doesn't say which

1 college she attends and other information as
2 to -- I assume that all colleges are in
3 session at this time. It has a number that
4 says "please call." What say the state,
5 please?

6 MR. BAILEY: Your Honor, I have no
7 objection to excusing her if she's a full-time
8 college student.

9 MR. BELL: None, Your Honor. She looks
10 like she's in college at Suffolk, Virginia,
11 and that number is down there for her mom, so
12 I would think she's probably out of state at
13 this time even.

14 THE COURT: All right. Well, if the
15 court -- if any party deems it necessary then
16 I would have the clerk call and ascertain the
17 second chair student at Suffolk, Virginia,
18 Mary Baldwin, or whatever the case may be.
19 What say the state?

20 MR. BAILEY: I don't need that, Your
21 Honor.

22 MR. BELL: Be we don't either, Your
23 Honor.

24 THE COURT: All right. So I'm going to
25 make a note. Now, how about -- but you got to

1 call them, Madam Clerk, for the purpose of
2 postponing her jury service because she's not
3 automatically excused.

4 THE CLERK: Yes, sir. All right.

5 THE COURT: I think she's not
6 disqualified, she's exempt which to me means
7 she can claim her exemption, pursuant to the
8 statute it can be postponed. And that will be
9 Number 88 on the list. So I am going to write
10 by that excused college student. And, Madam
11 Clerk, it might be well to ascertain where
12 she's in school and that she is a full-time
13 student. Albeit, it's been agreed that she
14 doesn't have to appear.

15 And again, Madam Court Reporter, I'm
16 going to give this to you and then let you
17 give it to the clerk. Full-time college
18 student. And the clerk is going to keep
19 intact a separate stack of these that have
20 been excused. So would you hand that on over
21 to her?

22 Then, lady and gentlemen, we have
23 Number 100, Anice M. Encarnacion,
24 E-n-c-a-r-n-a-c-i-o-n. And in reviewing that,
25 other than she helps in a family business of

1 Captain Carolina and she does anything that's
2 needed, is there anything else that is
3 pertinent to her response, gentlemen?

4 MR. BELL: Number 21 says she has no
5 transportation to St. George. And, I mean, it
6 might be, you know, if one of these -- every
7 once in a while you get no way to get here and
8 I don't know what needs to be done by the
9 court or clerk on that.

10 THE CLERK: The sheriff usually takes
11 them, right?

12 MAJOR MOULTRIE: Right. If the judge
13 says so I'll make arrangements.

14 MR. BELL: I just saw that down there.

15 THE COURT: Sure. And I thank you for
16 bringing that to my attention. Oh, her
17 husband is an electrical engineer, surely they
18 would have transportation.

19 MR. BELL: I agree, Your Honor.

20 THE COURT: We'll just have to depend on
21 her to get here. I don't think that we should
22 take the initiative to have the sheriff offer
23 to bring her here, but we'll just look to have
24 her here, and then if she has a transportation
25 problem we will address that.

1 So, if you would, Major, give that
2 to my law clerk and tell him to put it in
3 chronological sequence with the other copies
4 the court has remaining.

5 So is there anything other further,
6 please, ladies and gentlemen relative to any
7 proceeding of State versus Kenneth Simmons
8 that we could dispose of today to help
9 expedite the trial, jury selection, et cetera?

10 MR. BAILEY: Not from the state, Your
11 Honor.

12 THE COURT: Anything from the defendant,
13 please?

14 MR. THEOS: Nothing from the defendant,
15 Your Honor.

16 THE COURT: We're off the record, ma'am.
17 (Lunch recess taken.)

18 THE COURT: The clerk received in regard
19 to Juror Number 33, Deborah Brown, who is
20 married, date of birth [REDACTED] of [REDACTED] that
21 she is a mother that stays at home with her
22 children, and according to this schedule her
23 children, she has one girl and two boys, ages
24 four, three and nine months. And the state
25 and the defense concur that she may be legally

1 excused from attending and participating as a
2 prospective member of the jury select.

3 Mr. Solicitor?

4 MR. BAILEY: That's correct, Your Honor.

5 THE COURT: Correct for the defense?

6 MR. BELL: Yes, sir, defense.

7 THE COURT: And so, ma'am, again, I'm
8 going to date it, today's the 17th, '99, young
9 children. I'm going to give it to you, ma'am,
10 for you to give to the clerk so she can keep
11 those in a separate stack, please. Thank you.

12 Madam Court Reporter, I'm advised
13 that the state and defense counsel have
14 arrived at certain stipulations which will
15 facilitate the trial and obviate the need to
16 have certain chain of custody folks present.
17 And I would ask Mr. Solicitor if you would
18 please dictate that into the record and then
19 Messrs. Theos or Bell, if they would like to
20 supplement or add to or delete, please.

21 MR. BAILEY: Thank you. Your Honor, my
22 understanding of the stipulation is that we're
23 stipulating to the chain of custody on the
24 victim's blood from the autopsy, vaginal and
25 oral swabs taken by Dr. Nichols at the

3149

1 autopsy, the defendant's blood drawn by
2 Dr. Lomax. The vaginal swabs were split into
3 two, one of them went to law enforcement
4 directly and then to SLED, the other one went
5 to the Medical University and remained there
6 for a while and then went back to law
7 enforcement. All the vaginal swabs ultimately
8 went to Life Co's Lab in Connecticut where all
9 the stuff was analyzed.

10 It's my understanding of the
11 stipulation that we wouldn't need to call any
12 of the people in the intermediate chain of
13 custody. I'll have Dr. Nichols that drew the
14 blood, did the vaginal swabs initially, and
15 I'll have the analyst from the DNA lab, I'll
16 also have the analyst from SLED, but no
17 intermediate chain of custody witnesses would
18 be required.

19 Now, as far as Mr. Simmons' blood
20 was drawn by Mr. Lomax who's subpoenaed, Ron
21 Manchester was with him, saw him draw the
22 blood and he handed it to him immediately. If
23 I can eliminate Dr. Lomax, that's one more
24 witness we could do without.

25 MR. THEOS: That's fine.

1 THE COURT: Mr. Bell, you concur?

2 MR. BELL: Yes, Your Honor.

3 THE COURT: Anything further?

4 MR. THEOS: Your Honor, it's my
5 understanding with this stipulation -- with
6 this stipulation, Your Honor, that Mr. Bailey
7 is going to bring in the evidence -- the crime
8 scene officer and the evidence custodian for
9 the police department related to certain --
10 the retrieval of certain physical evidence
11 from the scene and the taking of a
12 fingerprint, footprint, et cetera, but that he
13 is not going to -- and that the officer, and
14 Mr. Bailey will stipulate to this -- will be
15 allowed to testify as to where those items
16 were sent for testing and what the results of
17 those tests were rather than calling those
18 people in here from SLED and these other
19 places.

20 MR. BAILEY: That's correct.

21 THE COURT: Yes, sir. The court thanks
22 each of you for your timely review of these
23 items and for your cooperation. I pray it
24 shall continue.

25 MR. BAILEY: We'll do our best, Your

1 Honor.

2 THE COURT: Thank you. So, gentlemen,
3 unless I hear from you tomorrow or Friday, and
4 I've told you I'll be available Saturday,
5 Sunday, you have my office and home phone, if
6 you want the car phone I can give you that,
7 that fax number I have, you have, and
8 otherwise we'll see you at nine o'clock Monday
9 morning. You all have a nice weekend.

10 MR. BAILEY: Thank you, Your Honor.

11 MR. THEOS: Thank you.

12 THE COURT: Thank you, Madam Court
13 Reporter.

14 THE COURT REPORTER: You're welcome.

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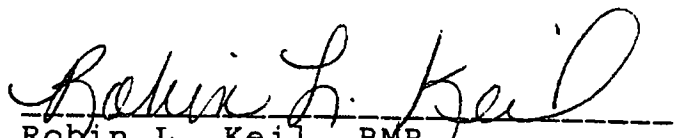
STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER) : C E R T I F I C A T E

I, Robin L. Keil, Registered Merit Reporter and First Judicial Circuit Court Reporter, certify that the preceding pages are a true and correct transcript of the proceedings had at the aforesaid time and place.

I certify that the same was reduced to typewritten form from my original stenograph notes by computer-aided transcription.

I further certify that I am not of counsel or kin to any of the parties to this cause of action, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand this the 9th day of July 1999.


Robin L. Keil, RMR
Circuit Court Reporter
First Judicial Circuit

STATE OF SOUTH CAROLINA ,

County of Dorchester }

INDICTMENT #98GS18-0075

At a Court of General Sessions, convened on January 19, 1998,
the Grand Jurors of Dorchester County present upon their oath:

COUNT:

MURDER
(COMMON LAW)

That Kenneth Simmons did in Dorchester County on or about September 1,
1996, feloniously, wilfully and with malice aforethought, kill one Lilly Bell
Boyd by means of by beating her about the head and strangling her and that the
said Lilly Bell Boyd did die as a proximate result thereof on or about the 1st
day of September, 1996.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR



WITNESSES

Det. Thomason

ARREST WARRANT #:

77-9272

Arrested on December 25, 1997

ACTION OF GRAND JURY

TRUE BILL

By _____

Date _____

Foreman: *W. J. Jones*

Grand Jury

VERDICT

Foreman: _____

Petit Jury

Date: _____

DOCKET #: 983818-2275

THE STATE OF SOUTH CAROLINA
County of DorchesterCOURT OF GENERAL SESSIONS
Term: January, 1998

THE STATE

VS.

Kenneth Simmons

INDICTMENT FOR

2116

MURDER

(COTTON LAW)

STATE OF SOUTH CAROLINA)
County of Dorchester)

INDICTMENT #98GS18-0079

At a Court of General Sessions, convened on January 19, 1998,
the Grand Jurors of Dorchester County present upon their oath:

COUNT: KIDNAPPING
(16-3-910)

That Kenneth Simmons did in Dorchester County on or about September 1,
1996, wilfully and unlawfully seize, confine, inveigle, decoy, kidnap, abduct,
or, carry away Lilly Bell Boyce, without authority of law.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR

W. B. Ray

WITNESSES

Det. R. Thomason

DOCKET #: 98GS18-0079

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS

Term: January, 1998

THE STATE

vs.

Kenneth Simmons

ARREST WARRANT #:

F719274

Arrested on December 29, 1997

INDICTMENT FOR

2255

KIDNAPPING

(16-3-910)

ACTION OF GRAND JURY

TRUE BILL

By: _____

Date: _____

Foreman: _____

Grand Jury

VERDICT

Foreman: _____

Petit Jury

Date: _____

STATE OF SOUTH CAROLINA)
County of Dorchester)

INDICTMENT #98GS18-0077

At a Court of General Sessions, convened on January 19, 1998,
the Grand Jurors of Dorchester County present upon their oath:

COUNT: ARMED ROBBERY
(16-11-330)

That Kenneth Simmons did in Dorchester County on or about September 1,
1996, while armed with a deadly weapon, take from the person or presence of the
victim, Lilly Bell Boyd, by means of force or intimidation, goods or monies of
said Victim.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR

Walt Ray

WITNESSES

Det. R. Thomason

DOCKET #: 98GS18-0077

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS

Term: January, 1998

THE STATE

vs.

Kenneth Simmons

ARREST WARRANT #:

F719272

Arrested on December 09, 1997

ACTION OF GRAND JURY

TRUE BILL

By: _____

Date: _____

Foreman: *W. J. Rogers*
Grand Jury

VERDICT

Foreman: _____
Grand Jury

INDICTMENT FOR

0139

ARMED ROBBERY

(16-11-330)

STATE OF SOUTH CAROLINA)
County of Dorchester)

INDICTMENT #98GS18-0078

At a Court of General Sessions, convened on January 19, 1998,
the Grand Jurors of Dorchester County present upon their oath:

COUNT: CRIMINAL SEXUAL CONDUCT - FIRST DEGREE
(16-3-652)

That Kenneth Simmons did in Dorchester County on or about September 1,
1996, wilfully and unlawfully engage in criminal sexual conduct in the first
degree in that Kenneth Simmons, engaged in sexual battery with Lilly Bell Boyce,
the victim, and did use aggravated force to accomplish such sexual battery
and/or that the said Lilly Bell Boyce submitted to sexual battery by the said
Kenneth Simmons under circumstances where Lilly Bell Boyce was also the victim
of forcible confinement, Robbery, Extortion and/or Burglary.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR

Watts Pa 4

3160

WITNESSES

Det. R. Thomason

DOCKET #: 98GS18-0078

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS

Term: January, 1998

THE STATE

vs.

Kenneth Simmons

ARREST WARRANT #:

#719271

Arrested on December 29, 1997

INDICTMENT FOR

2162

CRIMINAL SEXUAL CONDUCT - FIRST DEGREE

(16-3-632)

ACTION OF GRAND JURY

TRUE BILL

By: _____

Date: _____

Foreman: _____

Grand Jury

VERDICT

Foreman: _____

Petit Jury

Date: _____

STATE OF SOUTH CAROLINA)

County of Dorchester)

INDICTMENT #98GS18-0076

At a Court of General Sessions, convened on January 19, 1998,
the Grand Jurors of Dorchester County present upon their oath:

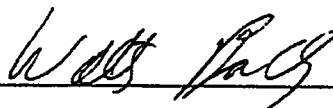
COUNT:

BURGLARY IN THE FIRST DEGREE
(DWELLING) 16-11-311

That Kenneth Simmons did in Dorchester County on or about September 1, 1996, willfully and unlawfully enter the dwelling of Lilly Bell Boyd without consent and with the intent to commit a crime therein, to wit: Armed Robbery, Criminal Sexual Conduct and Kidnapping and the defendant while in effecting entry or while in the dwelling or in immediate flight therefrom was armed with a deadly weapon, caused physical injury to Lilly Bell Boyd, who was not a participant in the crime, used or threatened to use a dangerous instrument, and/or entered said dwelling in the nighttime

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR



WITNESSES

R. Thomason

DOCKET #: 98GSLS-2276

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS

Term: January, 1998

THE STATE

VS.

Kenneth Simmons

ARREST WARRANT #:

F719273

Arrested on December 29, 1997

ACTION OF GRAND JURY

TRUE BILL

By: _____

Date: _____

Foreman: _____

Grand Jury

VERDICT

Foreman: _____

Petit Jury

Date: _____

INDICTMENT FOR

2276

BURGLARY IN THE FIRST DEGREE

(DWELLING) 16-11-311

STATE OF SOUTH CAROLINA - RECORDED
 COUNTY OF DORCHESTER SEP 14 PM 4:18

CLERK OF COURT
 DORCHESTER COUNTY

IN THE COURT OF GENERAL SESSIONS
 FIRST JUDICIAL CIRCUIT
 WARRANT NO. F-719270, F-719273,
 F-719097, F-719272, F-719271,
 F-719274

INDICTMENTS NO. 98-GS-18-75,
 -76, -77, -78, -79

CLERK OF COURT
 DORCHESTER COUNTY
 SEP 14 PM 4:19
 CERTIFIED COPY

STATE OF SOUTH CAROLINA,)
)
 versus)
)
 KENNETH SIMMONS,)
)
 Defendant.)

ORDER FOR EVALUATION AS TO
 COMPETENCY AND CRIMINAL
 RESPONSIBILITY

THIS MATTER comes before me, pursuant to the Defendant's Motion to Vacate the Court's Order requiring the Defendant, Kenneth Simmons, who is charged with Murder, Armed Robbery, Kidnapping, Criminal Sexual Conduct, Burglary, and Possession of Stolen Goods, to submit to a psychiatric evaluation by the South Carolina Department of Mental Health as to Competency and Criminal Responsibility. A hearing was held before me on April 30, 1998, at which Solicitor Walter M. Bailey, Jr., appeared on behalf of the State. The Defendant was present and was represented by his attorneys, Jerry N. Theos and Gene W. Dukes. I have considered the showing made in regard to the charges in this case and have determined that it is appropriate for the Court to order the aforesaid evaluation with certain modifications as reflected below.

IT IS, THEREFORE, ORDERED THAT:

1. Upon receipt of this Order, the Defendant shall be examined and observed at the South Carolina Department of Corrections by two examiners of the South Carolina Department of Mental Health for a period not to exceed

#1
 R.A.P.

fifteen (15) days, relative to his mental capacity to stand trial. See South Carolina Code Ann. Section 44-23-410 (1976, as amended);

2. The Defendant be examined as aforesaid to determine whether or not he is criminally responsible pursuant to the *McNaghten* test for his actions on or about September 1, 1996; and
3. If found responsible pursuant to the *McNaghten* test, the Defendant shall be examined as aforesaid to determine whether or not, because of mental disease or defect, the Defendant lacked sufficient capacity to conform his actions and/or conduct to the requirements of the law. South Carolina Code Ann. Section 17-24-20(A) (1978).

If the examination and observations of the Defendant have not been concluded at the end of fifteen (15) days, the Defendant may be examined and observed for an additional period not to exceed fifteen (15) days, provided that the designated examiners so request in writing the additional period of observation and examination.

Within five (5) days of the examination or at the conclusion of the observation period by the South Carolina Department of Mental Health, a written report shall be made to the Court pursuant to Section 44-23-420, Code of Laws of South Carolina, 1976, as amended.

IT IS FURTHER SPECIFICALLY ORDERED that the State does have the authority to order a compulsory mental examination in

#2
R.A.P.

accordance with State v. Myers, 220 S.C. 309, 67 S.E.2d 506 (1951); however, such examination shall be made in a manner consistent with the rights of the accused such that the authority of the evaluating institution shall not be permitted to reveal any admissions, confessions and/or any other inculpatory statements made by the defendant in the course of such examination, or any declarations implicating him in the crime(s) charged.

IT IS FURTHER ORDERED that no statements made by the Defendant and no results of the evaluation of the Defendant shall be used by the prosecution at trial or sentencing for any purpose other than the determination of the Defendant's competency to stand trial. However, if the Defendant asserts a defense of Insanity or a plea of Guilty but Mentally Ill or enters such a plea pursuant to South Carolina Code Sections 17-24-10 et seq. (1991 Cum. Supp.) or introduces "psychiatric testimony" in support of such defense or plea or in mitigation, the prosecution shall have the right to introduce evidence from the evaluation in rebuttal. See Estelle v. Smith, 451 U.S. 454 (1981).

IT IS FURTHER ORDERED that this examination shall be held in abeyance for a period of thirty (30) days such that it will not commence prior to June 1, 1998.

AND IT IS SO ORDERED this 10th day of September, 1998, at Ramwell, South Carolina.

Rodney A. Peebles
 RODNEY A. PEEPLES
 Presiding Judge
 First Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER
THE STATEIN THE COURT OF GENERAL SESSION
REPORT OF FINDING MENTAL CAPACITY

vs.

SIMMONS, KENNETH

CH981-0660

Defendant

TO: THE SOLICITOR/ASSISTANT SOLICITOR

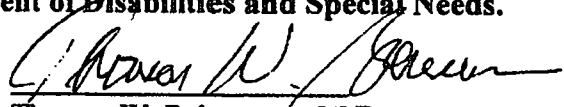
THE UNDERSIGNED RESPECTFULLY REPORTS TO THE COURT:

1. That the above-named defendant was evaluated on **November 23, 1998 and January 8, 1999**, to determine the defendant's capacity to stand trial pursuant to Section 44-23-410, et sequentia, Code of Laws of South Carolina, 1976. The evaluation was conducted under the supervision of **Dr. Thomas W. Behrmann**.
2. That after study and observation, the hospital staff submits the following report:
 - a. That the above-named defendant is diagnosed **Polysubstance Dependence, Mental Retardation, Mild (Provisional)**.
 - b. That the above-named defendant is capable of understanding the nature of the charges, and is capable of assisting counsel in his/her own defense.
 - c. That the above-named defendant **did** have the ability to differentiate right from wrong at the time of the alleged offense, on or about **September 1, 1996**.
 - d. That the above-named defendant **did** have the capacity to conform his/her conduct to the requirements of the law
3. It is recommended that the above-named defendant be returned to the jurisdiction of the court. And also referred to the Department of Disabilities and Special Needs.

C, Attorney at Law, & Department of Disabilities and Special Needs.

Columbia, South Carolina
January 13, 1999

sas


Thomas W. Behrmann, M.D.
Associate Director
WSHPI-Forensic Unit

(5-9) 2-11-99



FORENSIC UNIT OUTPATIENT EVALUATION

DATE OF EVALUATIONS: November 23, 1998 and January 8, 1999

RESIDING: Thomas W. Behrmann, M.D.

OTHERS PRESENT: Jeffrey Vidic, Ph.D.
Jerry N. Theos (Patient's Attorney)
Jim Bell. (Patient's Attorney), (11/23/98)
Nick Theos (01/08/99)

DIAGNOSES: AXIS I: Polysubstance Dependence.
AXIS II: Mental Retardation, Mild (Provisional).
AXIS III: Peptic Ulcer Disease, By History.
Migraine Headaches, By History.

COMPETENCY TO STAND TRIAL: Yes.

CRIMINAL RESPONSIBILITY: Yes.

CAPACITY TO CONFORM: Yes.

DISPOSITION: Returned to Dorchester County authorities for disposition of charges. The patient will require evaluation by the Department of Disabilities and Special Needs due to the possibility of mental retardation.

PERTINENT STATEMENTS: Kenneth Simmons is a 36-year-old African-American male who was seen pursuant to a court order from the Dorchester County Court of General Sessions ordering an evaluation for competency to stand trial, criminal responsibility, and capacity to conform behavior. Mr. Simmons is charged with the offenses of Murder, Armed Robbery, Kidnaping, Criminal Sexual Conduct, and Burglary, all of which allegedly occurred on or about September 1, 1996 in Dorchester County, South Carolina. Prior to beginning interviews, the purpose and nature of the evaluation was explained to Mr. Simmons on each occasion.

Simmons was seen on November 23, 1998 for the purpose of an interview to address the issues contained in the court order. Prior to beginning the interview on November 23, 1998, the patient was presented with Miranda Rights. The patient was unable to read his rights and so they were read to him. The patient had difficulty explaining his rights in a meaningful manner and it was felt that at that time the patient lacked the ability to waive his rights for the purpose of the evaluation. The patient was subsequently interviewed regarding issues related to competency to stand trial. The patient was not interviewed about issues related to the circumstances surrounding the incident at that time because he displayed some disorganization of his thought

SIMMONS, KENNETH
981-0660

process and because of his inability to adequately waive his Miranda Rights. It was also felt that given his presentation that additional psychological testing would be required to further clarify his mental status. It was agreed at that time that the patient would be seen subsequently to complete the evaluation. The patient subsequently underwent additional psychological testing which confirmed prior psychological testing of Full Scale I.Q. scores in the range of mild mental retardation. In addition, the patient was assessed for malingering and based on that testing, it was felt that the patient's presentation did not represent a malingered presentation of mental illness or mental defect. The patient was subsequently discharged back to the Dorchester County Detention Center until an appointment could be arranged for his counsel to be present with him at the time of the interview and this was accomplished on January 8, 1999. At that time, Mr. Simmons was transported to the Forensic Unit as an outpatient. He was noted to be alert and was cooperative with the evaluation.

At the outset of the second interview, the patient was once again described the purpose and nature of the interview. The patient's Miranda Rights were read to him and on this occasion, he was able to explain his rights satisfactorily and was felt to possess the ability to waive his rights for the purpose of the evaluation interview.

Mr. Simmons has an extensive history of substance use, primarily alcohol and cocaine. Patient freely admits to using these on a frequent basis, perhaps as often as daily, including the incident date. His pattern of use is consistent with a diagnosis of Polysubstance Dependence.

As previously noted, the patient's psychological testing has been consistent with a score that falls in the upper range of mild mental retardation. The patient has consistently scored in the high 60's on two different examinations of intellectual functioning.

CLINICAL STATUS EXAMINATION: The patient is a well developed, well nourished African-American male who on the dates of the evaluation has presented appropriately dressed and groomed and wearing detention clothing. The patient has been alert and cooperative with the interviews. The patient displays no evident psychomotor retardation or agitation. The patient's speech is occasionally difficult to understand and on occasion he needs to be asked to repeat his answers to questions. His speech is otherwise generally fluent and coherent. The patient describes his mood as being "okay". His affect appears to be mildly constricted. Thought process is, for the most part, logical and goal directed except at the time of the first interview where after an hour and a half, the patient displayed some evidence of thought disorganization. This was not present at the second interview which lasted for a longer period of time. The patient gives no evidence of delusional thought or preoccupation. The patient denied suicidal or homicidal ideations. The patient endorses auditory hallucinations of hearing the sound of birds around him and identifies this as occurring most frequently when he is not actively using drugs or alcohol. Intellectual functioning, as previously noted, falls within the range of mild mental retardation. The patient's concentration is good for the most part as noted by his ability to attend to the interview. The patient's thinking tends to be rather concrete and he has a limited ability to manipulate abstract concepts. Memory testing appears to be intact for registration of recent and remote memory. The patient is alert and oriented in three spheres. The patient's insight into his current situation is preserved. His judgment is felt to be satisfactory at this time. Impulse control and frustration tolerance are adequate.

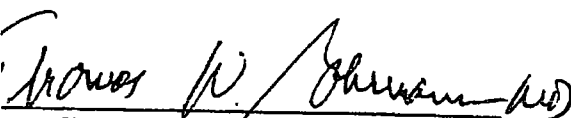
SIMMONS, KENNETH
981-0660

CONCLUSION REGARDING COMPETENCY TO STAND TRIAL: Mr. Simmons is able to testify charges against him as Murder, Rape, and Burglary. He is aware of the seriousness of these charges. He is also aware of the potential penalties he may face if found guilty of these charges. The patient is aware of the pleas of guilty and not guilty and has at least a basic knowledge of the process of plea bargaining. Patient is able to identify the roles of the various court officers and is also able to appreciate the adversarial nature of the court. The patient displays a self protective attitude. The patient is aware of the process of challenging witnesses against him and possesses the ability to appreciate the importance of evidence against him. The patient expresses confidence in his counsel to represent his best interests and also expresses trust in his attorney. The patient displays the ability to cooperate with his attorney in his own defense. The patient is aware of the proper rules of conduct in the courtroom. The patient expresses the wish that there is a fair outcome in his case and that he be allowed to go home. Based on these findings, we conclude that Mr. Simmons is competent to stand trial.

CONCLUSION REGARDING CRIMINAL RESPONSIBILITY: Mr. Simmons is diagnosed with Substance Dependence and Mild Mental Retardation. Following our evaluation, there was no evidence to include that the patient's mental illness or defect in any way prevented him from appreciating the nature of his actions or from differentiating between moral and legal right and moral and legal wrong on the date of the alleged offenses. We conclude therefore that pursuant to the McNaghten Standard, Mr. Simmons is criminally responsible towards those charges.

CONCLUSION REGARDING CAPACITY TO CONFORM: Mr. Simmons is diagnosed with Substance Dependence and Mild Mental Retardation. Following our evaluation, there is no evidence to include that the patient's mental illness or defect in any way prevented him from controlling his behavior on the date of the alleged offenses. We conclude, therefore, that the patient did possess the capacity to conform his behavior to the requirements of the law.

COMMENDATIONS: Mr. Simmons will require evaluation by the Department of Disabilities and Special Needs given his apparent mental retardation diagnosis. The patient has taken Midrin in the past for control of his headaches and I would recommend that this be available to him for control of his headaches in the future.



Thomas W. Behrmann, M.D.
Director of Forensic Services

B/tgm

01/13/99

01/13/99

01/13/99

SIMMONS, KENNETH
981-0660

SLED CASE NO.: 31960099

FIRST TAPED INTERVIEW/STATEMENT OF KENNETH SIMMONS - 12/5/97

PAGE 1

K. Mears Today's date is December the 5th, 1997, the time is 12:50 p.m. with me at the Richland County Detention Center is Ann Reese with SLED; I'm Kenny Mears of SLED, and Mable Hendricks, St. George PD. We have before us that would like to give us an interview, Kenneth Simmons. And Mr. Simmons before we start we would like to read you your rights.

K. Simmons Yes sir

K. Mears So you will understand exactly. Today's date is December the 5th, 1997, the time is 12:50 p.m. Before we ask you any questions, you must understand your rights and we want you to speak up so we can record you on the tape.

K. Simmons Yes sir.

K. Mears Do you understand that? You have the right to remain silent, do you understand that?

K. Simmons Yes sir

K. Mears Anything you say can and will be used against you in a court of law, do you understand that?

K. Simmons Yes sir

K. Mears You have the right to talk to a lawyer for advice or before we ask you any Questions and to have him or her present with you during questioning.

K. Simmons Yes sir

K. Mears If you have no money for a lawyer's fee the court will appoint one to represent You without cost to you if you wish.

K. Simmons Yes sir

K. Mears If you decide to answer any questions now without a lawyer present you will Still have the right to stop answering questions at any time, you also have The right to stop answering questions at any time until you talk to a lawyer.

K. Simmons Yes sir

K. Mears It says I have read this statement of my rights and I understand what my rights Are.

K. Simmons Yes sir

K. Mears You understand that?

K. Simmons Yes sir

K. Mears Have you been read your rights before?

K. Simmons Yes sir

K. Mears OK

K. Simmons I mean, yes sir, ok.

K. Mears We ask you to sign the rights, right there,

K. Simmons Uh-huh, ok

K. Mears And after you sign that right under there it says waiver of rights.

K. Simmons Hum hum

K. Mears You can read along with me. It says I am willing to make a statement and answer questions, I do not want a lawyer at this time. I understand and know what I am doing, no promises or threats have been made to me and pressure or coercion of any kind has been used against me. Do you understand that?

K. Simmons Yes sir

K. Mears This that means you are willing to talk with us and you asked to talk with us.

K. Simmons Yes sir

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K. Mears Ok if you would just sign those rights, right there for me. Ok I stopped the tape so you could sign this here. The tape is now started again.

K. Simmons Yes sir

K. Mears Now your rights have been read to you and you fully understand your rights?

K. Simmons Yes sir

K. Mears OK now with your rights and everything in mind you are still willing to talk with us?

K. Simmons Yes sir

K. Mears OK we understand that you want to talk with us

K. Simmons Yes sir

K. Mears I'm going to just let you start out by telling us what you want to tell us.

K. Simmons Yea to start off with

K. Mears First of all state your name.

K. Simmons Oh my name is Kenneth Simmons.

K. Mears OK, kind of talk clear so the tape can pick you up clearly

K. Simmons Yes sir at to start off with this Boyd murder. And

K. Mears Start with who?

K. Simmons I don't know, Ms. Boyd

K. Mears Ms. Boyd?

K. Simmons Yea, Ms. Boyd

K. Mears OK

K. Simmons Yea to start with her, I came from Jacksonville, I borrowed some money from a Couple of fellas.

K. Mears OK who are the couple of fellas you borrowed money?

K. Simmons One nickname is I know him by Shorty, but his name is John, I mean James Anderson - Anderson, ok. I borrowed from my girlfriend, I borrowed \$20,000.00 for her, you know.

K. Mears How much?

K. Simmons \$20,000.00 on some drugs, okay, you know and I never had get the money back for them.

K. Mears You borrowed this money from Shorty?

K. Simmons Yes sir

K. Mears OK

K. Simmons And after that I think three years later, they came looking for me through my Girlfriend, cause the girl had my kids for me.

K. Mears OK who is your girlfriend?

K. Simmons Brenda Brenda Stephenson

K. Mears Brenda Stephenson?

K. Simmons Yes sir, my ex-girlfriend.

K. Mears How do you spell the last name?

K. Simmons Just Stephenson
K. Mears Just Stephenson,
K. Simmons Yes sir.
K. Mears Ok. Go ahead
K. Simmons And borrowed the money for her
K. Mears You borrowed the money for her?
K. Simmons Yes sir
K. Simmons So she bring them down to see me, but I ain't had no money. This was Friday
Night around about 4:30, Friday night 4:30. I went to the club
K. Mears When was this, now what year, do you remember?
K. Simmons 96, I guess
K. Mears OK
K. Simmons It had to been in 1996
K. Mears Do you remember what month
K. Simmons No sir.
K. Mears Or approximately?
K. Simmons No sir.
K. Mears Winter, summer?
K. Simmons I think it was, it might have been Summer
K. Mears OK
K. Simmons And, I was coming from the club when my
K. Mears What club?
K. Simmons Uh 78, club (N/A)
K. Mears Good
K. Simmons Me and my friend Derek Duggins
K. Mears Alright, your friend Derek Duggins
K. Simmons Yea, was together. Me and him were together walking and I saw him pass me, so
I knowed, they were (inaudible) It was Ms. Jenny Thomas, she had a trailer park
which has some abandoned trailers in the back, that's where I use to meet them at
to get the drugs. There was a little guy over there waiting on me for right there.
K. Mears They?
K. Simmons Shorty
K. Mears OK
K. Simmons Yeah, they were waiting on me for right there okay and I
K. Mears Why were they waiting on you?
K. Simmons So I could bring the money to them
K. Mears OK
K. Simmons Well all of them, I had but a \$150.00 to give it to them you know and I guess I
took so long from the time I get there cause Ms. Boyd's house is right there by
This trailers, you know what I'm talking about. I guess they were mad with me
And they might have took it out like that. Cause my girlfriend, when she, when
she did, when my girlfriend came to me
K. Mears Alright, now your girlfriend you talking about Brenda Stephenson
K. Simmons Brenda yeah, when Brenda came to me Thursday, me and her was together
Thursday night, we spent, we had sex together. I had never used a rubber
on her, you know what I mean?

K. Mears Hum hum

K. Simmons Unless she has, or she had a condom, so I used a condom on her, you know. Then she told me what she told me she said they were setting me up with somebody, by raping them and putting my sperm up in them.

K. Mears Who told you this?

K. Simmons Brenda my girlfriend

K. Mears OK, now who was suppose to set you up?

K. Simmons Shorty, the fella who bring --- who I got the dope and the money from

K. Mears OK

K. Simmons You know, they was going to find anybody to do that against me, you know Because I I didn't I didn't have the money, I was working, but I wasn't making enough money to take care of her right, cause I had a family home here.

K. Mears Okay.

K. Simmons I know she had a kid for me.

K. Mears Brenda had a kid for you?

K. Simmons Yes sir.

K. Mears OK

K. Simmons And around about 5:15, me and Derek, I left Derek to my house so I could go and see what they had want. So when I went there to talk to them, they done killed her and then.

K. Mears Okay, now, they, they who?

K. Simmons Shorty had done killed her

K. Mears You sure Shorty did that?

K. Simmons Yes sir

K. Mears How are you sure?

K. Simmons My girlfriend Brenda told me sir

K. Mears OK, try not to beat on the desk because it makes a noise.

K. Simmons Yeah my girlfriend Brenda told me, you know. And after that when I got in the house I was trying to loosen Ms. Boyd, Shorty put a gun to my head

K. Mears Try to loose your boy?

K. Simmons Miss, Boy,

K. Mears Miss Boyd, ok

K. Simmons Yea, Miss Boyd, you know, Shorty put a gun to my head and I grabbed the telephone and was going to dial the number. He said if you do, I'll kill your son

K. Mears OK, now you were at the house when Shorty killed Ms. Boyd?

K. Simmons No sir, I came up and they done did that.

K. Mears They had they had killed her already.

K. Simmons Yes sir.

K. Mears And you came up and you caught them there?

K. Simmons Yes sir

K. Mears Shorty and who?

K. Simmons Shorty and my girlfriend, she was sitting in the car, ex-girlfriend was sitting In the car

K. Mears Did you go in the house?

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K. Simmons Yes sir I went in the house when I realized what he did. I tried to untie her And he put the gun right there and I run to the telephone. Alright, uh huh. Shit, I ain't never been through that before, you know. And after that I was going to tell Derek, but my friend Derek. I think -- I been-- I I might have wass there gone less than 15 or 20 minutes, I went back and Derek asked me what was wrong? I couldn't explain it to him, I hold this on me for better than a year and a half or better, you know. So Brenda came to me back in September, you know

K. Mears Of this year?

K. Simmons Yes sir, so she told me Shorty was coming down, alright. So I I took my time and leave out of Summerville and I came up here.

K. Mears You left Summerville to come up here to live?

K. Simmons No sir, I come up here to kill Shorty and then when I left from down there

K. Mears OK now you were suppose to come up here to kill Shorty?

K. Simmons I came up here and killed Shorty.

K. Mears Did you kill Shorty?

K. Simmons Yes sir.

K. Mears How did you kill him?

K. Simmons Through here, shoot him two times in the chest

K. Mears What did you do with his body?

K. Simmons I pay a fella \$600.00 to get rid of it.

K. Mears Who was the who was the fella?

K. Simmons I don't know, some of Brenda's friends

K. Mears Some of whose friends?

K. Simmons Brenda, my girlfriend, my ex-girlfriend, friends.

K. Mears Was Shorty alone when you killed him?

K. Simmons Yea, well another fella dropped him off me and him was meetng and Brenda was out on the road in the car.

K. Mears You don't know who the other fella was?

K. Simmons No sir.

K. Mears Where did this killing take place?

K. Simmons Up in Greenville at call it Traveler's Rest, a little Texas road.

K. Mears What did you do with the gun?

K. Simmons I give it to the fella with the \$600.00 and tell him to get rid of the gun and Shorty.

K. Mears Has Shorty been found since?

K. Simmons No the detective he called around for me and I tell him to get that off my chest cause it bothered me.

K. Mears But you are certain that you killed Shorty?

K. Simmons Yes sir.

K. Mears Ok, now getting back to Ms. Boyd.

K. Simmons Yes sir.

K. Mears When you went in the house did you see Ms. Boyd that night after she was killed?

K. Simmons Yes sir.

K. Mears Describe her to me.

K. Simmons Describe Ms. Boyd to you?

K. Mears Yes, describe the scene that you saw.

K. Simmons She was in the kitchen laying on the floor, hands tied.

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K. Mears How was her hands tied?
K. Simmons Hands tied in the back.
K. Mears In the back?
K. Simmons Yes sir.
K. Mears OK, was she shot, beaten or what?
K. Simmons Bruises, he beat her with a with a black jack, with a black jack stick whatever
 you call it, a blackjack stick.
K. Mears Brenda saw when
K. Simmons Yes.
K. Mears Shorty beat her?
K. Simmons She said Shorty had the stick, cause she was in the car.
K. Mears Shorty went in the house?
K. Simmons Yes sir.
K. Mears Brenda did not go in the house.
K. Simmons No sir that's what she tell me.
K. Mears OK
K. Simmons Well I doubt that she was in the car, you know.
K. Simmons Excuse me sir
K. Mears OK, how long after this happened that Brenda told you this?
K. Simmons Brenda told me that it was almost 2 months later, she got in touch with me 2
 months later.
K. Mears Did Shorty tell you why he killed the lady, or did Brenda tell you why because
 Shorty killed Ms. Boyd?
K. Simmons I didn't I didn't have his money and he-- I guess she went out the house, I didn't
 know how or why he killed her. You know it was just like I say. I owed him
 that money right. It was just like Brenda told me he threatened to come back and
 kill my son. I love my son, ask I love anybody.
K. Mears How old is your son?
K. Simmons I got one 13, I got one 9, and I got one from another girl that's 6.
K. Mears Ok, now which son did he threatened to kill?
K. Simmons My youngest one son.
K. Mears Who was about how old at that time?
K. Simmons Well he wasn't but 5.
K. Mears That was the one by Brenda?
K. Simmons Yes sir.
K. Mears OK, now Shorty killed Ms. Boyd you were saying.
K. Simmons Yes sir.
K. Mears Now what about this sperm deal you were telling me about?
K. Simmons It was it was my girlfriend, she-- she came to me, and said Shorty made her keep
 the sperm, I ain't know why.
K. Mears Shorty made who keep the sperm?
K. Simmons Brenda, my girlfriend.
K. Mears OK, that's the sperm where you used the condom?
K. Simmons Cause all the time me and her had sex, she ain't, I ain't never used a rubber on
 Her.
K. Mears This is the only time that you used a rubber on her?
K. Simmons Yes sir.

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K. Mears And that was for the purpose of framing you?
K. Simmons That's the only way it could be sir.
K. Mears Was Ms. Boyd robbed?
K. Simmons Sir, I don't know, Brenda never said nothing about that, she ain't told me nothing about that.
K. Mears OK, anything else you know?
K. Simmons No.
K. Mears About what time was this that this happened?
K. Simmons I left the coast, club closed at 3:30. Me and Derek are walking down the road and they passed us, so that about like at quarter to four or either four o'clock.
K. Mears How did you go in the house?
K. Simmons I went in the house?
K. Mears Yea, what door?
K. Simmons Oh from the back door.
K. Mears How did Shorty get in?
K. Simmons I guess from the back door, that's the only door that was open.
K. Mears What type of car was Shorty driving?
K. Simmons A grey Monte Carlo.
K. Mears Who was with Shorty?
K. Simmons My girlfriend.
K. Mears Just those two?
K. Simmons Yes sir.
K. Mears You talked with your girlfriend that night before you went into the house?
K. Simmons I saw her, she told me Shorty was in the house already.
K. Mears Now you walked over at the house or how--
K. Simmons Bicycle.
K. Mears You rode the bicycle at the house?
K. Simmons Yes sir.
K. Mears What made you go over there?
K. Simmons Cause they was down there waiting on me okay for the money sir.
K. Mears OK,
K. Simmons They were waiting on me for the money.
K. Mears So you told them that you were going to bring them the money?
K. Simmons Yes sir.
K. Mears The \$20,000.00?
K. Simmons No sir, he always come looking for some of his money.
K. Mears OK, and you
K. Simmons I had a \$150.00.
K. Mears OK and you rode the bicycle, how did you ride the bicycle up there, what route did you take?
K. Simmons Well I stayed like, my (n/a) I was staying right behind Ms. Baker - Ms. Baker. The lady's name was Baker, I came from her trailer I was renting-- We were renting a trailer from her.
K. Mears Hum, hum
K. Simmons Me and Charles Till, me and Charles Till were renting a trailer from her. We left there, I left there went on down to Derek, Billy's momma's house and that's beside it too.

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K. Mears Did Derek know about this?

K. Simmons No sir.

K. Mears Now you rode the bicycle, did you go in from the front of the road and go around to the back of the house or did you

K. Simmons Yeah, the front --

K. Mears Where did you park the bicycle?

K. Simmons The bicycle was parked right there where the trailer was at.

K. Mears OK, but now when you got to Ms. Boyd's house you say you rode the bicycle.

K. Simmons I went in the gate.

K. Mears You went in which gate?

K. Simmons The front gate.

K. Mears The front gate?

K. Simmons Yes sir.

K. Mears And went around the house?

K. Simmons Yes sir.

K. Mears What side of the house did you go in?

K. Simmons I went to the front door but it was locked.

K. Mears Uh-huh.

K. Simmons Brenda told me he was in there and I went to the side.

K. Mears Alright what side did you go, around the right side or the left side when you went around to the back side of the house?

K. Simmons I went to the right side, right side.

K. Mears And Shorty was still in the house?

K. Simmons Yes sir.

K. Mears And you are certain Shorty was the one that that killed Ms. Boyd?

K. Simmons He was the only one that been there sir.

K. Mears And you killed Shorty?

K. Simmons Yes sir.

K. Mears Was there anyone else at that house beside Shorty and Brenda?

K. Simmons The only two.

K. Mears So you are saying that Shorty got your sperm and placed it on Ms. Boyd

K. Simmons Yes sir.

K. Mears To make it appear like you had raped her?

K. Simmons Yes sir.

K. Mears Did you rape her?

K. Simmons No sir.

K. Mears Did you have sex with her?

K. Simmons No sir.

K. Mears Did you put your hands on her?

K. Simmons Yea when I tried to loosen her sir.

K. Mears When you tried to loosen her,

K. Simmons Yeah

K. Mears Was she still alive at that time?

K. Simmons She was moving sir.

K. Mears She was moving?

K. Simmons Yes sir.

K. Mears And this took place in what part of the house?

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K. Simmons In the kitchen part, it was in-- she was in the kitchen.
K. Mears She was in the kitchen?
K. Simmons Yes sir.
K. Mears OK who left the house first, you or Shorty?
K. Simmons Well I walked out the door first, but he was behind me.
K. Mears OK did you get back on your bicycle or did you ride with Shorty?
K. Simmons I got on my bicycle.
K. Mears Got on your bicycle?
K. Simmons Yes sir.
K. Mears And he and Brenda, got back -- he got back in the car with Brenda?
K. Simmons Yes sir.
K. Mears Did you see him later on that night?
K. Simmons No sir, I ain't seen him until after I come back up here to kill him.
K. Mears When was that?
K. Simmons It was 3 months ago.
K. Mears So you talking about, it's December, you talking about September?
K. Simmons Yes sir.
K. Mears You killed him in September?
K. Simmons Yes sir.
K. Mears Where is Shorty from?
K. Simmons Shorty's from Georgia.
K. Mears What part of Georgia?
K. Simmons Sir, I don't know, I meet -- I meet her -- I meet Shorty through my girl Brenda.
K. Mears You don't know what part of Georgia, Savannah or Augusta or
K. Simmons No sir.
K. Mears But you do know he's from Georgia?
K. Simmons If I do, I would tell you, but like I told the other deputies, that's cause it was a burden on me, it was getting too heavy on me.
K. Mears Does Brenda know where he is from?
K. Simmons She should cause I was trying to get back in touch with her. Brenda went back to Miami.
K. Mears Did Shorty tell you how he entered Ms. Boyd's house?
K. Simmons No sir but he ain't been in there that long.
K. Mears Why would he pick Ms. Boyd to kill to frame you?
K. Simmons He was going to get anybody. See that's where we meet at.
K. Mears OK.
K. Simmons See, Brenda told me he was going to get anybody. I told him he could just -- he could just take that up with me, instead of hurting anybody else. If I get something from you, I'm the one that pay you back.
K. Mears OK and this was, you went in that house you said after 4:00 o'clock that morning?
K. Simmons Yes sir, it has to been like -- yeah cause the club closed at 3:30. Me and Derek ride -- me and Derek always went to the club. Me and him walk down the road, me and Derek always together.
K. Mears Alright, now when you and Derek left the club, Derek went home?
K. Simmons No Derek went Derek went to my house, I said Derek I'll be back.

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K. Mears OK, so you left Derek at your house and rode the bicycle up to Ms. Boyd's house?

K. Simmons Yes sir because I didn't I didn't - I don't want nobody in no trouble, nothing like that somebody else to get hurt.

K. Mears Did you have blood on you?

K. Simmons No sir.

K. Mears Did Shorty have blood on him?

K. Simmons Yes sir, he has it on his hands.

K. Mears So when you left the house, you went back to your house where Derek was?

K. Simmons Derek was sitting in the house.

K. Mears Did you tell Derek what happened?

K. Simmons No.

K. Mears Did you tell anyone what happened?

K. Simmons No sir, cause it's my first time coming out to talking, cause I got tired of doing this I would tell Officer Worsham, cause he's close to me, you see. Me and him always talk.

K. Mears Officer?

K. Simmons (N/A) Earl Worsham, Ok, I was going to talk to him, but Brenda Brenda came to me back in September, she tell me what Shorty said about my son. That's I hate to see like he did to Ms. Boyd, he ain't had no right doing that to her he ain't got no right doing it to nobody, but.

K. Mears Where did Shorty get where did Shorty get \$20,000.00 to loan you from?

K. Simmons Shorty is a drug dealer sir.

K. Mears OK, I don't know this, that's the reason I'm asking, I'm not trying to be funny or nothing.

K. Simmons Yes sir, he's a drug dealer.

K. Mears And he actually gave you the \$20,000.00 or did he give you \$20,000.00 in drugs?

K. Simmons In drugs, half and half. Because Brenda had want some - she had some bills, I was looking out for her. I kept (inaudible)

K. Mears Have you ever gone to Ms. Boyd's house before?

K. Simmons No sir.

K. Mears You had never been there before?

K. Simmons No sir.

K. Mears Not for anything?

K. Simmons No sir.

K. Mears So you don't know if Shorty saw her on the outside and took her on the inside or broke in the house or?

K. Simmons I don't know.

K. Mears You don't know?

K. Simmons No sir.

K. Mears Did Shorty have a gun on him that night?

K. Simmons Yes sir.

K. Mears What type gun did you say?

K. Simmons I don't know what kind it was. He had a gun.

K. Mears And you say he drew the gun on you?

K. Simmons Yes sir.

K. Mears Why?

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K. Simmons Cause I was going to loosen her, cause it was wrong of him to mess with Anybody. Because I promised to pay him that money back.

K. Mears Alright When y'all left,

K. Simmons Yes sir.

K. Mears You you and Shorty and all

K. Mears Did you try to clean up anything or did you

K. Simmons No sir.

K. Mears What door did you leave out of?

K. Simmons The same door, back door, same door.

K. Mears The back door?

K. Mears And where was Shorty's car parked?

K. Simmons Where his car was parked? Between Ms. Thomas trailers.

K. Mears Ms. Thomas' trailers?

K. Simmons Ms. Thomas trailers.

K. Mears Describe the Monte Carlo to me.

K. Simmons It was a grey Monte Carlo, what year.

K. Mears Grey?

K. Simmons Grey, what year is I don't know between late seventies early eighties.

K. Mears OK, now when you killed Shorty what was he driving?

K. Simmons Shorty came up with a BMW.

K. Mears What color was it?

K. Simmons It was a red one.

K. Mears A red BMW?

K. Simmons Yes sir.

K. Mears Someone was driving that car?

K. Simmons Yes sir.

K. Mears And let Shorty out?

K. Simmons Yes sir.

K. Mears You don't know who was driving the vehicle.

K. Simmons No sir.

K. Mears And this happened in Greenville?

K. Simmons Yes sir.

K. Mears Near Traveler's Rest?

K. Simmons Yes sir.

K. Mears Where in the area, I mean

K. Simmons Traveler's Rest is pretty (inaudible)

K. Mears If we were to go back up there could you show me the exact area where you shot him?

K. Simmons Yes sir, right on a little section of the road.

K. Mears Alright now, did the fella come back in the BMW to check on Shorty?

K. Simmons Yes sir.

K. Mears Did he know what was going on?

K. Simmons Yes sir.

K. Mears You had planned before he brought Shorty up there you and this guy had planned to kill him?

K. Simmons Yes sir.

K. Mears Now what was this guy's name?

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K. Simmons Well, I know him through Brenda, the only thing I told him to do is just -- do this for me and I'll pay him.

K. Mears Alright, so Brenda got in touch with him?

K. Simmons Yes sir.

K. Mears And he brought Shorty down?

K. Simmons Yes sir.

K. Mears He was Shorty's friend?

K. Simmons Yes sir.

K. Mears And he was driving the BMW or was Shorty driving?

K. Simmons Shorty was driving and during the time he take the (inaudible) and leave -- take the car and went down the road.

K. Mears OK Shorty got out and Shorty's friend took the car and went down the road?

K. Simmons Yes sir.

K. Mears What did he do with the car?

K. Simmons He carried it with him cause I killed Shorty and put him in another car.

K. Mears Put him in another car?

K. Simmons Yes sir.

K. Mears What kind of car did you put him in?

K. Simmons Same grey Monte Carlo.

K. Mears Where was the grey Monte Carlo at?

K. Simmons The other two friends had it.

K. Mears How did you get Shorty into the brown, into the grey Monte Carlo if he came up in the red BMW?

K. Simmons Excuse me sir, listen.

K. Mears OK

K. Simmons Alright me and Brenda were in her car, Brenda had two friends driving the same grey Monte Carlo.

K. Mears Was the grey -- Whose grey Monte Carlo is it, was it Shorty's grey Monte Carlo at one time?

K. Simmons It was, yes sir.

K. Mears And he sold it to someone?

K. Simmons I don't know, how he did that sir, they was doing drugs.

K. Mears Alright, who was driving the grey Monte Carlo, when it came up there?

K. Simmons Sir, Brenda friend, two guys.

K. Mears You don't know their names?

K. Simmons No sir.

K. Mears Driving the Monte Carlo?

K. Simmons Yes sir, that was the guy with Shorty, the only thing I know is they called him Blackie, that's all I know from him.

K. Mears OK

K. Simmons And the only two I knew, Shorty and Blackie.

K. Mears Ok now when you killed Shorty?

K. Simmons Yes sir.

K. Mears You put the body in the Monte Carlo?

K. Simmons Yes sir.

K. Mears Where at in the Monte Carlo?

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K. Simmons In the trunk.
K. Mears In the trunk?
K. Simmons Yes sir.
K. Mears Who left there driving the vehicle?
K. Simmons The two guys.
K. Mears Brenda's two friends?
K. Simmons Yes sir.
K. Mears Where did they take the car?
K. Simmons Sir I don't know.
K. Mears Have you seen the car since?
K. Simmons No sir, I ain't seen none of them since this.
K. Mears Do you know if the body has been found or not?
K. Simmons No sir, the deputies I mean, the detectives I asked him to try. I told him to Call Greenville and Georgia. I know he's from Georgia I didn't know what --- where he was going to carry the body at. I just gave him \$600.00 and told him to get rid of the gun and to.
K. Mears You gave him \$600.00 and the gun?
K. Simmons Yes sir I told him to get rid of them
K. Mears Then how did you come back?
K. Simmons Brenda.
K. Mears In the Monte Carlo?
K. Simmons No sir, Brenda had her own little small car, all right, a little Honda, yes sir.
K. Mears Brenda drove her own Honda up there also?
K. Simmons Yes sir, me and her went together.
K. Mears OK, you and Brenda went up there in the Honda?
K. Simmons Yes sir.
K. Mears Brenda's two friends drove the Monte Carlo?
K. Simmons Yes sir.
K. Mears Shorty and Blackie
K. Simmons Come together.
K. Mears Came up in the red BMW -- BMW
K. Simmons Yes sir.
K. Mears OK after you killed Shorty you put the body in the Monte Carlo, got in the Car with Brenda, which is the Honda?
K. Simmons Yeah.
K. Mears And you left two guys with the body in the car?
K. Simmons Yes sir.
K. Mears And you and Brenda went where?
K. Simmons Well, Brenda bring me back right then because -- and dropped me off to my friend's.
K. Mears And where did Brenda go from there?
K. Simmons I guess she went back to Miami.
K. Mears Where is Brenda now?
K. Simmons She tell me she was going back to Miami sir.
K. Mears Miami, did she stay in Summerville for a while?
K. Simmons No she come -- , the only time she come to Summerville when she come to see me, I met her right here in Greenville.

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K. Mears And she was a Stephenson?
K. Simmons Yes sir.
K. Mears Describe her to me.
K. Simmons Brenda weigh about 120, 30 pounds.
K. Mears About how tall was she?
K. Simmons I don't 5'5" 5'3" something like that.
K. Mears Slender or tall?
K. Simmons In between.
K. Mears What about her complexion? Light, brown, dark
K. Simmons Brown, I say brown, she ain't dark.
K. Mears Okay. What about her hair, long hair, short hair?
K. Simmons Jeri curls stuff like that (inaudible) one time that she had finger waves.
K. Mears Finger waves?
K. Simmons Yes sir.
K. Mears These two other guys are Brenda's friends that left with the body in the Monte Carlo, where are they from?
K. Simmons Sir, to be honest I don't know, to be honest I don't know.
K. Mears You don't know where Blackie was from you thought he was from Georgia because that's where Shorty was from.
K. Simmons Shorty from, yes sir. Really I didn't know really know none of but Brenda during the time, me and her like messing with each for like almost a good year.
K. Mears After this incident at Ms. Boyd's house
K. Simmons Yes sir.
K. Mears Did you stay in Summerville at
K. Simmons Yes sir.
K. Mears How how long did you stay before you moved?
K. Simmons I stayed in Summerville for a while. I didn't like I say I until until around September.
K. Mears Did any of them wear gloves that you know of at the Ms. Boyd's house?
K. Simmons Shorty had one one hand in a glove and he had black jack in the other hand.
K. Mears He had on gloves?
K. Simmons He had one.
K. Mears He had on one glove?
K. Simmons Yes sir, he only wear one glove right hand.
K. Mears What type glove did he?
K. Simmons He had a little just a little leather glove.
K. Mears Just one of them on?
K. Simmons Yes sir.
K. Mears And he used a what?
K. Simmons Sir?
K. Mears You said he used a club to kill Ms. Boyd?
K. Simmons Yes sir.
K. Mears What type club was it?
K. Simmons Tell me a black jack stick.
K. Mears A black jack stick?
K. Simmons Yes sir.

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K. Mears OK, was Shorty living in Summerville at that time or he was just going and coming?

K. Simmons Just coming down, but I know he ain't know where I stay at, only Brenda Know.

K. Mears Alright, now who was staying with you when you were living in Summerville?

K. Simmons Who was staying with me?

K. Mears Yea.

K. Simmons Charles Taylor.

K. Mears Charles Taylor?

K. Simmons Yea me and him were renting a room from Ms.

K. Mears You're sure it's Charles Taylor, his last name was Taylor?

K. Simmons I lived with him yea, since

K. Mears Ferguson?

K. Simmons Yea Ferguson.

K. Mears Is it Charles Taylor or Charles Ferguson, which? You just know Charles?

K. Simmons Yea, but I know they call him meat man.

K. Mears Meat man?

K. Simmons Yes sir.

K. Mears OK, why do they call him meat man?

K. Simmons He steals meat, that's why they call him meat man.

K. Mears OK, anything else you know about this incident?

K. Simmons No.

K. Mears What made you come forward now and tell us about this?

K. Simmons Cause I was sitting there and I couldn't rest. I mean I --- the first time I ever killed somebody, you know what I mean.

K. Mears You only killed just this one person?

K. Simmons Yes sir.

K. Mears And did you have anything at all to do with Ms. Boyd's death?

K. Simmons No sir, I guess I I guess I do cause if the killer. Cause the money I owed him I guess I would have something to do with that.

K. Mears But physically?

K. Simmons No, sir. only time I touch her when I went and tried to loosen her.

K. Mears So the only person that you know had something to do with Ms. Boyd's physical death was who?

K. Simmons Shorty.

K. Mears Did you actually see him do it?

K. Simmons No sir.

K. Mears You arrived there shortly afterwards?

K. Simmons Yes sir.

K. Mears He was still in the house?

K. Simmons Yes sir.

K. Mears He still had the club?

K. Simmons Yes sir.

K. Mears What did he do with the club?

K. Simmons He carried it with him.

K. Mears He carried it with him?

K. Simmons Yes sir.

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K. Mears Did you return

END OF SIDE ONE OF THE TAPE

BEGINNING OF SIDE TWO OF THE TAPE

K. Mears And, now we going to resume the question

K. Simmons Yeah

K. Mears OK go ahead answer what you started.

K. Simmons What you --- What you were saying about the ambulance?

K. Mears Yea did you see any ambulances or anything going to Ms. Boyd's house from where you lived?

K. Simmons No sir.

K. Mears Were you home that morning?

K. Simmons Yes sir.

K. Mears If the ambulances or or the cops would have gone to Ms. Boyd's house, could you have seen them going there from where you lived?

K. Simmons No sir.

K. Mears Did you hear any sirens or anything go in there?

K. Simmons No sir.

K. Mears Did you see this over the news or anything?

K. Simmons Yes sir.

K. Mears What did you see over the news?

K. Simmons I mean I lived right there inside the neighborhood sir.

K. Mears OK, you know what I mean and you still didn't say nothing to anyone?

K. Simmons No sir I was going to talk to (inaudible) Worsham, I always talk to him.

K. Mears Hum Hum

K. Simmons You know what I mean, I --- I just feel like if I were to say something I wouldn't I wouldn't have no way to get back in touch with Brenda, cause that made me mad to start off with, what Shorty did. I made my mind to start off with I was going to kill him one way or the other cause ---

K. Mears What type person was Shorty?

K. Simmons He was a drug dealer, all drug dealers have bad attitude problems.

K. Mears OK Describe Shorty to me again now.

K. Simmons Shorty around about 5'6" 5'7" probably 100 --- from 150-175 pounds., he had gold in his mouth.

K. Mears What about rings on his finger?

K. Simmons I didn't pay no attention to that, he had gold in his mouth.

K. Mears Necklaces or anything?

K. Simmons He might have had it sir.

K. Mears OK did he wear a hat or a cap or he went bare head?

K. Simmons No a clean cut young guy.

K. Mears A clean cut young guy.

K. Simmons Yes sir.

K. Mears What complexion did you say he was my complexion

K. Simmons Yea he was a little lighter.

K. Mears A little lighter?

K. Simmons Yes sir.

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K. Mears Which is a light brown?
 K. Simmons Yes sir.
 K. Mears Complexion. Other than threatening you that night with the gun
 K. Simmons Yes sir.
 K. Mears Had he threatened you before?
 K. Simmons No my first, no, of his doing that and after that. When Brenda called and tell me he said he was going to kill my son. That --- That's what really made me come down here and stop it.
 K. Mears Ann, do you have any questions?
 A. Reese When did he say he killed Shorty, when did you say you killed Shorty?
 K. Mears OK when did you say you killed Shorty? What month
 K. Simmons In September.
 K. Mears In September?
 K. Simmons Yes sir.
 K. Mears Of 97?
 K. Simmons 97, just three --- just when I come up.
 K. Mears Just before you came up here?
 K. Simmons When I came up here.
 K. Mears Right after you came up here?
 K. Simmons Yes sir, (inaudible) late or end of --- or end of September.
 K. Mears And where do you live at now since you've been up here?
 K. Simmons Well I was living with a girl known --- a girl named Rose.
 K. Mears Rose what?
 K. Simmons Rose Jones.
 K. Mears And what address was that?
 K. Simmons That was [REDACTED] no [REDACTED] - [REDACTED] - yeah, [REDACTED].
 K. Mears [REDACTED]?
 K. Simmons [REDACTED] dash [REDACTED].
 K. Mears [REDACTED] dash [REDACTED]
 K. Simmons Yes sir.
 K. Mears Where?
 K. Simmons Oh, [REDACTED] [REDACTED]
 K. Mears [REDACTED] [REDACTED]
 K. Simmons Yes sir.
 K. Mears And that's here in Columbia?
 K. Simmons Yes sir.
 K. Mears Do you know if she still lives there or not?
 K. Simmons Yea she still lives there.
 K. Mears And you do not know where Brenda is?
 K. Simmons No sir.
 K. Mears Does she ever try to get in touch with you?
 K. Simmons No sir.
 K. Mears Can you get in touch with her if you try?
 K. Simmons I've been trying.
 K. Mears You've been trying?
 K. Simmons Yes sir.
 K. Mears What about her two friends, do you know where they are?

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K. Simmons Sir I don't know them, if I did I would let you know everything. Like I said I got tired of it. I took my, to get all that pressure off me I went to church with that praying and reading my bible back again, you know. That's the only for me to get it out.

K. Mears You have another question Ann.

A. Reese Yes, ask him what part of Miami, what street or whatever do you remember (inaudible)

K. Mears OK do you know a street or anything where Brenda lives in Miami or Florida?

K. Simmons No sir.

K. Mears But do --- you do know it's in Miami?

K. Simmons Yes sir.

K. Mears OK identify yourself for the tape.

A. Reese Ann Reese, do you know whether or not the night Ms. Boyd was murdered If Shorty like wiped anything down like the doors

K. Simmons Oh, I don't know.

A. Reese When you were leaving?

K. Simmons I don't know.

A. Reese OK, you just remember him coming out after you?

K. Simmons Yes.

A. Reese OK.

K. Mears Have you told anyone else about this?

K. Simmons Well -- anyone at all. Only I -- just like I say, I talked to Rose, okay Rose Jones, I told her.

K. Simmons About this fella, she asked me about what was wrong I mean cause me and her are good friends and we sit down and I talk to her.

K. Mears What's Rose's phone number?

K. Simmons I think [REDACTED] - uh huh [REDACTED].

K. Mears [REDACTED].

K. Simmons Yes sir.

K. Mears And she lives [REDACTED], that's in Columbia?

K. Simmons Yes sir.

K. Mears [REDACTED] is that the name of a street or subdivision or what?

K. Simmons That the name of a subdivision.

K. Mears Whhat's the name of the street?

K. Simmons It's a big subdivision, I mean it's off Harding Street.

K. Mears Off what?

K. Simmons It's off of Harding Street from the front, Harding, Harding, Harding.

K. Mears Harding?

K. Simmons Yes sir.

K. Mears OK Does she work anywhere?

K. Simmons No I don't think so.

K. Mears Does she live there alone now that you know of?

K. Simmons Yea her and her daughter, her and her daughter stay there.

K. Mears How long have you been here?

K. Simmons Been where Columbia?

K. Mears Here at this detention center?

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K. Simmons Two weeks, a week, something like that, cause I I - I called for the detective I mean to get this thing off my chest, right before it was Thanksgiving. (N/A) we We had a little Christian (inaudible) Bible reading. We'd be - you know, men get together with the Bible you know. I called the detective I think that it was a Monday or Tuesday, he ain't got to me until some time this week or last week. I think this week he got he got in touch with -- he got with me. I tell him because I say well you know since I did something I want you know what I mean get the story right.

K. Mears Anything else you can recall that happened that night at Ms. Boyd's house that you would like to tell us about, anything in specific?

K. Simmons No sir, ain't nothing else, that's it. That was all I know, that's all I know.

K. Mears Do you know whether Shorty raped Ms. Boyd or not?

K. Simmons Sir, I don't know.

K. Mears You don't know?

K. Simmons No sir.

K. Mears The night that you had sex with Brenda

K. Simmons Yes sir.

K. Mears Was it the same night?

K. Simmons No me and Brenda were together Thursday night.

K. Mears And this happened when?

K. Simmons It had to happen Friday, cause me and Derek always go to the club on Friday nights.

K. Mears So you had sex with the condom on that Thursday night?

K. Simmons Yes sir.

K. Mears You don't know what happened to the condom?

K. Simmons No sir.

K. Mears You didn't personally destroy it?

K. Simmons No sir.

K. Mears You don't know what Brenda did with it?

K. Simmons No sir.

K. Mears And Shorty told you that he was going to do what with the condom now?

K. Simmons Shorty, Brenda told me, not Shorty.

K. Mears OK.

K. Simmons And after that Brenda come and told me that, what Shorty said. I guess she set me up cause she come back and she apologized to me. Like I told you before, she just come back to me and she apologized.

K. Mears Let me ask you this

K. Simmons Yes sir.

K. Mears Would you be willing to take a blood test or may be a

K. Simmons Yea, I'll take a blood test.

K. Mears Anything else you want to tell us about Brenda or Shorty or any -- anything else that happened in that neighborhood?

K. Simmons No sir, I was I mean really that was all, you know what I mean. (Inaudible) I I ove her and I told her you know what I mean.

K. Mears Let me ask you this

K. Simmons Sir?

K. Mears You know Angie B?

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K. Simmons I know Angie B good.
K. Mears How do you know her?
K. Simmons I use to have sex with Angie B.
K. Mears What she had to do with this?
K. Simmons Angie B have to do with what?
K. Mears This murder?
K. Simmons Nothing, Angie B, nothing.
K. Mears Does she know anything about it?
K. Simmons No, not that I know.
K. Mears Did you mention anything to Angie B about it?
K. Simmons No sir.
K. Mears So she shouldn't know nothing about it is what you are saying?
K. Simmons Yes sir.
K. Mears And
K. Simmons But none of them know Brenda.
K. Mears Brenda Stephenson
K. Simmons Yes.
K. Mears And Angie B is not the same person?
K. Simmons No sir.
K. Mears They are two different people?
K. Simmons Yes sir, yes sir.
K. Mears I just want to be clear.
K. Simmons Oh yes sir.
K. Mears That we are talking about two different people
K. Simmons Yes sir.
K. Mears Instead of the same one.
K. Mears And you are certain that Brenda Stephenson and Angie B are two different
K. Simmons Sir, I'm positive of that.
K. Mears And you had a baby by who?
K. Simmons Sir?
K. Mears Who is your little girl by?
K. Simmons My little boy,
K. Mears I meant your little
K. Simmons I got three boys
K. Mears OK, your child is by whom?
K. Simmons Brenda.
K. Mears Brenda Stephenson?
K. Simmons Yes sir.
K. Mears Does she have him with her?
K. Simmons The baby?
K. Mears Yea.
K. Simmons No sir.
K. Mears Where is your son now?
K. Simmons I hope along with her.
K. Mears That's what I am asking
K. Simmons Yes sir.
K. Mears Your son is with Brenda?

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K. Simmons Yes sir, and two of them are with my wife.
K. Mears Who is your wife?
K. Simmons Valerie.
K. Mears Valerie?
K. Simmons Valerie Simmons.
K. Mears She lives in Summerville?
K. Simmons Yes sir.
K. Mears Valerie Simmons.
K. Simmons She stands on - on off of [REDACTED].
K. Mears Were you married at this time?
K. Simmons We well, I ain't never get a divorce, me and her been break up ever since 89, 90
89 someplace in there.
K. Mears OK so you were not staying with Valerie when
K. Simmons No sir.
K. Mears OK, Mable you have any questions.
Female Not right now.
K. Mears And you're telling us that this this is the absolute truth?
K. Simmons Yes sir, that's it.
K. Mears You haven't you have not discussed this with anyone else.
K. Simmons I haven't discussed it with Rose, she my best friend.
K. Mears You have discussed it with Rose?
K. Simmons The only day I discussed with Rose when I went up to kill Shorty.
K. Mears You told her before you killed Shorty that you were going to kill him.
K. Simmons Yes sir.
K. Mears So she knew about it before you went up there?
K. Simmons Oh, well, she she didn't believe me that's why, you know what I mean. I cause
she she knows I had something on my chest.
K. Mears Did you tell Rose about Ms. Boyd?
K. Simmons No sir.
K. Mears You never have?
K. Simmons No sir.
K. Mears She does not know anything about it?
K. Simmons No sir.
K. Mears OK.
K. Simmons The only time she know about it after I after I talked to the detectives and I called
her and I was talking to her on the telephone. And and that when my son called
looking for me.
K. Mears Let me ask you this, now the sperm that was found on Ms. Boyd is probably
your sperm.
K. Simmons Yes sir, what --- what Brenda what Brenda had told me
K. Mears From what Brenda told you,
K. Simmons Yes sir.
K. Mears She used the sperm from the condom and gave it to Shorty to
K. Simmons Yes sir.
K. Mears And Brenda is in Miami?
K. Simmons Yes sir I wish I can get in - I wish I can catch up with her too.

K. Mears How did you first meet Brenda?
K. Simmons In Greenville, I meet Brenda in Greenville
K. Mears In Greenville?
K. Simmons Yes sir
K. Mears Did you know Brenda when you were in Summerville?
K. Simmons Do I -- I -- I mean, what do you mean by that?
K. Mears Did you know Brenda, didn't you stay in Summerville for a while?
K. Simmons I born and raised in Summerville.
K. Mears Alright, did you know Brenda while you were in Summerville?
K. Simmons After I went to Greenville, I had went to Greenville, guy I used to work, was Ben Shivers.
K. Mears Then you worked in Greenville?
K. Simmons Yes sir.
K. Mears And lived in Summerville?
K. Simmons I worked in Greenville for awhile, along with Ben Shivers. Ben Shivers used to stay in Summerville, he moved to Greenville and I moved up there with him. I used to stay in the same house he's
K. Mears Ben Shivers?
K. Simmons Yes sir, Shivers, a contractor.
K. Mears OK.
K. Simmons I use to stay up there right up there along with him.
K. Mears And you met Brenda in Greenville?
K. Simmons Yes sir.
K. Mears Had she ever come up to Summer -- And she used to come to Summerville sometime to see you?
K. Simmons Yea cause she bring me home a couple of times when I was staying up there.
K. Mears How did you meet Brenda in Greenville, what made her come to Greenville?
K. Simmons Well me and her come --
K. Mears Does she have people in Greenville?
K. Simmons I don't know.
K. Mears Where did you meet her at in Greenville?
K. Simmons I went to the club.
K. Mears To the club?
K. Simmons Yes sir and I was renting a trailer in [REDACTED], she use to come and stay with me.
K. Mears OK, you rented a trailer at [REDACTED]?
K. Simmons [REDACTED].
K. Mears Do you have an address there?
K. Simmons No sir, it (inaudible)
K. Mears Who were you renting from?
K. Simmons I don't know sir.
K. Mears You don't know who you were paying the rent to or who the lady or man you were renting from?
K. Simmons No sir, you can,
K. Mears It was [REDACTED]?
K. Simmons Yeah. You can check back and you can catch the --- I used to have light in --- lights in my name inside the trailer, so you should find an address on that.

K. Mears Now you met Brenda at the club?
K. Simmons Yes Sir.
K. Mears What club?
K. Simmons I don't know the club sir, that was my first time up in Greenville working.
K. Mears If you go back up there, do you think you could find this club?
K. Simmons I might could, yes sir.
K. Mears How long did you work in Greenville?
K. Simmons I worked in Greenville for awhile --- for awhile.
K. Mears When you say awhile, are you talking about a year, six months
K. Simmons Yeah.
K. Mears Or two years or what
K. Simmons Probably a year something like that, I was working over at Ben Shivers.
K. Mears OK, when -- what year was this?
K. Simmons Excuse me I really I don't know what year it was.
K. Mears And this is the first that you met Brenda up at the --- at the club up there?
K. Simmons Sir?
K. Mears You met Brenda up at the club?
K. Simmons Yes sir.
K. Mears You don't if she had kin up there?
K. Simmons Kenneth, yes, oh yes. I don't know.
K. Mears Relative?
K. Simmons I don't know.
K. Mears You say your son is about how old now, the one you had by Brenda?
K. Simmons Oh five or six, one thirteen, one thirteen, one eight or nine, other one should be around five to six.
K. Mears What's his name?
K. Simmons His name is T[REDACTED].
K. Mears T[REDACTED] what does he go by?
K. Simmons He go by T[REDACTED]
K. Mears I'm talking about his last name?
K. Simmons Well it's just Stephenson, Brenda's last name.
K. Mears It's not in your name that you know of?
K. Simmons No sir, my other two boys are K[REDACTED] and the other one is T[REDACTED]
K. Mears And you were saying -- do you know if Brenda had any brothers or sisters or have you ever heard tell of a mother or some address or phone number or anything like that in Florida?
K. Simmons No sir.
K. Mears Did you have Shorty's phone number?
K. Simmons No sir.
K. Mears You never called him?
K. Simmons No sir.
K. Mears He just come down and checked on your business?
K. Simmons Yea.
K. Mears You said Stephenson, that's Stevens or Stephenson?
K. Simmons Stephenson.
K. Mears Stephenson?
K. Simmons Yes sir.

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K. Mears Do you know Angie B?
K. Simmons Yea I know Angie B.
K. Mears What the B stands for?
K. Simmons Sir?
K. Mears What the B stand for?
K. Simmons Sir I don't know.
K. Mears But they call her Angie B?
K. Simmons Yea , Angie B the last name is I know it's Simmons. (N/A) They just call her Angie B.
K. Mears What's her nickname?
K. Simmons Her nickname, I don't know Angie B's nickname, I mean I guess it's Angie B.
K. Mears Now you used to date Angie B?
K. Simmons Yes sir.
K. Mears How long did you date her?
K. Simmons On and off I know Angie B at least seven or eight years, seven years or something like that, I been knowing Angie B for years.
K. Mears When did you break this off with her?
K. Simmons With Angie B?
K. Mears This relationship, yes?
K. Simmons It ain't really, I'm saying it never wasn't really break off, cause I had a girlfriend I used to go with Barbara Ann Jones you know what I mean, I used to mess with Angie B.
K. Mears You used to go with Barbara Ann Jones?
K. Simmons Yes sir.
K. Mears Did you have a baby by Barbara Jones?
K. Simmons No sir.
K. Mears You didn't?
K. Simmons No sir.
K. Mears Now Angie B was not at that house that night?
K. Simmons No sir.
K. Mears She did not come up that night?
K. Simmons No sir.
K. Mears You and Angie used to smoke crack together?
K. Simmons Yes sir.
K. Mears Just give me a minute here and let me --
K. Simmons Yes sir.
K. Mears Did Shorty tell you how he got into that house of Ms. Boyd's home?
K. Simmons No sir.
K. Mears When you got there he was already inside?
K. Simmons Yes sir.
K. Mears You don't know if he knew Ms. Boyd or not, she was?
K. Simmons Shouldn't, I barely know her.
K. Mears I'm going to cut the tape off for a minute.
K. Simmons Yes sir.
K. Mears At this time I'm going to re-start the tape. I have a few other questions I would like to ask you Kenneth.
K. Simmons Yes sir.

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K. Mears Just to clear up any doubt.
K. Simmons Yes sir.
K. Mears Now you said that you had sex with Brenda
K. Simmons Yes sir.
K. Mears You talking about Brenda Stephenson?
K. Simmons Stephenson.
K. Mears And this is not Angie B?
K. Simmons No sir.
K. Mears What night did you have sex?
K. Simmons With Brenda?
K. Mears Right.
K. Simmons Thursday.
K. Mears And what did -- what was different about it?
K. Simmons Cause she had a rubber.
K. Mears Was it yours?
K. Simmons No sir, I don't use no rubbers.
K. Mears She brought it with her?
K. Simmons Yes sir.
K. Mears Did you use it?
K. Simmons Yes sir.
K. Mears OK, did you talk with Shorty prior to having sex with Brenda?
K. Simmons No sir.
K. Mears OK, when did you talk with Shorty to meet him?
K. Simmons I always -- always go through Brenda, when I when I saw Shorty that first time, was that same Friday night.
K. Mears That same
K. Simmons When me -- when me and Derek walking down the road, that Friday night, Saturday morning.
K. Mears And where were you suppose to meet Shorty?
K. Simmons At (N/A) just an empty (inaudible) Janie --- when Jane when Janie Thomas Trailer Park.
K. Mears At an empty trailer?
K. Simmons Yes sir, right there, they got two close trailers.
K. Mears Is it close to Ms. Boyd's residence?
K. Simmons Yes sir.
K. Mears Did you meet Shorty at that trailer park?
K. Simmons Yes sir.
K. Mears After you met Shorty at the trailer park?
K. Simmons I -- I -- I Shorty (N/A) had already been to the trailer park.
K. Mears OK
K. Simmons Like I told you before, they already been to the trailer park.
K. Mears OK and he left the trailer park?
K. Simmons What do you mean he left the trailer park?
K. Mears How did he get to Ms. Boyd's house?
K. Simmons I guess he had to get there with his car, cause the house right there in the trailer park, right there.

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K. Mears OK so when you went to the trailer park, the car was there, but he wasn't there.

K. Simmons Brenda was the only one in the car.

K. Mears And you did what?

K. Simmons Went in the gate.

K. Mears And went where?

K. Simmons Went, couldn't find no lock, I had to went to the back.

K. Mears Of whose house?

K. Simmons Ms. -- Ms. -- Boyd.

K. Mears And you had sex on that Thursday night, you can recall that Thursday night?

K. Simmons Yes sir.

K. Mears And the crime happened when that Friday night?

K. Simmons That Friday evening.

K. Mears About what time in the morning you said

K. Simmons It has to be, that's between -- like I said -- the club closed 3:30 something, me and Derek walked from the club. Like that what I told you it happened happened between 4:00 and 5:00 in the morning.

K. Mears Did you have anything to do with Ms. Boyd's murder physically, did you actually hit her

K. Simmons No sir.

K. Mears In any way?

K. Simmons No sir, no sir.

K. Mears Did you plan or help plan Ms. Boyd's murder?

K. Simmons No sir.

K. Mears Do you know of anyone planning this murder?

K. Simmons No sir.

K. Mears So when you had sex with Brenda Stephenson and she asked you to use a condom, you didn't ask her why?

K. Simmons No sir.

K. Mears You just used one?

K. Simmons Yea it was my first time seeing her back in --- in quite awhile, a couple of months, that's why.

K. Mears And she took the condom with her?

K. Simmons Took it off me we done with the sex then.

K. Mears You don't know what happened to it from there?

K. Simmons No sir.

K. Mears Until later on she told you what happened?

K. Simmons Yes sir.

K. Mears And the exact words, what did she tell you?

K. Simmons That was, probably, you know she called and really confessed to me that Shorty done been on her case again about my --- about me not paying her the money. And she finally come up, she said I'm sorry Kenneth but I gave Shorty the rubber what you used.

K. Mears So you and Brenda decided to get back at Shorty and kill him?

K. Simmons Really, no, no, it wasn't Brenda, it was me, cause he threatened to kill my son, that's why I did it.

K. Mears Brenda's son, you and Brenda's son?

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K. Simmons Yes sir, that's why I did that sir.

K. Mears But you the one that came up with the plan to kill Shorty?

K. Simmons Yes sir.

K. Mears To protect your son?

K. Simmons Yes sir.

K. Mears And Brenda knew about it?

K. Simmons Yes sir.

K. Mears Blackie knew about it?

K. Simmons Yes sir.

K. Mears And the other two

K. Simmons Fellas

K. Mears Fellas driving the grey Monte Carlo knew about it?

K. Simmons Yes sir.

K. Mears And the two that drove the Monte Carlo, you gave one of them the \$600.00

K. Mears and the gun?

K. Simmons Yes sir.

K. Mears And this is the truth?

K. Simmons Yes sir.

K. Mears Has anyone promised you anything for telling the truth?

K. Simmons No sir, only God that's the only person I go to.

K. Mears What made you decide to tell us this?

K. Simmons I got tired.

K. Mears You got tired of what?

K. Simmons The burden, toting that burden on me.

K. Mears And you just wanted to tell someone?

K. Simmons Yes sir, after I killed Shorty, yea that what I do.

K. Mears Do you know what can happen to you?

K. Simmons Yes sir.

K. Mears What?

K. Simmons Death penalty or whatever, life in jail, you know what I mean. As long as I get myself straight with God. I understand where y'all coming from you know what I mean, and that's why I'm being honest with you.

K. Mears At this time I don't have any other questions.

K. Simmons Yes sir.

K. Mears To ask you and is there anything else you would like to say, go ahead and say it now, if not, I'm going to end this conversation.

K. Simmons Only thing I can say I'm sorry what happened to Ms. Boyd, not feeling sorry what happened to Shorty. The only thing I got a hard heart, but something -- but it's something that he did I didn't like and that's something when he threatened my son I ain't had no other choice. He's threatening anybody who I love, I would hurt him, for him taking somebody else's life. Or was threatening to take somebody else's life.

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K. Mears You understand you don't have to tell us anything about this, you know that,
K. Simmons Sir
K. Mears But if you coming clear
K. Simmons It's from my heart.
K. Mears You come clean.
K. Simmons Thank you, it's from my heart, I don't have nothing else to hide. I done lost
 everything, what I had. You know what I'm talking about.
K. Mears Yes sir.
K. Simmons The only thing I can do now is to get myself straight with God.
K. Mears Do you know Derek Lemon?
K. Simmons Yea I know Derek Lemon.
K. Mears You have not talked to Derek at all?
K. Simmons Derek Duggins, Douglas, Derek Lemon, no sir.
K. Mears Is there a Derek Douglas and a Derek Lemon?
K. Simmons Yes sir.
K. Mears There's two?
K. Simmons Yeah.
K. Simmons Yea I mean this --- this comes from my heart and I'm coming clean with that
 cause myself, just coming to get myself back to God, cause it (N/A) to me.
K. Mears Anything else that's on your heart that's burdening you down that you would
 like to get off at this time?
K. Simmons No sir, I done said what I had to say. Like I say I apologized to Ms. Boyd's
 family, and and the church, Brownville Community Church. I apologize to them.
 What happened to her and my family.
K. Mears At this time this is the end of the interview. Same date, December the fifth,
 1997, the time is 2:00 p.m. With me is Ann Reese, I'm Kenny Mears of SLED,
 And Mable Hendricks with St. George PD.
K. Simmons Yes sir.

END OF TAPE OF SIDE TWO

VOLUNTARY STATEMENT

3198

STATE OF SOUTH CAROLINA

COUNTY OF Richland

PERSONALLY appeared before me Kenneth Simmons AKA: Skin Rat, who states:

"My name is Kenneth Simmons

Date of Birth [REDACTED], Social Security Number: [REDACTED]

I completed the 12th grade in school, and I can cannot read and write."

Before answering any questions or making any statements Ann Reese & Kenneth Meigs (SLED) & Maybelle Hend

a person who identified himself as Kenneth Simmons Police Officer

duty warned and advised me, and I know and understand that I have the following rights: That I have the right to remain silent and I do not have to answer any questions or make any statements at all; that any statement I make can and will be used against me in a court or courts of law for the offense or offenses concerning which the following statement is hereinafter made; that I have the right to consult with a lawyer of my own choice before or at anytime during any questioning or statements I make; that if I cannot afford to hire a lawyer, I may request and have a lawyer appointed for me by the proper authority before or at anytime during any questioning or statements that I make, without cost or expense to me; that I can stop answering any questions or making any statements at any time that I choose, and call for the presence of a lawyer to advise me before continuing any more questioning or making any more statements, whether or not I have already answered some questions or made some statements.

I do not want to talk to a lawyer, and I hereby knowingly and purposely waive my right to remain silent, and my right to have a lawyer present while I make the following statement to the aforesaid person, knowing that I have the right and privilege to terminate any interview at any time hereafter and have a lawyer present with me before answering any more questions or making any more statements, if I choose to do so.

I declare that the following voluntary statement is made of my own free will without promise or hope of reward, without fear or threat of physical harm, without coercion, favor, without leniency or offer of leniency, by any person or persons whomsoever.

1996 with Mrs Boyd was Kill She was
Kill by Shorty - James Anderson Because I owe Shorty
same money That I owe him \$20.000 I get
Dance and Cash \$10.000 me and Shorty AT THE
Trailer Park near Mrs. Boyd House went I got
Their Shorty and Brenda Anderson was Already, Their
Brenda was sitting the car and Shorty was AT Mrs
Boyd House I went to Mrs Boyd House Mrs. Boyd
was lying on kitchen floor beat up and bloody Shorty
has A stick in his hand with blood all over it Mrs Boyd
hand tied Behind her back she was still A
live Ann I tried to untie her But Shorty pulled
gun out on me and I went to the phone but
Shorty said he will Kill me, Brenda and I
had sex on Thursday Night she ask me to use A ladder.

I have read each page of this statement consisting of Two page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 3:05 P M. on the 5th day of Dec, 1997.

SWORN TO AND SUBSCRIBED TO BEFORE
ME THIS 5th DAY OF Dec 1997

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 6-28-98

Signature of person giving voluntary statement

WITNESS: Ann Reese

WITNESS: Det. M. Hendrick

Kenneth Simmons

Statement of, Continued.

She had never before sometime Aug 97
Brenda Tell me why Shorty went to get BACK
AT me because of the money Brenda give Shorty the folder
to look like I did ~~to~~ IT And Shorty ~~put~~ ^{put} ~~the~~ ^{the} ~~on~~ ^{on} sperm
on Mrs Boyd and look I did IT And I went to
Greenville I planned to kill Shorty me and Brenda. He
Threat To kill my son Tim and me, Brenda and me
driver to Greenville Shorty and Blackie driver red BMW
And Two Brenda Friends ~~and~~ ^{and} driver a Grey Monte
Carlo went me and Brenda met Shorty and Blackie
Shorty get out west me and Blackie driver off
I shoot Shorty two time in the chest was a 38 Gun
Brenda Two Friends driver up And I give them
\$600.00 And The Gun put Shorty Body In The Trunk of ~~the~~ ^{the} RS
Monte Carlo And Told Brenda Two Friends To take
Shorty Body And The Gun And get rid them This happened
IN Sept or Oct 1997 I have not seen or talk to
any of them since then. I Am give this statement
because IT is True, I Volenter To give this
statement. K.S.

Kenneth Simmons

Signature of person giving voluntary statement

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TAPED INTERVIEW/STATEMENT WITH KENNETH SIMMONS - 12/5/97

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K. Mears I'm Kenny Mears, with SLED, with me I have Kenneth Simmons, and I'm here questioning him about a murder that took place in Summerville in reference 1996. Kenneth first of all I'm going to read you your rights again.

K. Simmons Yes sir.

K. Mears This is the second interview today.

K. Simmons Yes sir.

K. Mears I interviewed you earlier and I read you your rights, you remember?

K. Simmons Yes sir.

K. Mears OK, I'm going to read you your rights again.

K. Simmons Yes sir.

K. Mears Today's date is December the 5th, 1997, the time is 8:26 p.m. First of all, I'm explaining the rights to you before you, we ask you any questions you must understand your rights.

K. Simmons Yes sir.

K. Mears You have the right to remain silent.

K. Simmons Yes sir.

K. Mears Anything you say can and will be used against you in a court of law.

K. Simmons Yes sir.

K. Mears You have the right to talk to a lawyer for advice before we ask you any questions to have him or her present with you during questioning.

K. Simmons Yes sir.

K. Mears If you have no money for a lawyer's fee, the court will appoint one to represent you without cost to you, if you wish.

K. Simmons Yes sir.

K. Mears If you decide to answer any questions now without a lawyer present, you will still have the right to stop answering questions at any time.

K. Simmons Yes sir.

K. Mears You also have the right to stop answering questions at any time until you talk with a lawyer.

K. Simmons Yes sir.

K. Mears And it also states that I have, which is meaning you, have you read this statement of my rights and I understand what my rights are.

K. Simmons Yes sir.

K. Mears These are the same rights I read to you earlier in our earlier interview.

K. Simmons Yes sir.

K. Mears Do you understand those rights?

K. Simmons Yes sir.

K. Mears There's a place a place indicated right under your rights that says sign. Well, it Says sign.

K. Simmons Yes sir.

K. Mears I need you to sign your name there if you understand these rights and initial each sentence on the side.

K. Simmons Yes sir.

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TAPED INTERVIEW/STATEMENT WITH KENNETH SIMMONS - 12/5/97

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K. Mears Ok, when you finish signing all of it. Just go right ahead when you finish signing that there's another section right on the bottom there; it's called waiver of rights. Let me read you your waiver of rights. I am willing to make a statement and answer questions, I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me. This is a waiver of rights stating you are willing to talk with me. If you are willing to talk to me, you need to sign right there. Are you willing to talk with me?

K. Simmons Yes sir.

K. Mears Ok, do you understand this section of your waiver of rights?

K. Simmons Yes sir.

K. Mears Ok, are there any questions about the waiver of rights?

K. Simmons No sir.

K. Mears None at all?

K. Simmons No sir.

K. Mears Alright, you're willing to talk to me?

K. Simmons Yes sir.

K. Mears OK this is in reference to Ms. Lilly Bell Boyd.

K. Simmons Yes sir.

K. Mears It happened in August 31st or September 1st of 1996.

K. Simmons Yes sir.

K. Mears Alright, tell us in your own words or tell me in your own words, what happened, exactly how it started?

K. Simmons It started the Friday night.

K. Mears Alright talk a little louder.

K. Simmons It started that Friday night, we was smoking crack.

K. Mears We, now who was smoking crack?

K. Simmons Me and a couple of fellas and

K. Mears Do you know the couple of fellas' names?

K. Simmons No sir.

K. Mears You don't know their names?

K. Simmons No sir and I left there, I needed some more money.

K. Mears Where were you smoking crack at?

K. Simmons Out to the club.

K. Mears OK, go ahead.

K. Simmons And I left there and went, was going home and started drinking some beer.

K. Mears Alright, who you left with?

K. Simmons Me and Derek Duggins left the club and drinking some beer. And we walked to my house we was drinking some beer to the house, me and him and Charles Taylor. And I left there after Derek had fall asleep for a little while so I got on my bicycle and went riding early that morning between 5:00 and 6:00 o'clock. I went riding around to (N/A) my drug spot and whatever, I saw Ms. Boyd on the other side. I went through the front gate.

K. Mears OK about what time was this now -- six?

K. Simmons Between 5:00 o'clock and 6:00 o'clock.

K. Mears Is that in the afternoon or in the morning?

K. Simmons In the morning, Friday -- Saturday morning.

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TAPED INTERVIEW/STATEMENT OF KENNETH SIMMONS - 12/5/97

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K. Mears Ok.

K. Simmons I went in the back.

K. Mears Were anyone with you?

K. Simmons No sir, I was by myself.

K. Mears OK.

K. Simmons I went in the house and catch her coming back outside push her back in the house.

K. Mears You went in the house behind her?

K. Simmons Yes sir. As she was coming back out I catch her and push her back in the house.

K. Mears What part of the house was this in now?

K. Simmons It was in the back porch okay and I push her back inside the house and I asked her to give me the money. She grabbed the money and start try to pull back and I push her.

K. Mears What did she have the money in?

K. Simmons An envelope and I push her, she fall and hit her head, and was getting back up. when I was trying to catch her, she was trying to hold on to me I try to hold her. She fall. She was getting back up and I hit her with A stick.

K. Mears What kind of stick did you hit her with?

K. Simmons A little piece - a little stick off the tree.

K. Mears Did you take that stick in the house with you?

K. Simmons No that was on the back porch, the stick was sitting on the back porch.

K. Mears How many times did you hit her?

K. Simmons Almost two three times?

K. Mears Where did you hit her at?

K. Simmons On her head. On her head.

K. Mears Then what did you do?

K. Simmons After that, I had sex with her.

K. Mears Was she still alive at that time?

K. Simmons Yes sir, she was still living at that time.

K. Mears You had sex with her?

K. Simmons Yes sir.

K. Mears OK.

K. Simmons And I left, I was I was really lost in my mind.

K. Mears Did you get any money?

K. Simmons Yea she had done give me the envelope, she done dropped the envelope when I hit her and I picked up the telephone ready to dial a number, put the telephone back down.

K. Mears Dial what number?

K. Simmons I was dialing 911 and put the telephone back down.

K. Mears Why were going to dial 911?

K. Simmons I realized what I had did, I know I had just made a mistake, a big mistake in my life.

K. Mears How many times did you rape her?

K. Simmons Only once sir.

K. Mears Was she alive or was she dead?

K. Simmons She was living sir.

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TAPED INTERVIEW/STATEMENT OF KENNETH SIMMONS - 12/5/97

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K. Mears Did you tell anyone about this after you left?
K. Simmons No sir, nobody.
K. Mears What did you do with the weapon or the club after you hit her with it?
K. Simmons I threw it on the side of the road on the trash pile, I threw it on the side of road on a trash pile.
K. Mears You threw it on the side of the road in the trash pile?
K. Simmons Yes sir.
K. Mears What kind of weapon was it?
K. Simmons It was a piece of stick off the tree.
K. Mears How much money did you get from her?
K. Simmons I don't know sir, really to be honest I really don't remember.
K. Mears Was there anyone with you?
K. Simmons No sir.
K. Mears Think about it now.
K. Simmons I am.
K. Mears Be honest with me.
K. Simmons I am sir.
K. Mears Who was with you?
K. Simmons I was by myself to be honest with you.
K. Mears I'm going to ask you once more.
K. Simmons I ain't going to lie to you sir.
K. Mears Who was with you?
K. Simmons Sir, I'm being honest, I wasn't quite honest the first time, but I'm honest this time.
K. Mears The story you told me the first time about Shorty and the two men, it that true?
K. Simmons No sir.
K. Mears Why did you tell me that?
K. Simmons I didn't know how to come out and confess all the way out, I didn't know how to come out and fess all the way out, that's why.
K. Mears You went to her house alone.
K. Simmons Yes sir.
K. Mears You left alone?
K. Simmons Yes sir.
K. Mears No one went in the house with you?
K. Simmons No sir.
K. Mears You are certain?
K. Simmons Yes sir.
K. Mears Did you meet with someone else later?
K. Simmons I went home.
K. Mears Did you tell anyone else about this?
K. Simmons No sir.
K. Mears Did you go buy crack and smoke it with someone else?
K. Simmons Somebody six or seven hours later, when I did stop and get something to drink I bought some crack and stuff.
K. Mears Who did you meet up with later on that day and buy crack and smoke?
K. Simmons I was buying beer earlier and I went back out the club Saturday night and

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TAPED INTERVIEW/STATEMENT OF KENNETH SIMMONS - 12/5/97

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K. Simmons Me and a bunch of fellas.
K. Mears Did you owe any drug dealers any money?
K. Simmons No sir.
K. Mears Remember, you are suppose to tell me the truth. Where did this \$20,000.00
dope cash money come from that you were referring to in your earlier
statement?
K. Simmons I made that up.
K. Mears So that was a lie.
K. Simmons Yes sir.
K. Mears Now this is the whole truth?
K. Simmons Yes sir.
K. Mears And you are telling me that no one else was with you?
K. Simmons Yes sir.
K. Mears Yes sir someone was with you or yes sir you telling me the truth?
K. Simmons No sir I was by myself sir, I telling you the truth sir.
K. Mears Who are you trying to protect?
K. Simmons Sir, nobody.
K. Mears Was a lady with you?
K. Simmons No sir, I was by myself.
K. Mears Was a man with you?
K. Simmons No sir, I was by myself.
K. Mears After you hit Ms. Boyd several times.
K. Simmons Yes sir.
K. Mears Was she conscious or was she unconscious, when you raped her?
K. Simmons She was half and half.
K. Mears Did she try to fight back?
K. Simmons A little bit, a little bit sir.
K. Mears How long did you wait on the outside of the house before she came outside?
K. Simmons I didn't wait that long.
K. Mears When you went to her house what was the purpose of going there?
K. Simmons To get some money from her.
K. Mears How were you going to get money from her?
K. Simmons I was going to ask her.
K. Mears You were going to ask her for some money?
K. Simmons Yes sir.
K. Mears And if she didn't give it to you what were you going to do?
K. Simmons Rob her.
K. Mears So she didn't give you the money?
K. Simmons Well, she, the first time she wasn't going to give it to me then she gave it to me.
K. Mears Why did you?
K. Simmons Cause she pulled back and I pushed her, just like I said sir. Like I said I was
under the influence of alcohol and drugs, being honest.
K. Mears So after she gave you the money she pulled back.
K. Simmons Yes sir, she pulled back on it.
K. Mears Where did this take place?
K. Simmons It took place right there when I was coming out the back door.
K. Mears Is that near the living room or the kitchen?

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TAPED INTEVIEW/STATEMENT OF KENNETH SIMMONS - 12/5/97

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K. Simmons The kitchen, sir
K. Mears Who tied her hands?
K. Simmons I tied her hands sir.
K. Mears Why did you tie her hands?
K. Simmons I just tied them.
K. Mears Is this before you robbed her or after you robbed her?
K. Simmons This was after.
K. Mears Did you tie her hands before you raped her or did you tie her hands after you raped her?
K. Simmons After
K. Mears You raped her and then tied her hands?
K. Simmons Yes sir.
K. Mears Why did you tie her hands?
K. Simmons Cause I knew she was going to get up.
K. Mears This is before you left?
K. Simmons Yes sir, right before I left.
K. Mears You didn't want her to get up before you left?
K. Simmons Yes sir.
K. Mears And again I ask you, who else was with you?
K. Simmons Sir, no body else, I'm being honest with you. You are straight with me I believe in you, I'm straight with you this time.
K. Mears You said you were honest with me the first time.
K. Simmons I know, but I'm being honest with you this time.
K. Mears So you did this alone?
K. Simmons Yes sir.
K. Mears No one helped you?
K. Simmons No sir.
K. Mears No one was on the outside as an outlook?
K. Simmons No sir, I was by myself sir.
K. Mears You rode the bicycle up there?
K. Simmons Yes sir.
K. Mears You went down the highway or did you go through the path?
K. Simmons I went in the back way.
K. Mears Is that through that little path?
K. Simmons No sir, I came the back way, across the train track.
K. Mears Where did you park the bicycle?
K. Simmons On the other side of the train track.
K. Mears When you left did you go back and get the bicycle.
K. Simmons I went right across the other side of the train track and get the bicycle
K. Mears You said you through the stick you used to beat her
K. Simmons In the trash.
K. Mears Near the trash pile is that in the front of the house?
K. Simmons No across the street.
K. Mears Across the street?
K. Simmons Yes sir.
K. Mears Do you think that stick may be still there or was it in the trash pile that the

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TAPED INTERVIEW/STATEMENT OF KENNETH SIMMONS - 12/5/97

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K. Mears trash removed?
K. Simmons Trash man comes through there.
K. Mears The trash man comes through there?
K. Simmons Yes sir.
K. Mears And you hit her several times and then raped her?
K. Simmons Yes sir.
K. Mears Once?
K. Simmons Yes sir, that's all.
K. Mears Took her money?
K. Simmons Yes sir.
K. Mears You don't know how much money it was?
K. Simmons No sir to be honest with you, no.
K. Mears Did you mention this to anybody at all?
K. Simmons No sir.
K. Mears Never did to no one?
K. Simmons No sir, this is my first time, you
K. Mears So no one else knows about this or knew about this?
K. Simmons But you, but you
K. Mears Until now?
K. Simmons But you, but you.
K. Mears You mentioned the name of Duggins.
K. Simmons Yea Derrick.
K. Mears Derrick Duggins?
K. Simmons Yes, hum hum.
K. Mears What about Derrick Duggins?
K. Simmons Me and him coming from the club.
K. Mears So he didn't go over there with you?
K. Simmons No sir.
K. Mears You and Angie were smoking dope earlier?
K. Simmons Maybe out to the club.
K. Mears Did she go over there with you?
K. Simmons No sir.
K. Mears Is there anything else that you need to tell me?
K. Simmons Apologize to the family and the church and the community with me bringing the tragedy to them.
K. Mears So you did not break into house?
K. Simmons No sir.
K. Mears You just waited on her on the outside?
K. Simmons When I got there, she was on the outside.
K. Mears What was she doing on the outside?
K. Simmons She was feeding the chickens and taking in eggs.
K. Mears Have you done any work for her before?
K. Simmons No sir, I never did.
K. Mears Did she know you?
K. Simmons No sir, she did never know me, I saw her one time.
K. Mears So that you waiting on her explains how you got into the house?

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K. Simmons Yes sir.
K. Mears You were told that the house stayed locked at all times?
K. Simmons I know it was locked at all times sir.
K. Mears How did you know that?
K. Simmons Cause I could see her, we use to go there and smoke dope, all of us use to be there and smoke dope.
K. Mears And the house would be locked at all time?
K. Simmons We would see her when she come outside.
K. Mears Have you ever asked her to let you in or talk to her?
K. Simmons No sir, never did.
K. Mears Did you know what time she usually come out in the morning time?
K. Simmons No sir, to be honest.
K. Mears You just went there and took a chance?
K. Simmons Yes sir, to be honest with you.
K. Mears To be out?
K. Simmons Yes sir.
K. Mears Again, I'm going to ask you this again.
K. Simmons Yes sir I know.
K. Mears Did you do this alone?
K. Simmons Yes sir.
K. Mears No one helped you?
K. Simmons No sir to be honest with you, no sir.
K. Mears Who is Brenda Stephens?
K. Simmons She's a girl friend of mine.
K. Mears Where does she live?
K. Simmons Like I tell you she went back to Miami.
K. Mears She lives in Miami?
K. Simmons Yes sir.
K. Mears Is she the mother of one of your children?
K. Simmons Yes sir, she I mean the last time me and her talked
K. Mears Who is Rose Jones Wells?
K. Simmons She's a friend of mine, a deep friend of mine.
K. Mears Where does she live?
K. Simmons Right here in Columbia.
K. Mears Did you make a statement to her about you going to take care of some business?
K. Simmons Yes sir.
K. Mears What kind of business were you referring to?
K. Simmons Really to get myself straight.
K. Mears What kind of business?
K. Simmons Like I'm saying to get my life straight, confess.
K. Mears Did you call her back and tell her you killed two guys?
K. Simmons I talked to her yea.
K. Mears Did you tell her you killed two guys?
K. Simmons Yea I told her that.
K. Mears Did you kill two guys?
K. Simmons No sir.
K. Mears Did you kill anyone else other than Ms. Lilly Bell?

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K. Simmons No sir.

K. Mears Than Ms. Lilly Bell?

K. Simmons No sir.

K. Mears Why did you call Rosa Jones and tell her that you killed two guys?

K. Simmons Cause I knew she was a good close friend of mine and one I could trust to talk to, just like you are right now talking to me.

K. Mears Did you tell Rosa that you killed Ms. Lilly Bell?

K. Simmons No sir, I was trying to, that's why I come up here to talk to her for. Be honest That's why I come up here to try to talk to her for sir. I just couldn't put the words together like this afternoon when you talking with me.

K. Mears So this is the honest truth you?

K. Simmons Yes sir.

K. Mears Has anyone promised you anything for coming forth and telling the truth?

K. Simmons Nothing but God.

K. Mears Do you know what could happen to you?

K. Simmons Yes sir.

K. Mears What?

K. Simmons I could get the death penalty, locked up forever, as long as I got my soul, right You know, that's all I got leave to come home. That's all I got leave.

K. Mears Was there anything else that occurred there that you not telling me?

K. Simmons Sir, ain't nothing else.

K. Mears Did you have on gloves?

K. Simmons No sir.

K. Mears Leather gloves or any kind of gloves at all?

K. Simmons No sir.

K. Mears You never did wear no gloves or nothing?

K. Simmons No sir.

K. Mears And you said you picked up the telephone to call 911.

K. Simmons Yes sir, I didn't wear any gloves at all sir.

K. Mears Anything else that you can recall that you would like to tell me before this interview concludes?

K. Simmons Sir that's it. If any chance, I mean that's all. That was all.

K. Mears And this happened early that morning?

K. Simmons Yes sir.

K. Mears About 6:00 o'clock that morning?

K. Simmons Yes sir.

K. Mears I believe I have identified myself to you, you know who I am?

K. Simmons Yes sir.

K. Mears Who did I tell you I am?

K. Simmons I forgot your name sir, I'm just thinking, I'm just thinking about truth, you know what I mean. He's a good fella.

K. Mears Is there anything else that I failed to explain to you that you don't understand that you would like to ask me at this time?

K. Simmons The only thing I why I want to know is why you keep asking me about Angie B? That's all sir.

K. Mears I've asked about several people.

K. Simmons Yea.

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K. Mears The reason I'm asking is to find out if you acted alone or did someone else help you?

K. Simmons No I was by myself sir.

K. Mears You told me you were going to be truthful with me.

K. Simmons Yea I am this time.

K. Mears If you did not act alone you are not being truthful with me.

K. Simmons I know that sir, I know that.

K. Mears And right now, I don't know if you acted alone or not.

K. Simmons I'm going to put it this way, I apologize to you for the first time, you know what I mean. I apologize to you.

K. Mears For telling me what you did?

K. Simmons Yes sir, yes sir I'm apologizing to you for the first one, you know what I mean.

K. Mears But you are telling me the honest truth now?

K. Simmons Yes sir.

K. Mears Everything you stated in this interview here is the truth?

K. Simmons Yes sir.

K. Mears No lies no where in it?

K. Simmons No sir.

K. Mears Including when I asked you if you acted alone?

K. Simmons Yes sir.

K. Mears That's the truth also?

K. Simmons Yes sir.

K. Mears You are not trying to hide or cover up for noone?

K. Simmons No sir.

K. Mears You are certain?

K. Simmons Yes sir, I'm serious with you, I feel a whole lot better now.

K. Mears Do you have any questions to ask me?

K. Simmons The only thing is why you keep asking me about Angie B sir, that's all. Why something you can't tell me.

K. Mears Huh, well I've asked about Angie B and I've asked about Rosa Wells, And I was trying to

K. Simmons Yea I told you about Rosa.

K. Mears I was trying to find out if anyone else was involved.

K. Simmons Yes sir, if I'm trying to cover up.

K. Mears Or if you were trying to cover up for someone else that's the reason.

K. Simmons No.

K. Mears Just run with that female who was with you.

K. Simmons Hum.

K. Mears And you tell me that's not so

K. Simmons True, it's not so.

K. Mears True, that is not so?

K. Simmons Yes sir.

K. Mears I don't have any other questions for you Kenneth and at this time this will conclude this interview.

K. Simmons Yes sir, thank you sir.

K. Mears The time now is 8:49 p.m. of December 5, 1997.

K. Simmons Yes sir.

K. Mears At this time this is Kenny Mears, I have Kenneth Simmons that would like
 To make some additional statements the time is 8:57. Kenneth you say
 You wanted to make some additional statements?

K. Simmons Yes sir.

K. Mears Alright sir, speak up into the mike so it can pick you up.

K. Simmons Yes sir, I know the first time I was lied to you, but I didn't know how you
 all were going to respond to me and I glad you were black not white cause
 I don't have nothing against white people but just they wouldn't understand
 Or treat me like ya'll would treat me. Y'all treat me with respect like
 somebody, so I was glad y'all come back, so I could get my story right
 and confess and get my soul right with God. Mr. Mears I appreciate
 everything what you do for me.

K. Mears Has anyone promised you anything at all?

K. Simmons Nothing but God sir, only person but God

K. Mears You know I can't promise you nothing

K. Simmons No sir, no man could promise me nothing, no man.

K. Mears OK.

K. Simmons No man.

K. Mears And you swear that this is the whole honest truth?

K. Simmons The truth sir.

K. Mears Anything else you would like to say?

K. Simmons I'm sorry what I did to the community and Ms. Boyd and their family. To my
 family, I'm sorry for that, but it's the price I got to pay. I willing of a man
 To stand up for what happened and what I had already done.

K. Mears Anything else?

K. Simmons No sir.

K. Mears OK, the time is 8:55 this will conclude Kenneth Simmons's statement,
 Dec. 5, 1997.

END OF TAPED STATEMENT

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THIRD TAPED INTERVIEW/STATEMENT OF KENNETH SIMMONS - 12/9/97

K. Mears I'm Kenny Mears with SLED, today's date is December the 9th, 1997, the time is 11:34 a.m. I have Kenneth Simmons with me. I have gave him a copy of the statement that he read--gave me on tape. Kenneth have you read over this statement that was transcribed and typed written?

K. Simmons Yes sir.

K. Mears Is that the statement you gave me on tape?

K. Simmons Yes sir.

K. Mears You thoroughly read over it and understands everything on it?

K. Simmons Yes sir.

K. Mears Is it anything different than what you told me?

K. Simmons No sir.

K. Mears On the tape?

K. Simmons No sir.

K. Mears So this is correct copy of what you told me?

K. Simmons Yes sir.

K. Mears You have read the whole transcribed tape?

K. Simmons Yes sir.

K. Mears Consisting of how many pages?

K. Simmons Eleven.

K. Mears Eleven pages? And right at the bottom of the eleventh page, did you sign it?

K. Simmons Yes sir.

K. Mears Is that your signature there?

K. Simmons Yes sir.

K. Mears And what's today's date you signed it?

K. Simmons 12/9/97.

K. Mears Is there any thing that you don't understand about this?

K. Simmons No sir.

K. Mears So everything is correct?

K. Simmons Yes sir.

K. Mears I am giving you a copy of this.

K. Simmons Yes sir.

K. Mears Okay that's your copy. I have a couple other questions that I would like to ask you.

K. Simmons Yes sir.

K. Mears If you're willing to answer them.

K. Simmons Yes sir.

K. Mears Again, I will advise you of your rights. Your rights have been read to you twice before.

K. Simmons Yes sir.

K. Mears You still understand your rights?

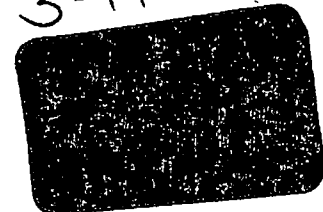
K. Simmons Yes sir.

K. Mears You do understand that your rights are still in tact?

K. Simmons Yes sir.

K. Mears Again, here's another rights form.

K. Simmons Yes sir.

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K. Mears You have read them twice before.
K. Simmons Yes sir.
K. Mears You can read over them again.
K. Simmons Yes sir.
K. Mears And sign this one.
K. Simmons Yes sir.
K. Mears Get today's date and all.
K. Simmons Yes sir.
K. Mears Alright I'm going to I'm going to cut the tape off for now until you read over
then rights and then I'll start the tape back up.
K. Simmons Yes sir.
K. Mears OK, now Kenneth I'm going to start the tape back up again.
K. Simmons Yes sir.
K. Mears Your rights have been read to you.
K. Simmons Yes sir.
K. Mears And you have signed the rights and you have initialed each one of them on the
side.
K. Simmons Yes sir.
K. Mears You still fully understand your rights?
K. Simmons Yes sir.
K. Mears Any questions at all about your rights?
K. Simmons No sir.
K. Mears OK, I know on the last interview you stated that what you told me is the whole
truth and you know of nothing else. Is there anything else that you would like
to tell me in addition to your last statement?
K. Simmons No sir.
K. Mears OK, I'm going to ask you again, and I keep asking you this. Did you act alone?
K. Simmons Yes sir.
K. Mears What about a man or a person standing by the gate when you went in there? Was
There someone standing at the gate that was with you?
K. Simmons No sir.
K. Mears No one was with you standing at that gate?
K. Simmons No sir.
K. Mears How did you know what door to go to when you went to Ms. Boyd's house?
K. Simmons How did I know?
K. Mears Yea. How do you know--
K. Simmons I went to the front door.
K. Mears You went to the front door?
K. Simmons Yea.
K. Mears And what did you do at the front door?
K. Simmons The door was locked.
K. Mears Did you knock on it?
K. Simmons It was --- it's a --it's a it's a steel door.
K. Mears Did you knock on it?
K. Simmons I shaked it.
K. Mears Okay then what did you do?

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K. Simmons I went around to the back.
K. Mears And when you went around to the back, did you see Ms. Boyd?
K. Simmons Yea, she was coming out back.
K. Mears She was coming out the back door?
K. Simmons Hum hum.
K. Mears Did she have anything in her hand?
K. Simmons a little cup.
K. Mears A little cup?
K. Simmons Yep.
K. Mears Now this stick that you referred to that you got?
K. Simmons Hum, hum.
K. Mears Did you get the stick off the tree?
K. Simmons No sir.
K. Mears Where was this stick?
K. Simmons Off the back porch.
K. Mears Off the back porch?
K. Simmons Hum, hum.
K. Mears Describe it to me.
K. Simmons It was, just a wood stick stick?
K. Mears A little what?
K. Simmons a little stick, a little wood stick.
K. Mears About how long was it?
K. Simmons Only 2 foot.
K. Mears About 2 feet long?
K. Simmons Yes sir.
K. Mears And about what size in diameter?
K. Simmons It was just
K. Mears Just just indicate
K. Simmons Yes sir just, I mean
K. Mears About what size, this size?
K. Simmons Yes sir. It was around--- around
K. Mears So you talking about maybe an inch and a half or two inches in diameter?
K. Simmons Yes sir.
K. Mears And about 2 feet long?
K. Simmons Yes sir.
K. Mears And you got it off the little back porch?
K. Simmons Yes sir.
K. Mears So you didn't take the stick there with you?
K. Simmons No sir.
K. Mears OK, after you hit her with the stick, did you use anything else?
K. Simmons No sir.
K. Mears Did you use a cord?
K. Simmons No sir.
K. Mears You didn't use a telephone cord or no other string or nothing?

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K. Simmons No sir.

K. Mears You didn't strangle her?

K. Simmons No sir.

K. Mears You didn't tie a rope or anything around her neck?

K. Simmons No sir, I just tied her hands.

K. Mears You never did use the rope to tie her hands to kind of put around her neck at any time?

K. Simmons No sir, not that I can remember.

K. Mears Not as you can remember?

K. Simmons Yes sir.

K. Mears Did you hit her with anything else other than the stick?

K. Simmons No sir.

K. Mears Did you hit her with your fist?

K. Simmons No sir, the only thing I knowed she hit was that she hit her head.

K. Mears That was the back of the head or the front?

K. Simmons Side of the head. ¶

K. Mears Side of the head?

K. Simmons Yes sir.

K. Mears You didn't hit her with nothing else?

K. Simmons No sir.

K. Mears A shoe or another stick or your fist.

K. Simmons No sir, not that I can recall sir.

K. Mears OK Did you get blood on you?

K. Simmons Not that I can remember, to be honest with you.

K. Mears When you left Mrs. Boyd's house

K. Simmons Uh—huh

K. Mears and went back and got on your bicycle, where did you go from there?

K. Simmons I went riding down the road (inaudible). Stopped by the paperman's house as I went home.

K. Mears Did you change clothes?

K. Simmons Yea the next day I mean when I went to sleep and got back up.

K. Mears Were there blood on your clothes?

K. Simmons It was dirty clothes I was working it might have would sir when I was working, it might have (inaudible) (N/A)

K. Mears But you changed clothes before you went back out that afternoon?

K. Simmons Yes sir.

K. Mears And where did you change clothes at?

K. Simmons Right there at the house.

K. Mears At your house?

K. Simmons Yes sir.

K. Mears And you were staying with whom?

K. Simmons Me and Charlie Taylor.

K. Mears You and Charles Taylor were.

K. Simmons Yes sir.

K. Mears staying together?

K. Mears Okay Charles Taylor is not the same person as Derek Duggins is it?

K. Simmons No sir.

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K. Mears Derek Duggins with you?
K. Simmons Me and Derek been to the club that night, you know and he always stays with me
 you know, I mean as long as me and him are working together and he got up and
 went home.
K. Mears OK, what did you do with Ms. Boyd's purse?
K. Simmons Her purse?
K. Mears Yes, the handbag?
K. Simmons There wasn't no handbag.
K. Mears You never did see one?
K. Simmons No sir.
K. Mears What about her ID or driver's license?
K. Simmons No sir.
K. Mears You didn't get any of that?
K. Simmons No sir.
K. Mears You didn't touch that?
K. Simmons No sir.
K. Mears You didn't go into her handbag or nothing to get that out?
K. Simmons Huh-uh she bring that to me, remember? Remember I tell you on the tape, she
 bring the money, I mean the little.
K. Mears Where did she get it from?
K. Simmons Sir, I don't know, she had to get it out of her room.
K. Mears You asked her for it?
K. Simmons Yes sir.
K. Mears And she went inside?
K. Simmons Yes sir.
K. Mears Did you go inside with her?
K. Simmons I didn't went that, I went halfway down the hall.
K. Mears And she went in the room and got it?
K. Simmons Hum hum,
K. Mears And brought it back out?
K. Simmons Yes sir.
K. Mears When did you push her against the the stove or push her on the floor?
K. Simmons Well I was I was back up coming back out then when I snatched it, she snatched
 back and I pushed her, you know, that's when she hit her head.
K. Mears This is before you asked her for the money or after you got the money?
K. Simmons That was almost at the same time sir.
K. Mears Alright, you asked her for the money, she went inside in her room
K. Simmons Uh-huh.
K. Mears You went down the hall with her, she came back out?
K. Simmons Yes sir.
K. Mears And that's when you pushed her or you pushed her first and then went inside?
K. Simmons You could say I push her first.
K. Mears You pushed her first?
K. Simmons Yea I could say that.
K. Mears Then you went inside?
K. Simmons Hum Hum.

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K. Mears And she got the money?
K. Simmons Yes sir.
K. Mears And gave it to you?
K. Simmons Yes sir.
K. Mears And she came back out as far as the kitchen?
K. Simmons Yes sir.
K. Mears And that's where you hit her with the stick?
K. Simmons Yes sir.
K. Mears You hit her several times?
K. Simmons Yea , two to three times.
K. Mears Okay and you didn't use a cord or nothing to wrap around her neck at any time?
K. Simmons Sir, during the time, no sir, not as I not---not as I could recall sir.
K. Mears OK, what did you do with that stick?
K. Simmons I threw it in the trash.
K. Mears You threw it in the trash?
K. Simmons Yes sir.
K. Mears In a trash bin or where?
K. Simmons No a trash pile, the town pick up every Monday or ---every Monday.
K. Mears You didn't take it down the railroad tracks and throw it down by the railroad track?
K. Simmons No.
K. Mears You are certain?
K. Simmons Yes sir.
K. Mears You are positive, you remember you sort of said one time that, you may have thrown it down by the railroad track.
K. Simmons Yea, but right beside the railroad track where I parked my bicycle at.
K. Mears Is there a trash pile down there?
K. Simmons Yes sir.
K. Mears Is that right beside the street?
K. Simmons Yes sir.
K. Mears You think the stick is still there or you think the trash man got it?
K. Simmons One of the trash men might have picked it up sir.
K. Mears OK.? Derek was not with you at that time?
K. Simmons He wasn't sir.
K. Mears Angie B was not with you at that time?
K. Simmons No sir she wasn't either.
K. Mears Ms. Stevens---Stephenson?
K. Simmons No sir.
K. Mears I believe
K. Simmons No sir.
K. Mears She wasn't with you?
K. Simmons Huh-uh.
K. Mears You are still telling me that you were by yourself?
K. Simmons Yes sir.
K. Mears How did you know that Ms. Boyd had money?
K. Simmons It I was just a guess sir, just a guess sir.

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K. Mears Is it because you and Angie went there earlier to see if you could borrow some money from her?

K. Simmons No sir.

K. Mears Be honest with me now.

K. Simmons I am sir, I wouldn't lie to you.

K. Mears So you didn't go there earlier to Ms. Boyd's house and ask her for some money?

K. Simmons No sir.

K. Mears You and Angie?

K. Simmons No sir.

K. Mears So after you did whatever you did after the murder, you went home?

K. Simmons Yes sir.

K. Mears You rode the bicycle home, you got some sleep got back up and you went on out?

K. Simmons To the club, yes sir.

K. Mears To the club later on. Did you have on a stocking stocking cap or something?

K. Simmons No sir.

K. Mears Where did you get the stocking that you tied her up with?

K. Simmons It was on the floor.

K. Mears On the floor?

K. Simmons Yes sir.

K. Mears Inside the kitchen.

K. Simmons In the hall.

K. Mears OK you got it off the floor in the hallway?

K. Simmons Yes sir I didn't even remember I was tied her up with a stocking.

K. Mears And you had never been in there before?

K. Simmons No sir.

K. Mears Do you remember when her home was burglarized in '93?

K. Simmons Yes sir.

K. Mears Who was that?

K. Simmons I don't know sir.

K. Mears Was it you?

K. Simmons No sir.

K. Mears Any of your buddies?

K. Simmons No sir.

K. Mears Have you heard who did it?

K. Simmons No sir.

K. Mears Any idea who might have done it?

K. Simmons No sir.

K. Mears Do you know what was taken then?

K. Simmons No sir.

K. Mears So you don't know nothing about the burglary, only what you heard?

K. Simmons Yes sir.

K. Mears About how long did you stay in the house after you pushed her. How long did you stay there?

K. Simmons What do you mean after I pushed her?

K. Mears After you pushed her, you took the money, you tied her up, you raped her, how long-- about how long did this take?

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K. Simmons Hum, I don't know, to be honest with you I didn't know sir, to be honest
K. Mears Approximately, how long did it seem to you? Long time, short time?
K. Simmons A very short time.
K. Mears OK, now let me see if I got the right sequential order.
K. Simmons Uh-huh.
K. Mears You went to the house?
K. Simmons Yes sir.
K. Mears She was coming out the back door?
K. Simmons Yes sir.
K. Mears You pushed her?
K. Simmons Yes sir.
K. Mears and asked her for the money?
K. Simmons Yes sir.
K. Mears Then she went back inside the house?
K. Simmons Yes sir.
K. Mears Down the hallway into a bedroom,
K. Simmons Uh-huh.
K. Mears You followed her?
K. Simmons Not all the way.
K. Mears Not all the way?
K. Simmons Yes sir.
K. Mears And she came back out ?
K. Simmons Uh-huh.
K. Mears With the money?
K. Simmons Hum, hum,
K. Mears Gave you the money?
K. Simmons Uh-huh.
K. Mears What was the money in?
K. Simmons A little brown envelope.
K. Mears A little brown envelope?
K. Simmons Yea.
K. Mears Where did she give you the money at, down the hallway, in the bedroom or
In the kitchen?
K. Simmons In between the kitchen and the hallway, when I pushed her.
K. Mears OK, after she gave you the money, you pushed her?
K. Simmons And she hit her head, yes sir.
K. Mears And she hit her head?
K. Simmons Yes sir.
K. Mears And that's when you beat her with the stick?
K. Simmons I hit her, yes sir.
K. Mears And what else happened?
K. Simmons I went and I tied her hands.
K. Mears Okay.
K. Simmons I raped her and then I tied her hands.
K. Mears OK, you raped her after after you knocked her to the floor?
K. Simmons Yes sir.

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K. Mears And beat her with a stick?
K. Simmons Yes sir.
K. Mears You raped her?
K. Simmons Yes sir.
K. Mears Okay After you raped her, you tied her up?
K. Simmons Yes sir.
K. Mears With what?
K. Simmons I guess a stocking.
K. Mears A stocking?
K. Simmons I didn't know what it was. Really I can't remember what I tied her up with no way sir.
- K. Mears Was she alive when you left?
K. Simmons She was half and half, and then when I went to the telephone. I tried to call 911 and
K. Mears You went to the telephone after you tied her up?
K. Simmons Yes sir.
K. Mears Did you make a call?
K. Simmons I was going to call, I picked up the telephone and dialed 911. I (N/A) dialing 911 sir.
K. Mears So you just hung the phone back up?
K. Simmons Yes sir. I was out of my mind.
K. Mears When you left did you close the back door or did you leave out through the front door?
K. Simmons I left out the back door.
K. Mears Did you close the door?
K. Simmons Yes sir.
K. Mears You closed the door?
K. Simmons Yes sir.
K. Mears You are certain?
K. Simmons Yes sir.
K. Mears Do you know how much money you got?
K. Simmons To be honest sir, no sir.
K. Mears Approximately how much?
K. Simmons To be honest, maybe a hundred and something, sir.
K. Mears About a hundred and something?
- K. Simmons Yes sir.
K. Mears OK, hold on one second. Now you and Angie did not go to Ms. Boyd's house earlier that day?
K. Simmons No sir.
K. Mears To borrow some money?
K. Simmons No sir, me and Angie did not.
K. Mears Could Angie could have gone with someone else?
K. Simmons Yes sir.
K. Mears Do you know of anyone else that she could have gone with?
K. Simmons Only person I could say would have to been Ross (N/A) her boyfriend.
K. Mears Is there any resemblance between you and Ross?
K. Simmons No sir.

K. Mears So there shouldn't be no mistake between the identity of you and Ross?

K. Simmons No sir.

K. Mears Ross is a much bigger bigger and lighter fellow

K. Mears and a lighter complexion

K. Simmons Yes sir.

K. Mears Have you ever asked Ms. Boyd to borrow any money?

K. Simmons No sir.

K. Mears Have you ever been to Ms. Boyd's house?

K. Simmons No sir.

K. Mears That was the first, second, first time going there?

K. Simmons Yes sir.

K. Mears Don't know what happened to her pocketbook?

K. Simmons No sir.

K. Mears ID?

K. Simmons Nothing.

K. Mears Did you see a pocketbook?

K. Simmons No sir.

K. Mears When she got the money for you?

K. Simmons A brown a brown envelope.

K. Mears A brown envelope?

K. Simmons Yes sir.

K. Mears She didn't get it out of out of her purse?

K. Simmons I don't know sir, I wasn't all the way down the hall.

K. Mears And you still saying that you act alone?

K. Simmons Yes sir.

K. Mears You can honestly say that Angie, Brenda, Derek, Charles, any of them didn't know anything about it?

K. Simmons Nobody sir.

K. Mears You didn't tell anyone?

K. Simmons No sir, I told you.

K. Mears They did not participate?

K. Simmons No sir, you are the only one I tell. Nobody know nothing but you, and me and God.

K. Mears OK This concludes the third interview with Kenneth Simmons. The date Is December the 9th, 1997. I'm Kenny Mears with SLED, the time is 12:13 p.m.

END OF TAPE

16A
State of 3221
DEFENDANT'S REQUEST TO CHARGE NO.

LESSER INCLUDED OFFENSE X

Robbery is a lesser included offense of armed robbery.

S.C. Requests to Charge - Criminal 6-7 (Ervin, Tom J., S.C. Bar CLE
Divison, 1994)

Good law but not applicable
to uncontradicted facts

STATE OF SOUTH CAROLINA *Margie K. ...* INDICTMENT NO.: 98GS180075,
CLERK OF COURT 98GS180076, 98GS180077, 98GS180078 &
DORCHESTER COUNTY 98GS1879

v.)
)
KENNETH SIMMONS,)
)
)
)
Defendant.)
)
)

Post Trial Motion to Set Aside Jury's
Recommendation of Sentence, or in the
alternative a new sentencing Trial

TO: THE HONORABLE RODNEY A. PEEPLES:

The Defendant, Kenneth Simmons, hereby moves this Honorable Court to set aside the jury's recommendation of sentence, or in the alternative to grant to the Defendant a new trial for sentencing.

The above named Defendant was convicted on Sunday, February 28, 1999 of Murder (Indictment No. 98GS180075), Criminal Sexual Conduct-First Degree (Indictment No.98GS180078), Armed Robbery (Indictment No. 98GS180077), Burglary-First Degree (Indictment No. 98GS180076), and Kidnapping (Indictment No. 98GS180079). Subsequently, the Defendant was sentenced to death on Tuesday, March 2, 1999. Pursuant to Rule 29(a) of *The South Carolina Rules of Criminal Procedure*, the Court granted defense counsel ten (10) days to file and/or make further post trial motions in addition to those made on the record. The Defendant hereby moves this Court to set aside the jury's recommendation of sentence, or in the alternative to grant to the Defendant a new trial for sentencing on the following grounds:

Failure to Instruct the Jury Pursuant to Section 16-3-20(C) of the South Carolina Code of Laws

The jury deliberated the sentence of the Defendant from 9:00 A.M. until 1:00 P.M.. The jury then submitted a question in writing to the Court questioning the necessity of reaching a unanimous verdict as to the death penalty or life imprisonment without parole. The jury then deliberated approximately two and one half hours before reaching their decision.

The Court previously denied defense counsel's request to instruct the jury in accordance with *South Carolina Code of Laws Section 16-3-20(C)* of the ramifications in the event of a failure to reach a unanimous decision.

The sentencing portion of *Section 16-3-20* at subsection (C) provides in part:

Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

In his pretrial motion with supporting memorandum, defense counsel sought to either have the trial judge instruct the jury as to the consequences of their inability to reach a unanimous verdict or allow defense counsel to argue that the Defendant would be sentenced to life imprisonment should the jury be unable to reach a unanimous verdict.

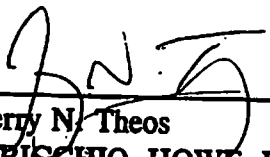
Clearly, based upon the duration of the jury's deliberation during the penalty phase and the specific question posed to the Court, had the jury been so instructed, either in the court's general charge or in response to their specific question, there would not have been a unanimous decision and the Court would have been required to impose a sentence of life imprisonment without parole.

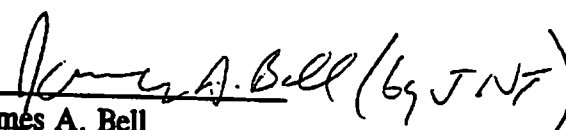
The Death Penalty in this Case would Constitute Cruel and Unusual Punishment

There is no question that the Defendant suffers from a diminished mental capacity. As such, the imposition of the death penalty would constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

Based upon the forgoing, the Defendant, Kenneth Simmons, hereby moves this Court to set aside the jury's recommendation of sentence and sentence the Defendant to life imprisonment without parole, or in the alternative, the Defendant moves this Court to grant to the Defendant a new trial for sentencing.

Respectfully submitted,


Jerry N. Theos
URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK & THEOS, P.A.
17½ Broad Street
Charleston, South Carolina 29401
(843) 723-7491


James A. Bell
437-B North Main Street
Summerville, Carolina 29483
(843) 851-0301

ATTORNEYS FOR DEFENDANT

Charleston, South Carolina

March 9, 1999.

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF DORCHESTER) INDICTMENT NO. 98-GS-18-0075 to 0079

STATE OF SOUTH CAROLINA,)
-**versus**-)
KENNETH SIMMONS,)
Defendant.)

ORDER

FILED-RECORDED
99 APR -1 AM 11:09
MARBLE COUNTY CLERK OF COURT
DORCHESTER COUNTY

This matter is before me pursuant to Defendant's Post Trial Motion to Set Aside Jury's Recommendation of Sentence, or in the alternative, a new sentencing Trial. Defendant's Motion alleges that the Court erred in failing to instruct the jury that the Court would impose a life sentence if the jury was unable to reach a unanimous verdict and further that imposition of the death penalty would violate the Eighth Amendment due to the defendant's alleged diminished mental capacity.

Pursuant to Rule 29(a), South Carolina Rules of Criminal Procedure, the Defendant's Motion has been considered by this Court without oral argument since the matters alleged by the defendant have previously been argued on the record and ruled upon by the Court.

The Court granted the Solicitor's pretrial Motion in Limine to prohibit the defendant from advising the jury as to the legal effect of a divided jury in the penalty phase. During the trial, the defendant attempted to again seek permission from the Court to educate the jury as to the legal effect of a divided penalty phase verdict. This was refused by the Court.

#1

R.A.P.

In its penalty phase instructions to the jury, this Court stated inter alia, "whatever your recommendation is, it must be a unanimous one, that is to say, it must be the verdict of each and every juror." After deliberating for approximately 4 hours and 10 minutes, the jury forelady submitted the following note to the trial judge: "Must both the verdict of death or life in prison be unanimous? (all 12 jurors agree to the verdict.)" After hearing from the defense attorneys and the Solicitor, this Court responded "yes" to the jury's question. After approximately another 2 hours and 18 minutes, the jury unanimously returned with a death penalty recommendation. Each juror had signed the written death penalty verdict form and each juror affirmed his or her vote when the jury was polled. At no point during the jury's deliberations did the jury ever indicate in any way whatsoever that they were deadlocked.

The specific issue raised by the defendant has been considered by our Supreme Court on several occasions and the law is well settled that the legal effect of a divided jury as stated in Section 16-3-20(C) is addressed to the trial judge only and not to the jury. The first South Carolina case to construe Subsection (C) of 16-3-20 was State v. Sylvester Adams, 283 SE2d 582 (1981). In that case, the appellant argued that the trial judge erred by failing to instruct the jury initially that if it failed to agree on a verdict, the Court would be required to sentence the defendant to life in prison. The defense alleged that the failure to give the charge coerced individual jurors into capitulating to an arbitrary verdict recommendation. Our Supreme Court disagreed and held as follows:

"The language of the statute provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury."

#2
R.A.P.

The Court next addressed this issue in State v. Copeland and Roberts, 300 SE2d 63 (1982). In that case, Copeland argued that the trial judge erred in denying his request to instruct the jury as to the actual effect of its failure to reach a unanimous verdict as to sentence and in instructing the jury as follows: "irrespective of what your verdict or recommendation is, it must be unanimous on each count, that is, your verdict or recommendation must be the verdict or recommendation of all twelve of you." The Court, citing Adams, supra, found no error in the charge as given.

The issue was next considered in State v. Dale Robert Yates, 310 SE2d 805 (1982). In that case, after approximately fifty minutes of deliberations, the jury indicated it was deadlocked. The judge responded "I would not conclude that after the length of time which you have deliberated that you have given due and thorough deliberation to the matter before you, and I am going to ask you to return to the jury room and continue your deliberations." Approximately two hours later, the jury returned recommending the death penalty. The defendant alleged the trial judge should have told the jury that if they were not capable of breaking the deadlock, a life sentence would be imposed. The Supreme Court, again citing Adams, supra, found no error in refusing to charge 16-3-20(C) even in the face of an apparently hung jury.

Our Supreme Court has in at least two other cases, State v. Raymond Patterson (II), 384 SE2d 699 (1989) and State v. Anthony Green, 392 SE2d 157 (1990), held that the trial judge "properly charged that the jury's verdict, whether for life or death, must be unanimous."

To properly charge a jury that their verdict must be unanimous and then instruct them as to what will happen if their verdict is not unanimous would create an absurd situation of having the trial judge tell the jury what the law is and then encouraging it not to follow the law by not reaching a unanimous verdict.

#3
S.A.P.

The defendant next alleges that his execution would be cruel and unusual punishment in violation of the Eighth Amendment because he allegedly suffers from diminished mental capacity. At trial, the defense introduced conflicting expert testimony as to the defendant's mentality. There was testimony the defendant was mildly mentally retarded, that mental retardation was suspected, but could not be diagnosed, that the defendant was not mentally retarded but was in the borderline range and that the defendant was not initially mentally retarded, but functioned at a diminished level due to chronic use of alcohol and drugs. Since there was evidence of diminished mental capacity, the Court submitted, inter alia, the following mitigating circumstances: 1) The ^{RAP} ~~defendant~~ murder was committed while the defendant was under the influence of mental or emotional disturbance; 2) 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; 3) The age or mentality of the defendant at the time of the crime; and 4) The defendant had mental retardation at the time of the crime.

The United States Supreme Court held in Penry v. Lynaugh, 492 US 302, 106 LEd 256, 109 S.Ct. 2934 (1984), that mental retardation alone is not an Eighth Amendment bar to the death penalty as long as the jury can consider mental retardation as a mitigating circumstance.

Our Supreme Court held in State v. Frank Middleton (II), 368 SE2d 457 (1988), where the defendant had an IQ of 68, that execution of a mentally retarded defendant is not a violation of the Eighth Amendment when appropriate mitigating circumstances were given to the jury. State v. Donald Jones (II), 378 SE2d 594 (1989), also held that the execution of a mentally retarded defendant is not a violation of the Eighth Amendment.

#4
R.A.P.

IT IS THEREFORE, ORDERED that the Defendant's Post Trial Motion to Set
Aside Jury's Recommendation of Sentence, or in the alternative a new sentencing Trial is denied;
and

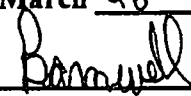
IT IS SO ORDERED.

#5



RODNEY A. PEEPLES, PRESIDING JUDGE
FIRST JUDICIAL CIRCUIT

March 28, 1999


_____, South Carolina

3230

1. ☒ MUST BOTH THE
VERDICT OF DEATH OR
LIFE IN PRISON BE
UNANIMOUS (ALL 12 JURORS
AGREE TO THE VERDICT.)

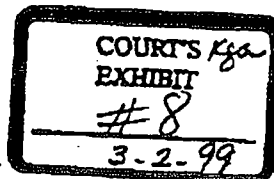
Yes

IN THE
DEATH OR
LIFE IN PRISON BE
(ALL 12 JURORS
THE VERDICT)

2. MUST THE FORM "JURIES
FINDING AS TO AGGRAVATING
CIRCUMSTANCES" BE SIGNED
~~YES~~ IF A VERDICT OF
LIFE IN PRISON IS REACHED?

Yes

FORM "JURIES
TO AGGRAVATING
CIRCUMSTANCES" BE SIGNED
IF A VERDICT OF
LIFE IN PRISON IS REACHED?



Rodney A. Peck
interviewed

Rodney A. Peck
interviewed

3231

The State of South Carolina**OFFICE OF SOLICITOR
First Judicial Circuit**

140 North Main Street
Suite 102
Summerville, SC 29483
(843) 871-2640
FAX (843) 871-2643
PTI (843) 873-7842



Courthouse, Amelia Street
Post Office Box 1525
Orangeburg, SC 29116
(803) 533-6252
FAX (803) 533-6004
PTI (803) 533-6137

WALTER BAILEY**Solicitor****11 MARCH 1999****VIA FAX 1-803-359-8314 - LEXINGTON COUNTY COURTHOUSE**

Honorable Rodney A. Peeples
Judge, The Second Judicial Circuit
Post Office Box 426
Barnwell, South Carolina 29812

IN RE: STATE OF SOUTH CAROLINA vs. KENNETH SIMMONS

Dear Judge Peeples:

I am in receipt of the Defendant's Post-Trial Motion in the above referenced matter. Pursuant to Rule 29(a), this Motion may be decided based on briefs without oral arguments or in the alternative, you can schedule a hearing.

I would greatly appreciate your advising me and Mr. Theos with regard to how you wish to handle this Motion.

Thank you for your consideration.

With kindest personal regards, I remain,

Sincerely,

A handwritten signature in cursive script, appearing to read "Walt", which is the signature of Walter M. Bailey, Jr.

Walter M. Bailey, Jr.

WMBjr:jgh

cc: Jerry Theos, Esquire (via fax)
James Bell, Esquire (via fax)

3232

URICCHIO, HOWE, KRELL, JACOBSON, TOPOREK & THEOS, P.A.

ATTORNEYS AT LAW
174 BROAD STREET
CHARLESTON, SC 29401

PAUL N. URICCHIO, JR.
ARTHUR G. HOWE
BARRY KRELL
CARL H. JACOBSON
ALAN D. TOPOREK
JERRY N. THEOS
GREGORY D. KEITH
CARMEN M. TEVIS

March 25, 1999

MAILING ADDRESS:
P.O. BOX 399
CHAS., SC 29402-0399

TELEPHONES:
(843) 723-7491
1-800-899-1683
FAX (843) 577-4179

Honorable Rodney A. Peeples
Judge, The Second Judicial Circuit
Post Office Box 426
Barnwell, South Carolina 29812

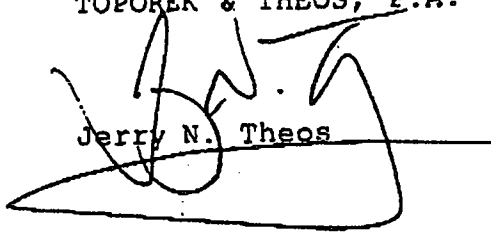
IN RE: STATE OF SOUTH CAROLINA vs. KENNETH SIMMONS

Dear Judge Peeples:

Please allow this letter to serve as confirmation of our telephone conversation this morning regarding Defendant's Post Trial Motion. I have conferred with co-counsel, James Bell, and we have determined that oral arguments are unnecessary. We would thus ask the Court to rule based upon the written Motion filed, along with the previously filed memorandum of law.

Sincerely,

URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK & THEOS, P.A.


Jerry N. Theos

JNT/jss

cc: James Bell, Esquire
Walter Bailey, Solicitor
Margie C. McKissick, Clerk of Court
Kenneth Simmons, Defendant



3233

THE CIRCUIT COURT OF SOUTH CAROLINA
SECOND JUDICIAL CIRCUIT
AIKEN • BAMBERG • BARNWELL COUNTIES

RODNEY A. PEEPLES
RESIDENT JUDGE
BARNWELL COUNTY COURTHOUSE
P.O. Box 426
BARNWELL, SOUTH CAROLINA 29812

803-259-7022
803-541-1029
FAX # 803-259-1402

March 29, 1999

Hon. Margie Carn-McKissick
Clerk of Court
P. O. Box 158
St. George, South Carolina 29477

Re: State v. Kenneth Simmons
98-GS-18-75

Dear Margie:

mailed copies of order 4-1-99 cla

In connection with the above matter, I now enclose the original Order denying the post trial motions of the defendant. I would ask that you please file and promptly forward a certified copy to Solicitor Bailey as well as attorneys Theos and Bell. The State and Defense each agreed to waive oral arguments in view of the fact that the same post trial motions were previously argued on the record during the trial and denied. I am also enclosing copies of letters from the attorneys wherein they agreed to waive oral arguments. I would ask that you also file these letters. I am also enclosing the Death Penalty Sentencing Report which I would appreciate your filing. You will note this report must be submitted to the Supreme Court within 10 days after receipt of the transcript by the Clerk of the Trial Court.

I hope that all is well with you and your staff.

With kind personal regards, I remain,

Yours sincerely,

Rodney A. Peebles
Rodney A. Peebles

RAP:pp
enclosures

STATE OF SOUTH CAROLINA,)
 FILED - RECORDED IN THE COURT OF GENERAL SESSIONS)

COUNTY OF DORCHESTER JAN 26 PM 12:05 INDICTMENT # 98-GS-18-0075

98-GS-18-0076

98-GS-18-0077

98-GS-18-0078

98-GS-18-0079

STATE OF SOUTH CAROLINA,)

-versus-)

KENNETH SIMMONS,)

Defendant.)

**NOTICE OF INTENT TO SEEK
DEATH PENALTY**

**TO: THE DEFENDANT, KENNETH SIMMONS AND HIS
ATTORNEY, GENE DUKES:**

YOU WILL PLEASE TAKE NOTICE, that, pursuant to Section 16-3-26, SC Code Ann., 1997 Cum. Supp., upon trial of the above entitled action at least thirty (30) days from the date of service hereof and of which you will be timely notified, the imposition of a sentence of death upon the defendant, **Kenneth Simmons**, will be sought by the State.



WALTER M. BAILEY, JR.
SOLICITOR, THE FIRST JUDICIAL CIRCUIT
134 East Richardson Avenue
Summerville, South Carolina, 29483
(803) 871-2640

January 22, 1998

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF GENERAL SESSIONS

3235

THE STATE,

-VS-

KENNETH SIMMONS

DEFENDANT

JURY'S FINDING AS TO
AGGRAVATING CIRCUMSTANCE

Indictment No. 98-GS-18-75

Complete either A or B, as appropriate:

(A) WE THE JURY IN THE ABOVE - ENTITLED CASE, DO NOT
UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THE
EXISTENCE OF ANY STATUTORY AGGRAVATING CIRCUMSTANCE(S).

DATE: 3/2/99

SIGNED: _____

FORELADY

(B) WE THE JURY IN THE ABOVE-ENTITLED CASE DO UNANIMOUSLY
FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE
FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE(S):

(1) CRIMINAL SEXUAL CONDUCT -	(NO) _____	(YES) <u>X</u>
(2) KIDNAPPING -	(NO) _____	(YES) <u>X</u>
(3) ARMED ROBBERY -	(NO) _____	(YES) <u>X</u>
(4) PHYSICAL TORTURE -	(NO) _____	(YES) <u>X</u>
(5) BURGLARY -	(NO) _____	(YES) <u>X</u>

SIGNED:

Jan Whombe
Forelady

Robert L. Hughes
Juror

Mark Will
Juror

Robert K. Shuford
Juror

Ben J. Hester
Juror

Rebe Dell D. All
Juror

Byron Sullivan
Juror

Paul K. Smith
Juror

Milton J. Hordley
Juror

Allen Foster
Juror

Herbert L. Smith Jr.
Juror

Donald F. Hest Jr.
Juror

March 2, 1999

St. George, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF GENERAL SESSIONS

THE STATE,)

-VS-)

RECOMMENDATION OF SENTENCE
 DEATH PENALTY

KENNETH SIMMONS)

Indictment No. 98-GS-18-75

DEFENDANT)

KENNETH SIMMONS)

DEVELOPMENT

WE, THE JURY, IN THE ABOVE CAPTIONED CASE, HAVE FOUND BEYOND A

REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY

AGGRAVATING CIRCUMSTANCE(S): CRIMINAL Sexual conduct

KIDNAPPING - ARMED ROBBERY - PHYSICAL TORTURE AND
Burglary

NOW RECOMMEND TO THE COURT THAT

THE DEFENDANT, KENNETH SIMMONS, BE SENTENCED TO DEATH.

Jan Whelan

Forelady

Robert L. Hughes

Juror

Mark Will

Juror

Deborah A. Shepherd

Juror

Benj. W. Lewis

Juror

Rebe Dell B. Skel

Juror

Bryan Sullivan

Juror

Ken R. Smith

Juror

Miller J. Hamblin

Juror

Allen Postell

Juror

Herbert D. Smith

Juror

Donald L. Shad Dr.

Juror

March 2, 1999
 St. George, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

3238

IN THE COURT OF GENERAL SESSIONS

THE STATE,)

-VS-)

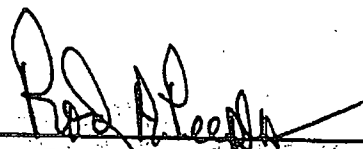
KENNETH SIMMONS)

DEFENDANT)

AFFIRMATION OF DEATH SENTENCE

Indictment No. 98-GS-18-75

As the Trial Judge in the above captioned action, and prior to the imposition of the death sentence upon the Defendant, Kenneth Simmons, I find as an affirmative fact that the evidence of the case warrants the imposition of the death penalty and its imposition is not a result of prejudice, passion, or any other arbitrary factor.



Rodney A. Peoples
Presiding Judge
First Judicial Circuit

March 2, 1999
St. George, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF GENERAL SESSIONS

THE STATE,)

SENTENCE

-VS-)

Indictment No. 98-GS-18-75

KENNETH SIMMONS)

DEFENDANT)

The Defendant, Kenneth Simmons, 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, Kenneth Simmons, be transported to the County Jail of Dorchester County, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 1st day of May, 1999, upon which day between the hours of six o'clock P.M. and six o'clock A.M., the Defendant, Kenneth Simmons, shall suffer death by electrocution or lethal injection in the manner provided by law.


Rodney A. Peebles
Presiding Judge
First Judicial Circuit

March 1, 1999
St. George, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

3240

O R D E R

RE: DEATH PENALTY SENTENCING REPORT

IT IS ORDERED that the attached questionnaire is adopted for use by the trial judge in all cases in which the death penalty is imposed. This report must be submitted to the Supreme Court within ten (10) days after the receipt of the transcript by the Clerk of the trial court.

<u>/s/ J. Woodrow Lewis</u>	C. J.
<u>/s/ Bruce Littlejohn</u>	A. J.
<u>/s/ J. B. Ness</u>	A. J.
<u>/s/ Wm. L. Rhodes, Jr.</u>	A. J.
<u>/s/ George T. Gregory, Jr.</u>	A. J.

Columbia, South Carolina

November 18, 1977.

REPORT OF THE TRIAL JUDGE

3241

OF THE
COURT OF GENERAL SESSIONS FOR DORCHESTER

FILED-RECORDED

99 APR - 1 AM 11:10
COUNTY,

SOUTH CAROLINA*

MARGIE CARR MONSIECK
CLERK OF COURT
DORCHESTER COUNTYThe State v. Kenneth SimmonsDocket No. 98-GS-18-75A. Data Concerning the Defendant**1. Name Simmons Kenneth 2. Date of Birth
Last First Middle Mo. Day Yr.3. Social Security Number ☒ ☐ Unknown4. Sex: M ☒
F ☐5. Race: W ☐
B ☒Other
(Specify):

6. Education - Highest Grade Completed:

1 2 3 4 5 6 7 8 9 10 11 ☒ 12 13 14 15 16
(Circle One) (College)

7. Do you have an opinion as to the defendant's intelligence level?

Yes ☒ No ☐

If so, is it

- a. Below Average ☒
b. Average ☐
c. Above Average ☐

8. Was a psychiatric evaluation performed? Yes ☒ No ☐

a. If performed,*** by whom? ** See Attached

b. If performed, is defendant

(1) Able to distinguish right from wrong? Yes ☒ No ☐(2) Able to cooperate intelligently in
his own defense? ☒ ☐c. If performed, were character or behavior
disorders found? ☐ ☒

(If answer is yes please elaborate)

*Attach separate sheets where insufficient space provided for response.

**Separate report must be submitted for each defendant sentenced to death.

***If more than one evaluation was performed, attach a separate response for

9. Does the defendant have a record of prior convictions?

3242

Yes ☒ No ☐

- a. If so, either attach hereto a record manifesting such prior conviction(s) or list the offense(s), the date(s) of the offense(s) and the sentence(s) imposed:

<u>Offense</u>	<u>Date of Offense</u>	<u>Sentence Imposed</u>
1. Failure to Obey Lawful Order	9/81	\$100 Fine
2. Disorderly Conduct	9/81	\$100 Fine
3. Trespassing	9/81	\$100 Fine
4. Receiving Stolen Goods	3/23/91	5 Years Suspended on 2 Years Probation
5. Failure to Return Rented Objects	10/5/91	"Time Served"
6. Criminal Domestic Violence	1/1/97	30 Days
7. Shoplifting	11/22/97	15 Days Suspended

10. Was the defendant a resident or nonresident of the county in which trial was held?

Resident ☒

Nonresident ☐

B. Data Concerning Pre-Trial Matters

- The defendant was arrested on December, 1997.
- Was a preliminary hearing requested? Yes ☐ No ☒
- Was a preliminary hearing conducted? Yes ☐ No ☒
- The defendant was indicted at the January 1998
Term of the Court of General Sessions for
Dorchester County, South Carolina.
- List each charge alleged in the indictment.
 - Murder
 - Criminal Sexual Conduct - 1st Degree
 - Burglary - 1st Degree
 - Kidnapping
 - Armed Robbery
 -

6. The defendant was arraigned on January 22, 19 98.

a. If not arraigned, did the defendant waive arraignment?

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Yes ☐ No ☐

7. Was the defendant provided with a true copy of the whole indictment at least three days prior to his trial thereupon?

Yes ☒ No ☐

a. If not, did the defendant waive this right to a three-day sight of the indictment?

Yes ☐ No ☐

8. Did the Solicitor notify the defendant at least thirty days before trial that the State would seek the imposition of the death penalty upon the defendant?

Yes ☒ No ☐

9. Did the Solicitor make known to the defendant in writing prior to trial the evidence in aggravation of punishment thereafter introduced by the State during the trial or during the sentencing proceeding?

Yes ☒ No ☐

10. Did the defendant move for a change of venue?

Yes ☐ No ☒

a. If so, was the venue changed?

Yes ☐ No ☐

(1) If so, designate the county _____.

C. Data Concerning the Trial

1. The defendant was brought to trial in the Court of General Sessions for Dorchester County, South Carolina, on February 22, 19 99, during the February, 19 99 Term of that Court.

2. How did the defendant plead? Guilty ☐
Not Guilty ☒

3. List each offense of which the defendant was convicted and each offense of which the defendant was acquitted:

a. The offense(s) of which the defendant was convicted:

(1) Murder

(2) Criminal Sexual Conduct - 1st Degree

- (3) Burglary - 1st Degree
(4) Kidnapping
(5) Armed Robbery

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b. The offense(s) of which the defendant was acquitted:

- (1) _____
(2) _____
(3) _____
(4) _____
(5) _____

4. On what date and at what time did the conviction(s) occur?

February 28, 1999, at
9:45 o'clock, a. .m.

D. Data Relating to Sentencing Proceeding*

1. Before whom was the defendant's sentencing proceeding conducted?

the trial jury ☒ the trial judge ☐
a new jury ☐ a new trial judge ☐

a. If conducted before the trial jury,

(1) On what date and at what time was the sentencing proceeding held?

March 1, 1999, at
10:00 o'clock, a. .m.

(a) If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes ☐ No ☐

b. If conducted before the trial judge or a new trial judge,

(1) And if the defendant was convicted by a jury,

(a) Did the defendant and the State waive having the trial jury recommend sentence?

Yes ☐ No ☐

*The term "sentencing proceeding" includes the term "resentencing proceeding".

"1" If not, was the sentencing proceeding conducted by the trial judge because the case, due to nonprejudicial error, had been remanded to the trial court for resentencing based upon the record and argument of counsel?

Yes ☐ No ☐

(b) On what date and at what time was the sentencing proceeding held?

_____, 19____, at

_____ o'clock, _____.m.

"1" If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes ☐ No ☐

(2) And if the defendant was convicted upon a plea of guilty, on what date was the sentencing proceeding held?

_____, 19_____.

c. If conducted before a new jury,

(1) On what date was the sentencing proceeding held?

_____, 19_____.

(2) Was such proceeding conducted by the same judge who presided over the defendant's trial?

Yes ☐ No ☐

2. Which of the following statutory aggravating circumstances were instructed, if the sentencing proceeding was conducted before a jury, and which of those circumstances were found, irrespective of whether or not that proceeding was conducted before a jury or a trial judge?

	<u>Instructed</u>	<u>Found</u>
a. Murder was committed while in the commission of		
(1) Rape Criminal Sexual Conduct - 1st Degree	[XX]	[]
(2) Assault with intent to ravish	[]	[]
(3) Kidnapping	[XX]	[]
(4) Burglary	[XX]	[]
(5) Robbery while armed with a deadly weapon	[XX]	[]
(6) Larceny with use of a deadly weapon	[]	[]
(7) Housebreaking	[]	[]
(8) Killing by poison	[]	[]
(9) Physical torture	[XX]	[]
b. Murder was committed by a person with a prior record of conviction for murder.	[]	[]

	<u>Instructed</u>	<u>Found</u>
c. The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[]	[]
d. The offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value.	XX	[]
e. The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.	[]	[]
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[]	[]
g. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[]	[]
3. Was (were) the aggravating circumstance(s) found supported by the evidence?		
Yes XX No []		
4. Was there evidence of mitigating circumstances?		
Yes X No []		
5. If so, which of the following mitigating circumstances was in evidence?		
** See attached sheet for additional material.		
a. The defendant has no significant history of prior criminal activity involving the use of violence against another person.		XX
b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.		XX
c. The victim was a participant in the defendant's conduct or consented to the act.		[]
d. The defendant was an accomplice in a murder committed by another person and his participation was relatively minor.		[]
e. The defendant acted under duress or under the domination of another person.		[]
f. 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.		XX

Addendum to Trial Judge Report ^{question} page 5 and 6.

Statutory Mitigating Circumstances in evidence:

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

- g. The age or mentality of the defendant at the time of the crime(s). ☒
- h. The defendant was provoked by the victim into committing murder. ☐
- i. The defendant was below the age of eighteen at the time of the crime(s). ☐
- j. Other. ☒

Please explain if (j) is checked.

- (1) The Defendant would not pose danger if spared, but incarcerated.
- (2) The Defendant's long-term addiction to alcohol and drugs.
- (3) The Defendant's intoxication at the time of the commission of the crime.
- _____
- _____
- _____
- _____

6. If tried with a jury, was the jury instructed to consider the circumstances in 5 as mitigating circumstances? Yes ☒ No ☐
7. Was the jury provided in writing for its deliberation the statutory instructions as to aggravating and mitigating circumstances? Yes ☒ No ☐
8. As trial judge, did you, prior to imposing the sentence of death upon the defendant, find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion or any other arbitrary factor? Yes ☒ No ☐

E. Data Relating to Offense(s)

1. Was there evidence that the defendant, at the time the offense(s) was (were) committed, was
- a. Under the influence of alcohol? Yes ☒ No ☐
- b. Under the influence of narcotics or other dangerous drugs? Yes ☒ No ☐

2. Was (were) any weapon(s) used in the commission of the crime of murder?

Yes ☒ No ☐

a. If so, check each weapon used

- (1) Poison ☐
 (2) Pistol ☐
 (3) Rifle ☐
 (4) Shotgun ☐
 (5) Blunt instrument ☒
 (Describe)

Stick and/or fists ☒
 (6) Sharp instrument ☐
 (Describe)

- ☐
 (7) Motor vehicle ☐
 (8) Other ☐
 (Describe)

☐

3. Cause of death. Manual Strangulation and Blunt Head Trauma

4. County in which the body was found. Dorchester County

5. County in which the murder occurred if different from county in which the body was found. N/A

F. Data Relating to Victim

1. What was the victim's age? 89

2. Was the victim related by blood or marriage to the defendant?

Yes ☐ No ☒

a. If so, what was the relationship? _____

3. Was the victim the same race as the defendant? Yes ☒ No ☐

4. Was the victim the same sex as the defendant? Yes ☐ No ☒

5. Was the victim physically harmed or tortured? Yes ☒ No ☐

If yes, state nature of harm or extent of torture:

Beating to face and head causing contusions. Subdural and Subarachnoid

Hemmoraging. 14 Fractured Ribs. Vaginal Trauma

G. Data Concerning Defense Counsel

1. Who was (were) the defendant's attorney(s) and what was (were) his (their) mailing address(es)?

<u>Name</u>	<u>Mailing Address</u>
a. Jerry N. Theos	17 1/2 Broad St., Charleston, SC 29401
b. James A. Bell	216 Parler Ave., St. George, SC 29477
c. _____	_____
d. _____	_____

2. Did the defendant retain his own counsel or did the court appoint defense counsel?

Retained by defendant ☐
 Appointed by court ☒

- a. Specify for each such counsel, the date retained or appointed, the number of years as a licensed attorney and the number of years of actual felony trial experience.

<u>Name</u>	<u>Date retained or appointed</u>	<u>Years experience as attorney</u>	<u>Years felony trial experience</u>
(1) Jerry N. Theos	1/26/98	16 + Yrs.	16 yrs.
(2) James A. Bell	9/3/98	29 yrs.	29 yrs.
(3) _____	_____	_____	_____
(4) _____	_____	_____	_____

3. Identify by name each attorney who, at the time of his appointment, was employed by the Public Defender's Office.

Initially Attorney Gene Dukes, Public Defender for Dorchester County was
appointed. Attorney James A. Bell was subsequently substituted as counsel
for Attorney Dukes.

4. Did each counsel serve throughout the trial?

Yes ☒ No ☐

- a. If not, explain in detail. _____
- _____
- _____

H. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes ☐ No ☒
2. Did race otherwise appear as an issue in the trial? Yes ☐ No ☒
3. Were members of the defendant's race represented on the petit jury? Yes ☒ No ☐
4. Were members of the defendant's race represented on the jury venire? Yes ☒ No ☐
5. Was there any evidence that members of the defendant's race were systematically excluded from the jury? Yes ☐ No ☒
6. Was the jury instructed to exclude race as an issue? Yes ☐ No ☒
7. Was there extensive publicity in the community concerning this case? Yes ☒ No ☐
8. Was the jury instructed to disregard such publicity? Yes ☒ No ☐
9. Was the jury sequestered? Yes ☒ No ☐
10. Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when recommending sentence? Yes ☒ No ☐
11. Your general comments concerning the appropriateness of the sentence imposed in this case.

Prior to imposing the sentence of death upon the defendant, I did find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion or any other arbitrary factor.

12. If the defendant is a female, is she currently pregnant? Yes ☐ No ☒
 - a. If so, the anticipated delivery date is _____, 19__.
13. This report was submitted to the defendant's counsel for such comments as he (they) desired to make concerning the factual accuracy of the report and
 - a. His (their) comments are attached ☐
 - b. He (they) stated he (they) had no comments ☒
 - c. He has (they have) not responded ☐

1. Chronology of Case

		Elapsed Days
1.	Date of offense	9/1/96
2.	Date of arrest	12/9/97
3.	Date trial began	2/22/99
4.	Date sentence imposed	3/2/99
5.	Date post trial motions ruled on	3/2/99 ** 3/28/99
6.	Date trial judge's report completed	3/3/99
7.	*Date received by Supreme Court	
8.	*Date sentence review completed	
9.	*Total elapsed days	

*To be completed by Supreme Court

Rodney A. Poole
Judge, Court of General Sessions
DORCHESTER County,
South Carolina
Presiding Judge, 1st Judicial Circuit

March 3, 1999

Date

** Defense Counsel requested 10 days in which to make any additional Post Trial motions. This request was granted in accordance with Rule 29 SCRCrimP.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

April 17th, 2002



Robert M. Dudek
Assistant Appellate Defender

South Carolina Office of Appellate Defense
1122 Lady Street, Suite 940
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(803) 734-1330

ATTORNEY FOR APPELLANT.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Rodney A. Peebles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH SIMMONS,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Assistant Appellate Defender

ELEANOR DUFFY CLEARY
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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the judge erred by admitting evidence appellant invoked his right to counsel when the state wanted to administer psychological tests, since this violated *Doyle v. Ohio*, and even if the evidence was relevant it should also have been excluded since its unduly prejudicial effect outweighed its probative value?

2.

Whether the judge abused his discretion by dismissing juror Campeau near the close of the guilt phase where the judge correctly ruled juror Campeau had not done anything improper, and where the juror's note unequivocally stated the fact that one of appellant's relatives lived near property he owned would not affect his impartiality, since there was no cause to discharge this juror, and the judge's ruling unfairly granted the state an extra peremptory challenge?

3.

Whether the judge erred by refusing to charge the lesser-included offense of robbery where the only "weapon" involved was a stick or appellant's hands, since this evidence did not constitute armed robbery as a matter of law, and there was evidence from which the jury could have convicted appellant of robbery?

4.

Whether the judge erred by ruling irrelevant the testimony of appellant's first cousin, Calvin Linning, Sr., during the penalty stage that he, and appellant's family, also found the victim's death "real painful," since members of appellant's family

knew the victim, and the defense had the right to meet victim impact evidence once

it was offered by the state?

STATEMENT OF THE CASE

Appellant was indicted at the January 19, 1998 term of the Dorchester County grand jury for the offenses of murder, burglary in the first degree, criminal sexual conduct in the first degree, kidnapping, and armed robbery. R. 3153. The state served its notice of intent to seek the death penalty. R. 3234.

Appellant's case came on for trial on February 22, 1999, before the Honorable Rodney A. Peeples, and a jury. R. 1. Jerry N. Theos and James A. Bell represented appellant. The solicitors were Walter M. Bailey and Harrison Bell. R. 1. The jury found appellant guilty on all counts. R. 2112-2113.

After the twenty-four hour waiting period, the sentencing phase commenced. At the conclusion of the sentencing phase on March 2, 1999, the jury recommended death. R. 2454, l. 20 - 2455, l. 10.

Judge Peeples then sentenced appellant to death for murder, life imprisonment for burglary in the first degree; thirty years imprisonment for armed robbery and thirty years imprisonment for criminal sexual conduct in the first degree. All sentences were consecutive. R. 2468, l. 3 - 2469, l. 11.

This appeal follows.

ARGUMENT 1

The trial judge erred by admitting evidence appellant invoked his right to counsel when the state wanted to administer psychological tests, since this violated *Doyle v. Ohio* and *Wainwright v. Greenfield*, and even if the evidence was relevant, it should also have been excluded since its unduly prejudicial effect outweighed its probative value.

Relevant Facts

At a *Blair*¹ and *Jackson v. Denno*² hearing, held on February 11-12, 1999, as well as at trial, appellant's attorneys argued that appellant could not competently waive his *Miranda*³ rights, rendering his statements to police made in December 1997 inadmissible. R. 2476. The contested issues were appellant's mental retardation, his ability to understand *Miranda* warnings, his propensity to be easily led, and malingering. The trial court ruled that appellant's statement were admissible. R. 2932, l. 15 - 2933, l. 5.

Pursuant to the state's motion and court order signed on September 14, 1998, appellant, while in the state's custody, underwent a competency and criminal responsibility evaluation at William S. Hall Psychiatric Institute, a facility of the state Department of Mental Health. R. p. 3163; R. p. 3166. Dr. Thomas W. Behrmann, M.D., a psychiatrist, and Dr. Jeffrey Vidic, Ph.D., a psychologist, conducted the evaluation and wrote the report submitted to the court. Prior to beginning their first interview with appellant on November 23, 1998, the doctors read appellant the list of rights contained in *Miranda*, as required. R. 1639, ll. 9-22; R. 1657, ll. 4-9

¹ *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

² 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

For two hours, the doctors attempted to educate appellant about his Miranda rights. R. 1710, ll. 11-19. They explained "over and over" the right to remain silent and the right to have an attorney present.⁴ R. 1710, l. 21 - 1711, l. 1. Appellant was unable to explain his rights in a meaningful manner so the interview was discontinued since appellant was unable to adequately waive his Miranda rights for the purposes of that evaluation. R. 1634, ll. 17-18; R. 1639, l. 5 - 1640, l. 24. Dr. Behrmann concluded that "he did not have the ability at that time" to knowingly and intelligently waive his Miranda rights. R. 1650, ll. 8-15. Appellant's trial attorney, who had attended the session, then returned to his office in Charleston. R. 1693, l. 21 - 1694, l. 12; R. 1710, ll. 3-7.

⁴ Chief Psychologist Leslie Sandler of the Department of Disabilities and Special Needs testified during the February 11-12, 1999, pre-trial hearing. Sandler said school records showed appellant had an IQ of 69 at age 9.8. Sandler said IQ was only "a secondary or tertiary consideration" since the evaluators did not know the conditions under which appellant took the test. R. 2618, l. 22 - 2619, l. 24; r. 2657, l. 22 - 2659, l. 1. Dr. Charles Saylor testified during trial that appellant's full scale IQ of 69 classified him as "functioning in the lower one percent of the overall population," and stated appellant was not malingering in pre-trial testing. R. 1604, l. 16 - 1609, 10. However, Sandler testified before the jury that he thought appellant was malingering at times. R. 1727, l. 13 - 1728, l. 1. On cross-examination by the solicitor, Sandler opined appellant was not mentally retarded. R. 1740, ll. 7-10. The trial hearings were on appellant's ability to understand Miranda warnings. The contested issues were appellant's mental retardation, his ability to understand Miranda warnings, his propensity to be easily led, and malingering.

Dr. John Foxworth, a psychiatrist who graduated from the Citadel, evaluated appellant, and he testified in the presence of the jury. R. 1493, l. 15 - 1494, l. 11. Dr. Foxworth said appellant was very easily led and had trouble understanding concepts. Dr. Foxworth offered, "I felt he was mentally retarded." R. 1517, l. 17 - 1521, l. 20. Dr. Foxworth opined appellant could not "comprehend the concept of his right to remain silent." R. 1533, ll. 2-10.

The judge ultimately ruled appellant understood his Miranda warnings, and voluntarily gave the police his statements. R. 2768, l. 3 - 2779, l. 2; r. 2932, l. 13 - 2933, l. 9.

Less than an hour later, Vidic asked an intern to administer some more tests to appellant. R. 1711, ll. 2-20. She reported back to Vidic that she did not administer the tests because "he told me that he didn't have to answer questions, that he wanted to talk to Mr. Theos, first; that he had a right to talk to Mr. Theos before he answered any questions." R. 1705, ll. 5-11. At the next interview with Vidic and Behrmann, appellant sufficiently expressed an understanding of his rights to the examiners. R. 1650, l. 16 - p. 1651, l. 9.

The state sought to admit Vidic's testimony about the report made by the intern, stating, "that is a graphic example of [appellant] not only understanding his Miranda rights but actually exercising those Miranda rights during a crucial period of time." The state argued this situation was not covered by Doyle⁵, discussed infra. R. 1692, ll. 4-16. Appellant's attorney objected on the grounds that the admission of these statements would deny appellant his constitutional right to silence and right to counsel and that to allow his invocation of those rights to be used against him would be improper. R. 1693, ll. 5-11.⁶

After further arguments, the trial court ruled that the testimony was admissible under Rule 403, SCRE, because "the relevancy of the evidence would outweigh any prejudice thereto." R. 1698, ll. 15-19. The objectionable evidence was then admitted in the presence of the jury. R. 1702, l. 21 - 1705, l. 23.

⁵ Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976).

⁶ Appellant's trial counsel also objected because the statements of the intern, as repeated by Vidic, were inadmissible hearsay. R. 1697, ll. 10-18. The trial court overruled that objection, relying on Rule 703, SCRE. R. 1698, ll. 16-17. Appellant's trial counsel later withdrew the hearsay objection to eliminate any need for the state to call the intern as a witness. R. 1862, l. 20 - 1863, l. 14.

In closing argument, the solicitor disputed appellant's assertion that he was not competent to waive his rights in December 1997, stating:

Dr. Behrmann spoon-fed these [Miranda] rights and went over it very slowly and patiently with him and tried to read it to him, and Mr. Simmons was drawing a blank, he can't understand it; shortly thereafter, Dr. Vidic gets his intern, Monica Skaggs, to go down there and ask Mr. Simmons to do some tests, some psychological tests. And according to Dr. Vidic's testimony, Simmons tells Mrs. Skaggs that he wants to exercise his right not to do that, he wants to talk to his lawyer. So not only can he understand his rights, he's actually exercising those rights on the first day that he was there. . .

R. 1966, ll. 6-19. In his charge to the jury, the trial judge stated,

you may further consider the ability of the defendant to understand and comprehend the Miranda warnings and whether or not he knowingly and voluntarily⁷ gave up his rights.... [Y]ou must consider the totality of the circumstances such as intelligence, education, experience, and ability to comprehend the meaning and effect of the statement. You must determine if the defendant in this case had the ability or capacity to comprehend the meaning and effect of waiving his constitutional rights....I instruct you, Ladies and Gentlemen, that a decision can be made intelligently with an understanding of the consequences without the decision itself being a wise one."

R. 2073, l. 17 - 2074, l. 17.

Discussion

The trial court erred by allowing the testimony about appellant exercising his right to an attorney and his right to remain silent. Once that evidence was erroneously admitted, the solicitor was allowed to make his highly prejudicial argument based on it. This Court,

⁷ Appellant's attorney objected to the judge's failure to charge that the confession must be made knowingly, voluntarily, and intelligently. R. 2400, ll. 7-17; r. 2414, ll. 16-19.

relying on Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976), has consistently held that reversible error occurs when the state is permitted through evidence or in argument to refer, indirectly or directly, to a defendant's post-arrest exercise of a constitutional right. McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000); Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000); State v. Reid, 324 S.C. 74, 476 S.E.2d 695 (1996); State v. Pickens, 320 S.C. 528, 530, 466 S.E.2d 364, 366 (1996); State v. Cockerham, 294 S.C. 380, 381, 365 S.E.2d 22, 23 (1988); State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987); State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986).

Here, there is no doubt that appellant made his statement of a desire to remain silent until he could speak to his attorney. At Hall Institute, he was in state custody, being examined by state doctors pursuant to an order issued on the state's motion. He was educated intensely, "spoon-fed," in fact, about his right to remain silent and his right to talk to his attorney. No longer under the protection of his attorney, he then exercised those rights as just explained to him. Miranda, *supra*; U.S. Const. amend. V; U.S. Const. amend. VI.

However, the solicitor was allowed to call direct attention to appellant's invocation of his constitutional rights to remain silent and to speak to his attorney through both testimony and closing argument. The use of post-Miranda silence as substantive evidence "breaches the implicit assurances contained in the warning and violates the Fourteenth Amendment." State v. Smith, *supra*, at 395, 350 S.E.2d at 924. Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634 (1986). "Post-Miranda silence" means not only "muteness," but also includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." *Id.* at 284, 106 S.Ct. at 640, note 13.

In Wainwright, the defendant pleaded not guilty by reason of insanity and the state was allowed to elicit testimony from police officers that the defendant had exercised his right to remain silent and had requested an attorney after his arrest. In his closing argument, the prosecutor suggested that the defendant's repeated refusals to answer questions without first consulting an attorney demonstrated he was not insane. The substance of his improper argument was similar to that of the solicitor in appellant's case. The Wainwright prosecutor argued to the jury:

He [defendant] goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them?... No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act....And here we are to believe that this person didn't know what he was doing at the time of the act."

Wainwright, 474 U.S. at 287, 106 S.Ct. at 636, n. 2.

On appeal, the state in Wainwright sought to distinguish Doyle, because "proof of sanity is significantly different from proof of commission of the underlying offense," so that the due process rationale does not apply. Id. 474 U.S. at 292, 106 S.Ct. at 639. In Doyle, supra, the defendants presented an exculpatory story on the witness stand and the United States Supreme Court held that the state could not impeach their testimony by asking them why they had not explained their conduct at the time of their arrest. Refusing to recognize a distinction, the Wainwright Court held,

The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State

gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Wainwright, 474 U.S. at 292, 106 S.Ct. at 639.

This Court also addressed this issue in State v. Smith, *supra*. In that case, the defendant relied upon the defense of insanity, presenting psychiatric testimony that he was legally insane. During cross-examination, the state asked the psychiatrist whether he was aware that appellant refused to make a statement to police officers. The Court held that "the solicitor's question intended to focus the jury's attention on appellant's post-arrest silence as substantive evidence of his sanity, and was therefore improper." *Id.* 290 S.C. at 395, 350 S.E.2d at 924.

Here, appellant presented testimony that he was incompetent to waive his Miranda rights when he gave his police statements. During cross-examination, the solicitor was permitted to elicit the fact that appellant had invoked his constitutional rights. Similar to the prosecution in Smith, the state attempted to focus the jury's attention on appellant's exercise of his constitutional rights as substantive evidence of his competency to waive Miranda in December 1997 and that was similarly improper.

In Wainwright, the state argued that a suspect's comprehension of his Miranda warnings is more probative of sanity than of commission of the underlying offense. Similarly, the trial court found here that appellant's exercise of his rights was probative of his competency when he gave a statement to police. However, this was error because the Supreme Court in Wainwright specifically rejected this argument, stating, "the argument

about the probative value of silence therefore fails entirely to meet the problem of fundamental unfairness that flows from the State's breach of its implied assurances." 474 U.S. at 294, 106 S.Ct. at 294 (emphasis added). This same reasoning clearly applies to appellant's situation and it was error for the trial court to permit the state to penalize appellant for exercising his Miranda rights, shortly after they were given to him at Hall Institute. With the requirement of "fundamental fairness" implicated, it was improper for the Court to conduct an analysis under Rule 403, SCRE, of the probative value of the testimony. Wainwright, supra.

Additionally, this Court addressed the issue of probative value in State v. Reid, supra. In that case the state was permitted to question a police officer about whether the defendant, charged with murder resulting from a fatal car crash, had failed to ask about the condition of his passengers. The trial court admitted the testimony because it was probative of the element of malice. 324 S.C. at 76, 476 S.E.2d at 696. This Court held it was reversible error for the state to inquire into a defendant's post-arrest silence, despite the probative value. Id.

Even if an analysis under Rule 403, SCRE, were appropriate, the prejudicial value far outweighed the probative value of the testimony. The exercise of his rights in November 1998, after being "spoon-fed" information about their meaning, is not probative of the issue of whether he understood his rights when they were given to him in December 1997. The transcripts of appellant's statement reveal the police only read him his rights and elicited "yes" or "no" answers about his comprehension of them. R. p. 3170-3220; R. 1709, l. 25 - 1710, l. 7.

In contrast, the prejudicial value is high because of the risk the jury improperly inferred the appellant understood his Miranda warnings on the day he confessed simply because he exercised his constitutional rights almost a year later. Edmond, supra, 341 S.C. at 349, 534 S.E.2d at 685.

The state also argued that Doyle, supra, was inapplicable because "the door has been opened to whether or not he could comprehend Miranda rights." R. 1692, ll. 10-12. However, the evidence of post-arrest invocation of appellant's rights is inadmissible regardless. In Wainwright and Smith, the defendants, the prosecutors claimed, had also "opened the door" by pleading not guilty by reason of insanity. Nonetheless, the United States Supreme Court and this Court disallowed the evidence.

The trial court noted that the intern was not going to question appellant about the criminal offense when appellant invoked his Miranda rights. R. 1696, ll. 1-4. However, this distinction is irrelevant. In addition, the fact that the Miranda rights were given by employees of the Department of Mental Health and not the police is irrelevant. It is clear that the psychiatrists were acting as agents of the state when they gave appellant his Miranda warnings. As the solicitor noted, they are required to administer Miranda warnings prior to conducting a forensic examination. R. 1657, l. 4-9. See Estelle v. Smith 451 U.S. 454, 101 S.Ct. 1866 (1981).

The purpose of the rule enunciated in Doyle and Wainwright is to prevent a breach of the promise given by an agent of the state when Miranda warnings are read. The promise, and not the subject of the intended interrogation or the reason the rights were given, is the important factor. Wainwright, supra.

This error in permitting this testimony requires reversal and a new trial. These "principles are rooted in due process and the belief that justice is best served when a trial is fundamentally fair." Edmond, *supra*, 341 S.C. at 349, 534 S.E.2d at 685. In a direct appeal, the admission of comments or evidence of the defendant's exercise of a constitutional right is a "trial error" subject to harmless error analysis. *Id.* [citing State v. Pickens, 320 S.C. 528, 530-31, 466 S.E.2d 364, 367 (1996); Arizona v. Fulminante, 499 U.S. 279, 306-10, 111 S.Ct. 1246, 1263-65 (1991)].

In Reid, discussed *supra*, this Court held that the fact that the trial court admitted the testimony because it was deemed probative of malice showed that the jury may have used it to find malice. Therefore, the constitutional error was not harmless beyond a reasonable doubt. 324 S.C. at 79, 476 S.E.2d at 697. Likewise, the jury here most likely used the improperly admitted testimony as conclusive evidence that appellant understood Miranda, and therefore that he voluntarily confessed. Furthermore, the prosecutor relied strongly on the petitioner's conduct as evidence of his competency to waive his Miranda rights when he gave his statement to the police. Appellant's statements were crucial to the state's case. Without the admission of these challenged statements and the contested DNA tests resulting therefrom, the state had no evidence against appellant. R. 1175, ll. 19-22 (no fingerprint match); R. 1261-1287; R. 1480, ll. 16-21. State v. Cannon, 248 S.C. 506, 515-516, 151 S.E.2d 752, 757 (1966), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

The victim was killed in late August 1996 and no arrest was made until December 1997, when appellant contacted police on his own initiative. R. 1221, ll. 18-19; R. 1289, ll. 23-25; R. 1315, ll. 19-22. It is extremely unlikely he would have been charged with

this murder if he had not made his statements to police. There were no eyewitnesses to the murder. R. 1075, l. 22 – 1078, l. 22; R. 1082, l. 10 – 1083, l. 6. There was absolutely no physical evidence to tie him to the scene until he submitted blood for DNA analysis after his statement and arrest.

Because the trial court erred by admitting testimony in violation of the principles of due process and fundamental fairness, and the error was not harmless, appellant is entitled to a new trial.

ARGUMENT 2

The judge abused his discretion by dismissing juror Campeau near the close of the guilt phase where the judge correctly ruled juror Campeau had not done anything improper, where the juror's note unequivocally stated the fact he learned in an authorized communication that one of appellant's relatives lived near property he owned would not affect his impartiality, since there was no cause to discharge this juror, and the judge's ruling unfairly granted the state an extra peremptory challenge.

Relevant Facts

The jury was sequestered in a hotel from February 24 to March 2, 1999. At the outset, the trial judge instructed the clerk of court not to allow phone calls during which the agents could not hear the person on the other end of the call. However, the agent in charge apparently misunderstood this instruction and followed the procedure used in a prior death penalty case, with another judge, where the jurors were allowed to telephone their family members with a SLED agent present. Therefore, the jurors were allowed to make phone calls in the presence of SLED agents until the trial judge corrected the misunderstanding on Friday, February 26, 1999. R. 1835, l. 17 - 1838, l. 7.

During the guilt phase, on Wednesday, February 24, 1999, the SLED agent in charge of the jury received a phone call from the wife of juror Christopher P. Campeau. She told him she realized that she and her husband owned property across the street from appellant's sister. The judge ordered the SLED agent to contact Ms. Campeau and ask her not to discuss the matter with her husband, but he was unable to reach her. R. 1833, ll. 7-9; R. 1848, ll. 16-25.

On Thursday night, juror Campeau called his wife on the telephone with the permission of the SLED agent in charge of the jury. R. 1839, ll. 14-22. Not having received instruction from SLED, she told her husband about their connection to appellant's sister. Juror Campeau wrote a note to the judge late that night, February 25, 1999, and gave it to the agent sometime the next day, February 26, 1999. R. 1849, ll. 1-7. The judge received it about 3:00 p.m. and conducted an *in camera* hearing to discuss the matter with the attorneys and the agents later that evening. R. 1832-1845.

In the note, juror Campeau wrote:

Your honor, I have realized that I know a possible relative of the defendant, Kenneth Simmons, and [when] *asked earlier in the week if I knew relatives of the accused, I truthfully answered no.* After the trial started, I saw a woman I recognized sitting behind Kenneth Simmons. I now realize the woman in the audience was, I believe, a Mrs. Louise that lives opposite a vacant lot I own in the town of Summerville on Congress Street. In the future my wife and I intend to build on this lot, our primary residence. I have upon occasion been cordial with Mrs. Louise and [I do] say hello to her while I am on or about my property. *Knowing Mrs. Louise will not influence my decision-making ability regarding the guilt or innocence of Kenneth Simmons. If the trial proceeds to the penalty stage, none of the above will influence my decision-making ability regarding life imprisonment or the death penalty as outlined in the pre-trial questionnaire.* I felt it was my duty as a juror to inform you of the above and to continue to serve you in any capacity you see fit.

R. 1833, l. 24 - 1834, l. 21 (emphasis added).

The state moved to excuse juror Campeau and replace him with an alternate. R. 1842, l. 25 - 1843, l. 2. Declining to consent, appellant asked the court to inquire of the juror whether this situation had an impact on his ability to continue to serve as a juror. R. 1843, ll. 4-13. The trial judge stated that he "answered that question by what he's put in his

letter." R. 14-15. The letter, as seen, stated this knowledge would not have any effect on his ability to serve. Again appellant objected to juror Campeau's excusal, noting there was nothing to indicate his inability to perform his service. R. 1844, ll. 5-12. The trial judge then found that because of the communication about the case, the juror must be excused.

The next morning, Saturday, February 27, 1999, the trial judge brought juror Campeau in chambers, on the record, to tell him he was being excused. Throughout the conversation, he emphasized that the juror had done nothing wrong and was "completely innocent." R. 1847, ll. 9-10; R. 1848, ll. 13-15; R. 1850, ll. 1-3; R. 1851, ll. 9-14; R. 1852, l. 22 - 1853, l. 1. He further stated he did not "know that any 'harm' had been done." R. 1848, ll. 14-15. He then explained to juror Campeau he was excusing him for the sake of his and his wife's "best interest" and to avoiding putting them in "a difficult situation for months or years to come." R. 1850, ll. 20-25.

Discussion

Once the jury has been sworn and evidence submitted, the judge cannot discharge a qualified juror without legal cause unless he has consent of both parties. Greer v. Norvill, 21 S.C.L. 262, 3 Hill 262 (1837). If he does so, the defendant is entitled to a new trial. As the Court stated in Greer:

This juryman formed a part of the tribunal to which the defendant was willing to trust his cause when he announced himself ready for trial; that tribunal was changed contrary to his consent, and a new one formed at the instance of his adversary. I presume the change made no material difference in this case; nor do I believe any undue advantage was sought. It is sufficient to say, however, that such might be the case, if the practice were to receive the sanction of the court. Id.

Here, the judge's comments show that he did not find juror Campeau to be disqualified and did not doubt his ability to be impartial. He repeatedly stated that juror Campeau had done nothing wrong and that he was removing him to avoid future problems for the juror and his family. Therefore, it is clear that juror Campeau remained qualified after he realized his attenuated relationship with appellant's sister and the trial judge erred by excusing him.

After the jury is sworn, a juror should be disqualified only if (1) he intentionally concealed information during *voir dire* and (2) the information would have (a) supported a challenge for cause, or (b) been a material factor in the use of the party's peremptory challenges. State v. Kelly, 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998); see, also, State v. Gulledge, 277 S.C. 368, 371, 287 S.E.2d 488, 490 (1982) (absent any justification for the juror's failure to disclose her relationship on *voir dire*, the trial judge abused his discretion in denying appellant/defendant's motion for mistrial); State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001)(intentional concealment of information warranted a new trial).

As indicated by the record and the judge's findings, juror Campeau did not know of his relationship to appellant until midway into the trial and at that point, he properly notified the judge. Therefore, it is clear that juror Campeau did not conceal information during *voir dire* so he should not have been dismissed.

However, even if he had, the second prong was not met since his relationship with appellant did not warrant a dismissal for cause and there is no evidence it would have been a material factor in the use of the state's peremptory strikes, as discussed herein.

The information would not have supported a challenge for cause. A juror should be disqualified by the court if it appears to the court the juror is not indifferent in the case.

Thompson v. O'Rourke, 288 S.C. 13, 339 S.E.2d 505 (1986). Where the failure to disclose a relationship is innocent, as here, one cannot draw an inference that the juror is not impartial. State v. Savage, 306 S.C. 5, 8, 409 S.E.2d 809, 810 (Ct. App. 1991), cert. denied (1992). Here, juror Campeau could not have been excused for cause based on this relationship since he asserted the connection would not affect his ability to serve impartially and fairly and the judge did not dispute that.

Moreover, such an attenuated relationship to a witness does not *per se* render a juror disqualified. There must be a showing of some prejudice, bias, or interest in the action. Thompson, supra; State v. Owen, 277 S.C. 189, 192, 284 S.E.2d 584, 586 (1981) (citing, State v. Wells, 249 S.C. 249, 153 S.E.2d 904 (1967)); Savage, supra (kinship or relationship to any of the parties does not disqualify juror); Gulledge, supra; State v. Quattlebaum, 223 S.C. 384, 765 S.E.2d 154 (1953); State v. Dingle, 279 S.C. 278, 306 S.E.2d 223 (1983); (a juror is not automatically disqualified because of her relationship by blood or marriage to a police officer); State v. George 323 S.C. 496, 476 S.E.2d 903 (1996).

Here, the judge did not find that juror Campeau's ability to be fair and impartial was affected by the connection to appellant's sister or the authorized contact with his wife nor did he find there was cause to excuse juror Campeau. Instead, he excused juror Campeau, upon the state's motion, for his own "best interest." There is no provision for disqualifying a juror for his own best interest.

Secondly, the information would not have been a material factor in the use of the state's peremptory challenges. Thompson, supra; Savage, supra. The state exercised all five of its peremptory strikes during jury selection and juror Campeau was seated between the fourth and fifth strike. R. pp. 976-980. Here, the state did not claim that the use of its

peremptory challenges would have been altered by disclosure of the information so its burden was not met. Therefore, this prong was not met and the juror should not have been excused. Savage, supra, at 7, 409 S.E.2d at 810.

Additionally, §14-7-1030 provides that "[a]ll objections to jurors . . . if not made before the juror is impaneled for or charged with the trial . . . is [sic] waived, and if made thereafter is of no effect." S.C. Code Ann. (1976). This section has been interpreted to bar objections based on disqualifying factors that could have been discovered, using due diligence, prior to swearing the jury. State v Rayfield, 232 S.C. 230, 101 S.E.2d 505 (1958), State v. Johnson, 248 SC 153, 149 S. E. 2d 348 (1966).

In Southern Welding Works, Inc. v. K&S Construction Co., 286 S.C. 158, 162, 332 S.E.2d 102, 105 (1985), two jurors informed the court they recognized the president of K&S when he came into the courtroom. They had dealt with his company in the past and the president had a "problem" with them. Since the jury had been sworn, the court refused to allow a belated strike of both of them, noting "the jury list was available to Knight and K&S before the day of trial" giving K&S the "means available to ascertain those facts before the jury was empanelled." 286 S.C. at 161, 162, 332 S.E.2d at 104, 105. Here, the state, as the objecting party, was not required by the judge to make a showing of the exercise of due diligence. It is doubtful they could have made such a showing considering the state had jury lists in advance, investigators, and the means to research the landholdings of the venire.

By removing a juror who was qualified and could not be excused for cause, the judge granted the state an additional belated peremptory strike. Where, as in this case, the juror has not acted improperly or withheld information, such a belated strike is not permissible. The "ability to remove jurors with peremptory challenges mid-trial is a

significant weapon . . . [because] the parties have had the opportunity to observe the demeanor of the jurors and to employ that knowledge in their decision." United States v. Harbin, 250 F.3d 532 (7th Cir. 2001). As the Court stated in Greer v. Norvill, *supra*, removing one juror because he is displeasing to one party, gives an unfair advantage to that party. The remedy, the Court declared, is to "[g]ive the opposite party a right of veto, and you secure him against the consequences of vague and licentious challenges of his adversary." Failure to allow this protection cannot be harmless error, as the Court further stated in Greer, *supra*, "[t]his advantage would be frequently obtained if parties were not at liberty to stand upon and sustain their rights," concluding:

I presume the change made no material difference in this case; nor do I believe any undue advantage was sought. It is sufficient to say, however, that such might be the case, if the practice were to receive the sanction of the court.

The judge acceded to the solicitor's request to remove juror Campeau where he unequivocally stated this knowledge would not affect his impartiality. The state was not entitled to such preferential treatment. Appellant should be granted a new trial.

ARGUMENT 3

The judge erred by refusing to charge the lesser-included offense of robbery where the evidence showed that the only "weapon" involved was a stick or appellant's hands, since this evidence did not constitute armed robbery as a matter of law.

Relevant facts

The victim was last seen working in her yard in a predominately black community in Summerville on Saturday afternoon, August 31, 1996. Her body was discovered on Sunday afternoon, September 1, 1996, inside of her house. Her hands were tied behind her back, and it was apparent that she had been sexually assaulted. There were no eyewitnesses to the crime. R. 1075, l. 22 – 1078, l. 22; 1082, l. 10 – 1083, l. 6:

Appellant was booked into the Richland County Detention Center on November 22, 1997, on a shoplifting charge. R. 1288, l. 4 - 1289, l. 8. Detention Center Correctional Officer Margaret Ann Bush testified appellant handed her a note on December 3, 1997, at about 2:55 p.m. R. 1300, l. 22 - 1302, l. 1. Appellant told Bush "he wanted to confess to a murder, and I took the note." R. 1301, l. 22 - 1302, l. 1.

The note read: "Dear sir, my name is Kenneth Simmons; I am confessing to a murder in Greenville. I killed two men in 9/97; for killing a lady in Summerville, South Carolina, and they said they will kill my son; that is [why] I killed two men. I need to talk to someone today or tonight." R. 1302, l. 23 - 1303, l. 4.

Bush gave detention center Officer Samuel Jackson the note. Jackson took the note to his supervisor, Sergeant Perryman. R. 1304, l. 17 - 1305, l. 23.

Perryman escorted appellant to Supervisor Everett Howard's office that same day. R. 1310, l. 20 - 1311, l. 3. Howard testified he read appellant his Miranda⁸ warnings there. R. 1311, l. 4 - 1312, l. 13.

Evidence at trial

Appellant provided the authorities with several statements. At first appellant told Howard he killed a man named "Shorty." R. 1312, l. 24 - 1314, l. 16.

Howard contacted Lieutenant Randall Stewart with SLED. R. 1314, ll. 20-23. The following day, December 4, 1997, a correctional officer informed Howard appellant had sent a note that he wanted to meet with Howard again. R. 1314, l. 24 - 1315, l. 22. Howard testified he again gave appellant Miranda warnings. R. 1315, l. 25 - 1317, l. 7.

Appellant told Howard he wanted to talk to him about "an old woman who was killed in Summerville last year. He said that two guys killed her, Blackie and the other guy...he said that she was strangled and beat in the head. I asked him if anybody had been arrested for this crime, and he told me no." R. 1317, l. 8 - 1318, l. 4.

SLED agent Kenny Mears was assigned to a task force to investigate the victim's death in November of 1997. The victim was killed on August 31, 1996 or September 1, 1996. R. 1363, ll. 9-16.

On December 5, 1997, Mears went to the Richland County Detention Center to interview appellant. R. 1363, l. 17 - 1364, l. 25. ⁹ Mears conducted a taped interview with

⁸ 384 U.S. 436, 86 S.Ct. 1602 (1966).

⁹ Mears read appellant his Miranda warnings. R. 1365, ll. 9-11.

appellant that day beginning at 12:50 p.m. SLED agent Ann Reese and Georgetown Police Department Detective Mable Hendricks were also present. R. 3170.¹⁰

In this statement, appellant told the three law enforcement officials that Shorty killed the victim and that he was not inside at the time Shorty killed her. Appellant gave a long interview wherein he chronicled events that Mears did not believe. R. 3170-3197

The interview ended at approximately 2:00 p.m. Mears asked appellant to provide him with a written statement. R. 1372, l. 18 - 1373, l. 2.

In his written statement, appellant said the victim was "killed by Shorty and James Anderson because I owe Shorty some money that I owe him twenty-thousand dollars. I get drugs and cash, ten thousand. Me and Shorty at the trailer park near Ms. Boyd's house." R. 1380, l. 20 - 1381, l. 10. Appellant said when he got to the trailer, he found Shorty with "a stick in his hand with blood all over it. Mrs. Boyd's hand [sic] tied behind her back. She was still alive. I tried to untie her, but Shorty pulled [a] gun out on me and I went to the phone. But Shorty said he will kill me." R. 1381, ll. 1-17.

Mears left with SLED Agent Reese and Officer Hendricks to interview a witness that appellant had provided to them during the interview. R. 1383, l. 6 - 1384, l. 10. The three officers then returned to the Detention Center and told appellant "that the statement he gave earlier did not pan out or did not coincide with the witness that he gave us." Appellant agreed to give another interview. R. 1384, l. 24 - 1385, l. 22.

¹⁰ State's Exhibit #17; R. 3170.

This time, appellant requested that Detective Hendricks and Agent Reese stay outside so that he could talk to Mears alone. R. 1385, l. 19 - 1386, l. 3. Appellant gave Mears his second statement of the day at 8:26 p.m. R. 3200.¹¹

In this statement, appellant said he had been smoking crack "out to the club." Between five and six o'clock "in the morning, Friday -- Saturday morning" he went to the victim's house by himself. R. 3201-3202.¹² Appellant said he caught the victim coming out the back door and pushed "her back in the house." The victim had an envelope with money and "I asked her to give me the money." He grabbed the money and start try [sic] to pull back and I push her." R. 3202. "She fall and hit her head, and was getting back up. When I was trying to catch her, she was trying to hold on to me. I try to hold her. She fall. *She was getting back up and I hit her with a stick.*" Appellant described the stick as "*a little piece -- a little stick off the tree.*" Appellant found the stick on the back porch. R. 3202. (emphasis added).

Appellant had sex with the victim. Appellant dialed 911 because "I realized what I had did. I know I had just made a mistake, a big mistake in my life." R. 3202. Appellant *threw the stick in a trash pile on the side of the road.* Appellant did not know how much money he took from the victim. Appellant admitted to Mears that his statement about Shorty and two other men was not true. "But I'm honest this time." R. 3203. The interview concluded at 8:55 p.m. R. 3210.¹³

¹¹ State's Exhibit #18; R. 3200.

¹² State's Exhibit #18, at pp. 2-3; R. 3201-3202.

¹³ State's Exhibit #18, at p. 11; R. 3210.

On December 9, 1997, Mears returned to the Detention Center "to go over the transcribed statement with him and get him to sign, to read the copy, to be sure it was accurate and what he had testified to on the tape." R. 1391, l. 10 - 1392, l. 8. Appellant agreed to give Mears yet another statement. R. 1393, ll. 6-9.

That statement was State's Exhibit #19, appellant's statement to Mears on December 19, 1997, beginning at 11:34 p.m. R. 3211-3220. In this statement, appellant said he first went to the victim's front door, but the door was locked. R. 3212.¹⁴ He went around the back door and the victim was coming out with a cup in her hand. Appellant said there was *"a little stick, a little wood stick" about two feet long on the back porch.*¹⁵ R. 3213-3214. (emphasis added). The following occurred between Agent Mears and appellant regarding the stick:

K. Mears: So you're talking about maybe an inch and a half or two inches in diameter?

K. Simmons: Yes sir.

K. Mears: And about 2 feet long?

K. Simmons: Yes sir.

K. Mears: And you got it off the little back porch?

K. Simmons: Yes, sir.

K. Mears: So you didn't take the stick there with you?

K. Simmons: No sir.

K. Mears: Okay, after you hit her with the stick, did you use anything else?

¹⁴ State's Exhibit #19 at pg. 2; R. 3212.

¹⁵ State's Exhibit #19 at p. 3; R. 3213.

K. Simmons: No sir.

K. Mears: Did you use a cord?

K. Simmons: No sir.

K. Mears: You didn't use a telephone cord or no other string or nothing?

K. Simmons: No sir.

K. Mears: You didn't strangle her?

K. Simmons: No sir.

K. Mears: You didn't tie a rope or anything around her neck?

K. Simmons: No sir, I just tied her hands.

K. Mears: You never did use the rope to tie her hands to kind of put around her neck at any time?

K. Simmons: No sir, not that I can remember.

K. Mears: Not as you can remember?

K. Simmons: Yes sir.

K. Mears: *Did you hit her with anything else other than the stick?*

K. Simmons: No sir.

K. Mears: *Did you hit her with your fist?*

K. Simmons: *No sir, the only think I knowed she hit was that she hit her head.*

K. Mears: That was the back of the head or the front?

K. Simmons: Side of the head.

K. Mears: Side of the head?

K. Simmons: Yes sir.

K. Mears: You didn't hit her with nothing else?

K. Simmons: No sir.

R. 3213-3214.¹⁶ (emphasis added).

Appellant told Mears he hit the victim with the stick "two to three times" in the house.¹⁷ R. 3216. Appellant stated he hit the victim with the stick, and "I raped her and then I tied her hands."¹⁸ R. 3216. Appellant again said he threw the stick in a trash pile.¹⁹ R. 3219.

Appellant "only guessed" the victim had money. Appellant said he guessed he tied the victim's hands with a stocking, but added "really, I can't remember what I tied her up with, no way sir."

The following occurred between Mears and appellant:

K. Mears: Was she alive when you left?

K. Simmons: She was half and half, and then when I went to the telephone. I tried to call 911 and

K. Mears: You went to the telephone after you tied her up?

K. Simmons: Yes sir.

K. Mears: Did you make a call?

¹⁶ State's Exhibit #19, pp. 3-4; R. 3213-3214.

¹⁷ State's Exhibit #19, p. 6; R. 3216.

¹⁸ State's Exhibit #19, p. 8; R. 3218.

¹⁹ State's Exhibit #19, p. 6; 3216.

K. Simmons: I was going to call, I picked up the telephone and dialed 911. I (N/A) dialing 911 sir.

K. Mears: So you just hung the phone back up?

K. Simmons: Yes sir. I was out of my mind.

R. 3219.²⁰

Medical evidence

Forensic pathologist Allen Nichols had earlier testified that the victim suffered a "subaerial hemorrhage." Dr. Nichols opined, "It can occur as a result of a fall. But in this particular case, considering all the bruising to the outside of the face and the head, as well as all the bruising to the inside of the head on multiple directions that this was caused by intentional beating or blunt trauma." R. 1206, l. 1 - 1208, l. 4.

Dr. Nichols testified, "there were two parts to Mrs. Boyd's death. One was the asphyxiation and the other was due to blunt head trauma causing the subdural and subarachnoid hemorrhages." Dr. Nichols opined "blunt force trauma" likely caused these injuries. R. 1208, ll. 15-22.

The following occurred on direct examination of Dr. Nichols:

Q. Did you note anything with regard to the location of the areas on or about the face or the head where Mrs. Boyd was struck?

A. These areas tend to be the areas targeted by people throwing blows or punches to a person's face such as the eyes and cheeks and chin area.

R. 1203, ll. 7-12.

²⁰ State's Exhibit #19, p. 9; R. 3219.

Dr. Nichols also testified the victim suffered vaginal trauma. The following occurred in this regard:

Q. Do you have an opinion that you can state to a reasonable degree of medical certainty as to what caused that trauma?

A. It was due to an insertion of some object. Of course a penis is certainly one of the objects that was inserted. Semen and sperm were recovered. It's also possible another object was also put in causing the damage *such as a stick*.

Q. Can you state to a reasonable degree of medical certainty what object may have been inserted to a reasonable degree of medical certainty?

A. It would be something akin to a stick or some sort of rounded object like that. *It was like a stick, although a finger could have caused this type of damage*. And it certainly wasn't anything like a knife or anything with a sharp object, a sharp blade; otherwise we would have seen more evidence of cutting or deeper lacerations.

R. 1228, l. 16 - 1229, l. 8. (emphasis added).

The indictment for burglary in the first degree alleged entry at night and possession of a deadly weapon as the aggravators. R. 3161. On cross-examination, Dr. Nichols testified he could not rule out that the victim died between 5:00 to 6:00 a.m. that Sunday morning.

However, Dr. Nichols cautioned, "in estimating times of death, the general rule is that a death can occur virtually at any time between when the person was last seen alive by a credible witness and when they were found dead. All the approximations that we used in forensic pathology are only approximations, and there are wide variables between there.

And there's no exact test other than a reliable witness with a good watch to come up with an exact time of death." R. p. 1230, ll. 1-10.

Request to charge

Defense counsel Theos requested that the trial judge charge robbery as a lesser-included offense. On the defendant's request to charge, the judge wrote "state objected." The judge also wrote, "good law, but not applicable to uncontradicted facts." Defendant's request to charge 16-A; R. 3221.

At the charge conference, the judge ruled "the 16-A, the state objects to that. And the court will sustain the objection of the state. While it's a true proposition of law that robbery is a lesser-included offense of armed robbery, it is not applicable to the uncontradicted facts. And that's why the court is not charging it." R. 1937, ll. 14-23; R. 1944, ll. 3-6.

After the judge charged the jury, Theos took exception to the judge's refusal to charge his requested instructions. R. 2096, ll. 10-14.

After the jury was charged and was deliberating during the penalty stage, it informed the judge it wished to go to the hotel for the evening. When the jury returned the next morning, and while it was deliberating, the judge placed on the record the discussions about the requests to charge. R. 2397, l. 13 - 2398, l. 15. The trial judge said the following about the request to charge at issue:

Now number 16-A which is a short charge; robbery is a lesser-included offense of armed robbery. The court declined to submit to the jury lesser-included offenses of both robbery and larceny, those being part and parcel of the elements of armed robbery. But it was either armed robbery or nothing. But note the objection to that of the defendant. It's good law,

but it just wasn't applicable to the uncontradicted facts in view of the court...

R. 2400, l. 23 - 2401, l. 7.

Discussion

Robbery is a lesser-included offense of armed robbery. State v. Scipio, 283 S.C. 124, 322 S.E.2d 15, 16 (1984); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). "Armed robbery is 'the crime of robbery while armed with a pistol, dirk, sling shot, metal knuckles, razor or other deadly weapon.' " S.C. Code Ann. §16-11-330 (Supp. 1995).²¹

Strong armed robbery is defined as the "felonious or unlawful taking away of money, goods, or other personal property of any value from the person of another or in his presence *by violence* or by putting such person in fear." State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241 (1996).

In reversing the court of appeals in Gourdine, this Court noted that the trial judge must charge the jury on a lesser-included offense "if there is any evidence from which it could be inferred, the lesser rather than the greater, offense was committed." The court of appeals incorrectly considered only the state's version of the facts when holding Gourdine was not entitled to an instruction on accessory before the fact of strong armed robbery. State v. Gourdine, 322 S.C. at 398, 472 S.E.2d at 241.

²¹ The statute was later amended to cover situations where the robber represented that he had a deadly weapon. S. C. Code §16-11-338, states "a person who commits robbery while armed with a pistol, dirk, sling shot, metal knuckles, razor or other deadly weapon, or while alleging, either by actions or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony..." The amendments about representing to have a deadly weapon, such as a robber pretending that he had a pistol in his pocket, are not applicable to this case.

In Gourdine, this Court, citing the court of appeals' opinion in State v. Heck, 304 S.C. 345, 404 S.E.2d 514 (Ct. App. 1991), held that "whether an instrument qualifies as a deadly weapon is a jury question." State v. Gourdine, 322 S.E.2d at 398, 472 S.E.2d at 241.

In State v. Heck, the court of appeals held that a BB gun was capable of producing great bodily harm and therefore it was a jury question whether the use of a BB gun qualified the robbery as an armed robbery.

There were no eyewitnesses to this crime. Appellant's statements to the authorities led to this capital trial.²² In appellant's statements, he said that he hit the victim several times with a stick that was described as being about two feet long. It can be inferred from the evidence that the perpetrator here may have used his hands, his fists, or a stick. The use of hands or a stick while demanding money can certainly constitute the kind of violence that places a person in fear for purposes of common law robbery. See, State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981).

In State v. Davis, 309 S.C. 326, 422 S.E.2d 133, 144 (1992), this Court held, for purposes of an implication of malice, that a hand or fist may constitute "a deadly weapon depending upon the manner and means of its use, the wounds inflicted, and other relevant

²² Subsequent DNA testing resulted in Lifecodes Corporation technician Lauren Crane testifying that "we could not eliminate Kenneth Simmons' blood as being a contributor." R. 1470, l. 21 – 1471, l. 5. Crane acknowledged her report said that "a 1.2 allele which is identifiable with Mr. Kenneth Simmons may be present in the sperm." R. 1472, ll. 1-19. Crane admitted if the 1.2 allele was not present appellant had to be excluded as a possible sperm donor. R. 1472, l. 17 – 1473, l. 11. Dr. Michael Baird supervised Crane and said she had properly conducted the PCR tests. R. 1474, ll. 3-14. Baird opined appellant could not be excluded as a contributor, and that the DNA sample was consistent with the victim and appellant. Baird also said if the 1.2 allele was not present that appellant was excluded. However, Baird said he did not think appellant could be excluded. Baird testified the samples excluded almost all white persons, and that "one

facts.” Similarly, this Court wrote in State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) “[E]ven if we were to hold that hands or fist may not be deemed deadly weapons for purposes of armed robbery, Bennett suffered no prejudice in this case. It is undisputed that Victim was stabbed 70-75 times with a Phillips screwdriver, and Bennett raises no contention that the screwdriver was not a deadly weapon.” The judge here obviously ruled that the use of hands, fists, or a stick made the crime armed robbery *as a matter of law* – there was no other evidence about a weapon.

There was not any medical testimony that the stick was the cause of the victim’s death. Dr. Nichols listed asphyxiation and blunt head trauma causing the subdural and subarachnoid hemorrhage as the causes of death. However, Dr. Nichols could not rule out that the victim’s fall caused the hemorrhaging. He opined “blunt force trauma” more likely caused these injuries, but that was not the only evidence. R. 1208, ll. 15-22. See State v. Gourdine, *supra*.

Robbery versus armed robbery was a jury question in this case. The judge therefore erred by refusing to charge the lesser-included offense of robbery.

Penalty Stage Implications

The jury found the aggravating circumstances of armed robbery and burglary. In addition, it found criminal sexual conduct, kidnapping, and physical torture.²³ R. 2454, ll. 3-13.

person in eight million (black people) would have that profile that we see in Mr. Simmons.” R. 1480, l. 9 – 1482, l. 3.

²³ The jury apparently wrote “Yes” next to the “armed robbery” aggravator on the form provided by the Court. “Robbery while armed with a deadly weapon” is the actual aggravating circumstance. R. 2363, ll. 4-9. See S.C. Code §16-3-20(C)(a)(1)(d).

In his opening statement during the penalty stage, the solicitor argued, "Now, four of these five aggravating circumstances have already been established to your satisfaction beyond a reasonable doubt by your verdict of guilty to those four separate indictments that also constitute statutory aggravating circumstances in phase one of this trial." R. 2139, ll. 1-7. The solicitor informed the jury that physical torture was an aggravating circumstance, but not a separate crime. R. 2139, ll. 7-17.

Since appellant was entitled to an instruction on the lesser-included offense of robbery, the armed robbery aggravator is tainted and invalid. The armed robbery, or, more specifically, the "robbery while armed with a deadly weapon" aggravating circumstance was tainted in this case because the submission of only armed robbery was reversible error — a properly instructed jury during the guilt phase may well have convicted appellant of robbery rather than armed robbery. See S. C. Code §16-3-20(C)(a)(1)(d). R. 2362, ll. 6-9.

The problem with the guilt phase jury instruction, absent the lesser-included offense, and the solicitor's subsequent reliance on the conviction of armed robbery to prove the aggravator, is that the jury was never given the option of common law or strong armed robbery where the evidence supported that option.

In State v. Huggins, 336 S.C. 200, 519 S.E.2d 574 (1999) this Court held that a solicitor was not required to reintroduce the guilt phase evidence to rely on that evidence to prove an aggravating circumstance.

However, in State v. Kelly, 343 S.C. 350, 364-365, 540 S.E.2d 851, 859 (2001), *cert granted* 121 S.Ct. 2548 (2001), this Court held that verdicts of guilty for burglary, kidnapping, and armed robbery cannot support a conclusion that the jury will find even a single aggravating circumstance during the penalty phase.

In Tuggle v. Netherland, 516 U.S. 10, 116 S.Ct. 283 (1995), the defendant was denied the assistance of psychiatric testimony pursuant to Ake to Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985), and therefore the United States Supreme Court held the "future dangerousness" aggravator could not stand. The Supreme Court held that the Virginia Supreme Court on remand erroneously reasoned that because there was a valid aggravating circumstance remaining, the death sentence survived.

The Court in Tuggle v. Netherland held that Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1993) did *not* stand for the proposition that the existence of a valid aggravator always excuses a constitutional error in the admission or exclusion of evidence. Zant v. Stephens only supports the proposition that the invalidation of one aggravator does not necessarily *require* that a death sentence be set aside. 516 U.S. at 14, 116 S.Ct. at 285.

The Court in Tuggle v. Netherland, 516 U.S. 10, 116 S.Ct. 283 (1995) admonished the Court of Appeals and the Virginia Supreme Court that a full harmless error analysis had to be employed, and that simply relying on a remaining valid aggravator to uphold the death sentence was error.

As stated, the judge erroneously found the crime in this case was "armed robbery or nothing." R. 2401, ll. 3-4. A robbery obviously occurred. However, the robbery while armed with a deadly weapon aggravator was constitutionally invalid given the improper preclusion of the jury's consideration of the lesser-included offense during the guilt stage. See, Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1993).

Although there were remaining aggravating circumstances in this case, the robbery *motive for the crime* was stressed by the state. The solicitor argued in closing that appellant beat the victim to death "for a hundred dollars or so to buy more crack." R. 2307, ll. 9-12.

Further, the jury was instructed on burglary in the first degree during the guilt phase based upon the use of a deadly weapon or entry at night: R. 2080-2081. It is impossible to know which reason – the use of a deadly weapon or entry at night -- the jury used to justify its verdict for that offense.

However, it is a logical inference that the finding of use of a deadly weapon during the commission of a burglary would follow a guilty verdict of armed robbery. Therefore, the burglary aggravator, regardless of the fact it could be burglary in any degree during the penalty stage, was also tainted because the solicitor told the jury it had already convicted appellant of armed robbery and burglary during the guilt phase, and consequently had already found the aggravators. R. 2139, ll. 1-7; See S. C. Code §16-3-20(C)(a)(1)(c).

The armed robbery aggravator cannot logically be separated out from the other aggravating circumstances. The entry into the house (the burglary) was for the purpose of the robbery. The victim was confined and struck when she did not give appellant the money he demanded. The kidnapping, criminal sexual conduct and physical torture aggravating circumstances were all part and parcel of the burglary and armed robbery aggravators.

It is impossible to determine what actually swayed the jury to impose the death sentence in this case. However, it is important to note that the jury sent the judge a note asking "must both the verdict of death or life imprison [sic] be unanimous (all twelve jurors agree to the verdict)." App. 2431, l. 1 - 2432, l. 22. The judge told the jury their verdict of life imprisonment or death had to be unanimous.

That answer was over appellant's objection that the jury should be instructed that if it could not reach a unanimous verdict, the court would sentence appellant to life

imprisonment. Further, this was after the jury had already retired for the evening after deliberating the prior day. R. 2389, ll. 3-19. It is apparent the jury was struggling to reach its penalty stage verdict.

A holding that a remaining aggravating circumstance is valid, and appellant's death sentence therefore stands, would be improper under Tuggle v. Netherland and Zant v. Stephens, supra. A full harmless error analysis must be employed to determine the impact the armed robbery or robbery while armed with a deadly weapon aggravator played in the jury's ultimate decision to sentence appellant to death rather than life imprisonment.

Given the unusual facts of this case, and since it is impossible to determine that the tainted armed robbery and burglary aggravators – the motive for the crime aggravators-- did not result in appellant's death sentence, appellant should be granted a new sentencing hearing.

ARGUMENT 4

The judge erred by ruling irrelevant the testimony of appellant's first cousin, Calvin Linning, Sr., that he, and appellant's family, were also "real hurt" by the victim's death. The jury had heard an abundance of victim impact evidence from the victim's family about how the loss of the victim hurt their family. Appellant had the right to meet that victim impact evidence.

Relevant facts

In his opening statement to the jury during the penalty phase, the solicitor told the jury that they would hear victim impact evidence. "And the only way that I can present her to you is by photograph and by the testimony of family members *and people that were close to her*. And they'll tell you all about the kind of person she was and *what her loss meant to them*." R. 2140, ll. 13-22 (emphasis added).

Victim impact evidence

During the penalty stage of the trial, the solicitor called the victim's younger sister, Katherine Gilliard, as a witness. R. 2142, ll. 6-24. Gilliard testified the victim was self-taught and read a lot of books. R. 2143, ll. 12-23.

Gilliard offered that the victim had been married once, but did not have any children. R. 2144, ll. 10-18. Gilliard described her sister as "a very nice person; very quiet -- not because she was my sister, but she was really -- she worked hard to make a living for herself so she wouldn't have to bother anybody else. And she did a good job of that." R. 2145, ll. 16-22.

The following occurred on direct examination of Gilliard:

Q. Mrs. Gilliard, could you tell [the] jury, please, how Mrs. Boyd's death has affected you?

A. It [has] affected me in a lot of ways, in more ways than one. You know, *it was very painful that I have to look over there every day and see what she worked for and try to live so hard to take care of herself, and for somebody to come and just take it from her like that. So it's very painful.*

R. 2148, ll. 14-21. (emphasis added).

Virginia Wilson, another of the victim's sisters, testified the victim "was like a mother to me." R. 2155, l. 15 - 2156, l. 3. Wilson identified a picture of the victim taken at their church. R. 2157, ll. 12-20.

Jessie Mae Wilson, another sister, testified when she heard the victim had been murdered: "[I] just got a headache. I got a terrible headache. And I felt so shocking. I've never been so shocked in my life." R. 2184, ll. 11-14. The following occurred:

Q. Okay. Mrs. Wilson, how has your sister's death affected your life?

A. It's affected it a whole lot all around me; the idea of the terrible way, the awful way that she got killed. And then it made me very cautious of going out at night and coming back in. Like I said, coming back in the house at nighttime by myself. And I used to have sliding glass doors. And I've shortly had that redid over. There's a regular door put there instead of a sliding glass door because I was afraid of that. And I'm just very timid now looking around and seeing what happened. And I'm afraid to go out at night and come back in the nighttime.

Q. Do you think of her often?

A. Pardon?

Q. Do you think of [her] often?

A. All the time.

Q. Are there any times like holidays *that are harder than* other times?

A. *Yes; mostly the holidays.* For a long time I was still hoping that I would wake up and find it wasn't true, but that didn't happen.

Q. You wish it wasn't true; and then you realize that it was?

A. Yes, sir.

Q. Is it getting any easier to handle as time goes on?

A. Well, somewhat, you know; but sometimes it just feels like it will never leave me. But, you know, it's getting where I'm used to it. But it's hard. I don't know. It will probably would get a little better. *But it seems to me like I'm never going to get over it.*

Q. Mrs. Wilson, that's all I have. Thank you.

R. 2184, l. 17 - 2185, l. 25. (emphasis added).

Impact on appellant's family not allowed

The defense first called appellant's first cousin, Calvin Linning, Sr., as a witness. R. 2201, l. 16 - 2202, l. 1. Linning was fifty-eight years old and a college graduate. R. 2202, ll. 4-24. Appellant's father had sixteen children in all, and appellant was the sixteenth child born. R. 2203, l. 19 - 2204, l. 15.

Linning said appellant played football for Summerville High School "and he's what we considered a super star." Appellant also played semi-pro football. R. 2204, ll. 18-25.

Linning told the jury appellant worked with the church and "had quite a few role models in the family, which I though was very important, you know. And I want to share one or two with you there." R. 2205, ll. 9-16.

Linning related that another first cousin, Simon Fault, was the original builder of the town hall in Summerville. R. 2206, ll. 409. Linning said another cousin, Georgia Simmons, built Bethel Church in Summerville. R. 2206, ll. 7-11.

Yet another cousin ran a beauty salon in Summerville. Appellant's son, Keith Simmons, Linning testified, was a first year law student. R. 2206, ll. 11-17.

The following occurred on direct examination of Linning:

Q. Have you got anything else that you could add that you would like to tell this jury?

A. It's awfully hard for me to be up here today because I'm certainly nervous *because we know Sister Lilly Bell Boyd personally*. I grew up in the Church of God in Summerville. *And Sister Boyd and my family was real close*. We would take her to the state youth convention year after year. My brother is the one that taught her how to drive. And my niece was real close to Sister Boyd. She had a real close relationship with her. *And it was real painful when we discovered about her --*

MR. BAILEY: I'm going to object to this. I have no objection whatsoever to this man testifying about Mr. Simmons and all that; but about his personal feelings about what occurred, I think is highly irrelevant.

R. 2209, ll. 8-25. (emphasis added).

The judge sustained the solicitor's relevance objection. R. 2209, l. 25. Linning then testified appellant was like a son to him. The following then occurred with Linning:

Q. And would you like him to receive life imprisonment and not receive the death penalty?

A. If Kenneth were my son and he was accused of this particular crime, then I would want my son to be able *to reflect year after year after year what has happened, you know the hurt --*

MR. BAILEY: Your Honor, I think he's going too far. I think he's answered Mr. Bell's question.

Q. And your answer to that would be yes?

A. Yes; I would want him to receive life, not the death penalty....

R. 2211, ll. 3-14. (emphasis added).

Appellant and the decedent

Sandra Franklin testified that she met appellant at the Palmetto House, a homeless shelter in Summerville. Franklin said she did not think appellant was living there but that he came to take advantage of the meals and to use the shelter's telephone. R. 2252, l. 23 – 2254, l. 7. Appellant cleaned the shelter, and took out the trash. R. 2254, ll. 15-17.

Doris Russell was the Manager of Palmetto House. R. 2277, ll. 7-23. Mrs. Russell testified about how appellant knew the decedent:

Mrs. Boyd [the decedent] used to come to the shelter to pick up bread for a lady named Mrs. Noland. And sometimes she would try to get enough bread to carry, and she couldn't make it out the door. And Kenneth [appellant], mainly, and another young man that's not there any more; they would take the bread and carry it and put it in her car to keep her from trying to go down there because they said who built the house put the steps too short. And I'm living witness of it because I fell out the door. And they would take her bread and stuff that she would pick for Mrs. Noland and take it to her car and put it in her car. And that's more time than once that he has done that for her to my knowledge.

R. 2282, l. 12 – 2283, l. 1.

In his closing argument, the solicitor told the jurors, "she made her mark in life. She won't be forgotten by her family and those that loved her." R. 2304, ll. 20-22.

The solicitor mocked defense testimony that his family would benefit by having appellant alive in prison. The solicitor noted that appellant's brother and sister lived in Summerville and that his brother had only been to see appellant twice since he "was locked up in 1987. He's seen his son one time since December of 1997 at the jail. It's unfortunate that he has children; that they have a father that's done what he's done. But no matter what your sentence is, death penalty or life without parole, he can't be a father to his children if he ever was." R. 2334, ll. 3-14.; R. 2238, l. 14 - 2241, l. 25; R. 2250, l. 15 - 2251, l. 17.

The solicitor said appellant's family members were "nice people," but they were not victims. The real victims were the decedent's family. R. 2334, ll. 3-21.

Discussion

The state presented the victim impact evidence of three of the victim's sisters. A picture of the victim was presented to the jury, and the victim impact evidence about the hurt that the victim's family felt over the victim's death was introduced by the state.

In State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994), this Court noted that while the state was entitled to offer victim impact evidence under Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991), "the defendant may rebut the victim impact evidence offered by the state." State v. Southerland, 447 S.E.2d at 867. This Court in Southerland ruled that since the state did not offer any victim impact evidence, the judge correctly held that Payne v. Tennessee did not allow Southerland to introduce evidence of the victim's bad character as victim impact evidence.

The state here raised the issue of the pain caused to the victim's family by introducing the victim impact testimony of the victim's sisters. The fact that Linning and appellant's family also suffered because of the victim's death was a fair response to the

state's victim impact evidence. Cf. State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000); United States v. Robinson, 485 U.S. 25, 32, 108 S.Ct. 864 (1998). See also State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001) and State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (victim impact evidence about the effect of death on testifying witness and family members is admissible).

The solicitor contended that Linning's testimony that he also felt pain, and his family also was pained by the victim's death, was irrelevant. The judge sustained the solicitor's relevance objection.

Linning's testimony did not attempt to rebut the state's victim impact evidence by showing the victim was a bad person or that she contributed to her own death. Cf. State v. Spears, 220 Wis.2d 720, 585 N.W.2d 161 (Ct. App. Wis. 1998),²⁴ but instead sought to show the jury that Linning and appellant's family also were hurt by the victim's death since they were also close to her.

The Chief Justice in Payne v. Tennessee, noted that victim impact evidence was needed to "keep the balance true" between the capital defendant and the state. See, Payne v. Tennessee, 501 U.S. at 826, 111 S.Ct. at 2609, citing Snyder v. Massachusetts, 291 U.S. 97, 122, 54 S.Ct. 330, 338 (1934). Ironically, that balance Payne now demands was denied appellant in this case.

In State v. Watson, 1993 W.L. 603341, 5 Sup. Ct. Del. (1993), the Court reviewed the evidence presented and found as a mitigating factor that the defendant was a member of the victim's family and that his execution would further traumatize that family. The Delaware Court stated that it was not influenced by the victim's family's expressed wishes

that the defendant not be executed. Rather, the expressed impact the sentencing decision would have upon the victim's family was a relevant factor to be considered.

The impact of the victim's death upon appellant's family, because of the closeness of members of appellant's family to the victim, was likewise a relevant factor for the jury to consider here. The jury was entitled to consider the relationship between the victim and appellant, and the hurt Linning and appellant's family felt over her death if the sentencing stage was indeed going to be balanced. See Payne v. Tennessee, supra.

This Court has held that even when evidence would otherwise be irrelevant or incompetent, the other party is entitled to introduce evidence in explanation or rebuttal thereof. State v. Taylor, 333 S.C. 159, 208 S.E.2d 870, 878 (1999).

In State v. Humphries, 325 S.C. 228, 479 S.E.2d 52, 55 (1996), this Court rejected the defendant's argument that due process entitled him to notice of the state's plan to introduce victim impact testimony. This Court noted the defendant had uncovered damaging information about the victim's temper, his use of alcohol and his prior marriage. This Court wrote: "the defense was perfectly free to cross-examine the state's witnesses and to present rebuttal testimony; it had gathered the information necessary for effective rebuttal testimony. For whatever reason, the defense elected not to cross-examine the state's witnesses or to present rebuttal testimony. It is strange beyond belief, however, for the defendant now to suggest that the prosecution's failure to provide him with notice of intent to introduce victim impact evidence somehow deprived him of an *opportunity* to respond to such evidence." State v. Humphries, 479 S.E.2d at 55.

²⁴ Aff'd as Modified, State v. Spears, 227 Wis.2d 495, 596 N.W.2d 375 (1999).

It would be an odd result for courts to allow rebuttal evidence denigrating the victim or "execution impact evidence" on how hurt the defendant's family would be if he was executed, but not allow the defense to "meet" the state's victim impact evidence with testimony the defendant's family was also pained by the victim's death. Even if the hurt Linning and appellant's family felt over the victim's death was not initially relevant, it was relevant in rebuttal, or to meet the state's evidence. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986).

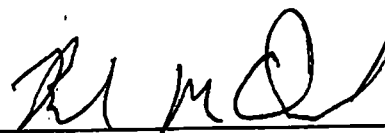
The solicitor sought to choreograph the penalty stage, and successfully did so to emphasize the pain suffered by the victim's family, while denying appellant an opportunity to meet that evidence. The solicitor's arguments stressed the pain suffered by the victim's family, and offered that even if appellant was spared the death penalty he could not be of any use to his family. The solicitor strongly suggested appellant's family had only sparingly visited him. Therefore, the solicitor insinuated, their testimony that they wanted appellant's life spared, in part, so that they could visit him, and that younger people could learn from him, was not credible.

The solicitor also argued that appellant's family were not the victims, and that the decedent's family were the victims. R. 2334, ll. 3-21. The judge erred by ruling the hurt suffered by appellant's family over the victim's death was irrelevant under the facts of this case. Appellant should be granted a new sentencing hearing.

CONCLUSION

By reason of arguments 1, 2, and 3, appellant's conviction should be reversed, and this case remanded to the Dorchester County Court of General Sessions for a new trial. By reason of arguments 3 and 4 appellant should be granted a new sentencing hearing.

Respectfully submitted,



Robert M. Dudek
Assistant Appellate Defender



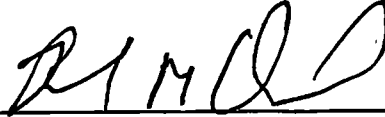
Eleanor Duffy Cleary
Assistant Appellate Defender

ATTORNEYS FOR APPELLANT.

This 7th day of May, 2002.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 210(b), SCACR.



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May 7, 2002

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

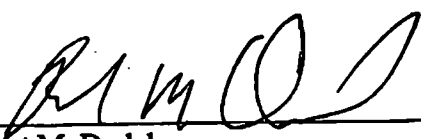
V.

KENNETH SIMMONS,

APPELLANT

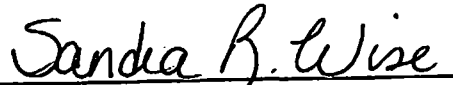
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 7th day of May, 2002.


Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 7th day of August, 2002.


Sandra R. Wise (L.S.)
Notary Public for South CarolinaMy Commission Expires: February 3, 2005.

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

Attorney General
Washington, D. C. 20530

Dear Sir:

Enclosed

Very truly yours,

Respectfully,

UNITED STATES OF AMERICA

Washington, D. C.

UNITED STATES OF AMERICA
Washington, D. C.

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Washington, D. C.

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the judge erred by admitting evidence appellant invoked his right to counsel when the state wanted to administer psychological tests, since this violated *Doyle v. Ohio*, and even if the evidence was relevant it should also have been excluded since its unduly prejudicial effect outweighed its probative value?
2. Whether the judge abused his discretion by dismissing juror Campeau near the close of the guilt phase where the judge correctly ruled juror Campeau had not done anything improper, and where the juror's note unequivocally stated the fact that one of appellants relatives lived near property he owned would not affect his impartiality, since there was no cause to discharge this juror, and the judge's ruling unfairly granted the state an extra peremptory challenge?
3. Whether the judge erred by refusing to charge the lesser-included offense of robbery where the only "weapon" involved was a stick or appellant's hands, since this evidence did not constitute armed robbery as a matter of law, and there was evidence from which the jury could have convicted appellant of robbery?
4. Whether the judge erred by ruling irrelevant the testimony of appellant's first cousin, Calvin Linning, Sr., during the penalty stage that he, and appellant's family, also found the victim's death "real painful", since members of appellant's family knew the victim, and the defense had the right to meet victim impact evidence once it was offered by the state?

RESPONDENT'S STATEMENT OF THE CASE**a. Court Proceedings**

The Appellant, Kenneth Simmons, was indicted at the January 19, 1998 term of the Dorchester County Court of General Sessions for murder, burglary in the first degree, criminal sexual conduct in the first degree, kidnapping and armed robbery. The charges arose from the September 1, 196 assault upon Lilly Bell Boyd. The state served a notice of intent to seek the death penalty.

Jerry N. Theos of Charleston and James A. Bell were appointed to represent the Appellant. The case began at trial on February 22, 1999 before the Honorable Rodney A. Peebles, Presiding Judge. The matter was prosecuted by First Circuit Solicitor Walter M. Bailey and Deputy Solicitor Harrison Bell. On February 28, 1999, the jury found the Appellant guilty of each offense.

The penalty phase began on March 1, 1999. After hearing evidence in aggravation and mitigation, the jury was instructed on determining the existence of the following statutory aggravating circumstances:

1. Criminal sexual conduct
2. Kidnapping
3. Armed robbery
4. Physical torture
5. Burglary

The jury was advised to 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 murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; (3) 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; (4) the age or mentality of the defendant at the time of the crime... There was a fifth statutory mitigating circumstance on the second sheet, and it is that the defendant had mental retardation at the time of the crime. And mental retardation means significantly sub-average general intellectual functioning existing concurrently with deficits and adaptive behavior and manifested during the development period.

R. p. 2382-2383. The trial judge also instructed the jury to consider the following mitigating circumstances:

1. The defendant would not poses a danger if his life is spared but incarcerated.
2. The defendant's long term addiction to alcohol and drugs.
3. The defendant's intoxication at the time of the crime.

R. p. 2382. On March 2, 1999, the jury found the existence of each aggravating factor. The jury unanimously recommended a sentence of death. R. p. 2454-58. On that date, Judge Peebles sentenced Simmons to death for murder, no sentence on kidnapping, life sentence on burglary first degree, thirty (30) years on armed robbery consecutive, and thirty (30) years on criminal sexual conduct in the first degree, consecutive. Post trial motions were heard. On April 1, 1999 Judge Peebles entered an order denying a motion to set aside the sentence. R.p.3225.

b. Factual Summary

On Sunday, September 1, 1996, between 5 a.m. and 6 a.m., Kenneth Simmons came upon 89 year old Lilly Bell Boyd who was out feeding chickens at her home after he had spent a night doing drugs when he was riding home on his bicycle. He went into the back of her house and as he was coming back out of the house he caught her and pushed her back inside. He asked her for money and she went and got it. She brought a brown envelop with money and he grabbed it and

pushed her and she hit her head. He then beat her with a two foot long stick that he found on the porch. Simmons then raped her on her kitchen floor. He tied her hands and feet together. He continued to beat her, resulting in 14 broken ribs. She died as a result of blunt head trauma and manual strangulation.

DNA matching the Appellant was found in a vaginal sample from the victim. After initially denying knowledge, the Appellant gave two taped confessions to the crimes.

The victim was found by her sister, Virginia Wilson, after she failed to attend church that Sunday. She was found on the kitchen floor bound and gagged and savagely beaten.

Simmons, a detainee at the Richland County Detention Center, had initially reported that he knew something about the murder of a woman in Summerville. On December 5, 1997, he initially told police that a guy named Shorty killed Mrs. Boyd and that Shorty had planted Simmons' semen in Mrs. Boyd. Later, he gave the taped interviews on December 5 and December 9, 1997 confessing that he acted alone in the murder, rape, and robbery of Lilly Bell Boyd.

ARGUMENT

- I. **The trial court did not err in allowing testimony that the Appellant during an evaluation invoked his Miranda rights and requested counsel when the Appellant opened the door to the admission of this evidence when he asserted that Simmons lacked competency to waive his Miranda rights.**

The Appellant throughout the entire proceedings in an attempt to suppress his confessions sought to prove that he could not waive his Miranda rights thereby rendering his statement to the police inadmissible. Contested issues were whether he was mentally retarded, possessed the ability to understand his Miranda warnings, his propensity to be easily led, and malingering. The trial judge initially ruled the confessions were admissible. R.p. 2932-33.

The record reveals that, pursuant to court order, Simmons was evaluated at William S. Hall Institute for competency to stand trial and criminal responsibility. R. 3163 (order), R. 3166-69 (report). During these proceedings Simmons was read his Miranda rights and evaluated on his understanding by the court examiners. R. p. 1639, 1657. During the evaluation, the evaluators questioned Simmons about his understanding of his right to remain silent and right to have an attorney present. R. p. 1710-11. At one point the evaluation was discontinued by Dr. Behrmann who opined that he did not have the ability to waive his rights at that time. R. p. 1634, 1650. Counsel Theos was present at those meetings. R. p. 1693-94, 1710.

An hour later, Dr. Jeffrey Vidic asked an intern, Monica Skaggs, to complete some testing on Simmons. It was reported that Simmons "told me that he didn't have to answer questions, that he wanted to talk to Mr. Theos, first, that he had a right to talk to Mr. Theos before he answered any questions." R. p. 1705, ll. 5-11. During the next interview, Simmons sufficiently stated an understanding of his rights to the examiners. R. p. 1650-51.

a.) How the Issue Was Raised

The prosecution sought to admit the fact that during the court-ordered mental health evaluation, Simmons told Skaggs that he did not wish to do psychological testing and was invoking his right not to answer questions until he spoke with his lawyer. R. p. 1691, ll. 18-24. The prosecution contended that this was relevant as a “graphic example, not only of Mr. Simmons...understanding his Miranda rights, but actually exercising them during this time. He contended that the mandates of Doyle v. Ohio, 426 U.S. 610 (1976) were not invoked because the “door had been opened” on whether or not Simmons could comprehend Miranda rights.

Counsel Theos objected, asserting that he denied his Fifth Amendment right to silence and have counsel present. R. p. 1693, ll. 4-13.

Dr. Vidic clarified for the court that the psychological testing that he asked his intern to do did not concern the alleged facts of the case. R. p. 1695, l. 20 - p. 1696, l. 6.

Solicitor Bailey noted that the initial defense witness testified that Simmons did not understand the meaning of the word “right.” R. p. 1696, ll. 18-21. See Dr. Foxworth R. p. 1531-35.¹ The prosecution noted this information was in direct contravention of what Dr. Foxworth testified and demonstrates that he understands. R. p. 1697, ll. 1-7.

Counsel Theos further made an initial hearsay objection that he later withdrew. R. p. 1697, 1862-63.

The prosecution further asserted that he should be entitled to question the experts about these matters since it was material reasonably relied upon by the experts. R. p. 1698.

¹ Dr. Foxworth opined that, to a reasonable degree of medical certainty Simmons is not capable of reading his Miranda warnings and comprehending the meaning of the rights. R. p. 1535, ll. 10-14.

Judge Peeples concluded that the evidence was admissible under SCRE Rule 403 as relevant evidence and SCRE Rule 703. R. p. 1698, ll. 15-21. As stated above, this information was developed on cross-examination of Dr. Vidic.

The prosecution further used the evidence in its closing argument on whether Simmons could understand and waive his Miranda rights. R. p. 1966, ll. 6-19.

Consistent with South Carolina law, the trial judge instructed the jury on its role in determining the admission of the confessions. R. p. 1966, ll. 6-19. In his charge to the jury, the trial judge stated:

you may further consider the ability of the defendant to understand and comprehend the Miranda warnings and whether or not he knowingly and voluntarily gave up his rights....[Y]ou must consider the totality of the circumstances such as intelligence, education, experience, and ability to comprehend the meaning and effect of the statement. You must determine if the defendant in this case had the ability or capacity to comprehend the meaning and effect of waiving his constitutional rights...I instruct you, Ladies and Gentlemen, that decision can be made intelligently with an understanding of the consequences without the decision itself being a wise one.

R. p. 2073, l. 17 - p. 2074, l. 17.

b.) Law/Analysis

The Appellant contended throughout the trial that he lacked mental capacity to understand his Miranda rights. In the defense case, Simmons introduced evidence that from his own experts that he was incapable of comprehending his Miranda warnings to support his theory that the jury should not consider his statements based upon the Miranda waivers. Once the defense had "opened the door" to the factual issue of whether the Appellant could comprehend the Miranda

warnings, the prosecution was entitled to pursue the factual issue on whether Simmons could comprehend Miranda warnings. The trial judge did not abuse his discretion in allowing the admission of the evidence.

The defense guilt phase evidence plainly reveals that they strategically opened the door. Dr. Michael Foxworth, a psychiatrist, testified that Simmons gave an opinion that Simmons "did not really comprehend the right to remain silent." R.p. 1522. He further opined that Simmons "does not really comprehend the fact that he has the ability to exercise a prerogative to stop questioning whenever he wants to and not answer certain questions selectively." R.p. 1534, 21-25. He further stated that Simmons "was not capable of reading (the Miranda warnings) himself and comprehending them." R.p. 1535, l. 10-13. Also R.p. 1536, 17-p. 1537, l. 15. Dr. Thomas Behrmann, a state psychiatrist, testified as a defense witness that he was concerned that Simmons lacked the ability to waive his rights when he had an evaluation on November 23, 1998. R.p. 1640-41. Dr. Randy Waid, a defense witness, testified that he also had an opinion on whether Simmons could comprehend his Miranda warnings and opined "he does not have the capacity to fully understand his Miranda rights primarily based on capacity, knowing or intelligent reasons. R.p. 1789, l. 5-17. Also, R.p. 1790-91.

"[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct.App.1999); see also State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984)(holding where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though the latter evidence would be incompetent or irrelevant had it been offered initially). A party cannot complain of prejudice

from the admission of evidence if he opened the door to its admission. Beam, 336 S.C. at 52, 518 S.E.2d at 301; see also State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991)(concluding where appellant opened door to evidence, he cannot later complain of prejudice from its admission).

Here, the prosecution was aware of evidence that factual disputed the predicate that the defense was trying to establish that Simmons was incapable of invoking his rights to silence and an attorney because Simmons had expressly done so at the William S. Hall evaluation revealing his ability to both comprehend the rights and act upon those rights. As the prosecutor so eloquently described to the judge: "I think to allow it to stand like that when he has actually demonstrated he understands the meaning of a right that he would perpetrate a fraud on the court." R.p. 1697, 6-7. The testimony he used was that the intern was told by Simmons that he had "the right I don't have to answer no questions until I talk to Mr. Theos." R.p. 1705. This evidence factually contradicted the opinion of Dr. Foxworth about whether he could understand a "right" and invoke his rights. Plainly, this evidence was relevant to the issue at hand. It was not being used to penalize his silence or invocation. It was used merely to address the narrow forensic question that was at issue - his ability to comprehend Miranda warnings - an issue for the jury to consider and resolve.

Respondents recognize that it is improper for the State to refer to or comment upon a defendant's exercise of a constitutional right. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). Such comments may not be made either directly or indirectly. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980). In particular, the State may neither comment upon nor present evidence at trial of a defendant's decision to exercise his right to remain silent or be represented by an attorney. See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (due

process clause of Fourteenth Amendment is violated when a state prosecutor seeks to impeach defendants' exculpatory story, told for the first time at the trial, by cross-examining them about their post-arrest silence after receiving the Miranda warnings); Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) (Fifth and Fourteenth Amendments forbid comment by the prosecution on the accused's silence or failure to testify, as well as instructions by the court that such silence is evidence of guilt); State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988) (holding that prosecutor's indirect reference to defendant's silence and indirect comments on defendant's exercise of his rights to counsel and jury trial violated defendant's due process rights and were reversible error in murder and kidnaping trial); State v. Hawkins, 292 S.C. 418, 423, 357 S.E.2d 10, 13 (1987) (reversing conviction where prosecutor improperly commented upon defendant's failure to testify and explaining that such a comment essentially is a comment upon defendant's right to remain silent); State v. Woods, 282 S.C. 18, 20, 316 S.E.2d 673, 674 (1984) (reversing conviction where solicitor improperly introduced evidence that defendant had exercised his right to remain silent); State v. Holliday, 333 S.C. 332, 509 S.E.2d 280 (Ct.App.1998) (reversing conviction because solicitor's cross-examination of defendant, during which she repeatedly questioned defendant as to why he had not told his version of events until the day of trial, was improper in that the questions clearly referenced his post-Miranda silence).

These principles are rooted in due process and the belief that justice is best served when a trial is fundamentally fair. See Brecht v. Abrahamson, 507 U.S. 619, 629, 113 S.Ct. 1710, 1717, 123 L.Ed.2d 353, 367 (1993); Wainwright v. Greenfield, 474 U.S. 284, 291, 106 S.Ct. 634, 638, 88 L.Ed.2d 623, 630 (1986); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The obvious purpose is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions.

Such an inference is constitutionally impermissible because the burden at all times remains upon the State to prove beyond a reasonable doubt every element of a crime with which the accused is charged. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

In a direct appeal, the admission of comments or evidence of the defendant's exercise of a constitutional right is a "trial error" subject to harmless error analysis. State v. Pickens, 320 S.C. 528, 530-31, 466 S.E.2d 364, 367 (1996); see also Arizona v. Fulminante, 499 U.S. 279, 306-10, 111 S.Ct. 1246, 1263-65, 113 L.Ed.2d 302, 329-32 (1991) (a "trial error" occurs during the presentation of case to jury and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial; these are distinguished from structural defects in the constitution of the trial mechanism, which defy harmless error analysis).

The Supreme Court has consistently recognized the significance of Doyle, and has stated, "[a]n accused has the right to remain silent and the exercise of that right cannot be used against him. The State cannot, through evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent." State v. Smith, 290 S.C. 393, 394-95, 350 S.E.2d 923, 924 (1986); see State v. Reid, 324 S.C. 74, 476 S.E.2d 695 (1996) (It is a violation of due process for the State to permit comment on a defendant's post-arrest silence since the giving of Miranda warnings might induce silence by implicitly assuring a defendant his silence will not be used against him.).

However, courts have held that there are certain times that it is appropriate to here evidence about this matter. United States v. Robinson, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988) (where defendant's counsel in closing argument stated the Government had not allowed

defendant to explain his side of the story, the prosecutor's comment that the defendant "could have taken the stand and explained it to you" did not violate defendant's right against self-incrimination because the prosecutor's reference to the defendant's opportunity to testify was a fair response to a claim made by defendant's counsel); State v. Kimsey, 320 S.C. 344, 465 S.E.2d 128 (Ct.App.1995) (where defendant confessed to crime after being given his Miranda warnings and then gave a different version of his involvement in the offense at trial, Doyle did not apply, and prosecution was permitted to cross-examine defendant to inquire into prior inconsistent statements); Id. at 346, 465 S.E.2d at 130 ("[A] defendant who voluntarily speaks after being given Miranda warnings has not heeded the admonitions of the government and has not in any way relied on governmental assurances, but to the contrary, has chosen not to remain silent."). See also, Milburn v. Commonwealth, 788 S.W.2d 253, 258 (Ky. 1989) (by "open[ing] the door," defense counsel "should have seen the objectionable comment coming"); Anderson v. Charles, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980) (cross-examination of witness in which prosecutor brought out inconsistency of defendant's direct testimony and statements made to police after Miranda warning not Doyle violation, because defendant chose to speak after receiving Miranda warning). Noland v. French, 134 F.3d 208, 216-17 (4th Cir. 1998) (prosecutor's elicitation from police officers that defendant understood Miranda rights and exercised them was not reversible error because trial testimony only made passing reference to Miranda rights, prosecutor did not exploit defendant's exercise of Miranda rights, and prosecutor did not suggest that defendant's invocation of Miranda rights rebutted evidence of insanity); U.S. v. Reveles, 190 F.3d 678, 684 (5th Cir. 1999) (prosecutor's comment on defendant's post-arrest silence after defendant tried to convince jury that he cooperated with investigators was not reversible error because Doyle does not tie hands of prosecutor who attempts to rebut statements

by showing lack of cooperation)

Further, Doyle does not prohibit prosecutors from commenting on a defendant's post-arrest silence for all purposes. The Court in Doyle gave one example of one such permissible purpose:

It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. Cf. United States v. Fairchild, 505 F.2d 1378, 1383 (C.A.5 1975).

Doyle, 426 U.S. at 619 n. 11, 96 S.Ct. 2240. In Fairchild, which was cited with some approval by the Supreme Court, we held that a prosecutor may question a defendant about his post-arrest silence for the purpose of rebutting the impression that he cooperated with law enforcement authorities. See Fairchild, 505 F.2d at 1383; see also Chapman v. United States, 547 F.2d 1240, 1243 n. 6 (5th Cir.1977) (stating that Fairchild "clearly survive[s] Doyle"). A review of the trial transcript shows that the government's inquiries into Willie's post-arrest silence were for the purpose of rebutting his claim that he stood ready to cooperate all along. When a defendant attempts to convince a jury that he was of a cooperative spirit, Doyle does not tie the hands of prosecutors who attempt to rebut this presentation by pointing to a lack of cooperation.

The Appellant's reliance on Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) is misplaced. In addition to Noland, *supra*., other circuits have held that mere mention of a defendant's exercise of Miranda rights is not per se prohibited; rather, a Greenfield violation depends on "the particular use to which the post-arrest silence is being put." Lindgren v. Lane, 925 F.2d 198, 202 (7th Cir.1991); see also Jones v. Stotts, 59 F.3d 143, 146 (10th

Cir.1995) (holding that "it is the prosecutor's exploitation of a defendant's exercise of his right to silence which is prohibited"); United States v. Stubbs, 944 F.2d 828, 835 (11th Cir.1991) (finding no Greenfield violation "when the government does not specifically and expressly attempt to use ... the improper comment to impeach the defendant"). Greenfield "does not impose a prima facie bar against any mention whatsoever of a defendant's right to request counsel, but instead guards against the exploitation of that constitutional right by the prosecutor." Lindgren, 925 F.2d at 202. Here, its use by the prosecution was not to rebut a defense of insanity that was forbidden in Greenfield, but to reveal that he could comprehend his Miranda rights. The Appellant's analysis ignores the use to which the prosecution was using the evidence - not to prove guilt; not to defeat a claim of not guilty by reason of insanity, but to challenge the defense presentation of whether he could comprehend his rights. This issue was raised by the defense, not the prosecution and they were entitled to challenge it by the evidence. Similarly, the reliance on State v. Smith, 290 S.C. 393, 394-95, 350 S.E.2d 923, 924 (1986), is equally misplaced. There, the Court found that the solicitor's question was obviously intended to focus the jury's attention on appellant's post-arrest silence as substantive evidence of his sanity, and was therefore improper in his claim of insanity. The use here of the actions of Simmons does not raise this same concern. The trial judge properly allowed its use in these discrete circumstances. The exception must be denied.

- II. The trial judge did not err in removing juror Campeau as a juror during the guilt phase of the trial when he had communications with his wife concerning the fact that the Appellant's sister lived across the street of a vacant lot and that his wife had concerns about the effect the verdict would have on them. This communication was in violation of the judge's pretrial order to the juror.**

A. How This Issue was Raised Below

During the trial, Christopher Campeau was selected as a juror. R. p. 979. During his earlier voir dire he admitted he knew Mrs. Boyd's sister, Virginia Wilson. R. p. 677. He had not indicated that he knew any of Appellant Kenneth Simmons family or witnesses. R. p. 128-130, 158.

After the selection of the jurors, Judge Peeples instructed the jurors to not discuss this case among yourselves or with anyone else. R. p. 1008-09. He specifically instructed "you're not allowed to make telephone calls out. You're not allowed to receive telephone calls..." R. p. 1009, l. 22 - p. 1010, l. 2. The Court directed that the calls should be limited to an "emergency." R. p. 1009.

Contrary to these instructions, the agent allowed for a telephone call to be made to the family with an agent present. R. p. 1835-38.

On February 24, 1999, SLED Captain Polk received a telephone call from Christopher Campeau's wife indicating that she was concerned and upset because she realized the sister of the defendant lived across the street from a piece of property they owned in Summerville. R. p. 1832, l. 15 - p. 1833, l. 16. She told him that it would cause fear and concern if the jury returned a guilty verdict or death sentence since they were going to build on the lot. R. p. 1833. Judge

Peeples indicated that he learned that Captain Polk had unsuccessfully tried to get in touch with Mrs. Campeau on Wednesday and Thursday. R. p. 1833.

On Friday, Juror 50, Mr. Campeau handed a note to Captain Polk and the Court was advised and brought the prosecution and defense into discuss it. The note stated the following:

Your Honor, I have realized that I know a possible relative of the defendant, Kenneth Simmons, and [when] *asked earlier in the week if I knew relatives of the accused, I truthfully answered no.* After the trial started, I saw a woman I recognized sitting behind Kenneth Simmons. I now realize the woman in the audience was, I believe, a Mrs. Louise that lives opposite a vacant lot I own in the town of Summerville on Congress Street. In the future my wife and I intend to build on this lot, our primary residence. I have upon occasion been cordial with Mrs. Louise and say hello to her while I am on or about my property. *Knowing Mrs. Louise will not influence my decision-making ability regarding the guilt or innocence of Kenneth Simmons. If the trial proceeds to the penalty stage, none of the above will influence my decision-making ability regarding life imprisonment or the death penalty as outlined in the pre-trial questionnaire.* I felt it was my duty as a juror to inform you of the above and to continue to serve you in any capacity you see fit.

R. p. 1833, l. 24 - p. 1834, l. 21 (emphasis added). Judge Peeples indicated that he had asked Captain Polk to continue his efforts to contact Mrs. Campeau because he wanted to resolve if she had talked to her husband about the situation and if he was aware she was upset. R. p. 1835, ll. 15-16. Judge Peeples stated that his earlier instruction was that he had told the jurors to "inform your family that you will be unable to make any direct contact with them for the duration of trial..."except for emergencies. R. p. 1835-36.

Captain Polk stated that he had finally located Mrs. Campeau who confirmed that she had spoken with her husband about the fact that the Appellant's sister, Louise Brothers, was across

the street that they were going to build a house on and she had fear and was upset. R. p. 1838-39. She stated she had spoken with her husband about it the night before. R. p. 1839, ll. 14-15. He reported the telephone call between the juror and his wife occurred before the letter was written. R. p. 1840-41.

Also, it was reported that Mrs. Campeau had called the a cousin of a member of the Clerk's Office the previous day expressing her concern about what to do. She was referred to the SLED agent. R. p. 1842.

The prosecution moved to have juror Campeau removed and replaced with an alternate. R. p. 1842-43. The defense stated that before it agreed, he would ask that the court make an inquiry of the juror as to the exact nature of the conversation with his wife and about his ability to serve. R. p. 1843, ll. 4-13.

Judge Peoples stated that he thought this letter addressed the matter adequately and once he was "singled out" it might create more of a problem. R. p. 1843-44.

Judge Peoples then entered an oral order that:

There has been an improper communication concerning his case and discussions relative to whether the man was found guilty or receives life imprisonment or the death penalty between this man and his [wife]; it's apparent what happened and that the juror cannot continue in this case...

R. p. 1844, ll. 13-20.

The next day Mr. Campeau was brought into court and removed due to the extra-judicial communication with his wife. R. p. 1846-53. He admitted that he did discuss the situation with his wife and "whatever the situation is after we build there we'll juts have to live with it at that time." R. p. 1852-53. After the proceedings, both the state and the defense declared they had no

objection to the proceedings having been conducted. R. p. 1853, l. 22 - p. 1854, l. 3.

B. Law/Analysis

"In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences." State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998); see also State v. Salters, 273 S.C. 501, 504, 257 S.E.2d 502, 504 (1979)("A defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury; and, in order to fully safeguard this basic protection, it is required that the jury render its verdict free from outside influences." (citations omitted)). Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict. The trial court has broad discretion in assessing allegations of juror misconduct. Relevant factors to be considered in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice. Generally, the determination of whether extraneous material received by a juror during the course of the trial is prejudicial is a matter for determination by the trial court. 23A C.J.S. Criminal Law § 1365 (1989). Kelly, *supra*.

Where the defendant seeks a new trial on the ground of impropriety involving the jury, he is required to prove both the alleged misconduct and the resulting prejudice. See State v. Grovenstein, 335 S.C. 347, 351-52, 517 S.E.2d 216, 218 (1999); Kelly, 331 S.C. at 145-46, 502 S.E.2d at 106; State v. Smith, 338 S.C. 66, 72, 525 S.E.2d 263, 266 (Ct.App.1999)("The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence.").

Here, the Appellant mischaracterizes the reasons behind the removal of juror Campeau. The juror was removed because he engaged in improper extra-judicial communications with his

wife about the verdicts in the case and learned of her fear and concern about the verdict since they were going to build a house across the street from his sister. This communication was in express violation of the court's directive. Further, it cannot be reasonably argued that this communication was harmless. It went directly to the verdict and a concern that his wife had about the result. This are exactly the type of influences the "no discussion" directive are intended to cover and protect against.

This removal was not as the Appellant contends based upon his failure to recognize the defendant's sister in court. The removal was based upon the extraneous influence and communication that his wife had and her concerns about the verdict. These are forbidden topics among are how a verdict will directly affect them among themselves and certainly among outsiders, including family members.

Jurors should be admonished not to discuss the case with anyone, including each other, prior to submission of the case. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994); Gallman v. State, 307 S.C. 273, 276, 414 S.E.2d 780, 782 (1992). "The rule is well settled that jurors should not, prior to the submission of the case to them, converse with outsiders or among themselves on any subject connected with the trial, or form or express any opinion thereabout; and that the jurors should be so admonished when they are permitted to separate during the trial." State v. Parker, 255 S.C. 359, 361, 179 S.E.2d 31, 32 (1971).

Any unauthorized communication, contact, or tampering directly or indirectly, made by a nonjuror with a juror during a trial about the matter pending before the jury is generally deemed presumptively prejudicial, if not made in accordance with rules of court and the instructions and directions of the court made during the trial, with full knowledge of all the parties. The presumption is not conclusive, but the burden rests heavily upon the nonmovant to establish, after

notice to and hearing of the defendant, that such contact with the juror was harmless to defendant.

Prejudice may be shown by evidence that an extrinsic factual matter may taint the jury's deliberations. Essentially, an impermissible "outside influence" is an unauthorized communication or overt act by a third party which creates an extraneous influence on the jury. Here, the wife, albeit innocently, sought to influence her husband's continued involvement on the jury due to her expressed fears and concerns that she expressed to the juror in an improper communication. The trial court did not error in removing him.

This issue does not concern whether the juror should have disclosed his relationship with the defendant's sister during voir dire and whether a peremptory challenge would have been used. It does not concern whether the relationship with the Appellant sister would have been cause for removal standing alone. The action, however, does stand for the trial judge's appropriate use of his discretion to remove a juror from the decision process when his own action in the case became compromised by his wife's contact. This issue should be dismissed.

Alternatively, Respondents note not e that the Appellant may have concurred in the decision to remove the juror after his initial objection. He stated that he had no objection to the handling of the proceedings after the juror was removed on Saturday. This Court may find that he waived his right to challenge the removal on appeal by his assent in the lower court after the juror admitted the communication with his wife about the home.

- III. The trial court properly refused to instruct on the lesser included offense of "robbery" when there was no evidence that the Appellant was guilty only of robbery when the victim died as a result of fatal blows to the head and manual strangulation suffered 14 fractured ribs and massive vaginal trauma and the Appellant admitted the use of a stick against the victim.**

In this argument, the Appellant contends that he was entitled to be instructed on the lesser offense of robbery on his armed robbery indictment. He contends that while the perpetrator may have used his hands or a stick to inflict the injuries on Mrs. Boyd, he was entitled to the robbery instruction because whether those items were a "deadly weapon" raised a question for the jury. The trial judge, under the discrete facts of this case found that it was not appropriate to give the charge to the "uncontradicted facts". R. p. 1937, 1944. See also R. p. 2400-01 (penalty phase). Since the "uncontradicted" facts included the Appellant's statement and forensic medical evidence and there was an actual death, the Court correctly denied the request.

A. Standard of Review and Law on Robbery and Deadly Weapons

A trial judge is required to charge the jury on a lesser included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed. State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986). It is well settled that a jury instruction on a lesser included offense is required only when the evidence warrants such an instruction. Hopper v. Evans, 456 U.S. 605, 611, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982). It is not error to refuse to charge the lesser included offense unless there is evidence tending to show the defendant was guilty only of the lesser offense. State v. Atkins, 293 S.C. 294, 299, 360 S.E.2d 302, 305 (1987) (emphasis added), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Robbery is defined as the felonious or unlawful taking of money, goods or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981). "Armed robbery" occurs when a person commits robbery while armed with a deadly weapon. S.C. Code Ann. § 16-11-330 (1985)²; State v. Keith, 283 S.C. 597, 325 S.E.2d 325 (1985). See, e.g., State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987), cert. denied, 484 U.S. 1079, 108 S.Ct. 1060, 98 L.Ed.2d 1021 (1988)(defendant not entitled to robbery charge as a lesser included offense of armed robbery where, under State's version of the facts, the defendant was guilty of armed robbery, and, under defendant's version of the facts, defendant was innocent of any robbery charge).

A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm. State v. Scurry, 322 S.C. 514, 473 S.E.2d 61 (Ct.App.1996); State v. Campbell, 287 S.C. 377, 339 S.E.2d 109 (1985). The question of whether an instrument used in the commission of a robbery qualifies as a deadly weapon, thereby qualifying the incident as armed robbery, is a factual determination for the jury. State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996); State v. Tasco, 292 S.C. 270, 356 S.E.2d 117 (1987).

Whether defendant's hand or fist was deadly weapon was question of fact in armed robbery prosecution given disparity in size between victim and defendant. State v. Bennett, 328

² Section 16-11-330. Robbery and attempted robbery while armed with deadly weapon.

(A) A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony ...

S.C. 251, 493 S.E. 2d 845(1997). In the context of murder, that a hand or fist may be considered a deadly weapon depending on the factual circumstances. "Whether an object has been utilized as a deadly weapon depends upon the facts and circumstances of each case." State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992).

In State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996), the Court held that a defendant charged with accessory before the fact to armed robbery, which required use of deadly weapon, was entitled to instruction on lesser included offense of accessory before the fact to strong arm robbery, which involved taking of property by violence or by putting victim in fear, based on evidence that toy guns were used in robbery and that victim believed guns used were fake.

Respondents submit that "[w]eapons may be placed, generally in two categories, namely: deadly per se, such as firearms and deadly by reason of the manner in which they are used." Morgan v. State, 220 Tenn. 247, 415 S.W.2d 879, 882 (Tenn.1967). However, Respondents believe that the Morgan decision merely represents an acknowledgment of the fact that objects that are weapons, though not traditionally considered deadly weapons, may be so considered based upon the manner in which they are used.

B. Factual Analysis

The record reveals that the Appellant gave a series of statements to law enforcement. In a written statement on December 7, 1997, he declared that the victim was killed by "Shorty" and "James Anderson" because I owe Shorty money. R. p. 1380-81. He described that when he got to the victim's trailer, Shorty had "a stick in his hand with blood all over it. Mrs. Boyd's hand tied behind her back. She was still alive..." In a follow up interview at 8:26 p.m. to SLED Agent Kenny Mears, Simmons stated that he had been smoking crack at the club. He stated that

between 5 and 6 a.m. on Saturday morning, he went to the victim's home by himself. State Exhibit 18, p. 2-3, R.p.3201-02. He stated he caught the victim coming out the back door and pushed her back into the house. He asked the victim for money. The victim had an envelope with money and she fell when he grabbed the envelope. Id. p. 3, R.p. 3202. When "she was getting back up and I hit her with a stick." He described it as "a little piece - a little stick off a tree" that he had found on the back porch. Id. p. 3, R.p. 3202. He admitted also having sex with Mrs. Boyd. He dialed 911 because he realized he had made a big mistake. He further declared that he threw the stick in a trash pile at the side of the road after the incident. Id. p. 3, R.p. 3202.

On December 9, 1997, he gave Agent Mears another statement, State Exhibit 19. R.p.

3211. In this statement he declared the following:

1. Prior to the assault, he grabbed a "little wood stick" about two feet long from the back porch. State Exhibit 19, R.p. 3213.
2. After he hit her with the stick he did not hit her with anything else. R.p. 3213-14.
3. He denied hitting her with his hands or strangling her.
4. He admitted hitting her with the stick "two or three times." R.p. 3216.

The pathologist, Dr. Clay Nichols, testified in the guilt phase about the injuries to Mrs. Boyd and what led to her death. He opined that she had significant bruising on the left side of her face and head. R. p. 1200-02. He opined the cause was blunt trauma from several strikes to the head and face. R. p. 1202-03. In his opinion, these could not have come from a plain fall and were similar to areas where people throw punches. She also had trauma on her arms. R. p. 1203-04.

The autopsy also revealed further blunt head trauma. R. p. 1206-08. Dr. Nichols rejected that this trauma would have occurred in an accidental fall due to the bruising. He stated it was caused by intentional beating or blunt trauma. R. p. 1207-08.

Dr. Nichols opined that the causes of death were (1) asphyxiation and (2) blunt head trauma causing the subdural and subarachnoid hemorrhage. R. p. 1208, 1216. He further noted the fractured hyoid bone which frequently occurs in manual strangulation. R. p. 1209-10. He opined that there was additional evidence of bruising to support the opinion of manual strangulation when she was alive. R. p. 1211.

Dr. Nichols also noted that there were fourteen (14) multiple rib fractures, involving both sides of the rib cage. R. p. 1211-12. He opined that these were due either to a stomp or body slam which forcible force of considerable weight put on her while she was reclining. R. p. 1212. He also noted that there was severe trauma to the vagina. R. p. 1205-06, 1213-14. He opined that while there was evidence that a penis had been present, the massive injuries were consistent with "a stick or some sort of rounded object" being inserted also. R. p. 1228, l. 19 - p. 1230, l. 8. Also, R. p. 1231, l. 5 - p. 1232, l. 6. It was the second worse case of vaginal trauma he had seen. R. p. 1231.

He opined that the blows to the face were not consistent with the pattern of a stick. R. p. 1230, ll. 11-20.

a) How the Issue was Raised

i. Guilt Phase

After the evidence was completed there was a charge conference. The Appellant, through counsel, requested a charge on robbery as a lesser included offense. Defendant's Request 16A. Judge Peebles sustained the state's objection and declared "while it's a true proposition of law

that robbery is a lesser included offense of armed robbery, it is not applicable to the uncontradicted facts. And that is why the court is not charging it.” R. p. 1937, ll. 14-23, p. 1939, l. 14 - p. 1940, l. 5 (“under the evidence and uncontradicted testimony, the court does not believe those to be applicable.”), R. p. 1944, ll. 3-6.

ii. Penalty Phase

After the jury was charged and was deliberating during the penalty stage, it informed the judge it wished to go to the hotel for the evening. When the jury returned the next morning, and while it was deliberating, the judge placed on the record the discussions about the requests to charge. R. p. 2397, l. 13 - p. 2398, l. 15. The trial judge said the following about the request to charge at issue:

Now number 16-A which is a short charge; robbery is a lesser-included offense of armed robbery. The court declined to submit to the jury lesser-included offenses of both robbery and larceny, those being part and parcel of the elements of armed robbery. But it was either armed robbery or nothing. But note the objection to that of the defendant. It's good law, but it just wasn't applicable to the uncontradicted facts in view of the court...

R. p. 2400, l. 23 - p. 2401, l. 7

C. Law/Analysis

Respondents submit that Judge Peebles properly denied the request to instruct on the lesser included offense of robbery because the evidence presented was not that Simmons was guilty only of robbery rather than robbery.

It is undisputed that Mrs. Boyd was murdered during the course of the robbery. The guilt phase that the perpetrator seized a two foot long stick from the porch of the Appellant and used it in some manner during the assaults and theft. In his statements, Simmons referred to the stick as

“bloody” and declared he only struck her with the stick. The forensic medical evidence supports that a stick may have been used in the massive trauma to the victim’s vagina. However, the medical evidence was not consistent with a stick being used on the blows to her head.

Further, evidence suggest that her death resulted from blunt force trauma to her head and manual strangling. The evidence is uncontested that these blows were done by hands or fists. It is undisputed similarly that these blows caused the death of Mrs. Boyd.

The Appellant correctly notes that this Court has held that whether an instrument qualifies as a deadly weapon is a factual determination for a jury in an armed robbery case, citing State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). However, unlike Gourdine where toy guns were used, in this setting death actually occurred as a result of the use of hands. As this Court stated in State v. Davis, 390 S.C. 326, 422 S.E.2d 133 (1992), whether an object has been used as a deadly weapon depends upon the facts and circumstances in the case. In Davis, the Court noted that in State v. Smalls, 17 S.C. 63 (1882), it had held that a barrel stave could be a deadly weapon, among other items. Certainly then, wielding a two foot long stick would also satisfy the “deadly weapon” definition.

Further, under Gourdine, there is no evidence that the victim thought instrumentalities could not be “deadly.” In Gourdine, some witnesses thought the toy guns were false. As the Court correctly noted therein, the trial judge is not to be confined to the state’s version of the facts in determining the propriety of the charge.

Here, where the victim suffered fatal trauma from the blows to her head, fourteen (14) ribs were fractured from force, she was forcibly raped and further assaulted by injection of a blunt object like a stick, and she died additionally as a result of manual strangulation, and the Appellant either admitted actual strikes by the stick or saw a co-defendant with a bloody stick,

the Court was correct in rejecting the lesser offense of robbery request.³ Here, the nature of the death supported the decision not to instruct based upon the stick and the deadly use of hands to assist in completing the theft. His exception must be denied.

The Appellant further contends that if the armed robbery conviction is vacated he is entitled to a new sentencing proceeding under Tuggle v. Netherland, 516 U.S. 10 (1995). He asserts that Tuggle noted that Zant v. Stephens, 462 U.S. 862 (1993) stands for the proposition that the invalidation of one aggravator does not necessarily require that a death sentence be set aside. 516 U.S. at 14.

The Applicant ignores the fact that the jury was instructed on the various aggravating circumstances including “the murder was committed while in the commission of ...(4) robbery while armed with a deadly weapon...” R. p. 2362, ll. 4-8. The substantive nature of the crime of armed robbery and robbery was re-charged in the penalty phase. R. p. 2364-68. The jury’s finding in the penalty phase of its existence was independent of the guilt phase finding.

Further, there were independent statutory aggravating factors that were also found by the jury to support the death sentence, including that murder was committed while in the commission of (1) “criminal sexual conduct”, (2) “kidnapping”, (3) “physical torture”, and (4) “burglary”. Contrary to the Appellant’s contention, there are independent evidentiary support for each of these factors which independently stand for the propriety of the sentence.

As to the sexual assault, the extraordinary vaginal trauma and forcible sexual intercourse prior to death support the verdict. As to the kidnapping, the binding of her hands and feet prior

³ In his brief, he also relies upon State v. Heck, 304 S.C. 345, 404 S.E.2d 514 (Ct. App. 1991). Unlike the instant case where death actually occurred, Heck upheld the fact that a BB gun which was capable of producing great bodily harm was used in a robbery was adequate to support an armed robbery conviction.

to her death support the verdict. As to the physical torture, the heightened level of pain associated with the numerous assaults prior to death support the verdict. As to the burglary, the early morning entry without consent to steal money and commit other acts while armed with a stick, supports the verdict.⁴

First, because the statutory aggravation circumstance was properly submitted to the jury, there is no requirement to address the Tuggle issue. Accord, State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000). Further, the independent support for the unchallenged statutory aggravating circumstances support the verdict. Accord, State v. Elkins, 312 S.C. 541, 545, 436 S.E.2d 178, 180 (1993); State v. Ard, 332 S.C. 370, 505 S.C. 328 (1998)(failure of one factor does not require reversal where there remains another valid factor upon which the death sentence is based. Here, like Stephens, the evidence the jury considered in reaching its decision on death was unaffected by the claim against the robbery instruction.

Further Tuggle has not applicability to this situation. Whether a death sentence may be upheld on the basis of a valid aggravator was found to be invalid. Tuggle, 516 U.S. at 12-14. Unless the invalid aggravator was based upon inadmissible evidence or the defendant was precluded from adducing relevant mitigating evidence, the valid aggravator will support the sentence. Id. Neither of those exceptions apply here. His death sentence must be upheld. Accord, Smith v. Moore, 137 F. 3d 808, 815-817 (4th Cir. 1998).

⁴ Evidence in the penalty phase is summarized in Argument IV.

IV. The Eighth Amendment and Due Process Clause does not mandate that a jury be made aware that the defendant's cousin felt remorse or sorrow for the victim where it did not rebut the victim impact evidence nor present relevant evidence in mitigation.

In Payne v. Tennessee, 501 U.S. 808 (1991), the Court held that evidence about the victim and the impact of the murder on the victim's family is relevant to the jury's sentencing decision. However, Payne also held that the admission of the victim's family members characterization and opinions about the crime, the defendant and the appropriate sentence violates the Eighth Amendment. Payne, 501 U.S. 830, n.2. Although Simmons' family and friends on the defendant's behalf were able to fully present evidence about the background and character of the defendant, as well as their express opinion that his life should be spared,⁵ he contends that he should have been able to show more fully that his cousin felt pain and sorrow also for the victim's death because he knew her also. As stated more fully below, the prosecution's objection to this testimony was based upon the fact that Linning's "personal feelings about what occurred...is highly irrelevant." R. p. 2209. Respondents submit that a new sentencing hearing is not warranted where the trial judge did not abuse his discretion in sustaining the objection.

The Appellant contends that he should have been entitled to show the jury that his cousin, Calvin Linning, Sr., was "hurt" by the death of Lilly Bell Boyd since he was close to her. Initial Brief of Appellant, p. 45. He concedes that he was not attempting to rebut the state's victim impact evidence that she was a bade person or that she contributed to her death. He contends the jury was entitled to consider apparently under the Eighth Amendment that a cousin knew the

⁵ But see, State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988)(improper for defense witness to present opinion the jury should reach).

victim personally, that the victim and the cousin's family were close, and that it was painful when they discovered about her death. R. p. 2209, ll. 8-25. He contends that the fact that Linning [and Appellant's family] also suffered because of Boyd/s death "was a fair response to the state's victim impact evidence." Initial Brief of Appellant, p. 44-45.

The Appellant contends, apparently under the Due Process Clause, citing Skipper v. South Carolina, 474 U.S. 1 (1986), that even if the hurt of the Linning family was not initially relevant, it was relevant in rebuttal or to meet the state's evidence. Initial Brief of Appellant, p. 47.

A. Standard of Review on the Admission of Evidence and Victim Impact Evidence

Generally, evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rules 401, 402, SCRE. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). Even if evidence is relevant, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value. Rule 403, SCRE; State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). A trial judge has considerable latitude in ruling on the admissibility of evidence and his decision will not be disturbed absent prejudicial abuse of discretion. State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995). State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992)(holding the admissibility of evidence with little probative value was harmless where it did not affect the outcome of the trial), cert. denied, 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993). All relevant evidence is admissible. Rule 402, SCRE. "Evidence which is not relevant is not admissible. Id.

The exclusion of the evidence may be harmless because the video was cumulative to other evidence and no prejudice resulted from its exclusion. State v. Weaverling, 337 S.C. 460, 473, 523 S.E.2d 787, 793-94 (Ct. App.1999). State v. Brown, 344 S.C. 302, 309, 543 S.E.2d 568, 572 (Ct. App. 2001). State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000)(There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted.). State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)(Error in exclusion of evidence is not prejudicial where its effect would have been merely cumulative.) See State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989)(Exclusion of proffered sur-reply testimony of defense witness, a clinical psychologist, who would have testified that not all inmates classified in aggressive category were necessarily aggressive was not reversible error; proffered evidence was merely cumulative to testimony elicited on cross-examination.)

Even if the evidence was not relevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial. State v. Davis, *supra*; State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991), cert. denied, 503 U.S. 993, 112 S.Ct.1691, 118 L.Ed.2d 404 (1992).

During sentencing phase of capital murder trial, a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, but may not present witnesses to testify merely to their religious or philosophical attitudes about death penalty, and is not entitled to present opinion of witness about what verdict jury "ought" to reach. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988), the court held the prohibiting defense counsel from asking members of defendant's family which sentence they thought defendant should receive and what effect imposition of death penalty on defendant would have on them was not error during sentencing

phase of capital murder prosecution.

Victim impact evidence is admissible in the sentencing phase to demonstrate the "uniqueness" of the victim and the specific harm committed by the defendant. State v. Rocheville, 310 S.C. 20, 27, 425 S.E.2d 32, 36 (1993). In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court held that victim impact evidence is relevant for a jury to meaningfully assess the defendant's moral culpability and blameworthiness and is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair. See also State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991).

Victim impact evidence in a capital case may be introduced to show the specific harm committed by appellant in murdering the victim. This testimony is relevant for the jury to meaningfully assess appellant's moral culpability and blameworthiness and not so unduly prejudicial as to render appellant's trial fundamentally unfair. This Court has generally held the victim impact evidence did not violate appellant's rights under the Eighth Amendment or Fourteenth Amendment Due Process Clause. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)(Eighth Amendment did not establish a per se bar prohibiting the jury from considering or the solicitor from arguing victim impact); See State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997)(admitting testimony from victim's mother concerning the impact of her son's death); Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994), cert. denied, 513 U.S. 1003, 115 S.Ct. 518, 130 L.Ed.2d 424 (testimony by victim's stepdaughter as to victim's standing in community, victim's grandchildren, and impact of the murder on the witness was proper); State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993), cert. denied, 508 U.S. 978, 113 S.Ct. 2978, 125 L.Ed.2d 675, reh. denied, 509 U.S. 942, 114 S.Ct. 21, 125 L.Ed.2d 772 (parents' testimony about their families' reliance on their murdered sons and their sons' dreams and aspirations was proper); Lucas v.

Evatt, 308 S.C. 31, 416 S.E.2d 646 (1992); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991), cert. denied, 503 U.S. 993, 112 S.Ct. 1691, 118 L.Ed.2d 404 (1992). See, e.g., State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997)(victim's sister's testimony about the effect of the victim's death upon herself and the victim's three children was relevant for the jury to meaningfully assess appellant's moral culpability and blameworthiness); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57, cert. denied, 520 U.S. 1277, 117 S.Ct. 2460, 138 L.Ed.2d 217 (1997)(Victim impact testimony and testimony of victim's standing in community did not prevent fair sentencing for defendant convicted of murder; testimony from victim's wife and son about kind of person that victim was and impact that his death had on their family was permissible.)

In State v. Southerland, 447 S.E.2d 862, 867 (S.C. 1994), the Court held that a capital murder defendant has no Eighth Amendment right to present evidence of victim's bad character. In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the Supreme Court held that the Eighth Amendment does not bar the State from offering or the jury from considering evidence of the good character of the victim in the jury's assessment of the defendant's moral culpability for the death of the victim. Payne, however, did not hold or suggest that the Eighth Amendment grants a defendant the right to present evidence of the victim's bad character. See, e.g., United States v. Beckford, 962 F.Supp. 804, 822 (E.D. Va. 1997)("Payne cannot be read to sanction a defense argument that a defendant is undeserving of the death penalty simply because his victim was a drug dealer."); People v. Frye, 959 P.2d 183, 208 n.1 (Cal. 1998) (denying due process claim based on trial court's refusal of defendant's request to "rebut" impact evidence); Barnes v. State, 496 S.E.2d 674, 689 (Ga. 1998)(barring evidence of victim's "bad character" at sentencing); Grandison v. State, 670 A.2d 398, 412 (Md. 1995)(denying defendant right to cross-examine wife of victim regarding her alleged emotional

devastation and her civil suit against the government, the latter implying a financial motive with respect to the underlying prosecution); State v. Hurley, 876 S.W.2d 57, 67 (Tenn. 1993)(upholding denial of defendant's request to introduce evidence regarding decedent's solicitation of prostitute); Goff v. State, 931 S.W.2d 537, 556 (Tex. Crim. App. 1996)(upholding denial of defendant's request to introduce "reciprocal" character evidence, in this instance that the victim was a "fag"). The Louisiana Supreme Court has stated that impact evidence may include the "personal qualities of the victim," but defendants cannot proffer "lack of worth" unless the State first puts on evidence of the "victim's worth." State v. Cooks, 720 So. 2d 637, 645 n.6 (La. 1998).

In Oklahoma, Conover v. State, 933 P.2d 904 (Okla. Crim. App. 1997), presented unusual facts on this point. The trial court in Conover permitted the defendant to cross-examine the State's impact witnesses, except as to the victim's illegal drug use. The defendant also unsuccessfully sought to introduce the testimony of a police officer who found drugs in the victim's home at the time of the murder. The Oklahoma Court of Criminal Appeals held the exclusions to be prejudicial error concluding that the information was "relevant in giving the jury a complete picture of the entire crime...providing a 'quick glimpse of the life' the defendant 'chose to extinguish.'" Id. at 922 (quoting Payne, 501 U.S. at 822).

B. How the Issue was Raised Below

a) The State's Case on Victim Impact Evidence

In his opening statement to the jury in the penalty phase, Solicitor Bailey announced that he would present victim impact evidence about the impact of the death of 89 year old Lilly Bell Boyd. R. p. 2140.

During the hearing, the prosecution stated that it would seek to show the existence of the

statutory aggravating factors that it had proven in the earlier phase: armed robbery, kidnapping, criminal sexual conduct, and burglary. R. p. 2138-40. He further declared he would seek to show a fifth circumstance - physical torture. He stated the jury would also learn about the character of Simmons and his criminal record. He stated he would present victim impact evidence:

Y'all are going [to] get to know Lilly Bell Boyd to the extent that you can know somebody who is dead. And the only way that I can present her to you is by a photograph and by testimony of family members that were close to her. And they'll tell you all about the kind of person she was and what her loss meant to them.

R. p. 2140, ll. 11-22.

Kathleen Gilliard, the victim's sister, testified that the victim was the oldest of seven children. Although she did not have all the schooling she wanted, she described her sister as self-taught and loved to read. She said her sister did domestic work and had tried to be a nurse's aide when she was younger. She had married once but did not have children. She said her sister had put bars on the doors and windows because someone had broken into her house once. R. p. 2145. She lived about one-quarter of a block from her sister and saw her about every day. She described her as a nice, quiet person, hardworking, but frail. R. p. 2145. She stated she learned of her sister's death after she noticed she did not attend church and later heard the ambulance from her home. She went to the house, but the police would not let her in. R. p. 2148. She stated she realized then because someone said she was found on the floor. The prosecutor then asked the following:

Q. Mrs. Gilliard, could you tell [the] jury, please, how Mrs. Boyd's death has affected you?

A. It [has] affected me in a lot of ways, in more ways than one. You know, *it was very painful that I have to look over there every day and see what she worked for and try to live so hard to take care of herself; and for somebody to come and just take it from her like that. So it's very painful.*

R. p. 2148, ll. 14-21. (Emphasis added). She further testified that her sister's death ha affected her because it has helped her to be more cautious and careful than she was before. R. p. 2149. She stated that one of the most difficult things about her death that she has had to deal with is "just seeing she's not there", that she had worked so hard to keep from welfare or begging anyone and then in the last minute it was taken from her. She testified that she thought of the victim "all the time." R. p. 2149.

Virginia Wilson, the youngest sister of the victim, testified that she was like a mother to her.⁶ Her home was about 1/4 mile from Mrs. Boyd's home and she visited her at least twice a week. She described her older sister as "like a mother to me [R. p. 2151, l. 20], soft, gentle like, hardworking and willing to share...a self-help person." R. p. 2152. She described Mrs. Boyd raising chickens in her yard and she would sell some eggs and gave them to the homeless shelter. R. p. 2153-54. Her nickname, "Birdie" came from a description of her legs during her youth. R. p. 2154. She described finding her sister on the kitchen floor tied up, bound, and gagged and slowly realizing that she was dead. R. p. 2155. She described this as "devastating" and "overwhelming". R. p. 2155-56. She described the loss as difficult to adjust to because of the fact that she cannot call her sister when she leaves or returns as she had done in the past. She stated her death was hard and when she wakes up in the morning it is the first thing she thinks

⁶ Mrs. Wilson had also testified in the guilt phase. R. p. 1083-1105.

about. R. p. 2157. A photograph of the victim from the church directory was identified and published. State Exhibit 9. R. p. 2157-58.

Officer Ron Manchester testified about the photographs he took at Mrs. Boyd's home on September 1, 1996. R. p. 2159. A videotape, State Exhibit 3, was played to the jury while Officer Manchester narrated about the front of the house, the entry with the locked door, the location of a footprint near the back of the dirt area to the chicken coupe. R. p. 2161. Furthermore, he pointed out the stocking used to tie Mrs. Boyd's hands behind her back, the black rope used to tie her feet, and the other material then used by the victim's family to clean up the blood. R. p. 2161. State Exhibit 4, 5, and 6 were a photograph of the victim's body prior to removal to the autopsy on September 1, 1996. R. p. 2162-63.

Gladys Suddeth knew Mrs. Boyd for 25 years. R. p. 2164. She described Mrs. Boyd's garden full of vegetables, trees, and flowers. She stated Mrs. Boyd took pride in her garden and she canned and shared them with friends and neighbors. R. p. 2165-66. She also described her as a good hostess, but a quiet person. One time, though, Mrs. Boyd put out a fire at Mrs. Suddeth's home. R. p. 2167. She stated that she saw the victim the Thursday before the accident. R. p. 2167. She was shocked by the murder. R. p. 2168. She stated Mrs. Boyd's death had made her cautious and now have someone come inside her home with her to check to see if anyone was there. R. p. 2168. She spoke at the funeral because she was "my good friend" and she misses her. R. p. 2169.

Dr. Clay Nichols, the pathologist, testified about the blows to the victim's head and that she was alive when she received the blows and that they would be "very painful" and a 7 to 8 on a 10 point pain scale. R. p. 2172-73. He observed Mrs. Boyd's body on the floor at the crime scene. He described the 14 numerous fractured ribs with hemorrhaging indicating she was alive

when they were fractured. He opined that not only was it painful when fractured, but also during each time she attempted to breathe. In addition, the hyoid bone on the neck was fractured indicating that she was manually strangled. R. p. 2175-76. Until the time she lost consciousness, it would have been "very painful", a 9 or 10. R. p. 2177.

Dr. Nichols also opined that she was alive during the forcible sexual assault when 1/3 to 1/4 of the vaginal cavity was hemorrhagic. He described her injuries as the "second worse case of vaginal trauma I have ever seen." R. p. 2178. He opined that the sexual assault would also have been painful and that something other than a penis was also inserted into the vagina to cause the injuries. Semen was present on oral swabs from the victim. R. p. 2179, ll. 21-24.

Jessie Mae Wilson, another sister, was the ninth child in the victim's family. R. p. 2181. She lived within 2 miles of the victim. She saw her 3 to 4 times each week and would go to the Senior Citizens Center with her to do crafts, songs, and other games. R. p. 2182. She described her sister as a quiet loving person who was hardworking and kept to herself a lot. R. p. 2183. She saw her the Friday before Mrs. Boyd's death and planned to see her at church on Sunday. R. p. 2183-84.

Q. Okay. Mrs. Wilson, how has your sister's death affected your life?

A. It's affected it a whole lot all around me; the idea of the terrible way, the awful way that she got killed. And then it made me very cautious of going out at night and coming back in. Like I said, coming back in the house at nighttime by myself. And I used to have sliding glass doors. And I've shortly had that re-did over. There's a regular door put there instead of a sliding glass door because I was afraid of that. And I'm just very timid now looking around and seeing what happened. And

I'm afraid to go out at night and come back in the nighttime.

Q. Do you think of her often?

A. Pardon?

Q. Do you think of [her] often?

A. All the time.

Q. Are there any times like holidays *that are harder* than other times?

A. *Yes; mostly the holidays.* For a long time I was still hoping that I would wake up and find it wasn't true, but that didn't happen.

Q. You wish it wasn't true; and then you realize that it was?

A. Yes, sir.

Q. Is it getting any easier to handle as time goes on?

A. Well, somewhat, you know; but sometimes it just feels like it will never leave me. But, you know, it's getting where I'm used to it. But it's hard. I don't know. It will probably would get a little better. *But it seems to me like I'm never going to get over it.*

Q. Mrs. Wilson, that's all I have. Thank you.

R. p. 2184, l. 17 - 2185, l. 25. (Emphasis added). The state rested its case in the penalty phase.⁷

b) The Defense Case on Victim Impact Evidence

⁷ The state also presented a summary of Simmons' criminal history including "failure to obey a lawful order (1981), disorderly conduct (1981), trespassing (1981), receiving stolen goods (1991), failure to return rented objects (1991), criminal domestic violence (1997), shoplifting (1997)"

The defense stated that it intended to put into evidence information about Simmons from February 11, 1961 until the fateful day from people in the community that knew him and can't comprehend the event. Counsel James Bell described him as a man who went through school and played football and had children. He stated he had a problem, but he was not a vicious man. R. p. 2200-01.

The defense's first witness in mitigation was Calvin Linning, Sr., a 58 year old retired teacher who is the Appellant's first cousin. R. p. 2202-03. He testified about the Appellant's family tree and that Kenneth was Eugene Simmons 16th child from three marriages. He described Simmons as a super star football player in high school in Summerville, highly respectable, quiet, and highly respectful of others. R. p. 2205. He did volunteer work in church. He stated Simmons had a number of role models in church that were important including several teachers, ministers, a barber, a doctor, a law student, a banker, a nurse, and a publisher, among others. R. p. 2205-07. While teaching, Linning learned that Kenneth was a respectful well disciplined young man who regularly attended church. R. p. 2208.

Linning stated he had never known him to be violent or a discipline problem. R. p. 2208. He stated Simmons has two sons at Summerville High School who are also quiet and reserved. The following occurred on direct examination of Linning:

- Q. Have you got anything else that you could add that you would like to tell this jury?
- A. It's awfully hard for me to be up here today because I'm certainly nervous *because we know Sister Lilly Bell Boyd personally*. I grew up in the Church of God in Summerville. *And Sister Boyd and my family was real close*. We would take her to the state youth convention year after year. My brother is the one that taught her

how to drive. And my niece was real close to Sister Boyd. She had a real close relationship with her. *And it was real painful when we discovered about her—.*

MR. BAILEY: I'm going to object to this. I have no objection whatsoever to this man testifying about Mr. Simmons and all that; but about his personal feelings about what occurred, I think is highly irrelevant.

R. p. 2209, ll. 8-25. (Emphasis added).

The judge sustained the solicitor's relevance objection. R. p. 2209, l. 25. Linning then testified Appellant was like a son to him and hated for him to be in this situation. R. p. 2210.

The following then occurred with Linning:

Q. And would you like him to receive life imprisonment and not receive the death penalty?

A. If Kenneth were my son and he was accused of this particular crime, then I would want my son to be able to *reflect year after year after year what has happened, you know the hurt—*

MR. BAILEY: Your Honor, I think he's going too far. I think he's answered Mr. Bell's question.

Q. And your answer to that would be yes?

A. Yes, I would want him to receive life, not the death penalty....

R. p. 2211, ll. 3-14. (Emphasis added).

Linning also testified that the Appellant and his younger sister, Annette, took care of his father after his mother passed away in 1988. R. p. 2211-12.

On cross-examination, Linning noted that the last time he had significant contact with Simmons was when he was still in high school. R. p. 2215:

Charlie Wilson, a 58 year former teacher, said he knew Simmons from knowing the family growing up on the same street. He found him as a teenager to be young, energetic, and well-mannered. R. p. 2217-18. He never knew him to get into trouble. While he was in high school, Simmons' mother died and he and his sister took care of his father until he passed away. R. p. 2218. He stated he had seen Kenneth in recent years periodically. He had always known him to be respectful, not to abuse authority and "by no means" a violent person. R. p. 2220. The Simmons' family was also a close knit family. He stated that Kenneth was a good fellow, has always been a good fellow and "he would have some positive impact on someone's life if given the opportunity to live." R. p. 2223, ll. 9-14.

Gene Alex Simmons, Simmons' 39 year old brother, testified that Simmons did not cause problems in school. He described his mother's death in 1978 from sugar diabetes, and the Appellant's closeness to his mother. After her death he found that Kenneth stayed to himself. R. p. 2232-33. He stated Simmons got good grades, but was in sixth and seventh grade English classes with the other football players. R. p. 2233-34. He found that Simmons got into arguments, but not fights and was not violent. R. p. 2235. He said Kenneth loved his father and was the closest to him. He also said Kenneth loves his two children, but after he got into trouble his wife split up from him and his oldest son had his life torn apart and hardly sees him. R. p. 2236. He felt Simmons downfall began after his mother died. After his father died, he got married. Then he started to do drugs and alcohol and it went downhill. R. p. 2237. When Simmons got arrested, he felt shock and disappointment for his kids and it tore his family up because of the seniors in the area. R. p. 2238-39.

Gene Simmons testified he still loved his brother and would do anything to save his life. R. p. 2239. Hopefully, if he's locked up for the rest of his life, the Appellant would be able to

speak to his son to avoid the situation he is into. He noted that it was difficult for his sons and other family members to be in court and it was hard on them with the guilty verdict. "It would be more tragic for the verdict saying give him the death would be much more harder on us." R. p. 2240. He said he wanted the jury to give him life. He asked the jury to spare his life "to teach both his sons for a better life" and "so he cannot let another generation of my family go down the same trail he went." R. p. 2241. On cross-examination, the prosecution developed that he had visited the Appellant only twice since December 1997 and his son had only seen him once in the last year. R. p. 2241-42.

Annette Geddis, the Appellant's youngest sister, testified that she loved her brother and it hurt to hear he was arrested for this. R. p. 2243-44, 2246. He was not in trouble or fights in school and her parents did not have to discipline him. R. p. 2244-45. She asked the jury to not put her brother to death. She said to save his life because his two children and her two children looked up to him. R. p. 2246-47.

Annette described his care for their bedridden father included bathing him and feeding him. R. p. 2248. She said he always treated older people with respect and was not mean towards them. R. p. 2249.

Sandra Franklin, a hospice volunteer with her husband at Palmetto House, a homeless shelter, testified that had known Simmons for eight (8) years when he was taking advantage of the meals or telephone. She stated she liked him immediately and he seemed gentle and helpful around the facility. R. p. 2254. She found him to be a caring, honest sensitive person, who helped wash dishes and take out trash, and cleaned the shelter. R. p. 2254-55. She said she loved Simmons and trusted him. She felt his life was worth saving, that he was a Christian, and could help someone else. R. p. 2256, 2259. She never saw him show any propensity toward

violence. R. p. 2257. She stated she visited him in jail and he had not been violent there. R. p. 2257-58. She was in disbelief that he could commit an act like this. R. p. 2259. When asked if there was anything to tell the jury, she stated:

Please spare Kenneth's life. I HAVE UTMOST SYMPATHY FOR THE BOYDS, but the death penalty won't bring her back.

R. p. 2261, ll. 11-13 (emphasis added). No objection was made by the state to this testimony.

On cross-examination, she stated she had seen Simmons for 8 years and that he continues to be the same general caring person. R. p. 2262.

Robin Schmiedling testified that she had known Simmons since high school where he was one of the good guys. R. p. 2265-66. Simmons was not hostile or violent in school. She said she lost touch with him after high school until she saw him at the homeless shelter where she volunteered. R. p. 2269-70. The Appellant then started doing yard work for her. R. p. 2271. He also kept her children while he was there if she had to get food. R. p. 2273. She also stated he ate with them on occasion until 1997. She also described the work he did at the shelter. R. p. 2275-76. She stated she wanted his life spared because she loves him and believes that by sparing his life, "we can help save young Kenneth's life." R. p. 2276.

Doris Russell, the manager of Palmetto House since 1991, described the 24 hour homeless shelter. R. p. 2277-78. She stated she met Kenneth around 1992-93 when he came in for meals. R. p. 2279. She found him to be a quiet person who loves to joke and play around. R. p. 2279. She described the numerous jobs he would help with at the shelter. R. p. 2279-80, 2283-84. She said he had always been the same person, never disrespectful and like one of my sons. R. p. 2280. She said she had also had Kenneth work at her house and help mow the lawn and other things. R. p. 2282. She stated he could still paint at the shelter. R. p. 2281.

Mrs. Russell stated that after September 1996 (when the incident occurred), Kenneth was at the shelter and at her home doing things until he left (got arrested) October 1997. She described the fact that Kenneth knew Mrs. Boyd:

Mrs. Boyd [the decedent] use to come to the shelter to pick up bread for a lady named Mrs. Noland. And sometimes she would try to get enough bread to carry, and she couldn't make it out the door. And Kenneth [appellant], mainly, and another young man that's not there any more; they would take the bread and carry it and put it in her car to keep her from trying to go down there because they said who built the house put the steps too short. And I'm living witness of it because I fell out the door. And they would take her bread and stuff that she would pick for Mrs. Noland and take it to her car and put it in her car. And that's more time than once that he has done that for her to my knowledge.

R. p. 2282, l. 12 - 2283, l. 1. Mrs. Russell further stated that he treated elderly people in the same way.

She stated his life was worth sparing and Kenneth might be able to save others. R. p. 2283. She stated the Kenneth that she knew was different - lovable, kind, and nothing that he wouldn't do for anybody. R. p. 2284. She said that putting Kenneth to death would have her heart sadden. R. p. 2284-85.

On cross-examination, Mrs. Russell stated that Kenneth has never changed and he did not act any different the Monday after the incident when she saw him at the shelter. R. p. 2285-86. She also stated he had not changed in jail. R. p. 2286.

She re-affirmed that Mrs. Boyd had been to the shelter to get bread to carry it to other people. R. p. 2286-87. She said Simmons helped her load bread into her car about one year before the incident. R. p. 2287. She described Mrs. Boyd as quiet on that date, but Simmons

acted like he knew her. R. p. 2287, ll. 17-23.

During the penalty phase closing arguments, Kenneth Simmons made a personal statement. He apologized and said he knew what he did was wrong. R. p. 2347, ll. 3-7, 21 - p. 2348, l. 11.⁸

In the prosecution closing argument, Solicitor Bailey anticipated the defense closing argument about the community knowledge of Simmons as a great and peaceful fellow. R. p. 2331-32. He asserted that the defense may play the blame game. However, he noted that the defense witnesses from his family were nice people that he felt sorry for, but it does not make sense to give him a life sentence just because there were people who asked for it for him. R. p. 2332-34. He asked the jury to not forget "who the victim is in the case" and that Simmons' family, although "we can feel for them" are not the victims here. R. p. 2334-35.

C. Analysis

Contrary to the assertions of the Appellant, neither the Eighth Amendment nor Due Process Clause require that the jury be informed of a capital defendant's family's feelings toward

⁸ In the guilt phase of the trial, the defense also put into evidence information used in mitigation. Dr. Michael Foxworth, a psychiatrist, opined that he was mentally retarded basically with a history of drug and alcohol abuse. R. p. 1521-23. He opined that he suffered from an "alcohol related persisting dementia which includes amnesia." R. p. 1526-27. Clinical psychologist Barton Saylor testified Simmons functioned at a "mentally deficient" range. R. p. 1606. He also felt he was deficient in his understanding of Miranda. R. p. 1608. Dr. Thomas Behrmann, a psychiatrist, opined he had "poly-substance dependance, a provisional diagnosis of mental retardation. R. p. 1673-76. Dr. Jeffrey Vidic, a clinical psychologist, opined that Simmons did not try to malingering on the intelligence tests. R. p. 1688. Dr. Leslie Sandler, a psychological examiner from the Department of Disabilities and Special Needs, opined that Simmons tested above the mental retardation level and did not show deficits in adaptive behavior. R. p. 1739. She opined that he was not mentally retarded. R. p. 1740. Further, she opined he was not being truthful about his inability to comprehend Miranda warnings. R. p. 1743. Dr. Randy Waid opined that Simmons had diminished mental capacity due to his poly-substance abuse lifestyle. R. p. 1879-81, 1883.

the victim. First, such evidence does not meet the standards of relevancy because it is not the characteristic of the defendant or circumstances of the crime. This proffered evidence does not reveal any personal remorse that Appellant Kenneth Simmons has for the crime. In fact, it reveals nothing about Simmons at all. Instead, it attempts to suggest that there were people in Simmons family, albeit his cousin who knew Mrs. Boyd and was close to Mrs. Boyd (evidence that was admitted without objection), should be entitled to also describe their feelings for the victim's death. The Eighth Amendment does not require this and this Court need not enter that breach upon this record.

The Appellant mistakenly relies upon State v. Southerland, 316 S.C. 377, 386, 447 S.E.2d 862, 867 (1994) for the proposition that he was entitled to put in evidence that the defendant's cousin suffered pain from the victim's death. He misreads Southerland. This Court, therein, stated Payne v. Tennessee stood for the general proposition that "a defendant may rebut victim impact evidence offered by the state, and the Due Process Clause of the Fourteenth Amendment prohibits the use of victim impact evidence which is so unduly prejudiced that it renders the trial fundamentally unfair. In Southerland, however, the defendant sought to affirmatively present evidence of the victim's bad character when the state had not presented evidence of the victim's good character. In this case, the Appellant sought to introduce evidence from his cousin, Calvin Linning, who knew the victim, that was real painful to him when he learned about her death. R. p. 2209. This evidence does not rebut the victim impact evidence in any manner because it does not challenge to state's proof about the type of person she was. It merely corroborated evidence from the friends and neighbors of the victim who also felt pain and sorrow from her death. See R. p. 2148, 2155-56, 2167-69, 2182-85.

Further, the Appellant was not prevented from placing into evidence that a friend of the

Appellant's had sympathy for the victim. Annette Geddis, a friend of Appellant, asked for the jury to spare Kenneth's life, but also stated she had utmost sympathy for the Boyds. R. p. 2261. Most importantly, in his personal plea in his own closing statement, Simmons made a personal apology. R. p. 2347-48.

As the record reveals significant information about Kenneth Simmons was admitted which portrayed him as a helping and caring individual, who had even helped the victim on occasion at the homeless shelter. Under Payne and the Eighth Amendment, it was appropriate for the jury to have a brief glimpse of the victim's background and unique loss she was to her family. Similarly, it was appropriate for the jury to learn about the character of the defendant and his own sense of remorse and responsibility. However, whether the defendant's family felt remorse for the victim also, while a kind and an appropriate response for the vicious crime by law-abiding citizens that all of society should share, was no more relevant to the jury's decision that if the cousin did not feel remorse for the victim. The trial judge did not abuse his discretion in sustaining the prosecution's objection about Calvin Linning's personal feelings about what occurred. R. p. 2209.

Similarly, since this evidence from Linning did not rebut the state's evidence in the victim impact presentation, due process similarly did not mandate its admission. Compare, Skipper v. S.C., 476 U.S. 1 (1986). Here, there was no false dilemma where the jury was given true facts about the character of Mrs. Boyd. To the extent there was a proffer, it was consistent with the presentation. There was no error in its omission.

CONCLUSION

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

Respectfully submitted,

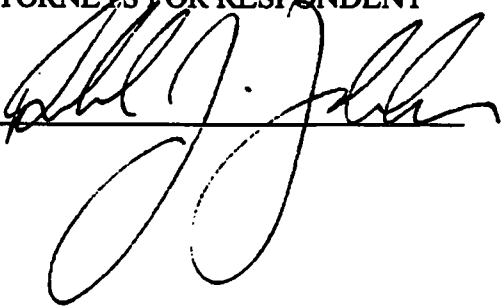
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ATTORNEYS FOR RESPONDENT

By: 

Columbia, South Carolina
May 7, 2002

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

**Appeal from Dorchester County
Rodney A. Peeples, Circuit Court Judge**

THE STATE,

Respondent,

v.

KENNETH SIMMONS,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with
SCACR 210(b).



DONALD J. ZELENKA

May 7, 2002

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Rodney A. Peeples, Circuit Court Judge

THE STATE,

Respondent,

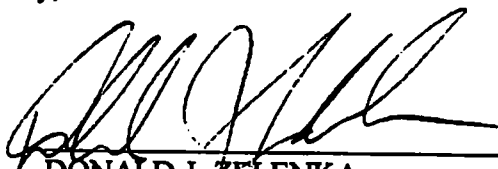
v.

KENNETH SIMMONS,

Appellant.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Final Brief of Respondent* and *Designation of Matter* in the foregoing by depositing two in the mail to Daniel T. Stacey, Chief Attorney, South Carolina Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, South Carolina 29201 this 7th day of May, 2002.



DONALD J. ZELENA

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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH SIMMONS,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

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ARGUMENT IN REPLY

The state contends that Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634 (1986), does not apply unless the state seeks to use evidence of post-Miranda silence against a defendant who is claiming he is not guilty by reason of insanity. Respondent's Brief at 14. This argument completely ignores the policy reason behind the Court's prohibition against the sort of blatant exploitation of a defendant's exercise of a constitutional right that occurred in appellant's case.

In Greenfield, the United States Supreme Court stated that the purpose of this prohibition is to remedy the fundamental unfairness that arises when the state is allowed to benefit from the breach of its implicit promise that any exercise of constitutional rights will not be penalized and then is allowed to use "the defendant's exercise of those rights in obtaining a conviction." Id., at 292, 106 S.Ct. at 639. Here, the state sought to use appellant's invocation of his right to remain silent to obtain a conviction by proving appellant made a confession, which appellant in turn claimed was not voluntary. The policy reason of Greenfield applies whether the exercise of the right is used as substantive proof of guilt, to defeat a claim of insanity, or to defeat a claim that constitutional rights were not voluntarily waived. The wrong to be remedied by the rule is the breach of the promise and the unfairness that results from such a breach.

The state claims that the evidence was not being used to "penalize his silence or invocation" but was merely to "address the narrow forensic question that was at issue -- his ability to comprehend Miranda warnings -- an issue for the jury to consider and resolve." Respondent's Brief at 9. However, Greenfield does not require a showing that the state's purpose was to penalize the defendant. If the invocation is used to substantiate the state's

position adverse to the defendant's, then the defendant has been penalized. The penalty occurs regardless of the stated purpose or motive for using the invocation of the right.

The state contends appellant's reliance on State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986) is also misplaced. Resp. Brief at 14. In Smith, as in Greenfield, the defense presented psychiatric testimony that at the time of the crime he was legally insane and thus unable to distinguish moral or legal right from moral or legal wrong. Id. at 394, 350 S.E.2d at 924. During cross-examination, the solicitor asked the psychiatrist whether he was aware that appellant refused to make a statement to police officers. Id. This Court stated the "solicitor's question was obviously intended to focus the jury's attention on appellant's post-arrest silence as substantive evidence of his sanity, and was therefore improper." Id. The state contends that "the use here of the actions of [appellant] does not raise the same concern." Resp. Brief at 14.

However, Greenfield, Smith, and appellant's case raise the exact same concerns. No meaningful distinction can be made. In each case, the effect is that the defendant is penalized for exercising a right after being implicitly promised that he would not be penalized.

The state argues that otherwise "irrelevant or incompetent" evidence may be introduced when the defense "opens the door." Respondent's Brief at 8. This is a bogus claim. Nonetheless, the state's contention that appellant "opened the door" by raising the issue of the voluntariness of his waiver also ignores the facts of Greenfield and Smith.

In Greenfield, the defense technically "opened the door" to any impeachment of the defendant's claim of insanity by raising insanity as a defense. The defense presented two psychiatrists who expressed the opinion that the defendant was a paranoid

schizophrenic who had been unable to distinguish right from wrong at the time of the alleged offense. Id. at 287, 106 S.Ct. at 636. Despite the fact that the defense had raised the issue of insanity, the United States Supreme Court would not allow the state to use his post-arrest silence against him. Likewise, in Smith, supra, the defendant also technically "opened the door" by relying upon the defense of insanity and this Court nonetheless prohibited the state from exploiting the breach of its promise.

By the same token, regardless of whether the defense raised the issue that appellant did not understand his Miranda rights with Dr. Foxworth's testimony, the state clearly cannot use his invocation of those rights against appellant to obtain a conviction. There is no real distinction between using the exercise of constitutional rights against an appellant who is claiming insanity and one who is claiming that his confession was involuntary. In both cases, the state seeks to create an adverse inference from the defendant's exercise of his rights, without regard to the implicit promise made by the conveying of these rights.

The state cites to United States v. Robinson, 485 U.S. 25, 108 S.Ct. 864 (1988) for the proposition that there are certain times that it is appropriate to hear evidence about a defendant's exercise of a constitutional right. Respondent's Brief at 11. The state's use of the invocation in appellant's case does not fall under the narrow limitation enunciated in Robinson.

In Robinson, defense counsel mentioned several times in his closing argument that the government did not allow the defendant, who did not testify, to explain his side of the story and had unfairly denied him the opportunity to explain his actions. The prosecutor in rebuttal remarked that the defendant "could have taken the stand and

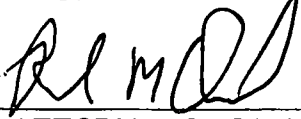
explained to you anything he wanted to. The United States of America has given him, throughout, the opportunity to explain." Id. 108 S.Ct. at 867. The United States Supreme Court held the prosecutor's statements, in light of defense counsel's comments, did not infringe upon the defendant's Fifth Amendment rights. The Court held that those rights are violated when a prosecutor, on his own initiative, asks the jury to draw an adverse inference from a defendant's silence or to treat such silence as substantive evidence of guilt. Id. See also, State v. McClure, 342 S.C. 403, 407, 537 S.E.2d 273, 275 (2000) (distinguishing Robinson and holding the solicitor's comments about lack of remorse were not a fair response to the defense's argument of remorse.)

Robinson provides a very limited exception to the prohibition against reference to the exercise of a defendant's right to remain silent. The prosecutor's comments in Robinson were not to provide substantive proof of guilt, to defeat a claim of insanity, nor to defeat a claim of an involuntary confession. Instead, the government's comments were made to remedy the erroneous belief potentially held by jurors that the state forbade the defendant from testifying -- a misconception created solely by the defense statement implying that the government had barred the accused from taking the stand. This narrow limitation on the general rule consistently reiterated by this Court -- that the state may not comment on the accused's exercise of a constitutional right -- simply does not apply to the facts of appellant's case. The state successfully -- and wrongfully -- exploited appellant's invocation of his constitutional rights. He should be granted a new trial.

Respectfully submitted,

Robert M. Dudek
Assistant Appellate Defender

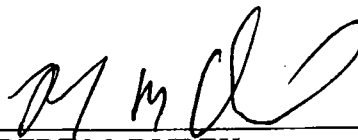
Eleanor Duffy Cleary
Assistant Appellate Defender

By 
ATTORNEYS FOR APPELLANT.

This 7th day of May, 2002.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 210(b), SCACR.



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May 7, 2002

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Rodney A. Peebles, Circuit Court Judge

THE STATE,

RESPONDENT,

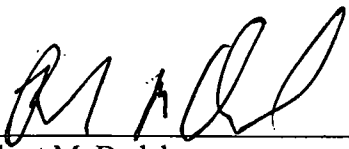
V.

KENNETH SIMMONS,

APPELLANT

CERTIFICATE OF SERVICE

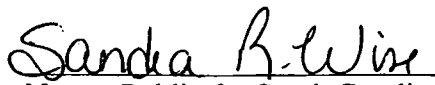
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Jeffrey A. Jacobs, Esquire, this 7th day of May, 2002.



Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 7th day of May, 2002.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: February 3, 2005.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

**ELLIS FRANKLIN, RICKY GEORGE,
LARRY HALL, HERMAN HUGHES,
JOHNNY PEARSON, TED POWERS,
KENNETH SIMMONS, et al.**

Petitioners,

v.

**GARY MAYNARD, Director,
South Carolina Department of
Corrections, and CHARLES M.
CONDON, Attorney General of
South Carolina,**

Respondents.

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION AND STATEMENT OF JURISDICTION

Petitioners, Ricky George, Larry Hall, Herman Hughes, Johnny Pearson, Ted Powers, Kenneth Simmons, et al., pray that this Court grant this petition for writ of certiorari filed in the Court's original jurisdiction. In the wake of the United States Supreme Court's recent decision in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), it is incumbent upon this Court to grant certiorari and establish constitutionally adequate procedures for capital cases where evidence of mental retardation exists. *Atkins*, as this Court is aware, held that the Eighth Amendment to the United States Constitution restricts "the State's power to take the life of a mentally retarded offender." *Id.* at

2252 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). In light of the High Court's constitutional mandate, post-conviction relief courts, trial courts and capital sentencing jurors are in need of procedures to reliably assess a death sentenced inmate's assertion, or a defendant facing a capital charge's assertion, that he is not eligible for the death penalty due to his mental retardation. Because the questions presented in these cases are not only of grave importance, but also are issues which must be resolved in these and other capital cases pending at trial, on direct appeal and in post-conviction proceedings, certiorari is especially appropriate.

This petition is not without precedent. Two decades ago, this Court accepted a case in its original jurisdiction following the United States Supreme Court's ruling in *Woodson v. North Carolina*, 428 U.S. 280 (1976), in order that it might "clarify the law and assure the validity of the sentences imposed, or to be imposed," in the affected cases. *State v. Rodgers, et al.*, 270 S.C. 285, 242, S.E.2d 215, 217 (1978). After the statute under which six capital defendants had been convicted and sentenced to death was found unconstitutional, the Attorney General brought the cases before this Court and requested its guidance as to how to proceed. *Id.* This Court intervened. In light of *Atkins v. Virginia*, it is likewise necessary for this Court to grant certiorari and establish procedures to be utilized in cases where evidence exists that the defendant is mentally retarded. By taking this opportunity to establish the procedures to be followed, this Court will ensure that clear and constitutionally adequate measures will be applied to the affected cases, resulting in valid and reliable determinations of a capital defendant's mental retardation. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (Eighth Amendment requires capital sentencing procedures which do not create a risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty"). The public interest will also be well served if this Court promptly establishes procedures for cases

involving mental retardation, thus avoiding the inconsistencies and potential errors inherent in an *ad hoc* approach to the issues raised by *Atkins*. See *Westside Quik Shop, Inc. v. Steward*, 341 S.C. 297, 300, 534 S.E.2d 270, 271 (2000) (Court accepted video gaming case in original jurisdiction due to the "great public interest in finally determining the matter"); *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) (citing "significant public interest" as basis for original jurisdiction); see also *Jean Hoefer Toal et al., APPELLATE PRACTICE IN SOUTH CAROLINA* 277 (1999) (original jurisdiction is appropriate in cases involving the public interest).¹

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

Petitioners are all either death sentenced inmates, or defendants against whom the State has announced its intention to seek the death penalty. In each of their cases, credible evidence that the petitioner is mentally retarded exists. The evidence of mental retardation in each case is briefly summarized below:²

Ellis Franklin - Defense experts, evaluators at William S. Hall, and his PCR judge have found that Mr. Franklin is mentally retarded. The trial judge charged the mental retardation statutory mitigating circumstance. Mr. Franklin has scored in the mentally retarded range on every IQ test he has ever taken (testing just before his PCR hearing placed his full-scale IQ at 68, and his communications and memory test scores have been in the 40s and 50s). Evidence presented at the PCR hearing showed that Mr. Franklin has the "test age" of a seven year-old. Mr. Franklin is also mentally ill. Mr. Franklin's case is currently pending in state post-conviction proceedings.

¹As the Court did when it prohibited the execution of the insane in *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.* at 2250. After *Ford*, this Court granted certiorari and devised both substantive and procedural rules for courts faced with claims of incompetency to be executed. See *Singleton v. State*, 437 S.E.2d 53 (1993).

²In some of the petitioners' cases, the State did (or may) contest that the individual petitioner is mentally retarded. However, for purposes of the questions presented by these cases, any contrary evidence the State has presented is irrelevant. As will be discussed in more detail below, the critical question is whether there is any credible evidence of mental retardation. And, in each petitioner's case, the answer is undoubtedly yes.

Ricky George - Mr. George was convicted of murder and armed robbery in the Horry County Court of General Sessions, and sentenced to death at a jury trial, in 1994. A post-conviction relief case is pending in Horry County. Psychological testing of Mr. George has shown his full scale IQ to fall within a range of 66-69. At trial, both a psychologist and a psychiatrist testified that Mr. George was mentally retarded. This evidence was not contradicted by the State. Mr. George consistently performed at very low levels in school, despite starting school at an older age, and was socially promoted in several instances. He failed the eighth grade twice, and also failed ninth and tenth grades, and ultimately dropped out of school at age 18. The most recent tests administered by an expert in mental retardation reveal that Mr. George's full scale IQ is 66, and that he has significant limitations in adaptive functioning. The post-conviction relief court stayed the proceedings after the United States Supreme Court granted certiorari to determine whether the Constitution prohibits the death penalty for mentally retarded offenders.

Larry Hall - Defense experts testified at the sentencing phase of Mr. Hall's trial that he is mentally retarded, and that he has the mental age of a nine or ten year-old. His full scale IQ was measured at approximately 72, and there was significant evidence of adaptive functioning difficulties. Defense witnesses, for example, testified that Mr. Hall cannot perform even simple chores such as mowing the lawn or caring for pets without assistance and daily instruction. Mr. Hall was sentenced prior to the adoption of the mental retardation statutory mitigating circumstance. However, his counsel asked the jury to consider Mr. Hall's mental retardation during the closing arguments of the sentencing trial. Additional evidence that Mr. Hall is mentally retarded was presented at the post-conviction relief hearing. Mr. Hall's case is currently pending before this Court.

Herman Hughes - Experts at both Mr. Hughes' trial and PCR hearing testified that he is mentally retarded, based on his IQ scores and problems in adaptive functioning. The trial judge submitted the statutory mitigating circumstance of mental retardation. Mr. Hughes' intellectual impairments have been evident since testing that took place when he was in the second grade. He was placed in learning disabled classes as a result of the second grade test scores, and he failed two grades. He was in a remedial eighth grade class at the time of the offense which resulted in his death sentence. Mr. Hughes also suffers from significant neurological impairments which, according to a defense neuropsychiatrist who testified at the PCR hearing, were likely caused by congenital neurosyphilis. The post-conviction relief court stayed the proceedings after the United States Supreme Court granted certiorari to determine whether the Eighth Amendment prohibits the execution of mentally retarded defendants.

Johnny Ringo Pearson - Mr. Pearson is charged with murder in the Marlboro County Court of General Sessions. He has been detained since 1994, but has never been to trial. He was deemed incompetent to stand trial by state mental health

professionals for approximately five years. Mr. Pearson has been determined to be mentally retarded by a variety of examiners -- including the staff of the South Carolina State hospital -- since he was a child. He consistently performed at a very low level of academic achievement -- he failed the first grade, the sixth grade twice, and the seventh grade, before dropping out of school at the age of 16. He was in Educable Mentally Handicapped classes throughout his school years. The most recent tests administered by a leading expert in mental retardation reveal that Mr. Pearson's full scale IQ is 65. He is also mentally ill. This Court stayed the trial of his case after the Supreme Court granted certiorari to determine whether the Constitution prohibited the death penalty for mentally retarded offenders.

Benji Powers - At trial, evidence was presented indicating that Mr. Powers has an IQ of 69. A neurologist and psychologist testified that Mr. Powers has the "mind of a damaged ten year-old." The evidence at trial also showed that Mr. Powers was consistently categorized as developmentally and emotionally handicapped by the school system, starting when he was in the first grade. As a result of this evidence, the trial judge submitted the statutory mitigating circumstance of mental retardation. Mr. Powers' case is currently pending in state post-conviction proceedings.

Kenneth Simmons - The Chief Psychologist of the Department of Disabilities and Special Needs testified during a pre-trial hearing that Mr. Simmons has a full-scale IQ of 69, classifying him as "functioning in the lower one percent of the overall population." A psychologist called by the defense testified that Mr. Simmons is mentally retarded. The trial judge submitted the statutory mitigating circumstance of mental retardation. Mr. Simmons' case is currently pending on direct appeal.

REASONS THE WRIT SHOULD BE GRANTED

THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *ATKINS V. VIRGINIA* REQUIRES THIS COURT TO ESTABLISH CONSTITUTIONALLY ADEQUATE AND RELIABLE PROCEDURES FOR ASSESSING CLAIMS OF MENTAL RETARDATION.

In *Atkins v. Virginia*, the Supreme Court held that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibits the execution of individuals with mental retardation. Reversing its prior decision in *Penry v. Lynaugh*, 492 U.S. 3003 (1989), the Court concluded that the Constitution "places a substantive restriction on the State's power to take the life' of a mentally

retarded offender.” 122 S.Ct. at 2252.³ After first discussing the Supreme Court’s decision in *Atkins*, petitioners will address the issues which must be resolved by this Court.

A. An Overview of *Atkins*.

The Court first established that a fundamental “precept of justice” is that “punishment for crime should be graduated and proportioned to the offense.” 122 S.Ct. at 2246 (internal citations omitted). The Court made clear that determining whether a punishment is constitutionally excessive or cruel and unusual⁴ is judged by current norms, not by those which existed at the time the Eighth Amendment was ratified. *Id.* at 2247. The core Eighth Amendment concept is the “dignity of man” and thus its constitutional content must be informed by “the evolving standards of decency that mark the progress of a maturing society.” 122 S.Ct. at 2247 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)). The evolving standard, the Court declared, should be informed by “objective factors” to the maximum extent possible, the most reliable evidence of which is found in state legislative enactments and jury verdicts. *Id.* However, the Court adhered to the constitutional principle that “in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

Its course set, the Court first reviewed the lay of the legislative land. The Court was greatly impressed with the fact that at the time of *Penry* only two death penalty states and the federal government proscribed the death penalty for mentally retarded offenders. 122 S.Ct. at 2248.

³Quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

⁴The Court left no doubt that the Eighth Amendment prohibits “all excessive punishments as well as cruel and unusual punishments which may or may not be excessive.” *Id.*

However, since *Penry*, an additional sixteen states had taken death off the punishment table for the mentally retarded. The Court noted that it "is not so much the number of States that is significant, but the consistency of the direction of change." *Id.* at 2249. These enactments, "[g]iven the well-known popularity of anticrime legislation," provided the Court with "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* In its successful search for a national consensus, the Court relied upon the fact that the legislatures passing the laws voted "overwhelmingly in favor of the prohibition." *Id.* The Court also looked to the opinions of social and professional organizations with "germane expertise," such as the American Psychological Association, *id.* at 2249, n. 21, the opposition to the practice by "widely diverse religious organizations," *id.*,⁵ international practice,⁶ and polling data.⁷ *Id.* While "not dispositive" these factors bolstered the Court's opinion there was a consensus opposing the practice "among those that have addressed the issue." *Id.* Finally, the Court also noted that even in those states that retained the death penalty for the mentally retarded, only five had actually carried out the execution of a mentally retarded individual since *Penry*. *Id.* Since the practice had become "truly unusual," it was "fair to say," according to the Court, that "a national consensus has developed against it." *Id.*

The consensus reflected a judgment about the "relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by

⁵The Court noted that representatives of Christian, Jewish, Muslim and Buddhist organizations believed that the execution of persons with mental retardation could not be justified. *Id.*

⁶"[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Id.*

⁷"[P]olling data shows a widespread consensus among Americans, even those that support the death penalty, that executing the mentally retarded is wrong." *Id.*

the death penalty.” 122 S.Ct. at 2250. The Court noted that, due to their impairments, defendants with mental retardation “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to control impulses and to understand the reactions of others.” *Id.* These deficiencies, while not justifying an exemption from criminal liability, do diminish a mentally retarded person’s personal culpability to the extent that neither of the justifications advanced by states in support of the death penalty – retribution and deterrence – would be served by permitting a retarded person’s execution. *Id.* Retribution in the capital context had been limited to ensuring that “only the most deserving of execution are put to death.” 122 S.Ct. at 2252. Since “just desserts” necessarily depends on the culpability of the offender, the most extreme punishment was excessive due to the “lesser culpability of the mentally retarded offender.” *Id.* And, because capital punishment can only serve as a deterrent when a crime is the result of premeditation and deliberation, i.e., when the threat of death will “inhibit criminal actors from carrying out murderous conduct,” no deterrence interests are served. *Id.* This type of calculus, the Court noted, is at the “opposite end of the spectrum” from the behavior of the mentally retarded due to their cognitive and behavioral impairments. *Id.*⁸

In addition to concluding that retaining the death penalty for mentally retarded defendants would not further any legitimate interest in retribution or deterrence, the Court also opined that the reduced capacity of mentally retarded offenders provided a “second justification for a categorical rule making such offenders ineligible for the death penalty.” *Id.* at 2251. Due to their impairments, there were a host of reasons, from the increased risk of false confessions, difficulties in communicating

⁸The Court also concluded that exempting the mentally retarded from capital punishment would not diminish any other deterrent interests associated with the death penalty because those without mental retardation are “not protected by the exemption.” *Id.*

with counsel, and their lesser ability due to limited communication skill to effectively testify on their own behalf or express remorse that, "in the aggregate," carried an unacceptable "risk of wrongful executions" for mentally retarded defendants.⁹ *Id.*

Thus, the Court concluded that its "independent evaluation of the issue reveals no reasons to disagree with the judgment of the legislatures that have . . . concluded that death is not a suitable punishment for a mentally retarded criminal," and thus the Constitution "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

B. Issues to Be Resolved.

Since South Carolina was one of a dwindling number of states that permitted the execution of mentally retarded offenders, there was no mechanism in place at the time of *Atkins* for the adjudication of cases involving mental retardation. Therefore, it is now incumbent on this Court to establish procedures for cases where evidence of mental retardation is presented. Petitioners will address several of the more pressing issues raised by *Atkins* below.

A. What is the Definition of Mental Retardation?

The definition of mental retardation is well established. The American Association of Mental Retardation defines mental retardation as referring to,

[S]ubstantial limitation in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.

⁹*Id.* The Court also noted the danger that a mentally retarded person's demeanor "may create an unwarranted impression of lack of remorse for their crimes" which could enhance the likelihood that the jury will impose the death penalty due to a belief that they pose a future danger. *Id.*

Mental Retardation: Definition, Classification, and Systems of Support 5 (9th ed. 1992). The American Psychiatric Association uses a similar definition. See Diagnostic and Statistical Manual of Mental Disorders-IV- TR at 41. This commonly agreed upon understanding of mental retardation has already been incorporated into the South Carolina death penalty statute. The *Atkins* Court cited these definitions with approval. 122 S.Ct. at 2245, n. 3. The current mental retardation statutory mitigating circumstance defines mental retardation as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” See S.C. Code §16-3-20(C)(b)(10). This definition is in accord with both the AAMR and American Psychiatric Association definitions approved in *Atkins*, and should be the benchmark for assessing post-*Atkins* claims of mental retardation.

B. Who Makes the Mental Retardation Determination?

Another issue this Court must resolve is who makes the determination whether the defendant is mentally retarded: the judge or the jury? An analysis of the current legal landscape, including another case decided by the Supreme Court this term, *Ring v. Arizona*, 122 S.Ct. 2428 (2002), indicates that both judge and jury have a significant role to play.

Let us first begin with *Ring*, which involved a Sixth Amendment challenge to Arizona’s judge-sentencing capital punishment scheme. Relying on the constitutional principles established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone), *Ring* argued that *Apprendi* was irreconcilable with the Court’s prior decision in *Walton v. Arizona*, 497 U.S. 639 (1990), which upheld Arizona’s judge-sentencing procedure. The *Ring* Court agreed, overruled *Walton*, and held

that the Sixth Amendment requires that any finding of fact that makes a defendant eligible for the death penalty must be unanimously made by the jury beyond a reasonable doubt. 122 S.Ct. at 2440.¹⁰ While *Ring* dealt specifically with statutory aggravating circumstances, it included "factfinding[s] necessary to . . . put [a defendant] to death." *Id.* at 2443. As set forth previously, *Atkins* held that the Eighth Amendment prohibits a mentally retarded defendant from being sentenced to death. Thus a mentally retarded defendant is now constitutionally ineligible for the death penalty. 122 S.Ct. at 2252. Since mental retardation is now a factual issue upon which a defendant's eligibility for death turns, "that fact. . . must be found by a jury beyond a reasonable doubt." *Ring*, 122 S.Ct. at 2439.

However, the judge also has a very important role to play. Much like the current practice with regard to the admissibility of a defendant's statements,¹¹ eyewitness identification,¹² and expert testimony,¹³ the constitutionally required procedure occurs in two steps.

¹⁰Justice Scalia's concurring opinion also states: "All facts essential to the imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be made by the jury beyond a reasonable doubt." 122 S.Ct. at 2444 (Scalia, J. concurring).

¹¹The trial court must first make a determination, using a preponderance of the evidence standard, whether law enforcement complied with the requirements of *Miranda* and whether the defendant received and understood his rights. Once the court determines that a defendant received and understood his rights, the court allows the confession into evidence. It then is for the jury to decide, using the standard of beyond a reasonable doubt, whether the confession was voluntary. *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992); *State v. Washington*, 296 S.C. 54, 56, 370 S.E.2d 611, 612 (1988); *State v. Adams*, 277 S.C. 115, 283 S.E.2d 582 (1981).

¹²When the defendant challenges an in-court identification as being tainted by a previous improper identification procedure, the trial court must first hold an in camera hearing. *State v. Cash*, 257 S.C. 249, 185 S.E.2d 525 (1971). During the hearing the state must prove by clear and convincing evidence that the in-court identification of the defendant was not tainted by suggestive police action. *State v. LaRue*, 271 S.C. 256, 258, 246 S.E.2d 890, 891 (1978). If the court permits the in-court identification testimony, the court must instruct the jury in single-witness identification cases that the burden of proving the identity of the defendant still rests with the state. *State v. Simmons*, 308 S.C. 80, 84, 417 S.E.2d 92, 94 (1992).

¹³The trial court must first make a determination that the proffered expert possesses the necessary learning, skill, or practical experience to enable him to give opinion testimony. *State v. Myers*, 301 S.C. 251, 391 S.E.2d 551 (1990). The court must also determine whether the underlying science forming the basis for the expert testimony is reliable. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). If the court permits the testimony, the jury is instructed that expert testimony is to be given such weight and credibility as the jury determines. See, e.g., *State v. Hyman*, 322 S.C. 59, 471 S.E.2d 466 (Ct. App. 1996); *State v. Charping*, 313 S.C. 147, 437 S.E.2d 88 (1993).

Step 1: A judge must make an independent judicial determination that the defendant does (or does not) have mental retardation, and whether the defendant is eligible for a death sentence under *Atkins*.

The reasons for the requirement of a distinct *judicial* determination of fact and law are discussed in *Jackson v. Denno*, 378 U.S. 368 (1964), and reiterated in *Crane v. Kentucky*, 476 U.S. 683 (1986): the enforcement of a federal constitutional prohibition against exposing retarded persons to a death sentence at the jury's discretion can hardly be left solely to a procedure whereby the jury makes the ultimate factual determination of the existence *vel non* of the facts on which the prohibition turns. In *Jackson*, for example, the Court stated "the *requirement* that the court make a pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge the statement's reliability during the course of the trial." 378 U.S. at 386 (emphasis added). There is, in short, a due process mandate that the trial court make the initial determination whether the defendant's constitutional rights were violated. *Crane*, 476 U.S. at 687-88. This is especially true since *Atkins* created the constitutional prohibition in part as a result of recognition of the handicaps that retarded persons suffer in litigating issues in front of juries, which in turn exposes them to "a special risk of wrongful execution." 122 S.Ct. at 2252 (noting: (1) the difficulty a mentally retarded person may have in testifying; (2) the possibility that a mentally retarded person's "demeanor may create an unwarranted impression of lack of remorse;" and, (3) the possibility that the mental retardation evidence may enhance the likelihood that future dangerousness will be found by the jury).

Step 2: The defendant who presents evidence of mental retardation has a right to insist that he not be sentenced to death unless the jury finds unanimously, beyond a reasonable doubt, that he is not mentally retarded.

Ring and *Atkins*, read together, say this very clearly: *Ring* is explicit that the procedural rights

guaranteed by *Apprendi* attach to elements that are added by Supreme Court "interpret[ations] of the Constitution to require the addition of an . . . element to the definition of a criminal offense in order to narrow its scope." 122 S.Ct. at 2442. And, it is just as clear that *Atkins* adds just such an element. The Court stated: "Thus, *pursuant to our narrowing jurisprudence*, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate." 122 S.Ct. at 2251.

Even if the constitutional mandate of *Atkins* and *Ring* was not crystal clear, South Carolina law would require the same result.¹⁴ State law ordinarily places the burden of proof on the state to disprove a defense when the issue is raised by the evidence. An alibi defense, for example, places no burden on a criminal defendant, and the charge must emphasize that it is the State's burden to prove the defendant was present and participated in the crime. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). The state also bears the burden of disproving self-defense beyond a reasonable doubt. *State v. Burkhardt*, ___ S.C. ___, ___ S.E.2d ___, Op. No. 25484 (June 17, 2002). "When self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable

¹⁴Were it not for *Ring*, the Supreme Court's decision in *Cooper v. Oklahoma*, 517 U.S. 348 (1997), would set the constitutional floor. In *Cooper*, the Supreme Court held that no standard of proof greater than a preponderance of the evidence could be placed on a capital murder defendant challenging his competency to stand trial. The Court's examination of both English common law and contemporary law revealed that the burden of proof for a competency determination has long been a preponderance of the evidence. *Cooper v. Oklahoma*, 517 U.S. at 356-361; accord *State v. Lee*, 274 S.C. 372, 264 S.E.2d 418 (1980); *State v. Nance*, 274 S.C. 372, 264 S.E.2d 418 442 S.E.2d (1996). Historically, mentally retarded persons, formerly referred to as idiots or imbeciles, have been viewed and treated similarly to incompetent persons by courts and under the law. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 332 (1989), *rev'd on other grounds* (citing Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash.L.Rev. 414, 432 March/May 1985); accord *State v. Wilson*, 306 S.C. 498, 509, 413 S.E.2d 19, 25 (1992). The *Cooper* Court found that the procedural consequences to a defendant of an erroneous determination of competency were dire, and outweighed any interest the state had in creating procedural rules or standards, especially those with little or no historical roots or modern acceptance. *Cooper v. Oklahoma*, 517 U.S. at 364-368. The consequence of an erroneous determination regarding mental retardation for a capital murder defendant is even more dire, because such a determination could result in the impermissible imposition of a death sentence.

doubt.” *State v. Addison*, 343 S.C. 290, 294, 540 S.E.2d 449, 451 (2000).¹⁵

South Carolina also has a long history of requiring submission of issues in capital cases to a jury. The Supreme Court held in *Enmund v. Florida*, 458 U.S. 782, 797 (1982), for example, that the Eighth Amendment prohibits imposition of the death penalty on a person who may be guilty of felony murder as defined by the relevant jurisdiction, but who does not himself intend to kill. This Court, however, has required that the *Enmund* issue be submitted to and decided by the jury. *State v. Peterson*, 335 S.E.2d 800 (S.C. 1985). This history is consistent with a requirement that the final determination whether a defendant is mentally retarded be made by the jury. Likewise, this history is consistent with requiring that the state prove the defendant is not mentally retarded in order to show that he is death-eligible. Thus in all cases proceeding to trial after *Atkins*, where mental retardation is at issue, this two step process sets the constitutional floor.

C. What About Cases Where the Defendant Has Been Sentenced to Death?

Most of the petitioners in this case have already been sentenced to death. This Court must establish constitutionally appropriate procedures for handling their cases in light of *Atkins*. In cases where the evidence of mental retardation was not disputed at trial, or in post-conviction proceedings,

¹⁵Similarly, accident is not an affirmative defense because the existence of the *mens rea* is an element of the offense that must be proven by the prosecution beyond a reasonable doubt. *State v. McDaniel*, 68 S.C. 304, 47 S.E. 384 (1904); *State v. McCaskill*, 387 S.E.2d 268 (S.C. 1990). There are a number of other instances where the burdens shift under South Carolina law. See, e.g., *State v. Amerson*, 428 S.E.2d 871, 873 (S.C. 1993) (Once defendant has made prima facie showing of double jeopardy, the state bears burden of proving two separate offenses). *State v. Dyar*, 452 S.E.2d 603, 604 (S.C. 1994) (when a defendant challenges the state’s use of peremptory strikes as discriminatory under *Batson*, and makes a prima facie showing, the burden shifts to the state to present a non-discriminatory, neutral explanation for the challenges; if the state meets that burden, the defendant then has the burden to prove that the allegedly neutral reasons are pretextual); *State v. George*, 503 S.E.2d 168 (1998) (if defendant makes a prima facie showing of discrimination in selection of grand jurors, the burden shifts to the State to rebut that showing); *Singleton v. State*, 313 S.C. 75, 87, 437 S.E.2d 53, 60 (1993) (Initial burden in competency to be executed context is on the death-sentenced inmate to show by a preponderance of the evidence that he or she lacks the requisite competency for execution; once the defendant is found incompetent and a stay of execution granted, the burden shifts to the State to request a hearing and to prove by a preponderance of the evidence that the defendant has been restored to competence).

the remedy is simple: the death sentence must be modified to a sentence of life imprisonment.¹⁶ In cases where the evidence was disputed, the appropriate remedy is a new sentencing hearing. As noted above, since a mentally retarded defendant is not eligible for the death penalty, the ultimate decision must be made by the jury. Thus the only constitutional remedy which will permit a death sentence is a new proceeding before a new jury. A jury can not be impaneled to decide the mental retardation issue in isolation. The only remedy consistent with both *Atkins* and *Ring* is for a new, properly instructed and guided jury to decide both the defendant's eligibility for the death penalty, as well as its appropriateness, in light of all the relevant evidence. Even if the jury decides that the defendant is not mentally retarded, and thus is death "eligible," one or more jurors may well decide that the defendant's diminished intellectual capacity is sufficiently mitigating to warrant a life sentence. *Williams v. Taylor*, 529 U.S. 362, 397 (2000) (counsel rendered ineffective assistance in failing to present evidence that the defendant was "borderline mentally retarded"); *id.* at 398 ("Mitigating evidence unrelated to [death-eligibility] may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case"). Knowing that mental retardation makes the defendant ineligible for the death penalty necessarily heightens the mitigating effect of a decision that the defendant falls just over the line into the "borderline" range of intellectual functioning. Thus, a new sentencing hearing at which the jurors have the opportunity

¹⁶This is not only a matter of common sense, but is also in accord with the established practice in other analogous situations. This Court has recognized, for example, that while entrapment is ordinarily a question of fact for the jury, the court need not submit the question when there is undisputed evidence and only one reasonable conclusion can be reached. *State v. Johnson*, 295 S.C. 215, 367 S.E.2d 700 (1988). Likewise, a criminal defendant in South Carolina has the burden to prove an insanity defense by a preponderance of the evidence. S.C. Code § 17-24-10. When the defendant has met that burden, however, and the state has presented no evidence from which a jury could find the defendant sane, this Court has recognized that the presumption of sanity alone is insufficient to create a jury issue and the trial court should direct a verdict. *State v. Milian-Hernandez*, 287 S.C. 183, 185, 336 S.E.2d 476, 477-78 (1985). The defendant's parole eligibility would be determined by the law in effect at the time of the offense.

to decide whether the defendant is eligible for the death penalty, and, if so, whether it is the appropriate punishment, is the only remedy which will permit full consideration of a capital defendant's mental retardation.

Thus in cases pending in post-conviction proceedings where evidence of mental retardation was disputed, a variant of the above two step process should be adopted.

Step 1: The post-conviction relief court should determine if the weight of the evidence establishes the defendant's mental retardation.

If the court concludes that the defendant is retarded, the death sentence should be modified to a sentence of life imprisonment.

Step 2: If the post-conviction relief court determines that the defendant is not mentally retarded, then a new sentencing trial should be ordered.

Assuming there are no viable post-conviction claims warranting a new trial on the applicant's guilt-or-innocence, if the post-conviction relief court, after hearing the mental retardation evidence, determines that the defendant is not mentally retarded, then a new sentencing trial must be granted. At the new sentencing hearing, the two step trial procedure for cases involving mental retardation set forth in section B should be followed.

CONCLUSION

This Court should grant certiorari, order oral argument and establish constitutionally adequate procedures for capital cases where evidence of mental retardation exists.

Respectfully submitted,

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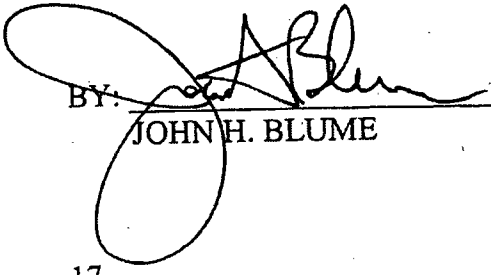
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July 17, 2002

THE STATE OF SOUTH CAROLINA
In The Supreme Court

IN THE ORIGINAL JURISDICTION

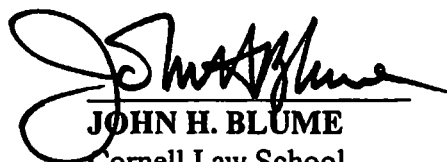
Ellis Franklin, Ricky George, Larry Hall,
Herman Hughes, Johnny Pearson
Ted Powers, Kenneth Simmons, et al Petitioner,

v.

Gary Maynard, Director,
Department of Corrections, ... Respondent.

CERTIFICATE OF SERVICE

I certify that Petitioner's Petition for Writ of Certiorari in the above-referenced case was served upon opposing counsel by mailing a copy of the same on July 17, 2002 in a postage prepaid envelope addressed to Donald J. Zelenka, Office of the South Carolina Attorney General, C. Dennis Remert Building, P.O. Box 11549, Columbia, South Carolina.



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July 17, 2002
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN ITS ORIGINAL JURISDICTION

ELLIS FRANKLIN, RICKY GEORGE, LARRY HALL, HERMAN LEE HUGHES, JOHNNY
PEARSON, TED POWERS, KENNETH SIMMONS, Et Al.

Petitioners,

v.

GARY MAYNARD, Director , South Carolina Department of Corrections, and CHARLES M.
CONDON, Attorney General of South Carolina,

Respondents.

RESPONDENTS RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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The Respondents, above-named, hereby make a response to this Court to the petition for a writ of certiorari in light of *Atkins v. Virginia* dated July 17, 2002. In the Petition, the Petitioners death row inmates Ricky George, Larry Hall, Herman Lee Hughes, Ted Powers and Kenneth Simmons and pretrial detainee Johnny Pearson request this Court to grant certiorari and establish constitutionally adequate procedures for capital cases where evidence of a mental retardation may exists. *Atkins* held that the Eighth Amendment to the United States Constitution restricts the State's power to take the life of an offender who is also mentally retarded. In *Atkins*, the Court did not set forth any particular procedures for implementing its decision. Particularly, the Court stated: "To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people

who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in Ford v. Wainwright, with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." 477 U.S. 399, 405, 416-417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)."

In Ford, the Supreme Court established that a state was precluded from executing an inmate who was presently incompetent. In light of Ford, this Court in Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993), established the following procedure for pre-execution insanity issues:

Upon the issuance of an Order for Execution by this Court, the defendant or his/her guardian may apply for subsequent Post Conviction Relief on the basis of competency, pursuant to §S.C.Code Ann. 17-27-20(a)(6) (1985). At the evidentiary hearing, the applicant, through competent evidence or expert testimony, must show by a *preponderance of the evidence* that he or she lacks the requisite competency for execution. If the PCR court finds the applicant incompetent in accordance with the standard adopted in this opinion, then the appropriate remedy is to issue a temporary stay of execution pending a mandatory review by this Court.

Once the defendant is found incompetent and the stay of execution is affirmed by this Court, the burden necessarily shifts to the State to move for a hearing upon the defendant's return to competency. At this subsequent hearing, the State must show by a preponderance of the evidence that the defendant is competent to be executed. If the State establishes competency, then the PCR court may lift the previous stay of execution subject to the review of this Court.

Singleton, supra. The Supreme Court established this procedure implicit in its authority under the State Constitution to create rules and procedures under the Uniform State PCR Act, Section 17-27-10, et seq.

1. Certiorari Is Not An Appropriate Remedy For This Matter

The Petitioners rely upon *State v. Rogers, et al*, 270 S.C. 285, 242 S.E.2d 215, 217 (1978)

to support their position on the propriety of certiorari in this Court's original jurisdiction.

However, it may be held that this Court lacks jurisdiction on certiorari to set forth these substantive procedures that the Petitioners request. However, a writ of certiorari is an extraordinary form of relief that generally is used *only in the absence of other effective relief*.

Rowe v. City of West Columbia, 334 S.C. 400, 513 S.E.2d 379 (Ct. App. 1999). See Ray v.

State, 330 S.C. 184, 186, 498 S.E.2d 640, 640 n. 1 (1998) ("This matter is before the Court

pursuant to a common law writ of certiorari. Petitioner's trial attorneys neglected to file a timely appeal, necessitating this extraordinary relief."); 14 C.J.S. Certiorari § 6 (1991) ("The writ is reserved for extraordinary situations or exceptional circumstances, and is granted sparingly").

Thus, we conclude that the availability in this case of a form of judicial review, even if that review is collateral review, renders unavailable the certiorari review exercised by the circuit court in this case. See 14 Am.Jur.2d § 11 (1964) ("[A] writ of certiorari will not issue if there is another adequate remedy, such as an appeal or writ of error, an action at law or in equity, or intervention with the right of appeal secured.") (emphasis added); cf. Key v. Currie, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) (The Supreme Court "will not entertain matters in its original jurisdiction where the matter can be entertained in the trial courts of this State. Only when there is an extraordinary reason such as a question of significant public interest or an emergency will this Court exercise its original jurisdiction."). See also Rule 229, SCACR.

Respondents question whether the present setting suggests either emergency or a "question of significant public interest" that would underlie original jurisdiction rather than having the trial courts handle the matters on a case by case basis until appellate jurisdiction reaches this Court.

A writ of certiorari is to keep inferior tribunal within the scope of its powers, and one of the most important functions of the writ is to determine *whether inferior tribunal has acted without jurisdiction*. Certiorari from the Court of Common Pleas goes to an inferior tribunal to keep it within the scope of its powers, if not to correct errors of law, but certainly not to correct errors of fact. Ex Parte Schmidt, 1886 WL 2429, 24 S.C. 363 (1886). Stated another way, the writ of Certiorari, to remove the record from an inferior jurisdiction, is designed to correct errors of law, and not errors of fact. It is not a substitute for an appeal. State v. Steuart, 36 S.C.L. 29 (1850). In City of Columbia v. South Carolina Public Service Commission, 242 S.C. 528, 131 S.E.2d 705 (1963), this Court explained the nature of a writ of certiorari:

At common law the writ of certiorari is used for two purposes: (1) As an appellate proceeding for the re-examination of some action of an inferior tribunal. (2) As an auxiliary process to enable the Court to obtain further information with respect to some matter already before it for adjudication." "While certiorari has been said to be original in nature, it has also been said to be appellate. It may be said, indeed, to have characteristics of both. For example, to the extent that it involves the review of the proceedings of an inferior court, certiorari is an appellate proceeding, but to the extent that the subject matter of the proceeding brought before the appellate court will not be reinvestigated, tried, or determined on the merits as on appeal or writ of error, it is an original proceeding."

Id. at 534, 131 S.E.2d at 707. The Court concluded that when a court is reviewing some proceeding held in a lower tribunal, the proceeding is an appellate proceeding, regardless of the title given the proceedings by the reviewing court. Id. ("An appeal is a review by a superior court of some proceeding held in an inferior tribunal. The method of review may be called appeal or certiorari and be classified as an appellate proceeding....").

In this certiorari in the original jurisdiction setting, however, the Petitioner's request is beyond the call of certiorari in its original jurisdiction. It is not to test the jurisdiction the the trial

tribunal so was to warrant certiorari. Instead it is seeking this Court to create substantive rules and procedures in matters that either are pending in the Court of General Sessions (Johnny Pearson) or may be pending in the Court of Common Pleas in state PCR actions (Herman Hughes, Ricky George, Ted Powers) or may be in the future (Larry Hall, Kenneth Simmons).¹ This request for rule-making action goes beyond the scope of certiorari. As such, it should be denied.²

2. These Requests May Go Beyond The Authority of This Court To Make Rules.

Further, the Respondents note that this Court does possess rule-making authority under the State Constitution. South Carolina Constitution, Article V, Section 4 provides: "The Supreme Court shall make rules governing the administration of all the courts of the State. *Subject to the statutory law*, the Supreme Court shall make rules governing the practice *and procedure* in all such courts." (Emphasis added). South Carolina Constitution, Article V, Section 4A provides for court rules subject to the approval of the General Assembly : "All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after

¹ On this date the Respondents made responses to this Court in matters involving the direct appeal of Kenneth Simmons and the PCR appeal of Larry Hall. To the extent appropriate, those responses are incorporated herein by reference.

² This does not mean that Respondents are of the opinion that standards or procedures in the area of capital cases and the mental retardation issues are not necessary, but that this is not the correct approach to resolve what ultimately is a rule-making decision on policy as well as procedure before the lower courts (or General Assembly) act.

submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting." To the extent, the Petitioner requests these procedures to create new rules and new definitions for "mental retardation" which differs from the current definition and procedures, his request goes beyond mere rules to new substantive law and procedure. Respondents are concerned that these current requests may usurp the role of the General Assembly to make law. Respondents note that at this time, there may be no need to take that extraordinary and tenuous step, particularly where the expanded request of the Petitioners would, if adopted, plainly create new substantive law.

3. Assuming Arguendo That These Issues May Be Addressed In This Court's Original Jurisdiction, Respondents Would Suggest The Following Procedures May BE Appropriate.

A. The Definition of mental retardation.

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The definition criteria for mental retardation is presently established in 16-3-20 as "Mental retardation" meaning significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.³ This is consistent with the statutory definitions set forth in other portions of the Code. Section 44-20-30 (11), 44-26-10(11). Unless and or until the General Assembly acts to further amend or refine this definition, it would be inappropriate and beyond this Court's jurisdiction to adopt a differing definition. The suggestion of the Petitioners to create a new definition is unnecessary where the General Assembly has already established a definition in the murder statute. Any

³ Section 44-20-30 (11): "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. Section 44-26-10(11): "'Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."

further refinement should be subject to the legislative process.

B. Suggested Initial Pretrial Procedures.

The issue in Atkins is solely based upon the state's ability to execute an individual who suffers from mental retardation. This is similar to Tison v. Arizona, in which the United States Supreme Court discussed accomplice liability for murder. That court held that a defendant may be sentenced to death for a murder done by an accomplice only if the defendant had substantial involvement in its commission and showed a reckless indifference to human life. 481 U.S. 137, 157, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127 (1987). Tison, like Atkins, dealt with eligibility for the death penalty rather than application of aggravating factors. In Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), the Court held there was no constitutional bar to an appellate court's finding that a defendant killed, attempted to kill, or intended to kill, as Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), required for imposition of the death penalty in felony-murder cases. In Cabana, the Supreme Court stated that the *Eighth Amendment* does not require that a jury make the findings required by Enmund; an appellate court, a trial judge, or a jury may make the requisite findings. *Id.* at 474 U.S. at 392, 106 S.Ct. at 700. In Ring v. Arizona, --- U.S. ---, 122 S.Ct. 2428, --- L.Ed.2d--- (2002), the Supreme Court has held that a jury must determine the existence of aggravating factors that would increase a sentence from imprisonment to the death penalty. Ring explicitly states, however, that the Court was not considering the state supreme court's authority to reweigh the aggravating and mitigating circumstances after it struck an aggravating factor. See Ring, 122 S.Ct. at 2437 n. 4.

The Petitioners rely upon the Court's recent decision in Ring v. Arizona, to suggest that the Sixth Amendment requires the jury to make any finding of fact that makes a defendant

eligible for the death penalty when dealing with the existence or non-existence of aggravating factors. The Petitioner contends that since mental retardation is a "factual issue" upon which the defendant's eligibility for the death penalty turns, that fact must be proved by a jury beyond a reasonable doubt. We respectfully disagree with the analysis of Ring as requiring a jury finding of mental retardation. To the contrary, we submit that since it is not an aggravating factor as in Ring, there is no requirement under the Eighth Amendment that the jury must make that constitutional determination under either the Eighth or Sixth Amendment.

As with the Enmund /Tison rule which does not require that a finding of culpability be made at a particular stage of the sentencing hearing, Cabana v. Bullock, 474 U.S. 376, 386, 106 S.Ct. 689, 697, 88 L.Ed.2d 704, 716-17 (1986). "The Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under Enmund for such punishment." Cabana, 474 U.S. at 386, 106 S.Ct. at 697, 88 L.Ed.2d at 716. "At what precise point in its criminal process a State chooses to make the Enmund determination is of little concern from the standpoint of the Constitution." Cabana, 474 U.S. at 386, 106 S.Ct. at 697, 88 L.Ed.2d at 717.

Clearly then, so long as the Eighth Amendment determination is made at some point under Atkins, the Constitutional parameters are satisfied. Since we submit there is no requirement that the jury make the ultimate conclusion about the existence or non-existence of mental retardation, we would submit that this decision may reasonably left with the trial judge. Also, by having the judge make the decisions, it also protects the jury from having a potential violation under Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) (whether a death sentence was obtained in violation of the Sixth, Eighth and Fourteenth Amendments because the jury instructions and verdict slip may have led the jury to believe that it

had to unanimously agree to the existence of mitigating circumstances in order to consider them in weighing the appropriate sentence). This will allow the jury to weigh the effect any evidence of low mentality as mitigation and clearly define their role as sentencer. Although the Court in *State v. Peterson*, 335 S.E.2d 800 (S.C. 1985) may have stated that such a jury charge was appropriate, in *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991), the court clarified that it was not required in every case as the Petitioner may now be suggesting as a constitutional threshold. See also, *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986). (appellate court makes Enmund findings).

Respondents have used recent legislation from Arizona as a guide to possible suggestions for the Court and legislature in this area. See. Arizona Statutes, Section 12-703.02.

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Suggestion One : If the state files a notice of intent to seek the death penalty, the trial court shall, upon request of a capital defendant or the prosecution, appoint the Department of Disabilities and Special Needs (hereafter Department) to designate appropriate prescreening psychological experts as a court witness(es) in order to determine make a provisional determination of whether the defendant possess any indicia of significantly subaverage general intellectual functioning using current community, nationally and culturally accepted intelligence testing procedures. The Department shall submit a written report of the determination to the court and counsel for the defense and counsel for the prosecution within ten days of the testing of the defendant. An appropriate and secure environment for testing will be necessary.

This request would create an initial screening device for the court's purposes limited to so-called I.Q. testing for the court's purposes. The Department of Disabilities and Special Needs

has advised this Office that it will appropriately respond to court orders for testing in the area of mental retardation as a "court witness," not an expert for either the defense or prosecution, although it recognizes the right of either side to call staff as witnesses. The Department has further advised the Respondents that its preference is to have the Department designated to complete an examination rather than two designated examiners. The Department staff indicated that the opinions reached will be the opinion of the Department and not any individual examiner.

Suggestion 2. If the prescreening examiners from the Department determines that the defendant's intelligence quotient is above the range for mental retardation, the notice of intent to seek the death penalty shall not be dismissed on the ground that the defendant has mental retardation. A prescreening determination that the defendant's intelligence quotient is above the level of mental retardation does not prevent the defendant from introducing evidence of the defendant's mental retardation, low mentality or diminished mental capacity as a statutory mitigating factor at any sentencing proceeding pursuant to § 16-3-20.

Suggestion 3. If the prescreening examiners determine that there is evidence of significantly subaverage general intellectual functioning, the trial court shall appoint the Department to independently determine whether the defendant has mental retardation as a court witness. If the Department determines that the defendant's intelligence is significantly subaverage general intellectual functioning, the trial court, within ten days of receiving the written report, shall also order the state and the defendant to each nominate two psychological experts, or jointly nominate a single psychological expert. The trial court shall appoint one psychological expert

nominated by the state and one psychological expert nominated by the defendant, or a single psychological expert jointly nominated by the state and the defendant, none of whom made the prescreening determination of the defendant's intelligence quotient. The trial court may, in its discretion, appoint an additional psychological expert who was neither nominated by the state nor the defendant, and who did not make the prescreening determination of the defendant's intelligence quotient. Within sixty (60) days after the trial court orders the state and the defendant to nominate psychological experts, or upon the appointment of such experts, whichever is later, the state and the defendant shall provide to the psychological experts and the court any available records that may be relevant to the defendant's mental retardation status. The court may extend the deadline for providing records upon good cause shown by the state or defendant.

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Suggestion 4. Not less than thirty days after receipt of the records provided pursuant to the above section, or thirty days after the expiration of the deadline for providing such records, whichever is later, each psychological expert and the Department shall examine the defendant using current community, nationally and culturally accepted physical, developmental, psychological and intelligence testing procedures, for the purpose of determining whether the defendant has mental retardation. Within fifteen days of completing the examination of the defendant, each psychological expert and the Department shall submit a written report to the trial court that includes the expert's opinion as to whether the defendant has mental retardation.

Suggestion 5. If the scores on all the tests for intelligence quotient administered to the defendant

are above significantly subaverage general intellectual functioning, the notice of intent to seek the death penalty shall not be dismissed on the ground that the defendant has mental retardation. This does not preclude the defendant from introducing evidence of the defendant's mental retardation or diminished mental capacity as a mitigating factor at any sentencing proceeding pursuant to § 16-3-20.

Suggestion 6. No less than thirty days after the designated psychological experts' reports are submitted to the court and before trial, the trial court shall hold a hearing to determine if the defendant has mental retardation. At the hearing, the defendant has the burden of proving mental retardation by a preponderance of the evidence.⁴ A determination by the trial court that the defendant's intelligence quotient is below significantly subaverage general intellectual functioning establishes a rebuttable presumption that the defendant has mental retardation. Nothing in this subsection shall preclude a defendant with an intelligence quotient of significantly subaverage general intellectual functioning from proving mental retardation by a preponderance of the evidence. However, to satisfy the burden, the defendant must show both 1).significantly subaverage general intellectual functioning and 2). existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

Suggestion 7. If the trial court finds that the defendant has mental retardation as defined by South Carolina law, the trial court shall dismiss the intent to seek the death penalty, shall not

⁴The preponderance of the evidence standard is consistent with the Singleton Eighth Amendment standard. However, the Arizona statute used "clear and convincing."

impose a sentence of death on the defendant if the defendant is convicted of murder and shall dismiss one of the attorneys appointed under Section 16-3-26 unless the court finds that there is good cause to retain both attorneys.

If the trial court affirmatively finds that the defendant does not have mental retardation, the court's finding does not prevent the defendant from introducing evidence of the defendant's mental retardation, his mentality or diminished mental capacity in mitigation at any sentencing proceeding pursuant to Section 16-3-20.

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Suggestion 8. *Within ten days after the trial court makes an entry of a dismissal of the notice of intent to seek the death penalty a finding on the existence of mental retardation, the state may appeal with the South Carolina Supreme Court pursuant to the rules of procedure upon a timely notice of intent to appeal. Upon filing of the notice by the state, the prosecution in the matter is stayed until completion of the appeal. The defendant has no right to appeal these findings until after sentencing is completed and a sentence of death is found by the jury or judge.*

C. Suggested Post Trial Procedure

A. Evidence of Mental Retardation In Prior Trial Settings.

In their pleading before this Court, the Petitioners assert that in cases when the defendant has already been sentenced to death and where evidence of mental retardation was "not disputed" at trial or in a post-conviction relief setting that there must be an automatic modification to a life sentence. As already presented to this Court in *Thomas Lee Davis v. State* pending on certiorari before this Court, Respondents fervently oppose this assertion. The existence of some evidence

of mental retardation was never required to be a contested fact under the prior capital litigation in this state. To the contrary, it was only when there was a question as to whether there was any evidence of mental retardation to require a mitigation instruction. As this Court is well aware, some evidence of a low I.Q. only requires an instruction on mitigation- it does not require the court to establish its existence by any standard of proof. As stated in the response in Davis,

Therefore it is clear that the Petitioner is asking this Court on certiorari from a decision denying relief from the lower court to do something that the lower court was not asked to do : determine the conclusive existence or non-existence of Thomas Lee Davis's mental retardation and whether the Eighth Amendment precludes a death sentence based upon his particular level of cognitive functioning. Absent that request or any conclusive findings in this area, it is improvident and beyond this Court's jurisdiction to assume that role to allow an issue to be asserted that was not presented below. A review of the Order in the PCR proceeding below also supports the narrowness of the particular claims presented in the PCR hearing. As noted, it concerned whether counsel was ineffective in failing to present or pursue evidence of Davis's alleged mental retardation in a particular manner. Therefore, it should not be allowed to restructured de novo before this Court where it was not presented as a free-standing claim below where the lower court made no ruling on either the factual or legal basis of the claim he now seeks to amend in this appeal. As such the motion should be denied, albeit without prejudice.

III. The Petitioner Has An Appropriate Remedy Available In A Successive Post-Conviction Relief Action Pursuant to Section 17-27-45(B) to Litigate This Issue Both Factually And Legally.

This response should not be construed as asserting that Davis has no remedy available in the state court to litigate his claim. The Respondents recognize that Atkins v. Virginia, supra., which announced that executing mentally retarded defendants violates the Eighth Amendment prohibition against "cruel and usual punishment." Respondents also recognize that this is the type of decision that has retroactive effect. See Penry v. Lynaugh, 492 U.S. 302 (1989). The Supreme Court, in federal habeas contexts held that new rules generally did not apply to final decisions past the direct appeal stage. There were however two exceptions. The exceptions include only rules that "place[] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, or ... require[] the observance of those procedures that ... are implicit in the concept of ordered liberty...." This exception was broadened somewhat in Penry, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256, to include

rules immunizing certain classes of defendants (there, a mentally retarded man) from certain types of punishment (there, the death penalty), although the Court decided that such a new rule did not exist in Penry. Nevertheless, applying the analysis of Penry and Atkins, it is virtually beyond cavil that Atkins, has retroactive effect. Cf. Heck Van Tran v. State, 66 S.W.3d 790, 2001 WL 1538508 (Tenn. Dec.4, 2001).⁵

Further, in South Carolina, up to the Atkins decision, the common law of this state authorized execution of convicted murderers who are sane, but possess the characteristic of mental retardation. See, State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989) ("While evidence presented at trial was in conflict on the factual issue of retardation, we assume, for purposes of our holding here, that Jones' retardation was established as a matter of law....in South Carolina, prior to bifurcation of capital trials, mental retardation was not a defense to conviction for a capital crime. See State v. Bradford, 256 S.C. 51, 180 S.E.2d 632 (1971); State v. Byrd, 229 S.C. 593, 93 S.E.2d 900 (1956); State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956); State v. Chasteen, 228 S.C. 88, 88 S.E.2d 880 (1955); State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951). We hold that, in the sentencing phase of a bifurcated trial, it is also not a bar to imposition of the death penalty."). Contrary to certain claims, Respondents are unaware of any person since the 1977 statute became effective who was found to possess mental retardation and was executed. See, State v. Middleton, 368 S.E.2d 457 (S.C.) (Middleton I), cert. denied, 488 U.S. 872 (1988) (imposition of death sentence was not cruel and unusual punishment by reason of defendant's borderline mental retardation, given his appreciation of reason for penalty. He introduced evidence that he is a borderline mental retardate with an IQ of 68 and that he suffers from an anti-social personality disorder and attention deficit disorder.); (James Terry) Roach v. Martin, 757 F.2d 1463, 1479-80 (4th Cir.) (Alleged borderline mentally retarded); Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993) (court stays execution of incompetent mentally retarded capital defendant). See also, State v. Wilson, 306, S.C. 498, 413 S.E.2d 19 (1992) (noting Penry held that mentally retarded capital

⁵ Heck Van Tran is particularly probative in this area because the Tennessee appellate court in concluding that death sentences for mentally retarded murderers violated the State Constitution remanded the case to a trial court for a determination of the existence of the mental retardation despite that fact that evidence of mental retardation was presented to the jury in mitigation. On remand, the trial court was directed to hear the petitioner's motion to reopen and make a determination as to the petitioner's alleged mental retardation. The applicable criteria in Tennessee were those set forth by Tennessee statute: (1) significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) deficits in adaptive behavior; and (3) mental retardation manifested during the developmental period, or by eighteen (18) years of age. See § Tenn. Code Ann. 39-13-203 (1997); see also Fleming v. Zant, 386 S.E.2d at 342 (adopting and applying the statutory definition of mental retardation as the constitutional standard).

defendants were not excluded from the death penalty.).

Since the common law of this State allowed for the execution of mentally retarded individuals, this represents a clear change in the law for South Carolina capital defendants as determined by the binding United States Supreme Court. In its pertinent part, § 17-27-45(B), provides :

"(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist."

Since the decision in Atkins created a clear break in both South Carolina and Supreme Court precedent, Davis should be allowed to file a second application in the Court of Common Pleas for Greenwood County to litigate this issue, should he be unsuccessful in his procedurally proper claims pending in this Court. Therefor consistent with the prior precedent of this Court and the statutory procedures established by the General Assembly for this statutory remedy, Davis and the State can correctly litigate the determination of whether Davis is actually mentally retarded as defined by present South Carolina under an appropriate factfinding procedure, not merely whether such evidence exists to allow for a jury instruction or defense presentation. Davis may well be determined to fit the criteria for mental retardation established in 16-3-20 as "Mental retardation" meaning significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.⁶ Among the evidence presented in the state PCR hearing revealed that there evidence existed that he exhibited deficits in intellectual functioning and adaptive behavior consistent with mental retardation. See Report of Dr. Ott - App.p. 3764 - 69. Testimony of Dr. Ott, Dr. Broughton, Dr. Keyes, Dr. Price. App.p. 2948-3156. However, absent a requirement that a finding be made, this Court should not sua sponte make the finding for the PCR court on an issue it was not required to determine. Allowing, as it must, the filing of a new action where this particular issue can be litigated under the appropriate standards

⁶ Section 44-20-30 (11): "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. Section 44-26-10(11): "'Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."

and issues is the necessary and appropriate procedure for resolving, if necessary this issue.

Davis, supra.

B. There is no requirement that a jury decide the existence of mental retardation.

Even if we assume that Ring requires a jury determination for "mental retardation", Ring would not apply to cases which were beyond the direct appeal level. The decision created a clear break from precedent as evidence by overruling its earlier decision. Ring has been held not to apply to cases on collateral review in Cannon v. Mullin, 297 F.3d 989 (8th Cir . 2002). See also Vargas v. U.S. 207 F.Supp. 2d 304 (S.D.N.Y. 2002) (*Apprendi* not retroactive). The Petitioner's protestations notwithstanding, courts, including this Court have properly determined the existence of 8th Amendment limitations on when someone may be executed. See, Singleton.

C. Since there is no requirement for a jury determination collateral review allows for a remedy

As stated before this Court in the recent pleadings in Davis, Hall, and Simmons, there is a remedy available to assert this issue. § 17-27-20 provides

(a) Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

(2) That the court was without jurisdiction to impose sentence;

(3) That the sentence exceeds the maximum authorized by law;

(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief..... Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

Clearly, the General Assembly has created a remedy which can effectively address these issues. Further as noted in the prior pleadings before this Court, there is no bar from this issue being raised in a second application. § 17-27-45(B), provides :

“(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.”

Since under Penry , this is the type of decision that applies retroactively, there is a right to litigate the claim in collateral review.

Similar to the trial setting Respondents would place assert that the burden of proof will be the same as in all state PCR actions- the burden is on the defendant to show the existence of mental retardation by a preponderance of the evidence. In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC. (“Burden of Proof. The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). This burden is consistent with the burden placed upon the defendant at trial in the suggestions set forth above.

Further, the capital PCR proceedings also provide a vehicle for the appointment of counsel and discovery. Consistent with the approach set forth above for the trial setting, the Respondents would suggest this procedure, in addition to the procedures set out in Section 17-27-160.

Suggestion One : If a capital defendant's sentence is affirmed and he did not litigate the constitutionality of his sentence or the existence of mental retardation at trial or on appeal and his trial and/or appeal predated the decision in Atkins, the Applicant may seek to raise when appropriate a claim that his sentence violates the Eighth Amendment because he suffers under mental retardation. Consistent with the trial setting, when the Applicant makes this allegation or a similar claim in his post-conviction application, the PCR court shall appoint the Department of Disabilities and Special Needs (hereafter Department) to designate appropriate prescreening psychological experts as a court witness(es). However in this PCR setting, since the Applicant has affirmatively made a verified allegation, the Department would be directed to make a determination of whether the defendant possess significantly subaverage general intellectual functioning using current community, nationally and culturally accepted intelligence testing procedures existing concurrently with deficits in adaptive behavior and manifested during the developmental period. The Department shall also submit a written report of the determination to the court and counsel for the defense and counsel for the prosecution within ten days of the completion of testing. An appropriate and secure environment for testing will be necessary. If the Department determines that the defendant's intelligence is significantly subaverage general intellectual functioning, the trial court, within ten days of receiving the written report, shall also

order the state and the defendant to each nominate two psychological experts, or jointly nominate a single psychological expert. The hearing judge shall appoint one psychological expert nominated by the state and one psychological expert nominated by the defendant, or a single psychological expert jointly nominated by the state and the defendant, none of whom made the Department determination of the defendant's intelligence quotient. The hearing judge may, in its discretion, appoint an additional psychological expert who was neither nominated by the state nor the defendant, and who did not make the prescreening determination of the defendant's intelligence quotient. Within sixty (60) days after the trial court orders the state and the defendant to nominate psychological experts, or upon the appointment of such experts, whichever is later, the state and the defendant shall provide to the all psychological experts and the court any available records that may be relevant to the defendant's mental retardation status. The court may extend the deadline for providing records upon good cause shown by the state or defendant.

Suggestion 2. Not less than thirty days after receipt of the records provided pursuant to the above section, or thirty days after the expiration of the deadline for providing such records, whichever is later, each psychological expert and the Department shall examine the defendant using current community, nationally and culturally accepted physical, developmental, psychological and intelligence testing procedures, for the purpose of determining whether the defendant has mental retardation. Within fifteen days of completing the examination of the defendant, each psychological expert and the Department shall submit a written report to the trial court that includes the expert's opinion as to whether the defendant has mental retardation.

Suggestion 3. No less than thirty days after the designated psychological experts' reports are submitted to the court and before trial, the hearing judge shall hold a hearing to determine if the defendant has mental retardation. At the hearing, the defendant has the burden of proving mental retardation by a preponderance of the evidence.⁷ A determination by the hearing court that the defendant's intelligence quotient is below significantly subaverage general intellectual functioning establishes a rebuttable presumption that the defendant has mental retardation. Nothing in this subsection shall preclude a defendant with an intelligence quotient of significantly subaverage general intellectual functioning from proving mental retardation by a preponderance of the evidence. However, to satisfy the burden, the defendant must show both 1).significantly subaverage general intellectual functioning and 2). existing concurrently with deficits in adaptive behavior and manifested during the developmental period by a preponderance of the evidence.

Suggestion 4 . If the hearing judge finds that the defendant has mental retardation as defined by South Carolina law, the hearing judge shall enter an order finding such pursuant to Section 17-27-80.

If the hearing judge affirmatively finds that the defendant does not have mental retardation, the court shall enter an order denying state post-conviction relief on this issue.

Suggestion 6. Within thirty days after the hearing judge makes an entry of an order in the action

⁷The preponderance of the evidence standard is consistent with the Singleton Eighth Amendment standard. However, the Arizona statute used "clear and convincing."

either side has the right to appeal the decision.

CONCLUSION

Respondents respectfully request this Court to deny the Petitioner requests for relief.

Respondents further assert the procedures suggested by the Petitioners place requirements upon the government not contemplated nor required by either the Eighth or Sixth Amendments.

Respondents request this Court deny the Petition for Writ of Certiorari of the named Petitioners.⁸

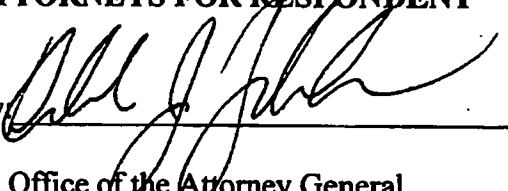
Respectfully submitted,

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By 

Office of the Attorney General
Post Office Box 11549
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(803) 734-6305

August 26, 2002

⁸ Respondents reserve the right in an appropriate forum to challenge the factual summaries of the named Petitioners. As set forth in previous pleadings before this court in Hughes, Hall, Pearson, Powers and Sullivan, the evidence of mental retardation is contested by the evidence presented at trial or already in the PCR hearing in pending matters. Further, since the existence of mental retardation was not a litigated fact in any of the trials, Respondents reserve the right to challenge the existence in any future trial in any of the named Petitioners, including but not limited to George, Franklin and Davis.

State Statutes Prohibiting the Death Penalty for People with Mental Retardation

State	Statute Citation	Definition of Mental Retardation	Qualified Examiners
Arizona	Ariz. Rev. Stat. Sect. 13-3982	A condition based on a mental deficit that has resulted in significantly subaverage general intellectual functioning existing concurrently with significant limitations in adaptive functioning, where the onset of the forgoing conditions occurred before the defendant reached the age of eighteen.	Requires the trial court in a capital case to appoint a licensed psychologist to conduct a prescreening evaluation to determine the defendant's IQ.
Arkansas	Ark. Code Ann. Sect. 5-4-618 (1993)	Significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning, and manifested in the developmental period. The age of onset is 18. There is a rebuttable presumption of mental retardation when the defendant has an IQ of 65 or below.	There is no information on this aspect of the statute.
Colorado	Colo. Rev. Stat. Sect. 16-9-401-403	Any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. The requirements for documentation may be excused by the court upon a finding that extraordinary circumstances exist. The court does not define extraordinary circumstances. The law does not give a numerical IQ level.	There is no information on this aspect of the statute.
Connecticut	Public Act No, 01-151	Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. (as defined in Conn. Gen. Stat. § 1-1g (2001))	There is no information on this aspect of the statute.
Florida	Florida Statutes, Sect. 921.137	significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18	Court-appointed experts in the field of mental retardation shall evaluate the defendant and report their findings to the court and all interested parties prior

Georgia	Ga. Code. Ann. Sect. 17-7-131(i)	"...Significantly subaverage intellectual functioning resulting in or associated with impairments in adaptive behavior which manifests during the developmental period."*	Court-appointed licensed psychologists or psychiatrists; or physicians or licensed clinical psychologists chosen and paid for by the defendant.
Indiana	Ind. Code Sect. 35-36-9-1 et. seq.	An individual before becoming 22 years of age manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior that is documented in a court-ordered evaluative report.	State does not specify if the court can appoint psychologists or psychiatrists. Attorneys should probably obtain this information from trial court at pre-trial.
Kansas	Kan. Stat. Ann. Sect. 21-4623	An individual having significantly subaverage general intellectual functioning to an extent that substantially impairs one's capacity to appreciate the criminality of one's conduct or conform one's conduct to the requirements of law. The statute does not define adaptive behavior or the age of onset. However, Kan. Stat. Ann. Sect. 76-12b01 defines these terms. Adaptive behavior refers to the effectiveness of personal independence and social responsibility expected of that person's age, cultural group and community. The age of onset must be prior to 18 years old.	There is no information on this aspect of the statute.
Kentucky	Ky. Rev. Stat. Sect. 532.130-140	A significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period. The age of onset is 18 years old. Significantly subaverage general intellectual functioning is defined as an IQ of 70 or below.*	There is no information on this aspect of the statute.
Maryland	Md. Code. Ann. art. 27 Sect.412	An individual who has significantly subaverage intellectual functioning as evidenced by an IQ of 70 or below on an individually administered IQ test, and impairment in adaptive behavior. The age of onset is before the age of 22.	There is no information on this aspect of the statute.

Missouri	RSMo 565.030	Significantly subaverage general intellectual functioning which originates before age eighteen; and is associated with a significant impairment in adaptive behavior.	There is no information on this aspect of the statute.
New Mexico	N.M. Stat. Ann. Sect. 31- 20A-2.1 (1978)	Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An IQ of 70 or below on a reliably administered IQ test shall be presumptive evidence of mental retardation.	There is no information on this aspect of the statute.
Nebraska	R.R.S. Neb. Sect. 28- 105.01 (2000)	Mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An IQ of 70 or below on a reliably administered IQ test shall be presumptive evidence of mental retardation.	There is no information on this aspect of the statute.
New York (except for murder by a prisoner)	N.Y. Crim. Proc. Sect. 400.27 (12)	The statute uses the most recent American Association on Mental Retardation definition (1992).** The N.Y Statute does not list specific levels of intelligence, nor does it go into detail regarding adaptive skills.	No specifics noted - "Psychiatrist, psychologist or other trained individual."
North Carolina	2001 N.C. Sess. Laws 346	Significantly subaverage general intellectual functioning (defined as having an IQ of 70 or below), existing concurrently with significant limitations in adaptive functioning(defined as having significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills) both of which were manifested before the age of 18.	A licensed psychiatrist or psychologist
South Dakota	S.D. Codified Laws Sect. 23A- 27A- 26.1 (2000)	Mental retardation means significant subaverage general intellectual functioning existing concurrently with substantial related deficits in applicable adaptive skill areas. An IQ exceeding 70 on a reliable standardized measure of intelligence is presumptive evidence that the defendant does not have significant subaverage general intellectual functioning. Mental retardation must have been manifested and documented before the age of 18 years.	A psychiatrist, licensed psychologist, or licensed psychiatric social worker designated by the state's attorney, for the purpose of rebutting evidence offered by the defendant.

Tennessee	Tenn. Code. Ann. tit.39. Ch. 13 pt. 2 sect. 39-13-203	(1) significantly subaverage general intellectual functioning as evidenced by a functional IQ of 70 or below; (2) deficits in adaptive behavior; (3) the mental retardation must have been manifested during the developmental period or by age 18. The state does not define "deficits in adaptive behavior." The statute clearly provides that adaptive behavior and intellectual functioning are independent criteria.	There is no information on this aspect of the statute.
Washington	Was. Rev. Code Ann. Sect. 10.95.030 (West)	The individual has (1) significantly subaverage general intellectual functioning; (2) existing concurrently with deficits in adaptive behavior; and (3) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period. The age of onset is 18 years of age. The required IQ level is 70 or below.*	A court-appointed licensed psychiatrist or psychologist experienced in the diagnosis and evaluation of mental retardation. This leaves open the issue of whether or not the defendant may hire his own expert.
Federal Government	18 U.S.C.A. Sect. 3596(c) (Federal Crime Bill of 1994)	In 1994, Congress adopted legislation to ban the execution of individuals with mental retardation. The statute states that a sentence of death shall not be carried out upon a person who has mental retardation. The statute does not define mental retardation, or discuss at what stage in the criminal proceedings the determination of mental retardation must be made. Earlier, Congress had also provided a form of an exemption for this issue in the Anti-Drug Abuse Act of 1988 (pub. L. No. 100-690).	

* AAMR 1983 definition; see Grossman, H. "Manual on Terminology and Classification" (8th ed.) AAMR 1983

***"Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." (Luckasson, R., et. al. "Mental Retardation: Definition, Classification, and Systems of Supports" (9th ed.) AAMR (1992))

Source: Denis W. Keyes and William J. Edwards, "Mental Retardation and the Death Penalty: Current Status of Exemption Legislation," 687 Mental & Physical Disabilities Law Reporter (September - October 1997) with updated information for Arizona, Nebraska and South Dakota by DPIC.

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

IN ITS ORIGINAL JURISDICTION

ELLIS FRANKLIN, RICKY GEORGE, LARRY HALL, HERMAN LEE HUGHES, JOHNNY
PEARSON, TED POWERS, KENNETH SIMMONS, Et Al.

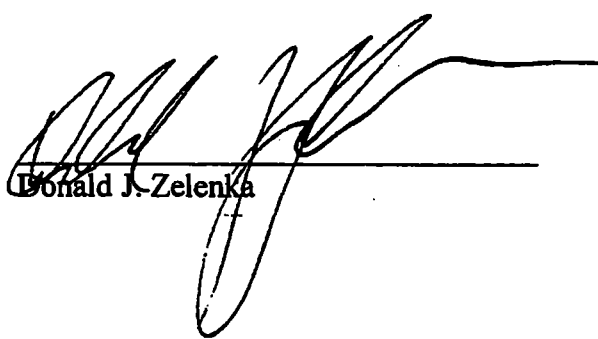
Petitioners,

v.

GARY MAYNARD, Director , South Carolina Department of Corrections, and CHARLES M.
CONDON, Attorney General of South Carolina,

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents **RESPONSE TO
PETITION FOR WRIT OF CERTIORARI** on John H. Blume, P.O. Box 11744, Columbia
South Carolina 29211 by depositing copies in the United States Mail, postage prepaid this 27th
day of August, 2002.


Donald J. Zelenka

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH SIMMONS,

PETITIONER

MOTION TO ALLOW SUPPLEMENTAL BRIEFING
IN LIGHT OF *ATKINS V. VIRGINIA*

A Dorchester County jury found petitioner guilty of the offenses of murder, burglary in the first degree, criminal sexual conduct in the first degree, kidnapping, and armed robbery. On March 22, 1999, the jury recommended petitioner be sentenced to death. The Honorable Rodney Peeples then sentenced petitioner to death for murder, life imprisonment for burglary in the first degree; thirty years imprisonment for armed robbery and thirty years imprisonment for criminal sexual conduct in the first degree. His case is scheduled to be argued before this Court during its September, 2002 term.

After the filing of briefs in this case, on June 20, 2002, the United States Supreme Court held that the execution of a mentally retarded defendant was cruel and unusual punishment

prohibited by the Eighth Amendment to the United States Constitution. Atkins v. Virginia, 122 S.Ct. 2242 (2002).

During pre-trial hearings to determine petitioner's competency to stand trial and the voluntariness of his statements to the police, evidence of petitioner's mental retardation was introduced. Chief Psychologist Leslie Sandler of the Department of Disabilities and Special Needs testified school records showed petitioner had an IQ of 69 at age 9.8. R. 2618, l. 22 – 2619, l. 24; r. 2657, l. 22 – 2659, l. 1.

Dr. Charles Saylor testified during the trial that petitioner's full scale IQ of 69 classified him as "functioning in the lower one percent of the overall population," and stated petitioner was not malingering in pre-trial testing. R. 1604, l. 16 – 1609, 10. However, Sandler testified before the jury that he thought petitioner was malingering at times. R. 1727, l. 13 – 1728, l. 1.

Dr. John Foxworth, a psychiatrist who graduated from the Citadel, evaluated petitioner; and he testified in the presence of the jury. R. 1493, l. 15 - 1494, l. 11. Dr. Foxworth said petitioner was very easily led and had trouble understanding concepts. Dr. Foxworth opined that petitioner "was mentally retarded." R. 1517, l. 17 - 1521, l. 20.

Mental retardation is typically used to describe people with an IQ of 50 to 70, and at times higher. Atkins, 112 S.Ct. at 2245 (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 42-43 (4th ed. 2000)).

The record in this case also reveals that petitioner's life skills were lacking. He was unable to maintain a job or a permanent residence. Although he was socially promoted out of high school, his mental retardation manifested itself before the age of eighteen. The trial judge also instructed the jury that it could consider petitioner's mental retardation at the time of the

crime as a statutory mitigating circumstance. R. 2382, ll. 1-8; See S.C Code §16-3-20(C)(b)(10).

The United States Supreme Court noted that “mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial:

however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Id. at 2250.

Petitioner is a party to the Ellis Franklin et al. v. Maynard et al. petition for writ of certiorari filed in the original jurisdiction of this Court that requests that this Court set the procedures and guidelines, pursuant to *Atkins v. Virginia*, on how to determine if a defendant is mentally retarded, and consequently ineligible for the death penalty. Petitioner is the sole party to that suit with a case pending on direct appeal. Understanding that oral argument is set at the September, 2002 term of this Court, and understanding the issue of mental retardation will have to be heard in a lower court, petitioner respectfully requests an expedited briefing schedule on this issue in light of the June 20, 2002 decision in Akins v. Virginia.

WHEREFORE, counsel for petitioner would respectfully request that this Court allow the parties be file supple+mental briefs, on an expedited schedule ordered by this Court, on the issue of how petitioner’s mental retardation should be determined in the lower court pursuant to Atkins v. Virginia, supra.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Assistant Appellate Defender

Attorney for Petitioner

This 26th day of July 2002

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

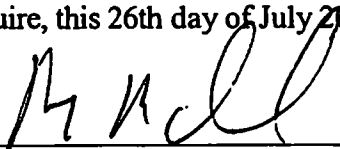
V.

KENNETH SIMMONS,

PETITIONER.

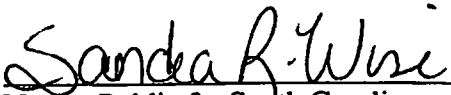
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the motion to allow supplemental briefing in light of *Atkins v. Virginia* in the above-referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire, this 26th day of July 2002.


Robert M. Dudek
Assistant Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 26th day of July 2002.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: February 3, 2005

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

**Appeal from Dorchester County
Rodney A. Peeples, Circuit Court Judge**

THE STATE,

Respondent,

v.

KENNETH SIMMONS,

Appellant.

**RESPONDENTS RESPONSE TO MOTION TO ALLOW SUPPLEMENTAL BRIEFING
IN LIGHT OF ATKINS V. VIRGINIA**

 The Respondents, above-named hereby make a return to the motion to allow supplemental briefing in light of Atkins v. Virginia, 122 S.Ct. 2242 (2002). In Atkins, the Supreme Court, Justice Stevens, held that executions of mentally retarded criminals were "cruel and unusual punishments" prohibited by Eighth Amendment. The Appellant requests supplemental briefing on the issue of how petitioner's mental retardation should be determined in the lower court pursuant to Atkins v. Virginia. Respondents respectfully submit that this issue is premature in this setting.

I.

The record reveals the following issues were preserved and perfected to this Court by briefing while Atkins was pending in the United States Supreme Court:

1. Whether the judge erred by admitting evidence appellant invoked his right to counsel when the state wanted to administer psychological tests, since this violated *Doyle v. Ohio*, and even if the evidence was relevant it should also have been excluded since its unduly prejudicial effect outweighed its probative value?
2. Whether the judge abused his discretion by dismissing juror Campeau near the close of the guilt phase where the judge correctly ruled juror Campeau had not done anything improper, and where the juror's note unequivocally stated the fact that one of appellants relatives lived near property he owned would not affect his impartiality, since there was no cause to discharge this juror, and the judge's ruling unfairly granted the state an extra peremptory challenge?
3. Whether the judge erred by refusing to charge the lesser-included offense of robbery where the only "weapon" involved was a stick or appellant's hands, since this evidence did not constitute armed robbery as a matter of law, and there was evidence from which the jury could have convicted appellant of robbery?
4. Whether the judge erred by ruling irrelevant the testimony of appellant's first cousin, Calvin Linning, Sr., during the penalty stage that he, and appellant's family, also found the victim's death "real painful", since members of appellant's family knew the victim, and the defense had the right to meet victim impact evidence once it was offered by the state?

None of the issues currently raised before this Court in the direct appeal concerning the propriety of sentencing the Appellant based upon his alleged intellectual deficits. Supplemental briefing to raise new issues is not appropriate in this litigation.

II.

Further, it does not appear that the trial counsel below raise the particular constitutional claim that due to his client's alleged mental retardation that the death penalty was improper as a matter of federal constitutional law. The record reveals that the Appellant moved after the sentencing verdict to have a life sentence imposed because "there is no question that the Defendant suffers from a diminished mental capacity. As such, the imposition of the death penalty would constitute cruel and unusual punishment in violation of the Eighth Amendment."

App.p. 3223-3224. The Honorable Rodney A. Peeples denied relief on this issue. App.p. 3228. Judge Peeples noted the defense had introduced conflicting expert testimony as to the defendant's mentality. There was testimony that the defendant was mildly mentally retarded, that mental retardation was suspected, but could not be diagnosed, that the defendant was not mentally retarded but was in the borderline range and that the defendant was not initially mentally retarded, but functioned at the diminished level due to chronic use of alcohol and drugs." App.p. 3223. Judge Peeples noted that in light of this conflicting evidence that he gave a series of mitigating circumstance instructions. App.p. 3228. However, in light of Penry v. Lynaugh, 492 U.S. 302 (1984), State v. Middleton, 368 S.E.2d 457 (S.C. 1988) and State v. Jones, 378 S.E.2d 594 (1989), he denied the new sentencing request. App.p. 3228-3229.

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The Appellant did not appeal this issue to this Court and consideration at this time is not appropriate. First, we submit that the evidence, albeit conflicting is that Simmons is not mentally retarded. In the guilt phase of the trial, the defense also put into evidence information used in mitigation. Dr. Michael Foxworth, a psychiatrist, opined that he was mentally retarded basically with a history of drug and alcohol abuse. R. p. 1521-23. He opined that he suffered from an "alcohol related persisting dementia which includes amnesia." R. p. 1526-27. Clinical psychologist Barton Saylor testified Simmons functioned at a "mentally deficient" range. R. p. 1606. He also felt he was deficient in his understanding of Miranda. R. p. 1608. Dr. Thomas Behrmann, a psychiatrist, opined he had "poly-substance dependence, a *provisional* diagnosis of mental retardation. R. p. 1673-76. Dr. Jeffrey Vidic, a clinical psychologist, opined that Simmons did not try to malingering on the intelligence tests. R. p. 1688.

However, Dr. Leslie Sandler, a psychological examiner from the Department of

Disabilities and Special Needs, opined that Simmons tested above the mental retardation level and did not show deficits in adaptive behavior. R. p. 1739. She opined that he was not mentally retarded. R. p. 1740. Further, she opined he was not being truthful about his inability to comprehend Miranda warnings. R. p. 1743. Dr. Randy Waid opined that Simmons had diminished mental capacity due to his poly-substance abuse lifestyle. R. p. 1879-81, 1883.

Therefore we submit that the evidence presented by the Simmons did not suffer from mental retardation but from intellectual deficits due to polysubstance abuse. The only witness qualified by training as an expert in the area of mental retardation, Dr. Sandler found neither prong for mental retardation as a matter of South Carolina law existed. R.p. 1724-26, 1739.¹ Dr. Sandler found him to be a high school graduate, two letters in football, had a drivers license, drove a car by himself, had a "remarkable number of signs that we were able to determine had indicated an absence of mental retardation" or an onset before the age of 18. Id. She opined his verbal score was 70, performance was 82 and a full scale of 75, which is in the mid-range of intellectual functioning and did not find deficits or impairments in adaptive functioning prior to age 18. R.p. 1739-40. She opined he was not mentally retarded. R.p. 1740.

III.

Respondents submit that only the issues preserved in this appeal under the South Carolina Rules of Appellate Procedure should be addressed at this time and forthwith. Since the issue raised in the post-trial motion was abandoned, it would be inappropriate for this issue to be raised

¹Section 44-20-30 (11): "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. Section 44-26-10(11): "'Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

in this action and further unnecessary delay created while issues not preserved are litigated.

Under SCACR Rule 208(b) 1 (B), ordinarily , no point will be considered which is not set forth in the statement of issues. Here, the Appellant seeks not only to re-open the appeal to address an issue not plainly raised below- a determination of mental retardation - but essentially seeks to re-open the trial. Both these requests are inappropriate in the cases present stature. However, it should not be contended that Simmons would be without a remedy to litigate this issue in the future. Three of the issues presently before this Court involve guilt phase concerns. If successful and the issues mandate a new trial, the determination of the matter will be left for another day and another judge and jury. If unsuccessful in the appeal, in light of *Atkins* and this Court's prior precedent in Middleton and Jones, the Appellant may have an appropriate remedy to litigate this claim, in a variety of potential causes of action.

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This response should not be construed as asserting that Davis has no remedy available in the state court to litigate his claim. The Respondents recognize that Atkins v. Virginia, supra., which announced that executing mentally retarded defendants violates the Eighth Amendment prohibition against "cruel and usual punishment." Respondents also recognize that *Atkins* is the type of decision that has retroactive effect. See Penry v. Lynaugh, 492 U.S. 302 (1989). The Supreme Court, in federal habeas contexts held that new rules generally did not apply to final decisions past the direct appeal stage. There were however two exceptions. The exceptions include only rules that "place[] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, or ... require[] the observance of those procedures that ... are implicit in the concept of ordered liberty...." This exception was broadened somewhat in Penry, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256, to

include rules immunizing certain classes of defendants (there, a mentally retarded man) from certain types of punishment (there, the death penalty), although the Court decided that such a new rule did not exist in Penry. Nevertheless, applying the analysis of Penry and Atkins, it is virtually beyond cavil that Atkins, has retroactive effect. Cf. Heck Van Tran v. State, 66 S.W.3d 790, 2001 WL 1538508 (Tenn. Dec.4, 2001).²

Further, in South Carolina, up to the Atkins decision, the common law of this state authorized execution of convicted murderers who are sane, but possess the characteristic of mental retardation. See, State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989) ("While evidence presented at trial was in conflict on the factual issue of retardation, we assume, for purposes of our holding here, that Jones' retardation was established as a matter of law....in South Carolina, prior to bifurcation of capital trials, mental retardation was not a defense to conviction for a capital crime. See State v. Bradford, 256 S.C. 51, 180 S.E.2d 632 (1971); State v. Byrd, 229 S.C. 593, 93 S.E.2d 900 (1956); State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956); State v. Chasteen, 228 S.C. 88, 88 S.E.2d 880 (1955); State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951). We hold that, in the sentencing phase of a bifurcated trial, it is also not a bar to

² Heck Van Tran is particularly probative in this area because the Tennessee appellate court in concluding that death sentences for mentally retarded murderers violated the State Constitution remanded the case to a trial court for a determination of the existence of the mental retardation despite that fact that evidence of mental retardation was presented to the jury in mitigation. On remand, the trial court was directed to hear the petitioner's motion to reopen and make a determination as to the petitioner's alleged mental retardation. The applicable criteria in Tennessee were those set forth by Tennessee statute: (1) significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) deficits in adaptive behavior; and (3) mental retardation manifested during the developmental period, or by eighteen (18) years of age. See § Tenn. Code Ann. 39-13-203 (1997); see also Fleming v. Zant, 386 S.E.2d at 342 (adopting and applying the statutory definition of mental retardation as the constitutional standard).

imposition of the death penalty.”). Contrary to certain claims, Respondents are unaware of any person since the 1977 statute became effective who was found to possess mental retardation and was executed. See, See State v. Middleton, 368 S.E.2d 457 (S.C.) (Middleton I), cert. denied, 488 U.S. 872 (1988)(imposition of death sentence was not cruel and unusual punishment by reason of defendant's borderline mental retardation, given his appreciation of reason for penalty. He introduced evidence that he is a borderline mental retardate with an IQ of 68 and that he suffers from an anti- social personality disorder and attention deficit disorder.); (James Terry)Roach v. Martin, 757 F.2d 1463, 1479-80 (4th Cir.) (Alleged borderline mentally retarded); Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993) (court stays execution of incompetent mentally retarded capital defendant). See also, State v. Wilson, 306, S.C. 498, 413 S.E.2d 19 (1992) (noting Penry held that mentally retarded capital defendants were not excluded from the death penalty.).

#7. Since the common law of this State allowed for the execution of mentally retarded individuals, this represents a clear change in the law for South Carolina capital defendants as determined by the binding United States Supreme Court. In its pertinent part , § 17-27-45(B), provides :

“(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.”

Since the decision in Atkins created a clear break in both South Carolina and Supreme Court precedent, Simmons should be allowed to file an application in the Court of Common Pleas for Dorchester County to litigate this particular issue, should he be unsuccessful in his procedurally proper claims pending in this Court. Therefore, consistent with the prior precedent of this Court and the statutory procedures established by the General Assembly for this remedy, Simmons and the State can correctly litigate the determination of whether he is actually mentally retarded as defined by present South Carolina under an appropriate factfinding procedure in collateral review, not merely whether such evidence exists to allow for a jury instruction or defense presentation. Although we feel that Simmons does not meet the criteria for mental retardation established in 16-3-20 as "Mental retardation" meaning significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, we recognize his right after Atkins to litigate this issue before he is executed for the murder.³ Allowing, as it must, the filing of a new action where this particular issue can be litigated under the appropriate standards and issues is the necessary and appropriate procedure for resolving, if necessary this issue.

CONCLUSION

Respondents respectfully request this Court to deny the Request for supplemental briefing to raise an entirely new claim where a remedy independent of the appeal remains available and the Appellant abandoned this issue prior to briefing. Respondents request this Court to resolve

³ Section 44-20-30 (11): "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. Section 44-26-10(11): "'Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."

the appropriate issue raised and litigated in the pending statement of issues before this Court
consistent with Rule 208.

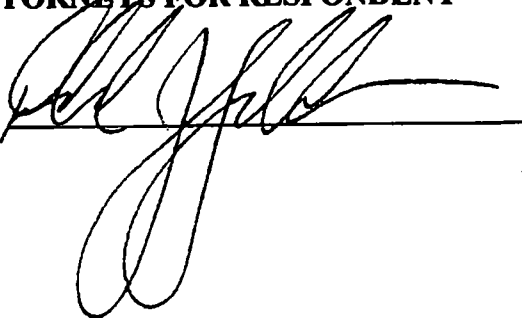
Respectfully submitted,

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

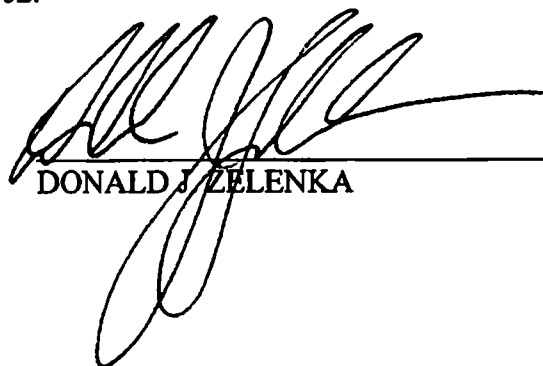
ATTORNEYS FOR RESPONDENT

By: 


August 26, 2002

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served *Respondents Response to Motion to Allow Supplemental Briefing in Light of Atkins v. Virginia* in the foregoing action by depositing two copies in the United States mail to Robert M. Dudek, Assistant Appellate Defender, South Carolina Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, South Carolina 29201 this 26th day of August, 2002.



DONALD J. ZELENA

The Supreme Court of South Carolina

3439

The State,

Respondent,

v.

Kenneth Simmons,

Appellant.

ORDER

Appellant asks this Court to allow the parties to file supplemental briefs addressing the question of how petitioner's mental retardation should be determined pursuant to Atkins v. Virginia, ___ U.S. ___, 1222 S.Ct. 2242, ___ L.Ed.2d ___ (2002). The State opposes the request.

This matter is stayed pending a decision in Franklin v. Maynard. The motion to allow supplemental briefing is denied without prejudice to appellant's right to renew the motion following the decision in Franklin v. Maynard.

IT IS SO ORDERED.

ATTORNEY GENERAL'S OFFICE

RECEIVED

9-19-02

ADMINISTRATIVE INSTRUCTIONS

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[Signature] C.J.
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Columbia, South Carolina

September 19, 2002

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH SIMMONS,

APPELLANT

PETITION TO ALLOW SUPPLEMENTAL
BRIEFING IN LIGHT OF FRANKLIN V. MAYNARD

Appellant filed his initial brief of appellant on August 10, 2001, from his convictions for murder, burglary in the first degree, criminal sexual conduct in the first degree, kidnapping and armed robbery, and his sentence of death. On June 20, 2002, the United States Supreme Court decided Atkins v. Virginia, 536 U.S.304, 122 S.Ct. 2242 (2002), which held the execution of a mentally retarded defendant was cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.

On July 26, 2002 , appellant filed a motion to allow supplemental briefing in light of Atkins v. Virginia. On September 19, 2002 this Court issued an order denying the motion without prejudice to appellant's right to renew the motion following the decision in Franklin v. Maynard.

Appellant was a party-petitioner in Franklin v. Maynard. The order also held this case in abeyance pending a decision in Franklin v. Maynard.

This Court decided Franklin v. Maynard, Op. No. 25747, 2003 WL 22475599 (S.C.), on November 3, 2003, and therefore appellant's time to renew his motion to allow supplemental briefing is now ripe.

In Franklin v. Maynard, this Court held, *inter alia*, that a defendant, such as appellant, who had been sentenced to death prior to Atkins v. Virginia, 536 U.S.304, 122 S.Ct. 2242 (2002), and "who claims he is mentally retarded and, as a result, not subject to the death penalty, may institute post-conviction relief (PCR) proceedings because his sentence is in violation of the Constitution and exceeds the maximum authorized by law." This Court wrote that the burden on the defendant in PCR was to prove by a preponderance of the evidence that he was mentally retarded.

The petitioners had argued in Franklin v. Maynard, that where the defendant's mental retardation was disputed at trial, such as here, the "appropriate remedy would include a mental retardation determination and, if necessary, a new sentencing hearing." Brief of petitioners at 21. "[S]ince a mentally retarded defendant is not eligible for the death penalty, the ultimate decision must be made by the jury. Thus the only remedy consistent with both Atkins and Ring¹ is for a new, properly instructed jury to decide both the defendant's eligibility for the death penalty, as well as its appropriateness, in light of all the relevant evidence." Brief of petitioners at 22.

During pre-trial hearings to determine appellant's competency to stand trial and the voluntariness of his statements to the police, evidence of appellant's mental retardation was introduced. Chief Psychologist Leslie Sandler of the Department of Disabilities and Special Needs testified school records showed appellant had an IQ of 69 at age 9.8. R. 2618, l. 22 – 2619, l. 24; r.

2657, l. 22 – 2659, l. 1.

Dr. John Foxworth, a psychiatrist who graduated from the Citadel, evaluated petitioner, and he testified in the presence of the jury. R. 1493, l. 15 - 1494, l. 11. Dr. Foxworth said petitioner was very easily led and had trouble understanding concepts. Dr. Foxworth opined that petitioner “was mentally retarded.” R. 1517, l. 17 - 1521, l. 20.

Dr. Charles Saylor testified during the trial that petitioner’s full scale IQ of 69 classified him as “functioning in the lower one percent of the overall population,” and stated petitioner was not malingering in pre-trial testing. R. 1604, l. 16 – 1609, 10. However, Sandler testified before the jury that he thought petitioner was malingering at times. R. 1727, l. 13 – 1728, l. 1.

The trial judge charged the jury the statutory mitigating circumstance “that the defendant had mental retardation at the time of the crime. And mental retardation means significantly sub-average general intellectual functioning existing concurrently with deficits and (sic) [in] adaptive behavior and manifested during the development[al] (sic) period.” R. 2382, ll. 1-8. See S.C. Code §16-3-20(C)(b)(10). This Court in Franklin v. Maynard held that altering this definition of mental retardation was a matter for the legislature.

In Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002), the Court held that the Sixth Amendment requires that any finding of fact that makes a defendant eligible for the death penalty must be unanimously made by the jury beyond a reasonable doubt. “All facts essential to the imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be made by the jury beyond a reasonable doubt.” (Scalia, J. concurring). 122 S.Ct. at 2440 (2002).

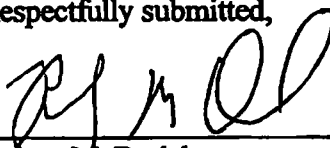
¹ Ring v. Arizona, 536 U.S.584, 122 S.Ct. 2428 (2002).

The petitioners in Franklin v. Maynard argued that “while Ring dealt specifically with statutory aggravating circumstances, it included “factfinding[s] necessary to . . . put [a defendant] to death. *Id.* At 2443. As set forth previously, Atkins held that the Eighth Amendment prohibits a mentally retarded defendant from being sentenced to death. In Apprendi² / Ring parlance, a mentally retarded defendant is now constitutionally ineligible for the death penalty. 122 S.Ct. at 2252. Since mental retardation is now a factual issue upon which a defendant’s eligibility for death turns, “that fact . . . must be found by a jury beyond a reasonable doubt. Ring, 122 S.Ct. at 2439.” Brief of petitioners at 11.

Appellant is on direct and mandatory appeal of his conviction and death sentence to this Court. Appellant will be denied the benefit of Atkins v. Virginia and Ring v. Arizona if his sole remedy is to raise the issue of his ineligibility for the death penalty because of his mental retardation before a judge only in post-conviction relief. Appellant respectfully submits his remedy for resolution of the mentally retarded issue should be a new sentencing trial in the event this Court does not grant him a new trial based on his other direct appeal issues. Regardless, since the issue of mental retardation was raised at trial as a matter in mitigation, prior to the decision in Atkins v. Virginia, petitioner respectfully requests leave to brief the proper resolution of the matter during his direct appeal to this Court.

Wherefore, undersigned counsel would therefore respectfully request that this Court allow supplemental briefing in light of Franklin v. Maynard based upon Atkins v. Virginia and Ring v. Arizona since all three cases were decided following appellant’s trial and the filing of the initial brief of appellant in this case.

Respectfully submitted,



Robert M. Dudek
Assistant Appellate Defender
Attorney for Appellant

This 12th day of December, 2003

² Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000).

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

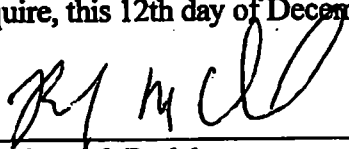
V.

KENNETH SIMMONS,

APPELLANT.

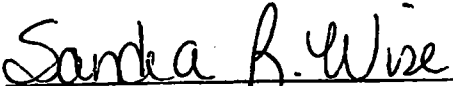
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition to Allow Supplemental Briefing in light of Franklin v. Maynard in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire, this 12th day of December, 2003.

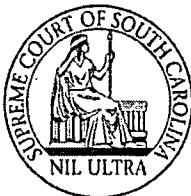

Robert M. Dudek
Assistant Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 12th day of December, 2003.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: February 3, 2005



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 28, 2004

Assistant Appellate Defender Robert M. Dudek
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: State v. Simmons, Kenneth

Dear Counsel:

The following Order has been endorsed on your Petition to Allow Supplemental Briefing in Light of Franklin v. Maynard in the above entitled case on appeal.

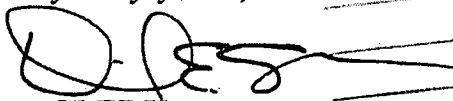
"Petition denied."

s/ Jean H. Toal C.J.
For the Court

January 28, 2004."

By copy of this letter we are advising opposing counsel of the action of the Court in this matter.

Very truly yours,


CLERK

✓
CLERK'S OFFICE
1-29-04
OFFICE OF THE CLERK
RECORDS

DES/dmh

cc: ✓ Assistant Deputy Attorney General Donald J. Zelenka

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

The State,

Respondent,

v.

Kenneth Simmons,

Appellant.

Appeal from Dorchester County
Rodney A. Peebles, Circuit Court Judge

Opinion No. 25838
Heard April 6, 2004 - Filed June 14, 2004

AFFIRMED IN PART; REVERSED IN PART

Assistant Appellate Defenders Robert M. Didek and
Eleanor Duffy Cleary, of South Carolina Office of
Appellate Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh, and
Assistant Deputy Attorney General Donald J.
Zelenka, of Columbia; and Solicitor Walter M.
Bailey, of Summerville, for respondent.

ACTING JUSTICE KITTREDGE: Kenneth Simmons was
convicted of murder, first degree burglary, armed robbery, and first degree
criminal sexual conduct. He was sentenced to death and given consecutive

sentences of life and two thirty-year terms on the remaining charges. We reverse the conviction and sentence for armed robbery, but otherwise affirm Simmons' convictions and sentences.

FACTS

On September 1, 1996, the battered body of an eighty-nine-year-old female, whom we will refer to as Ms. B,¹ was found bound and gagged on the kitchen floor of her home in Summerville. She had been raped, severely beaten, and strangled.

The crime went unsolved for more than a year until December 1997 when Simmons, who was incarcerated on other charges, confessed to the killing. He said he smoked crack and drank beer at a club before riding his bicycle home in the early morning hours on the day of the murder. Simmons saw Ms. B in her yard feeding her chickens and followed her into her house. Simmons pushed her and demanded money. Ms. B fell to the floor and hit her head. Simmons then hit her with a stick he had picked up on the back porch. He described the stick as being about two feet long and an inch and a half or two inches in diameter. Simmons raped Ms. B. She was "half and half" alive when he fled the scene.

The State's pathologist testified Ms. B died from blunt trauma and manual strangulation. She had multiple rib fractures caused by stomping or slamming, severe head trauma, and severe vaginal lacerations from the insertion of an object such as a stick or finger. She had semen in her vagina and also in her mouth. DNA testing indicated the semen taken from Ms. B's body was consistent with Simmons' DNA.

The jury found aggravating circumstances of criminal sexual conduct, kidnapping, armed robbery, physical torture, and burglary, and sentenced Simmons to death.

¹We elect not to identify the victim by name.

ISSUES

1. Did the State violate Doyle v. Ohio?
2. Was a juror improperly dismissed after the trial had begun?
3. Did the trial judge err in refusing to charge robbery as a lesser-included offense of armed robbery?
4. Was rebuttal evidence improperly excluded in the penalty phase?

DISCUSSION

1. Doyle v. Ohio

Because the State's case rested largely on Simmons' confession, the defense strategy during the guilt phase was to introduce expert testimony that Simmons was not mentally capable of understanding and waiving his Miranda² rights.

Dr. Jeffrey Vidic, a psychologist at the William S. Hall Institute,³ along with Dr. Thomas Behrman, a psychiatrist also employed at the Hall Institute, attempted to evaluate Simmons for competency on November 23, 1998. Drs. Vidic and Behrman testified as defense witnesses. Dr. Vidic was not satisfied Simmons possessed the ability to comprehend his Miranda warnings and therefore the competency exam could not proceed as planned. Dr. Vidic stated he could not formulate an opinion to a reasonable degree of certainty whether Simmons actually understood his rights or whether he was "malingering an inability to understand his rights." Dr. Behrman's testimony

² Miranda v. Arizona, 384 U.S. 436 (1966).

³ The William S. Hall Institute is the primary educational and research facility for the South Carolina Department of Mental Health.

lent further support to Simmons' position, for he stated, based on his November 23 observations, that Simmons was not "able to explain his rights . . . in a sufficient or meaningful fashion." Dr. Behrman specifically opined that on November 23 Simmons "lacked the ability to waive his rights for the purpose of the evaluation."

On cross-examination, Dr. Vidic testified over Simmons' objection that immediately after the aborted November 23 competency exam, he left a note for his intern, Ms. Skaggs, asking her to administer psychological tests to Simmons during a lunch break. The psychological testing requested by Dr. Vidic did not involve the facts of the case. Simmons refused to cooperate with the testing administered by Ms. Skaggs, invoking his "right" to speak with his lawyer. The State elicited this testimony in response to Simmons' position that he lacked the ability to understand and exercise the Miranda warnings and rights.

On appeal, Simmons argues the trial court erred in allowing the prosecutor's cross-examination in violation of Doyle v. Ohio, 426 U.S. 610 (1976), and Wainwright v. Greenfield, 474 U.S. 284 (1986). We disagree.

Doyle holds that the Due Process Clause prohibits the government from commenting on an accused's post-Miranda silence. Doyle rests on "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." South Dakota v. Neville, 459 U.S. 553, 565 (1983). This same concept of fundamental unfairness prohibits the government from using a defendant's post-Miranda silence as proof of sanity to overcome an insanity defense. Wainwright v. Greenfield, *supra*; see also State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986).

Doyle does not, however, create a per se rule requiring exclusion from evidence of a defendant's post-arrest, post-Miranda silence in all circumstances. As the Doyle court recognized:

It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an

exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

Id. at 619, n.11.

In Anderson v. Charles, 447 U.S. 404 (1980), the Court further clarified Doyle:

Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

447 U.S. at 408. Other courts have found the Supreme Court's holding in Charles is not limited to situations involving inconsistent statements. See Splunge v Parke, 160 F.3d 369 (7th Cir. 1998) (initial silence used to show police scrupulously honored defendant's rights); Allen v. State, 686 N.E.2d 760 (Ind. 1997) (refusal to give written statement after oral statement used to show rights respected); Commonwealth v. Waite, 665 N.E.2d 982 (Mass. 1996) (reassertion of silence used to show context in which questioning ended); State v. Correia, 707 A.2d 1245 (R.I. 1998) (same).

The underpinnings of Doyle, and the need for its application, are diminished where a defendant waives his right to silence. Here, Simmons did not remain silent "as to the subject matter of his statements." Simmons, following a waiver of his Miranda rights, confessed to the murder of Ms. B in December 1997. Following the lone invocation of his right to remain silent in the context of the November 23, 1998, competency evaluation, Simmons again waived his Miranda rights and cooperated with a January 1999

evaluation. In this regard, in response to the defense strategy centered on Simmons' purported inability to comprehend the Miranda warnings, the State's targeted and narrow use of Simmons' recognition and exercise of his "right" to speak with counsel did not breach the implied assurance contained in Miranda. Simmons asserted his right to silence only in the context of the November 23 psychological examination. The limited evidence of Simmons' silence in this context was not "designed to draw meaning from silence" regarding the substantive crime and therefore does not violate Doyle. Charles, 447 U.S. at 409.

This case is distinguishable from Greenfield. In Greenfield the evidence of the defendant's silence was used as substantive evidence of guilt in the prosecution's case-in-chief because the defendant pled not guilty by reason of insanity. Here, the evidence of Simmons' silence was not offered as substantive evidence of guilt but as evidence of malingering to rebut his claim that he was incapable of understanding his Miranda rights.

We thus conclude the State's use of evidence of Simmons' silence did not violate the fundamental fairness standard of Doyle.

2. Dismissal of juror

After jury selection, the trial judge informed the jury about sequestration and repeatedly admonished the jury not to discuss the case with anyone. Contact by jurors with family members, by telephone or otherwise, was to be monitored by the SLED team in charge of security and sequestration.

Before the end of the guilt phase, information regarding Juror C was brought to the court's attention. The trial judge noted for the record:

Captain Polk of SLED received a call from the wife of [Juror C] at which time the lady revealed to him that she was very concerned because she realized that the sister of the defendant, Kenneth Simmons, lived across the street from a piece of property that they owned on Congress Street in the Town of

Summerville. And in the event that the jury returned a verdict of guilty or imposed the death penalty and they were going to build on a vacant lot across the street from the defendant's sister that it would perhaps cause consternation, fear, concern, or whatever.

The trial judge asked Captain Polk to call Juror C's wife but Captain Polk was unable to immediately contact her.

Meanwhile, the trial judge received a note from Juror C stating:

Your honor, I have realized that I know a possible relative of the defendant, Kenneth Simmons, and asked earlier in the week if I knew relatives of the accused, I truthfully answered no. After the trial started, I saw a woman I recognized sitting behind Kenneth Simmons. I now realize the woman in the audience was, I believe, a Mrs. Louise that lives opposite a vacant lot I own in the Town of Summerville on Congress Street. In the future my wife and I intend to build on this lot our primary residence. I have upon occasion been cordial with Mrs. Louise and say hello to her while I am on or about my property. Knowing Mrs. Louise will not influence my decision-making ability regarding the guilt or innocence of Kenneth Simmons. If the trial proceeds to the penalty stage, none of the above will influence my decision-making ability regarding life imprisonment or the death penalty as outlined in the pre-trial questionnaire. I felt it was my duty as a juror to inform you of the above and to continue to serve you in any capacity you see fit.

Captain Polk then spoke with Juror C's wife. She told Captain Polk she had talked with her husband about Simmons' sister and stated she was upset, fearful, and "really concerned." Although Juror C's note was written after

the improper conversation, the note contained no reference to the conversation.

The State then moved to excuse Juror C. Simmons requested that the trial judge first question Juror C about the conversation with his wife. The trial judge questioned Juror C in chambers. Juror C confirmed that he and his wife had discussed the personal effect of a verdict in the case. The trial judge explained to Juror C that because he and his wife had discussed the case, he would be excused from the case. As a result of the "improper communication" between Juror C and his wife, Juror C was excused.

On appeal, Simmons contends the trial court erred in dismissing Juror C since the juror indicated he could maintain his impartiality. We disagree. Simmons cites Greer v. Neville, 21 S.C.L. (3 Hill) 262 (1837), for the proposition that once the jury has been sworn, the trial court cannot discharge a qualified juror without legal cause absent the consent of both parties. In Greer, a juror was removed after being seated solely on the basis of counsel's assertion that the juror was biased against counsel and would not do his client justice. There was no evidence to support counsel's bald assertion, and our court of appeals found the excusal of the juror arbitrary.

The court of appeals distinguished Greer in the case of Boland v. Greenville and Columbia R.R. Co., 46 S.C.L. (12 Rich.) 368 (1859), wherein a juror, who was the local coroner, was dismissed during trial because he was needed to investigate a homicide. The court noted it is within the trial court's discretion to substitute an alternate juror where there is a legal necessity or there is disclosed during trial a disqualifying interest of a juror. *Id.*

In this case, the record indicates Juror C discussed the case with his wife, including the personal effect of a possible verdict, against the trial judge's express admonition not to do so. We hold the trial judge acted within his discretion in excusing Juror C for the juror's unauthorized communication with his wife.⁴

⁴ We emphasize this is not a case where a juror was removed for concealing information during voir dire. This juror's self-proclaimed impartiality is therefore not dispositive. Cf. State v. Stone, 350 S.C. 442, 567

3. Robbery as a lesser-included offense

Upon the State's objection, the trial court refused Simmons' request to charge robbery as a lesser-included offense of armed robbery ruling that "[w]hile it's a true proposition of law . . . it's not applicable to the uncontradicted facts." Simmons contends this was error because the evidence indicates the only weapons involved were fists and a stick, and whether either of these qualifies as a "deadly weapon" is a question of fact for the jury. The State argues that since the victim died as a result of wounds inflicted by fists or a stick, these are "deadly weapons" as a matter of law.

South Carolina Code Ann. § 16-11-330(A) (Supp. 2003) defines armed robbery in pertinent part as "robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon." (emphasis added). Whether an object has been used as a deadly weapon depends upon the facts and circumstances of each case. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (murder);⁵ *see also* State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) (fist may be deadly weapon for purposes of armed robbery). Despite the egregious facts of this case, we adhere to the rule in Davis and hold that whether the robbery was perpetrated with a deadly weapon was a question of fact for the jury.

Although the trial court charged the jury that it was to determine whether a deadly weapon was used, the court refused to give the jury the option of convicting Simmons of the lesser offense of robbery. This was error. We therefore reverse Simmons' conviction and sentence for armed robbery. *See* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (trial judge must charge lesser-included offense if there is any evidence from which it can be inferred the defendant committed lesser rather than greater offense).

S.E.2d 244 (2002) (error to remove juror for innocently concealing information where juror indicated her impartiality was not affected).

⁵ *Overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (failure to give King charge not reversible error).

The real impetus in Simmons' challenge to the failure to charge the lesser-included offense is to invalidate the jury's finding of armed robbery as an aggravating factor, and ultimately, invalidate the sentence of death. While we agree that the error requires us to vacate the invalid aggravator of armed robbery, the error does not warrant reversal of the death sentence. Succinctly stated, we find Simmons' death sentence is supported by other valid aggravators.

In Zant v. Stephens, 462 U.S. 862 (1983), the Supreme Court held that in states such as ours where aggravating and mitigating factors are not weighed "pursuant to any special standard," a death sentence may be upheld even where one aggravator has been invalidated if there is a valid aggravator remaining.⁶ As the Court later explained in Tuggle v. Netherland, 516 U.S. 10, 13 (1995), Zant was "predicated on the fact that even after elimination of the invalid aggravator, the death sentence rested on firm ground." To the contrary, in Tuggle, an aggravator was invalidated because the defendant was precluded from developing rebuttal evidence relevant in the penalty phase. The Court concluded the evidentiary error could have affected the jury's

⁶ Zant involved Georgia's death penalty statute. Georgia's statutory approach requires the factfinder to consider applicable aggravating and mitigating circumstances, without regard to "any special standard." Id. at 873. In weighing "aggravating and mitigating circumstances against each other," the Georgia statutory scheme is not "governed by any specific standards." Id. at 875. Under Georgia law, the factfinder retains "absolute discretion" to impose a life sentence, notwithstanding the presence of an aggravating circumstance. Id. at 871. South Carolina's statutory scheme is in accord, and we find the reasoning of Zant persuasive. See S.C. Code Ann. § 16-3-20(B) (2003) (if statutory aggravating circumstance found, defendant sentenced to either death or life imprisonment); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) (jury may recommend life imprisonment for any reason or no reason at all); State v. Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993) (under our capital sentencing scheme, jury does not "weigh" aggravating circumstances; the failure of one aggravating circumstance does not require reversal where there remains a valid aggravator.).

consideration of the death sentence even though another aggravator was found. We are confronted with no such evidentiary preclusion.

Here, the jury affirmatively found independent aggravators of criminal sexual conduct, kidnapping, burglary, and physical torture, in addition to armed robbery. There was no error in the admission or exclusion of evidence in the penalty phase. We conclude the invalidation of the armed robbery aggravator does not impact the validity of the other aggravators found by the jury in this case, and we reject Simmons' challenge to his death sentence.

4. Rebuttal evidence in penalty phase

In the penalty phase, the State presented victim impact evidence from the victim's family and friends stating how they were negatively affected by the victim's death. During the defense case, Simmons' cousin, Calvin Linning, testified about positive features of Simmons' character. Linning then stated:

It's awfully hard for me to be up here today because I'm certainly nervous because we know [the victim] personally. I grew up in the Church of God in Summerville and [the victim] and my family was real close. We would take her to the State Youth Convention year after year. My brother is the one that taught her how to drive. And my niece was really close to [the victim]. She had a real close relationship with her. And it was real painful when we discovered about her -

At this point, the State objected to Linning's testimony regarding "his personal feelings about what occurred." The objection was sustained. Linning finished his testimony by asking the jury to give Simmons a life sentence rather than death.

Simmons contends it was a due process violation for the trial court to disallow Linning's testimony that Simmons' family suffered because of the victim's death. We disagree.

First, this argument was not raised at trial and no proffer was made as to what Linning's testimony would have been had he been allowed to continue. This issue therefore is not preserved for review. State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (to be preserved for appellate review, issue must be raised and ruled upon in the trial court). In any event, there was no error.

In Payne v. Tennessee, 501 U.S. 808 (1991), the Supreme Court ruled victim impact evidence is admissible to show the victim's uniqueness as an individual human being and the specific harm committed by the defendant in murdering the victim. This evidence is relevant for the jury to meaningfully assess the defendant's moral culpability and blameworthiness. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997). Here, the impact of the victim's death on Simmons' family is not relevant rebuttal to the evidence of Simmons' moral culpability shown by the victim impact testimony. We find no due process violation.

CONCLUSION

Pursuant to S.C. Code Ann. § 16-3-25(C)(2003), we find the death sentence in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor; the evidence supports the jury's findings of aggravating circumstances; and the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. See State v. Terry, 339 S.C. 352, 529 S.E.2d 274 (2000); State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996). We reverse Simmons' conviction and sentence for armed robbery and affirm his remaining convictions and sentences.

AFFIRMED IN PART; REVERSED IN PART.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

3459

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STATE OF SOUTH CAROLINA

ADMINISTRATIVE INSTRUCTIONS

IN THE SUPREME COURT

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ROUTE TO

Appeal from Dorchester County

ORDER: TRANSCRIPT

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Honorable Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH SIMMONS,

APPELLANT

PETITION FOR REHEARING

Opinion No. 25838

Filed June 14, 2004

Appellant respectfully requests the Court to rehear this case pursuant to Rule 221(a), SCACR. This Court affirmed appellant's convictions for murder, first degree burglary, armed robbery, and first degree criminal sexual conduct, as well as his death sentence.

Appellant requests rehearing because this Court held that "the limited evidence of Simmons' silence in this context [involving his understanding of Miranda¹ warnings] was not 'designed to draw meaning from silence' regarding the substantive crime and therefore does not violate Doyle. Charles, 447 US. at 409.²" State v. Kenneth Simmons, Op. No. 25838 at page 6 (filed June 14, 2004).

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

² Anderson v. Charles, 447 U.S. 404 (1980) and Doyle v. Ohio, 426 U.S. 610 (1976).

This Court then noted cases from other jurisdictions where limited exceptions – for very limited purposes – to references to a defendant’s invocation of his right to silence or to counsel were allowed where the defendant first chose to speak with the police. See Anderson v. Charles, 447 U.S. 404 (1980); Splunge v. Parke, 160 F.3d 369 (7th Cir. 1998); Allen v. State, 686 N.E.2d 760 (Ind. 1997); Commonwealth v. Waite, 665 N.E.2d 982 (Mass. 1996); State v. Correia, 707 A.2d 1245 R.I. 1998). State v. Kenneth Simmons, Op. No. 25838 at page 5 (filed June 14, 2004).

The *sine qua non* of a Doyle violation is the government’s use of the defendant’s silence against him. Greer v. Miller, 483 U.S. 756, 763 (1987). The question in this case therefore was whether appellant’s invocation of his right to silence and counsel was used against him. Appellant continues to strongly maintain, and therefore requests rehearing, because his invocation of Miranda rights was used against him in violation of Doyle v. Ohio, 426 U.S. 610 (1976), and Wainwright v. Greenfield, 474 U.S. 284 (1986).

The jury’s overall assessment of appellant credibility and culpability in this case cannot be viewed in a vacuum. The import of the invocation of rights testimony went far beyond appellant’s understanding of his Miranda rights. It was a shot across the bow at defense evidence appellant was mentally retarded, and it directly impacted upon that mitigating circumstance.³ See Brief of Appellant at 5. This totality of the circumstances assessment of appellant’s mental condition and abilities concern is also made apparent by the judge’s *in camera* references to the fact appellant had obtained a driver’s license, and had managed to make his way through Summerville High School

³ This case was held in abeyance following Atkins v. Virginia, ___ U.S. ___, 122 S. Ct. 2242 (2002), while this Court decided the state court implications of that case in Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003). Appellant was a party to that action in the original jurisdiction of this Court. Following Franklin v. Maynard appellant renewed his motion to be allowed supplemental briefing – which had earlier been denied without prejudice – on the issue of how evidence of appellant’s mental retardation should be considered. This Court denied that motion.

where he was a star football player. See Wainwright v. Greenfield, 474 U.S. 284, 294-295, n. 11. (1986)

Respectfully, this is an unusual and different case from those relied upon by this Court to affirm. Appellant spoke and cooperated with the evaluators while his attorney, Jerry Theos, was present. It was only after Theos left, and Ms. Skaggs wanted appellant to participate while she administered tests to him that appellant told Skaggs that he “didn’t have to answer questions, that he wanted to talk to Mr. Theos, first; that he had a right to talk to Mr. Theos before he answered any questions.” R. 1705, l. 5 – 1711, l. 20.

In the context of this record, the use of appellant’s invocation of his right to silence, and to confer with his attorney after Theos had left the evaluation had the impermissible effect of showing appellant was “hiding behind his attorney” because he did not want to give “the real” appellant away. R. 1693, l. 21 – 1694, l. 12; R. 1705, l. 5 – 1711, l. 20. The clear import of this invocation of rights testimony was that appellant had something to hide, and that he was misleading the doctors. Why should the jury accept the defense case under these circumstances? That was what is prohibited by Doyle v. Ohio, 426 U.S. 610 (1976), and appellant respectfully maintains there is not any meaningful distinction between this case and Wainwright v. Greenfield, 474 U.S. 284 (1986).

This was a pre-Atkins v. Virginia, ___ U.S. ___, 122 S. Ct. 2242 (2002) case. However, as stated, evidence that appellant was a liar and was attempting to mislead the state’s actors -- because he invoked his rights -- cannot be neatly separated out from the rest of the determinations the jury had to make in this case. This evidence directly impacted on the mental retardation mitigating circumstance, and the jury’s overall assessment of appellant. Further, the state had its evidence that appellant was malingering at times, and the Skaggs invocation of rights testimony was gratuitous and unnecessary. R. 1727, l. 13 – 1728, l. 1.

This is also not a case where appellant chose to speak with the authorities, and where the Doyle prohibition should not apply. Appellant at the relevant time only chose to speak with the state's doctors in the presence of his attorney, and he invoked his right to silence and to counsel in his absence.

The use of appellant's invocation of his right to counsel after Theos left to return to Charleston against appellant at trial breached the implicit promise in Miranda that appellant's reliance upon his right to silence and to confer with his attorney would not be used against him. See Doyle v. Ohio, 426 U.S. 610 (1976). The fact that appellant was comfortable speaking in the presence of his attorney, but invoked his right to silence and to counsel after his attorney left the evaluation is one other important factor that separates this case from those relied upon by this Court.

Appellant recognizes the case law which holds that where a defendant chooses to speak with the authorities, but then invokes his rights under Miranda, the fact that the defendant terminated questioning, can be stated in normal testimony -- if necessary -- without calling undue attention to that fact. Rowan v. Owens, 752 F.2d 1186, 1190 (7th Cir. 1984). However, the fact a defendant invoked his right to silence after starting to speak with the authorities can most often be done through the use of "well framed questions" without the need to "comment on silence." Wainwright v. Greenfield, 474 U.S. at 295. It easily could have here without reference to appellant invoking his Miranda rights and refusing to cooperate.

Since this case is controlled by Doyle v. Ohio and Wainwright v. Greenfield, *supra*, and the limited exceptions cases are inapplicable here, appellant respectfully requests that this Court reconsider its holding.

Finally, and importantly, appellant's invocation of his right to silence when Ms. Skaggs attempted to administer psychological testing was only collaterally relevant to the jury's

determination of whether appellant's confession was intelligently and voluntarily tendered.⁴ However, Dr. Vidic's testimony before the jury that appellant invoked his right to silence and to speak with his attorney had the devastatingly prejudicial impermissible effect prohibited by Doyle v. Ohio and Wainwright v. Greenfield. Rehearing should be granted in this case.

Respectfully submitted,



Robert M. Dudek
Assistant Appellate Defender

Attorney for Appellant

This 15th day of July, 2004

⁴ The real test was whether appellant's will was overborne when he gave the inculpatory statement. That determination is made based upon a totality of circumstances. See State v. Myers, ___ S.C. ___, 596 S.E.2d 488, 492-493 (2004).

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

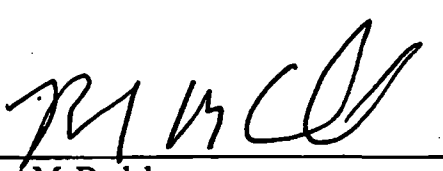
V.

KENNETH SIMMONS,

APPELLANT.

CERTIFICATE OF SERVICE

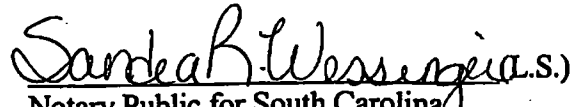
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire, this 15th day of July, 2004.

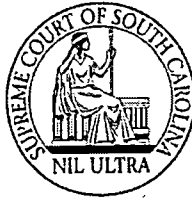


Robert M. Dudek
Assistant Appellate Defender

Attorney for Attorney

SUBSCRIBED AND SWORN TO before me
this 15th day of July, 2004.


Notary Public for South CarolinaMy Commission Expires: February 3, 2005



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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(803) 734-1080
FAX (803) 734-1499

August 9, 2004

Assistant Appellate Defender Robert M. Dudek
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: State v. Simmons, Kenneth

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John W. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

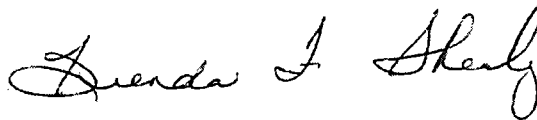
s/ John W. Kittredge J.

August 9, 2004."

The remittitur is today being forwarded to the lower court.

Assistant Appellate Defender Robert M. Dudek
Page Two
August 9, 2004

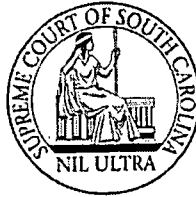
Very truly yours,

A handwritten signature in cursive script, appearing to read "Brenda I. Sherry".

CHIEF DEPUTY CLERK

BFS/dmh

cc: ✓ Assistant Deputy Attorney General Donald J. Zelenka



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

*cut due 90 days ->
11/9/07*

August 9, 2004

REMITTITUR

The Honorable Cheryl L. Graham
Clerk of Court, Dorchester County
101 Ridge Street
St. George, SC 29477

Re: State v. Simmons, Kenneth
1998-GS-18-7579

Dear Ms. Graham:

The above referenced matter is hereby remitted to the trial court. A copy of the judgment of this Court is attached.

Very truly yours,

Brenda F. Shealy
CHIEF DEPUTY CLERK

BFS/dmh

Enclosure

cc: Assistant Appellate Defender Robert M. Dudek
✓ Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Walter M. Bailey, Jr.

ATTORNEY GENERAL'S OFFICE
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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
Appeal from Dorchester County
Rodney A. Peeples, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

KENNETH SIMMONS,

PETITIONER.

PETITION FOR STAY OF EXECUTION

Counsel for Kenneth Simmons petitions this Court for a stay of execution to allow him to file a petition for writ of certiorari with the United States Supreme Court. This Court denied rehearing on August 9, 2004.

I.

This Court affirmed petitioner's conviction and death sentence in State v. Kenneth Simmons, Shearouse's Advance Sh. No. 25 at pp. 31-42 (filed June 14, 2004); 2004 WL 1302251 (SC).

II.

Petitioner filed a petition for rehearing on July 15, 2004. This Court denied that petition on August 9, 2004.

III.

A petition for writ of certiorari to the United States Supreme Court is petitioner's proper avenue for relief from the judgment of this Court affirming his murder conviction, and sentence of death. Supreme Court Rule 13.1. Pursuant to *In re STAYS OF EXECUTION IN CAPITAL CASES*, 321 S.C. 544, 471 S.E.2d 544 (1996), this Court is the proper Court to issue the stay pending the disposition of petitioner's case in the United States Supreme Court.

IV.

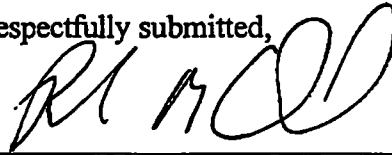
Petitioner will raise the following federal issue, preliminarily framed, in the United States Supreme Court:

Whether the South Carolina Supreme Court erred by holding that the prosecutor's cross-examination of a psychologist about petitioner's invocation of his right to silence and his right to counsel during competency testing did not violate the prohibitions of Doyle v. Ohio, 426 U.S. 610 (1976) and Wainwright v. Greenfield, 474 U.S. 284 (1986)?

Based on the above, petitioner requests a ninety day stay of execution from the date of the Court's order denying rehearing, August 9, 2004, in which to file a petition for a writ of certiorari in the United States Supreme Court. Counsel does not make this request for purposes of delay.

WHEREFORE, counsel for Kenneth Simmons, requests a ninety day stay of execution from August 9, 2004, in which to file a petition for writ of certiorari in the United States Supreme Court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Assistant Appellate Defender

This 12th day of August, 2004.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

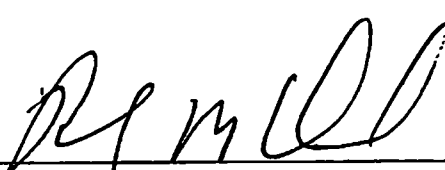
V.

KENNETH SIMMONS,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Stay of Execution in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire, this 12th day of August, 2004.


ROBERT M. DUDEK
Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 12th day of August, 2004.


Sandra K. Wessinger (L.S.)
Notary Public for South Carolina
My Commission Expires: 2-3-2005

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Rodney A. Peeples, Circuit Court Judge

THE STATE,

Respondent,

v.

KENNETH SIMMONS,

Appellant.

**Return to Petition For Stay Pending Filing of a Petition for Certiorari to the United States
Supreme Court**

The Respondent, through undersigned counsel, hereby make a Return to the Petition for a Stay of Execution received on August 12, 2004 to allow him to file a petition for writ of certiorari with the United States Supreme Court. The Court entered its opinion on April 6, 2004. *State v Kenneth Simmons*, _ S.C. _, _ S.E.2d. _, 2004 Westlaw 1302251 (2004). This Court denied rehearing on August 4, 2004.

I.

The Petitioner asserts that he intends to file a petition for a writ of certiorari in the United States Supreme Court. Pursuant to the Rules of the United States Supreme Court, Rule 13, review must be sought within ninety (90) days of the denial of the Petition for Rehearing on August 4, 2004. This Court in its Order concerning capital cases, *In Re Stays of Execution In Capital Cases*, 321 S.C.

544, 471 S.E.2d 140 (1996), stated that the Court will issue a stay in the direct appeal setting for filing certiorari, if the Petitioner files a stay motion setting forth the questions and "as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court", this Court will grant a stay of execution for ninety (90) days from the date of the remittitur. In his motion before this Court, Kenneth Simmons contends that he will pursue the following matters on certiorari:

1. Whether the South Carolina Supreme Court erred by holding that the prosecutor's cross-examination of a psychologist about petitioner's right to silence and his right to counsel during competency testing did not violate the prohibitions of Doyle v. Ohio, 426 U.S. 610 (1976) and Wainwright v. Greenfield, 474 U.S. 284 (1986)?

This Court rejected this assertions within the direct appeal.

A review of the record before this Court reveals at least one of the issues was preserved at trial and on appeal. Therefore, under *In Re Stays*, Respondent concedes the stay is appropriate, although there is no likelihood of success on the merits on certiorari for the reasons set forth in this Court's Opinion.

WHEREFORE, Respondent has made a Return to the Motion.

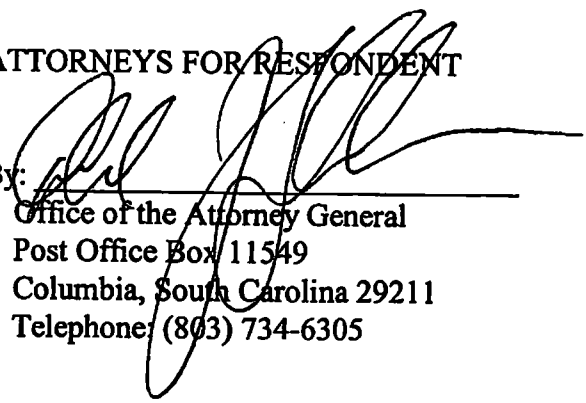
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

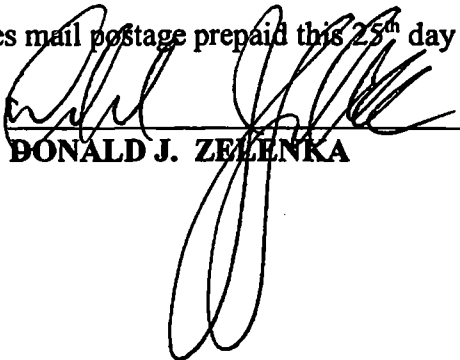
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

Columbia, South Carolina
August 25, 2004



CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that the *Return to Stay Motion* has been served on opposing counsel, Robert M. Dudek, Assistant Appellate Defender, of the South Carolina Office of Appellate Defense, 1205 Pendleton Street, Suite 306, Columbia, South Carolina 29201 by depositing two (2) copies in the United States mail postage prepaid this 25th day of August 2004.



DONALD J. ZELENA

The Supreme Court of South Carolina

ATTORNEY GENERAL'S OFFICE
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 ADMINISTRATIVE INSTRUCTIONS

The State,

Respondent,

v.

Kenneth Simmons,

Appellant.

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ORDER

Petitioner was convicted of murder, first degree burglary, armed robbery, and first degree criminal sexual conduct, and he was sentenced to death. This Court affirmed his convictions and sentences. State v. Simmons, ___ S.C. ___, 599 S.E.2d 448 (2004). The petition for rehearing was denied on July 15, 2004.

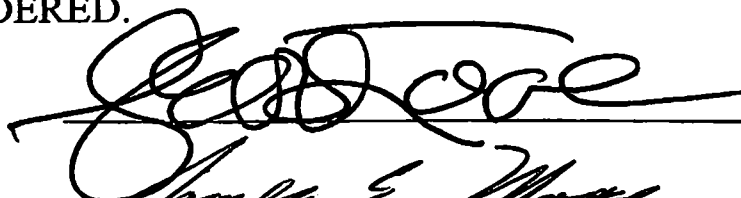
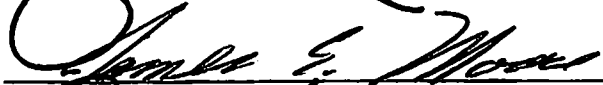
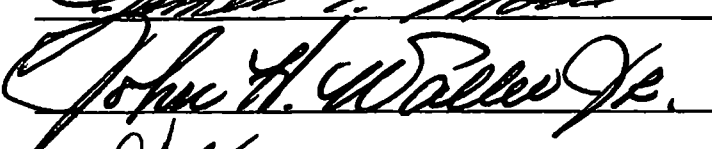
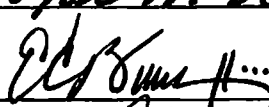
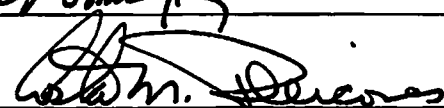
Petitioner now requests a ninety day stay of execution in which to file a petition for a writ of certiorari in the United States Supreme Court.¹ The State, by way of return, concedes a stay of execution is appropriate under In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996).

Because petitioner intends to raise to the United States Supreme Court a federal question that is preserved for review, we grant the petition for

¹ An execution notice has not been issued.

stay of execution. Id. The stay shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases, supra.

IT IS SO ORDERED.

 C. J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

September 9, 2004

3478
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ADMINISTRATIVE INSTRUCTIONS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 2004-

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KENNETH SIMMONS,

PETITIONER.

versus

STATE OF SOUTH CAROLINA,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

ROBERT M. DUDEK
Attorney at Law

South Carolina Office
Of Appellate Defense
1205 Pendleton St., Room 306
Columbia, SC 29201
(803) 734-1330

ATTORNEY FOR PETITIONER.

Capital Case**QUESTIONS PRESENTED**

1.

Whether Petitioner's right to due process was violated under the holdings of Wainwright v. Greenfield, 474 U.S. 284 (1986), and Doyle v. Ohio, 426 U.S. 610 (1976), where the state used the invocation of Petitioner's right to counsel during a competency evaluation to purportedly prove he understood his Miranda warnings at the time he gave an earlier confession?

2.

Whether the issue of Petitioner's mental retardation should be remanded to the South Carolina Supreme Court for reconsideration in light of the intervening cases of Atkins v. Virginia, 536 U.S. 304 (2002), and Ring v. Arizona, 536 U.S. 584 (2002), since the South Carolina Supreme Court twice refused to allow Petitioner to brief this issue on direct appeal, and the South Carolina procedure adopted following Atkins provides for a judge only determination of mental retardation for defendants sentenced prior to Atkins?

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STATEMENT OF FACTS	7
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WHY THE WRIT SHOULD BE GRANTED (ISSUE 1)	15
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APPENDIX

1. OPINION OF THE SUPREME COURT OF SOUTH CAROLINA A-1
2. ORDER DENYING REHEARING A-13
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SUPREME COURT OF THE UNITED STATES**October Term, 2004**
_____**No. 04-**_____
_____**KENNETH SIMMONS,****PETITIONER,****versus****STATE OF SOUTH CAROLINA,****RESPONDENT.**_____
**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA**

Kenneth Simmons asks this Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court in this case.

CITATION TO OPINION BELOW

The opinion of the South Carolina Supreme Court affirming Petitioner's murder conviction and death sentence is reported as State v. Kenneth Simmons, Opinion Number 25838, 599 S.E.2d 448 (filed June 14, 2004), and is reprinted in the Appendix to this petition at pages 1-12.

JURISDICTION

The final judgment of the South Carolina Supreme Court was entered on November 9, 2004. This Court's jurisdiction is invoked pursuant to 28 U.S.C §1257(a), Petitioner having asserted below and asserting herein the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." U.S. Const.Amend.VI

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

This case further involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part, " [N]o state shall . . . deprive any person of life, liberty, or property without due process of law. . ." U.S. Const.Amend. XIV.

STATEMENT OF FACTS

The procedural posture

Petitioner was indicted at the January 19, 1998 term of the Dorchester County grand jury for the offenses of murder, burglary in the first degree, criminal sexual conduct in the first degree, kidnapping, and armed robbery. R. 3153. The state served its notice of intent to seek the death penalty. R. 3234.

Petitioner's case came on for trial on February 22, 1999, before the Honorable Rodney A. Peeples, and a jury. R. 1. Jerry N. Theos and James A. Bell represented Petitioner. The solicitors were Walter M. Bailey and Harrison Bell. R. 1. The jury found Petitioner guilty on all counts. R. 2112-2113.

After the twenty-four hour waiting period, the sentencing phase commenced. The issue of Petitioner's mental retardation was raised as a statutory mitigating circumstance pursuant to S.C. Code §16-3-20(C)(b)(10). At the conclusion of the sentencing phase on March 2, 1999, the jury recommended death. R. 2454, l. 20 - 2455, l. 10.

Judge Peeples then sentenced Petitioner to death for murder, life imprisonment for burglary in the first degree; thirty years imprisonment for armed robbery and thirty years imprisonment for criminal sexual conduct in the first degree. All sentences were consecutive. R. 2468, l. 3 - 2469, l. 11.

Petitioner filed his initial brief with the South Carolina Supreme Court on August 10, 2001. While Petitioner's direct appeal remained pending before the state supreme court, this Court on June 20, 2002, decided Atkins v. Virginia, 536 U.S. 304 (2002), which held that execution of mentally retarded murderers was cruel and unusual punishment barred by the Eighth Amendment

to the United States Constitution.¹

On July 26, 2002, Petitioner filed a motion to allow supplemental briefing in light of Atkins v. Virginia. App. 24–28. The South Carolina Supreme Court denied this motion on September 19, 2002, without prejudice pending the decision of that court in Franklin v. Maynard, 588 S.E.2d 604 (2003). Petitioner was a party to Franklin v. Maynard. In that case Petitioner and several death row inmates, citing their mental retardation, asked the South Carolina Supreme Court, in its original jurisdiction, to set state court procedures for determining mental retardation at different stages in the process in light of Atkins v. Virginia.

The Petitioners argued for the right to a final jury determination of the issue of mental retardation at trial. That right to a final jury determination of the issue of mental retardation included those inmates sentenced to death prior to Atkins, including those in post-conviction relief. The South Carolina Supreme Court accepted the case in its original jurisdiction, and subsequently decided Franklin v. Maynard, 588 S.E.2d 604 (2003), on November 3, 2003. App. 31–35.

The state supreme court agreed with the Petitioners in Franklin v. Maynard, that a defendant should have the right to a final jury determination of the issue of mental retardation where that issue was raised during future capital trials. However, the Court disagreed with the Petitioners that a procedure also needed to be adopted for those cases where a defendant, including Petitioner, had been sentenced to death prior to Atkins.

The Court held that Petitioner, and similarly situated defendants, who had been sentenced to death prior to Atkins, already had an effective remedy in post-conviction relief. If the post-conviction judge found the defendant had proved mental retardation by a preponderance of the

¹ Certiorari was granted by this Court in Atkins v. Virginia, 533 U.S. 976 on September 25, 2001 as amended on October 1, 2001.

evidence, he would vacate the death sentence and impose a life sentence. App. 34. However, post-conviction relief does not provide for the presence of a jury. It is a judge only function. See S.C. Code §17-27-80.

Petitioner then filed a petition to allow supplemental brief in light of Franklin v. Maynard with the South Carolina Court on December 12, 2003. Petitioner, citing Ring v. Arizona, 536 U.S. 584 (2002), argued that the procedures set forth in Franklin v. Maynard were insufficient to protect him since he would be denied the right to a final jury determination of the issue of his mental retardation in post-conviction relief because he was sentenced prior to Franklin v. Maynard. App. 36-41.

The South Carolina Supreme Court denied Petitioner the right to brief this issue in its order dated January 28, 2004. App. 42. Oral argument was then heard in the South Carolina Supreme Court on April 6, 2004 on the issues involved in this case. As seen, the South Carolina Supreme Court later issued its opinion in State v. Kenneth Simmons, Opinion Number 25838, 599 S.E.2d 448 (filed June 14, 2004) affirming Petitioner's murder conviction and death sentence, and reversing his armed robbery conviction.

The opinion of the South Carolina Supreme Court

The South Carolina Supreme Court described the procedural posture and the facts of this case as follows:

On September 1, 1996, the battered body of an eighty-nine-year-old female, whom we will refer to as Ms. B,² was found bound and gagged on the kitchen floor of her home in Summerville. She had been raped, severely beaten, and strangled.

The crime went unsolved for more than a year until December 1997 when Simmons, who was incarcerated on other charges, confessed to

² The Court wrote, "we elect not to identify the victim by name."

the killing. He said he smoked crack and drank beer at a club before riding his bicycle home in the early morning hours on the day of the murder. Simmons saw Ms. B in her yard feeding her chickens and followed her into her house. Simmons pushed her and demanded money. Ms. B fell to the floor and hit her head. Simmons then hit her with a stick he had picked up on the back porch. He described the stick as being about two feet long and an inch and a half or two inches in diameter. Simmons raped Ms. B. She was "half and half" alive when he fled the scene.

The State's pathologist testified Ms. B died from blunt trauma and manual strangulation. She had multiple rib fractures caused by stomping or slamming, severe head trauma, and severe vaginal lacerations from the insertion of an object such as a stick or finger. She had semen in her vagina and also in her mouth. DNA testing indicated the semen taken from Ms. B's body was consistent with Simmons' DNA.

The jury found aggravating circumstances of criminal sexual conduct, kidnapping, armed robbery, physical torture, and burglary, and sentenced Simmons to death.

* * *

1. Doyle v. Ohio

Because the State's case rested largely on Simmons' confession, the defense strategy during the guilt phase was to introduce expert testimony that Simmons was not mentally capable of understanding and waiving his Miranda³ rights.

Dr. Jeffrey Vidic, a psychologist at the William S. Hall Institute,⁴ along with Dr. Thomas Behrman, a psychiatrist also employed at the Hall Institute, attempted to evaluate Simmons for competency on November 23, 1998. Drs. Vidic and Behrman testified as defense witnesses. Dr. Vidic was not satisfied Simmons possessed the ability to comprehend his Miranda warnings and therefore the competency exam could not proceed as planned. Dr. Vidic stated he could not formulate an opinion to a reasonable degree of certainty whether Simmons actually understood his rights or whether he was

³ Miranda v. Arizona, 384 U.S. 436 (1966).

⁴ The William S. Hall Institute is the primary educational and research facility for the South Carolina Department of Mental Health.

"malingering an inability to understand his rights." Dr. Behrman's testimony lent further support to Simmons' position, for he stated, based on his November 23 observations, that Simmons was not "able to explain his rights . . . in a sufficient or meaningful fashion." Dr. Behrman specifically opined that on November 23 Simmons "lacked the ability to waive his rights for the purpose of the evaluation."

On cross-examination, Dr. Vidic testified over Simmons' objection that immediately after the aborted November 23 competency exam, he left a note for his intern, Ms. Skaggs, asking her to administer psychological tests to Simmons during a lunch break. The psychological testing requested by Dr. Vidic did not involve the facts of the case. Simmons refused to cooperate with the testing administered by Ms. Skaggs, invoking his "right" to speak with his lawyer. The State elicited this testimony in response to Simmons' position that he lacked the ability to understand and exercise the Miranda warnings and rights.

On appeal, Simmons argues the trial court erred in allowing the prosecutor's cross-examination in violation of Doyle v. Ohio, 426 U.S. 610 (1976), and Wainwright v. Greenfield, 474 U.S. 284 (1986). We disagree.

HOW THE FEDERAL ISSUE WAS RAISED BELOW

During a competency hearing and a Jackson v. Denno hearing, held on February 11-12, 1999, as well as at trial, Petitioner's attorneys argued that Petitioner could not competently waive his Miranda rights, rendering his statements to police made in December 1997 inadmissible. R. 2476. The contested issues were Petitioner's mental retardation, his ability to understand Miranda warnings, his propensity to be easily led, and malingering. The trial court ruled that Petitioner's statements were admissible. R. 2932, l. 15 - 2933, l. 5.

Pursuant to the state's motion and court order signed on September 14, 1998, Petitioner, while in the state's custody, underwent a competency and criminal responsibility evaluation at William S. Hall Psychiatric Institute, a facility of the state Department of Mental Health. R. p.

3163; R. p. 3166. Dr. Thomas W. Behrman, M.D., a psychiatrist, and Dr. Jeffrey Vidic, Ph.D., a psychologist, conducted the evaluation and wrote the report submitted to the court. Prior to beginning their first interview with Petitioner on November 23, 1998, the doctors read Petitioner the list of rights contained in Miranda, as required. R. 1639, ll. 9-22; R. 1657, ll. 4-9

For two hours, the doctors attempted to educate Petitioner about his Miranda rights. R. 1710, ll. 11-19. They explained "over and over" the right to remain silent and the right to have an attorney present.⁵ R. 1710, l. 21 - 1711, l. 1. Petitioner was unable to explain his rights in a meaningful manner so the interview was discontinued since Petitioner was unable to adequately waive his Miranda rights for the purposes of that evaluation. R. 1634, ll. 17-18; R. 1639, l. 5 - 1640, l. 24. Dr. Behrman concluded that "he did not have the ability at that time" to knowingly and intelligently waive his Miranda rights. R. 1650, ll. 8-15. Petitioner's trial attorney, who had attended the session, then returned to his office in Charleston. R. 1693, l. 21 - 1694, l. 12; R. 1710, ll. 3-7.

Less than an hour later, Vidic asked an intern, Ms. Skaggs, to administer some more tests to Petitioner. R. 1711, ll. 2-20. She reported back to Vidic that she did not administer the tests because "he [Petitioner] told me that he didn't have to answer questions, that he wanted to talk to

⁵ As will be seen in more detail infra, there was evidence from school records that showed Petitioner had an IQ of 69 at age 9.8. R. 2618, l. 22 - 2619, l. 24; r. 2657, l. 22 - 2659, l. 1. Dr. Charles Saylor testified during trial that Petitioner's full scale IQ of 69, and that classified him as "functioning in the lower one percent of the overall population." He stated Petitioner was not malingering in pre-trial testing. R. 1604, l. 16 - 1609, l. 10. However, Dr. Sandler testified before the jury that he thought Petitioner was malingering at times. R. 1727, l. 13 - 1728, l. 1. On cross-examination by the solicitor, Sandler opined Petitioner was not mentally retarded. R. 1740, ll. 7-10.

Dr. John Foxworth, a psychiatrist educated at the Citadel in Charleston, testified Petitioner was very easily led and had trouble understanding concepts. Dr. Foxworth offered, "I felt he was mentally retarded." R. 1517, l. 17 - 1521, l. 20. Dr. Foxworth opined Petitioner could not "comprehend the concept of his right to remain silent." R. 1533, ll. 2-10.

Mr. Theos, first; that he had a right to talk to Mr. Theos before he answered any questions." R. 1705, ll. 5-11. At the next interview with Vidic and Behrmann, Petitioner sufficiently expressed an understanding of his rights to the examiners. R. 1650, l. 16 - p. 1651, l. 9.

The state sought to admit Vidic's testimony about the report made to him by Ms. Skaggs, stating, "that is a graphic example of [Petitioner] not only understanding his Miranda rights but actually exercising those Miranda rights during a crucial period of time." The state argued Doyle v. Ohio was not controlling in this situation. Petitioner's attorney vigorously disagreed, and they objected on the grounds that the admission of evidence Petitioner invoked his right to counsel with the intern denied Petitioner his constitutional right to silence and his right to counsel. Both of those were improper, and illegitimate R. 1693, ll. 5-11.

After further arguments, the trial court, conducting a strange balancing test, ruled that the testimony was admissible under Rule 403, SCRE, because "the relevancy of the evidence would outweigh any prejudice thereto." R. 1698, ll. 15-19. The objectionable evidence was then admitted in the presence of the jury. R. 1702, l. 21 - 1705, l. 23.

In closing argument, the solicitor disputed Petitioner's assertion that he was not competent to waive his rights in December 1997, stating:

Dr. Behrmann spoon-fed these [Miranda] rights and went over it very slowly and patiently with him and tried to read it to him, and Mr. Simmons was drawing a blank, he can't understand it; shortly thereafter, Dr. Vidic gets his intern, Monica Skaggs, to go down there and ask Mr. Simmons to do some tests, some psychological tests. And according to Dr. Vidic's testimony, Simmons tells Mrs. Skaggs that he wants to exercise his right not to do that, he wants to talk to his lawyer. So not only can he understand his rights, he's actually exercising those rights on the first day that he was there. . .

R. 1966, ll. 6-19. In his charge to the jury, the trial judge instructed,

you may further consider the ability of the defendant to understand and comprehend the Miranda warnings and whether or not he knowingly and voluntarily⁶ gave up his rights.... [Y]ou must consider the totality of the circumstances such as intelligence, education, experience, and ability to comprehend the meaning and effect of the statement. You must determine if the defendant in this case had the ability or capacity to comprehend the meaning and effect of waiving his constitutional rights....I instruct you, Ladies and Gentlemen, that a decision can be made intelligently with an understanding of the consequences without the decision itself being a wise one."

R. 2073, l. 17 - 2074, l. 17.

As seen, on appeal Petitioner continued to argue that the admission of testimony that he invoked his right to silence and his right to counsel when confronted with the request from the intern that he submit to further tests violated his Constitutional rights under Doyle v. Ohio and Wainwright v. Greenfield. The South Carolina Supreme Court, citing this Court's holding in Anderson v. Charles, 447 U.S. 404 (1980), noted that similar evidence had been allowed as evidence of a prior inconsistent statement.

The court reasoned that in Greenfield the objectionable evidence of silence was used as substantive evidence of guilt because Greenfield had pled not guilty by reason of insanity. The court determined in this case that the evidence was used as evidence of Petitioner's malingering, and it held Doyle v. Ohio and Wainwright v. Greenfield were not controlling.

The South Carolina Supreme Court did not mention the likely negative effect this evidence on Petitioner's mitigating circumstance of mental retardation during the sentencing hearing. As seen, Petitioner's attempts to squarely place the issue of mental retardation before the South Carolina Supreme Court were denied. R. 282, ll. 1-8; R. 2454, l. 3 - 2455 l. 11.

⁶ Petitioner's attorney objected to the judge's failure to charge that the confession must be made knowingly, voluntarily, and intelligently. R. 2400, ll. 7-17; r. 2414, ll. 16-19.

REASON THE WRIT SHOULD BE GRANTED

The South Carolina Supreme Court erred by holding that the admission of evidence Petitioner invoked his right to silence and his right to counsel when faced with an intern desiring to test him in his attorney's absence did not violate this Court's holdings in *Doyle v. Ohio* and *Wainwright v. Greenfield*. The court's opinion also failed to account for the negative effect this evidence very likely had on the jury's treatment of the statutory mitigating circumstance of mental retardation at sentencing.

There was no doubt that Petitioner made his statement of his desire to remain silent until he could speak to his attorney to intern Skaggs. At Hall Institute, Petitioner was in state custody, being examined by state doctors pursuant to an order issued on the state's motion. Petitioner was educated intensely, "spoon-fed," in fact, about his right to remain silent and his right to talk to his attorney. No longer under the protection of his attorney, who left during the break, he then exercised those rights as just had been explained to him. *Miranda*, *supra*; U.S. Const. amend. V; U.S. Const. amend. VI.

However, the solicitor was allowed to call direct attention to Petitioner's invocation of his constitutional rights to remain silent and to speak to his attorney through both testimony and closing argument. The use of post-*Miranda* silence as substantive evidence "breaches the implicit assurances contained in the warning and violates the Fourteenth Amendment." *Wainwright v. Greenfield*, 474 U.S. 284 (1986). "Post-*Miranda* silence" means not only "muteness," but also includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." *Id.* at 284, n. 13.

In Wainwright, the defendant pleaded not guilty by reason of insanity and the state was allowed to elicit testimony from police officers that the defendant had exercised his right to remain silent and had requested an attorney after his arrest. In his closing argument, the prosecutor suggested that the defendant's repeated refusals to answer questions without first consulting an attorney demonstrated he was not insane. The substance of his improper argument was similar to that of the solicitor in Petitioner's case. The Wainwright prosecutor argued to the jury:

He [defendant] goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them?... No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act....And here we are to believe that this person didn't know what he was doing at the time of the act."

Wainwright, 474 U.S. at 287, 106 S.Ct. at 636, n. 2.

On appeal, the state in Wainwright sought to distinguish Doyle, because "proof of sanity is significantly different from proof of commission of the underlying offense," so that the due process rationale does not apply. Id. 474 U.S. at 292. In Doyle, supra, the defendants presented an exculpatory story on the witness stand and this Court held that the state could not impeach their testimony by asking them why they had not explained their conduct at the time of their arrest.

Refusing to recognize a distinction, this Court in Wainwright held,

The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Wainwright, 474 U.S. at 292.

Here, Petitioner presented testimony that he was incompetent to waive his Miranda rights when he gave his earlier police statements. During cross-examination, the solicitor was permitted to elicit the fact that Petitioner had invoked his constitutional rights during the competency evaluation to intern Skaggs.

In Wainwright, the state argued that a suspect's comprehension of his Miranda warnings is more probative of sanity than of commission of the underlying offense. Similarly, the trial court found here that Petitioner's exercise of his rights was probative of his competency when he gave a statement to police. However, this was error because this Court in Wainwright specifically rejected this position, stating, "the argument about the probative value of silence therefore fails entirely to meet the problem of fundamental unfairness that flows from the State's breach of its implied assurances." 474 U.S. at 294.

This same reasoning applies to Petitioner's situation and it was error for the court to permit the state to penalize Petitioner for exercising his Miranda rights, shortly after they were given to him at the state mental health facility. With the requirement of "fundamental fairness" implicated, it was improper for the court to conduct an analysis under Rule 403, SCRE, of the probative value of the testimony against its prejudicial effect. Wainwright, supra.

The state here also argued that Doyle, supra, was inapplicable because "the door has been opened to whether or not he could comprehend Miranda rights." R. 1692, ll. 10-12. However, the evidence of post-arrest invocation of Petitioner's rights is inadmissible regardless. In Wainwright the defendant, the prosecutor claimed, had also "opened the door" by pleading not guilty by reason of insanity. Nonetheless, this Court held the admission this evidence was fundamentally unfair.

As the South Carolina Supreme Court noted, this case remained unsolved for more than a year, and no arrest was made until December 1997, when Petitioner contacted police on his own initiative. R. 1221, ll. 18-19; R. 1289, ll. 23-25; R. 1315, ll. 19-22. It is extremely unlikely he would have been charged with this murder if he had not made his statements to police. There were no eyewitnesses to the murder. R. 1075, l. 22 – 1078, l. 22; R. 1082, l. 10 – 1083, l. 6. There was absolutely no physical evidence to tie him to the scene until he submitted blood for DNA analysis after his statement and arrest.

It was fundamentally unfair to use Petitioner's alleged understanding of Miranda warnings given to him in late 1998, after he was "spoon fed" them by a psychiatrist and a psychologist to conclude Petitioner understood them in December of 1997 when a police officer gave rote Miranda warnings to Petitioner. The fundamental unfairness of the use of this evidence in this case was the same as it was in Doyle and Greenfield.

However, and importantly, this case also involved the issue of the statutory mitigating circumstance of Petitioner's mental retardation during the sentencing hearing. Evidence that Petitioner was able to understand the Miranda warnings because he invoked his right of silence and his right to counsel in 1998 surely had an unfair, and devastating effect on the jury's consideration of the otherwise strong mitigating evidence of his mental retardation. Although the South Carolina Supreme Court twice rejected Petitioner's attempts to have it consider Petitioner's mental retardation as an issue following Atkins v. Virginia, that evidentiary Elephant looms large on this Doyle and Greenfield right to counsel and right to silence issue in the Atkins mental retardation context in future cases also.

2.

How the federal issue of Petitioner's mental retardation was raised below

At trial, Chief Psychologist Leslie Sandler of the Department of Disabilities and Special Needs testified during the February 11-12, 1999, pre-trial hearing. Sandler said school records showed Petitioner had an IQ of 69 at age 9.8. Sandler said IQ was only "a secondary or tertiary consideration" since the evaluators did not know the conditions under which Petitioner took the test. R. 2618, l. 22 - 2619, l. 24; r. 2657, l. 22 - 2659, l. 1.

Dr. Charles Saylor testified during trial that Petitioner's full scale IQ of 69 classified him as "functioning in the lower one percent of the overall population," and he stated Petitioner was not malingering in pre-trial testing. R. 1604, l. 16 - 1609, 10. However, Sandler testified before the jury that he thought Petitioner was malingering at times. R. 1727, l. 13 - 1728, l. 1. On cross-examination by the solicitor, Sandler opined Petitioner was not mentally retarded. R. 1740, ll. 7-10.

As stated, the contested issues at trial were Petitioner's mental retardation, his ability to understand Miranda warnings, his propensity to be easily led, and malingering.

Dr. John Foxworth, a psychiatrist who graduated from the Citadel in Charleston, South Carolina also evaluated Petitioner, and he testified in the presence of the jury. R. 1493, l. 15 - 1494, l. 11. Dr. Foxworth said Petitioner was very easily led and had trouble understanding concepts. Dr. Foxworth testified, "I felt he was mentally retarded." R. 1517, l. 17 - 1521, l. 20. Dr. Foxworth also said that Petitioner could not "comprehend the concept of his right to remain silent." R. 1533, ll. 2-10.

The judge ultimately ruled Petitioner understood his Miranda warnings, and voluntarily

gave the police his statements. R. 2768, l. 3 – 2779, l. 2; r. 2932, l. 13 – 2933, l. 9. The judge charged the statutory mitigating circumstance of mental retardation to the jury during the sentencing phase. The jury found the existence of five aggravating circumstances. South Carolina is not a “weighing state,” and the jury does not make findings on mitigating circumstances. The jury sentenced Petitioner to death on March 2, 1999. R. 2454, l. 20 - 2455, l. 10.

After Atkins v. Virginia was decided on June 20, 2002, Petitioner petitioned the South Carolina Supreme Court to allow him to brief the significance of Atkins and Ring on the future resolution of the issue of his mental retardation. As seen, he was twice rejected that right on direct appeal.

REASON WHY THE WRIT SHOULD BE GRANTED

The procedure adopted by the South Carolina Supreme Court in *Franklin v. Maynard* to implement *Atkins v. Virginia* denies petitioner his right to a jury determination of the issue of his mental retardation. That is true even though his case was pending on direct review at time both *Atkins v. Virginia* and *Ring v. Arizona* were decided. Petitioner's case should be remanded for reconsideration of this issue following *Atkins v. Virginia* and *Ring v. Arizona* since the South Carolina Supreme Court denied Petitioner's requests to brief this issue on direct appeal.

The intervening case of *Atkins v. Virginia* and *Ring v. Arizona* should in fairness redound to Petitioner's benefit. Yet, despite Petitioner's best efforts, he has been denied the ability to make a record in this case beyond the collective consideration given to several defendants, not similarly situated, in *Franklin v. Maynard*. In *Franklin v. Maynard*, the court considered the case of six death row inmates, and one pre-trial defendant in a capital cases that all submitted they were mentally retarded and protected by *Atkins*.

The issue here is Petitioner's right to argue on direct appeal that he is entitled to a jury determination, in the future, of the issue of his mental retardation even though his trial was before this Court's decisions in *Atkins v. Virginia* and *Ring v. Arizona*. The South Carolina Supreme Court has refused to hear his argument that a judge only determination of the issue of mental retardation violates the collective holdings in *Atkins v. Virginia*, *Ring v. Arizona*, and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), this Court wrote that it had "no reason to disagree with legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal." Applying the "evolving standards of

decency” standard, this Court held that the execution of the mentally retarded was excessive, and “the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender. Atkins v. Virginia, 536 U.S. at 321, *citing* Ford v. Wainwright, 477 U.S. 399, 405 (1986).

In Ring v. Arizona, 536 U.S. 584 (2002), Ring argued that Apprendi v. New Jersey, 530 U.S. 466 (2000) was irreconcilable with Walton v. Arizona, 497 U.S. 639 (1990), which upheld Arizona’s judge only sentencing procedure. This Court agreed, and held that the Arizona statute which allowed a trial judge alone to determine the presence or absence of aggravating circumstances violates the Sixth Amendment right to a jury in capital proceeding.

While Ring dealt specifically with statutory aggravating circumstances, it included “factfinding[s] necessary to . . . put [a defendant] to death.” “The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.” Ring v. Arizona, 536 U.S. at 609.

Petitioner’s direct appeal, to the best of Petitioner’s knowledge, was the first case to come before the South Carolina Supreme Court following its opinion in Franklin v. Maynard, 588 S.E.2d 604 (2003), which held a defendant in Petitioner’s shoes, having been sentenced to death prior to Atkins v. Virginia, had a suitable remedy in state court post-conviction relief. As stated, in South Carolina post-conviction relief is – and always has been -- before a judge only. See S.C. Code §17-27-80.

“The application [for post]conviction relief] shall be heard in, and before any judge of, a