

ORIGINAL

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

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Appeal from Dorchester County  
Diane S Goodstein, Circuit Court Judge

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SC Supreme Court

**STATE OF SOUTH CAROLINA,**

Respondent,

v

**KENNETH HARRY JUSTUS,**

Appellant

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**FINAL BRIEF OF RESPONDENT**

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**ATTORNEYS FOR RESPONDENT**

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## **APPELLANT'S STATEMENT OF ISSUE ON APPEAL**

The guilty plea judge committed reversible error by granting State's motion to disqualify Justus' appointed counsel, Maite Murphy, simply because she had represented an investigator employed by the Solicitor's Office in an unrelated domestic matter

## STATEMENT OF THE CASE

Appellant murdered Justin Breganzer within the confines of Lieber Correctional Institution on July 26, 2005. Appellant was arrested for the murder on August 2, 2005. On October 20, 2005, appellant was indicted by the Dorchester County grand jury for murder (05-GS-18-1265) (R 330-352, 11, Tr 330-Tr 12/11/08, pp 54-76, Tr 2/16-17/06, p 11)

The State sought the death penalty against appellant and served him with its Notice of Intent to Seek the Death Penalty on August 11, 2005 (R 11, 18-19, Tr 2/16-17/06, p 11, Tr 12/11/06, pp 18-19). On July 31, 2007, appellant was served with Notice of Aggravating Circumstances (R 18-19, Tr 12/11/06, p 18-19)

This Court assigned this capital case to the Honorable Diane Shafer Goodstein, Circuit Court Judge. Appellant was originally represented by court-appointed attorneys Marva Hardee-Thomas and Maite Murphy. In February of 2006, Ms Hardee-Thomas and Ms Murphy were removed from the case for different reasons, and Walter Bailey and Norbert Cummings were substituted as court-appointed capital defense counsel. The case was eventually scheduled for trial the week of December 15, 2008.

On December 11, 2008, appellant pled guilty to murder before Judge Goodstein<sup>1</sup>. In his guilty plea, appellant admitted his guilt to Justin Breganzer's murder. At the conclusion of the guilty plea proceeding, Judge Goodstein accepted appellant's plea after finding it was freely, voluntarily,

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<sup>1</sup>Prior to appellant's guilty plea, a hearing pursuant to State v Blair, 275 S C 529, 273 S E 2d 536 (1981) was conducted at which Doctors Donna Schwartz-Watts and Jeffrey Ford testified appellant was competent to stand trial or plead guilty and to assist his attorneys in his defense. Appellant's attorneys also informed the court that in their opinion appellant was competent. At the conclusion of the Blair hearing, Judge Goodstein found and concluded appellant was competent *and* able to assist his attorneys with his defense.

and knowingly entered ( R 277-352, Tr 12/11/08, pp 1-76) The State continued to seek the death penalty against appellant for Justin Breganzer's murder

After the required twenty-four (24) hour waiting period, the sentencing phase began on December 15, 2008 and concluded on December 16, 2008 On December 23, 2008, in a written sentencing order read into the record, Judge Goodstein found the State had proven beyond a reasonable doubt the following statutory aggravating circumstance *The murder was committed by a person with a prior conviction for murder* S C Code Ann Section 16-3-20(C)(A)(2) In addition to finding the aggravating circumstance, Judge Goodstein sentenced appellant to death for Justin Breganzer's murder ( R 355-526, 535-558, 561-574, 585, Tr 12/15/08, pp 1-172, Tr 12/16/08, pp 1-24, Tr 12/23/08, pp 1-14 & Sentencing Order) This appeal followed

## **RESPONDENT'S STATEMENT OF FACTS**

On July 26, 2005, appellant brutally beat and eventually stabbed Justin Breganzer ("Justin") to death. Appellant used a shank to murder the victim. Appellant was thirty-eight (38) years old at the time he murdered Justin. Justin was just twenty-two (22) years old at the time of his death. (R 277-352, Tr 12/11/08, pp 1-76)

At the time of Justin's murder, appellant was incarcerated at Lieber Correctional Institution, a maximum security prison, serving two (2) consecutive life sentences for two (2) separate murders from Oconee County. Appellant was convicted in Oconee County on October 6, 1998 of the murder of Randal Eades and the murder of Kitty Smith. The murder of Mr. Eades and the murder of Mrs. Smith were unrelated. Appellant pled guilty to both murders and accompanying armed robbery charges. In addition to the consecutive life sentences for the two (2) Oconee murders, appellant received thirty (30) year sentences on the armed robbery indictments. (R 338-340, Tr 12/11/08, pp 62-64) The victim in the present case, Justin, was also incarcerated at Lieber. The victim's incarceration at Lieber came as a result of walking away from a litter detail, which resulted in a conviction for escape. The victim was on the litter detail after having been sentenced to an active Youthful Offender Act (YOA) sentence for carbreaking and grand larceny. Pursuant to Department of Corrections (DOC) guidelines, any person convicted of escape must be housed at a maximum security facility. Justin had approximately two (2) months remaining on his sentence at the time of his murder. (R 338-39, Tr 12/11/08, pp 62-63)

### ***The Evidence***

On July 26, 2005, shortly after 10:00 p.m., a prison guard found Justin's lifeless body lying in a pool of blood in his cell. A trail of blood drops and bloody footprints led from Justin's cell to

the area of appellant's cell Appellant's bloody palm print was also found on a stairway post leading to appellant's cell, which was on a lower level of the cell block from Justin's cell Justin's blood was also found on appellant's clothing located inside appellant's cell in appellant's prison locker Appellant's boots also contained Justin's blood on them Appellant's boots also matched the boot prints leaving the victim's cell and heading toward appellant's cell Appellant's fingerprint was found in Justin's cell on a tobacco wrapper Appellant's thumb print, in Justin's blood, was also found in Justin's cell on the sink ( R 338-341, 367-424, 432-444, Tr 12/11/08, pp 62-65, 12/15/08, pp 13-70, 78-90)

The autopsy determined Justin had been badly beaten and stabbed eleven (11) times with a sharp object ( R 466-471, Tr 12/15/08 p 112-117) Law enforcement recovered the shank, used to stab Justin, in the bottom of the toilet in the victim's cell ( R 390, Tr 12/15/08, p 36) A wooden handle wrapped with cloth, similar to prison uniform cloth, was also recovered in the sewer drain which collects material coming from the prison sewer system ( R 387-89, Tr 12/15/08, pp 33-35) The handle had a piece of metal in it A forensic expert microscopically compared the broken blade, found in the toilet, to the metal in the handle and determined the blade and the handle were at one time joined together ( R 435, Tr 12/15/08, p 81) The pathologist determined Justin died from one of his eleven (11) stab wounds This stab wound penetrated Justin's heart ( R 467-69, Tr 12/15/08, pp 113-115) At his guilty plea, appellant admitted he murdered Justin ( R 310-352, Tr 12/11/08, pp 34-76)

### ***The Penalty Phase***

#### *A Appellant s prior record*

In the penalty phase, the State introduced appellant's extensive criminal record Appellant

was convicted in 1985 of house breaking *and* grand larceny and malicious injury to personal property. In 1987, appellant was convicted of two (2) counts of auto-breaking *and* larceny, possession of a controlled substance, possession of tools used for a crime, and driving under the influence. Appellant was convicted in 1995 of attempting to possess prescription drugs by fraud and conspiracy to obtain drugs by fraud. As previously stated, appellant was convicted in 1998 of the two (2) Oconee County murders, and the two (2) accompanying armed robbery charges. (R. 364-66, Tr. 12/15/08, pp. 10-12)

*B Appellant's prison disciplinary record*

The State also introduced appellant's record of disciplinary violations while incarcerated. Appellant had disciplinary violations in 2000 for refusing to work, possession or use of drugs (2 counts), and under the influence. In 2001 appellant had numerous disciplinary violations for possession or use of drugs and one violation for refusing to take a urine test. In 2003, appellant was convicted of possession of contraband. In 2004, appellant had disciplinary violations for possession of drugs. During this same year, appellant had a violation for refusing to follow orders. Justin's murder occurred in 2005. (R. 373-74, Tr. 12/15/08, pp. 19-20)

*C The Prior Murders Committed by Appellant*

During the penalty phase, the State also introduced facts and circumstances surrounding the previous Oconee County murders to establish appellant's character and future dangerousness.

*(The Eades Murder)*

On January 30, 1997, Randal Eades was murdered on the front porch of his home, located about three (3) miles northwest of Walhalla, S.C. Mr. Eades operated a small grocery store directly across Highway 28 from his residence. Eades was at home alone at the time he was murdered. (R.

472-487, 491-95, Tr 12/15/08, pp 118-133, 137-141)

On the evening of Eades' murder, appellant was dropped off near Eades' home by his girlfriend. Appellant approached the home on foot carrying a firearm. When the victim's dogs began to bark, Eades came out on his front porch. Appellant shot Eades at least twice as Eades stood on his porch. Appellant then stole money and a gun from Eades' bedroom. Appellant also dragged Eades' body to the side of the home and dumped it over an embankment. Eades' body was discovered by his wife upon her returning to the home later that evening. (R 472-487, 491-95, Tr 12/15/08, pp 118-133, 137-141)

Appellant shot Eades with a shotgun. The pathologist determined Eades had been hit with numerous bird-shot pellets from the top of his head to down below his waist and mid-thigh. All of the bird-shot wounds were superficial, except for one pellet that penetrated an eye and would have blinded the victim in that eye. Appellant also shot Eades with at least one 00 buck-shot load. These pellets hit Eades from his left cheek down to his left thigh or groin area. His jaw was fractured by one pellet. One pellet went through his lung, his heart, the ventricle, and the aorta. Another pellet perforated the thoracic aorta and the lung. Still another pellet lodged in Eades' spine, which would probably have paralyzed him. And, another pellet went through his genitals. Eades bled to death from his gunshot wounds. (R 472-480, Tr 12/15/08, pp 118-126)

Eades was fifty-one (51) years old at the time of his death. Appellant's murder and armed robbery of Eades remained unsolved for approximately one (1) year. (R 472-487, 490-95, Tr 12/15/08, pp 118-133, 136-141)

*(The Smith Murder)*

On January 4, 1998, Kitty Smith was murdered in her business located on Highway 11 in

Oconee County Mrs Smith, a widow of a retired U S Army veteran, was operating the Highway 11 Grocery that evening when appellant entered her store carrying a shotgun Appellant shot Mrs Smith with the shotgun and then robbed the store of several thousand dollars, a duffel bag, some bank bags, and Mrs Smith's credit cards ( R 481-493, Tr 12/15/08, pp 127-139)

A witness, who came into the store after Mrs Smith was shot, testified appellant pointed the shotgun in his direction and attempted to shoot him but the gun did not fire but only clicked The witness ran and pushed his wife out of the store, and they fled together down Highway 11 ( R 496-501, Tr 12/15/08, pp 142-147)

Several days later appellant was arrested in Athens, Georgia after using one of Mrs Smith's stolen credit cards Police found in appellant's motel room several thousand dollars in cash, the bank bags, and the duffel bag ( R 490-93, Tr 12/15/08, pp 136-139) Appellant confessed to Mrs Smith's murder and eventually confessed to the Eades' murder ( R 493-95, Tr pp 139-141)

Mrs Smith was sixty-four (64) years old at the time of her murder and was five (5) ft three (3) inches tall and weighed approximately one hundred and forty (140) pounds Appellant shot Mrs Smith with buckshot in the upper chest One of Mrs Smith's arms was up when appellant shot her with the shotgun Like Mr Eades, Mrs Smith also bled to death as a result of the gunshot wound to her chest ( R 427-431, Tr 12/15/08, pp 73-77)

#### *D Justin s Murder*

In the penalty phase, the State also introduced the facts and circumstances surrounding Justin's murder at Lieber Correctional Justin was twenty-two (22) years old, stood five (5) ft six (6) inches tall, and weighed approximately one hundred and forty-six (146) pounds Appellant was thirty-eight (38) years old at the time he murdered Justin ( R 375, 466-472, Tr 12/15/08, pp 21,

112-118)

The autopsy determined Justin had multiple injuries to his body. His nose was fractured, and he had several bruises on his cheeks. He also had lacerations along each eyebrow and had superficial scratch wounds to his face. There were three (3) wounds to his left ear. The pathologist testified the most likely cause of the injuries to the face and head were as a result of being hit with a fist. Justin also had a total of eleven (11) stab wounds, one of which was directly to the heart. In addition to three (3) stab wounds to his chest, Justin had stab wounds to the abdomen, arms, left hand, and one in the back of the upper shoulder. (R 466-472, Tr 12/15/08, pp 112-118)

### *The Sentencing Order*

On December 23, 2008, Judge Goodstein issued her twelve (12) page sentencing order which she read into the record. The order was filed with the Dorchester County Clerk of Court the same day.

### *A Procedural Background*

In the sentencing order, Judge Goodstein initially recounted the procedural posture of the case. Judge Goodstein noted the State had timely served its intention to seek the death penalty and notice of aggravating circumstances. She explained appellant pled guilty to murder on December 11, 2008 and the twenty-four (24) hour waiting period was observed. She pointed out the sentencing hearing began on December 15<sup>th</sup> and concluded on December 16<sup>th</sup>, 2005. After reviewing the testimony, the complete record, and the applicable law, Judge Goodstein made the following findings of fact and conclusions of law.

### *B Blair Hearing*

In the sentencing order, Judge Goodstein indicated a Blair hearing had been conducted at the

start of the proceedings to ascertain whether appellant was competent to stand trial or subsequently to enter a plea of guilty to murder. She noted that during the hearing the court heard from a psychiatrist and an internist. Specifically, Doctor Schwartz-Watts, an expert in forensic psychiatry, testified she met with appellant seven (7) times, most recently on the morning of the guilty plea. In her opinion, appellant was clearly competent under the Blair standard, and appellant had sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding, and he had a rational as well as a factual understanding of the proceedings against him. In this regard, Judge Goodstein cited State v Weik, 356 S C 76, 81, 587 S E 2d 683, 685 (2002). Additionally, Dr Jeffrey Ford, appellant's internist, testified concerning appellant's physical health and whether it would affect his competency to stand trial.<sup>2</sup> Dr Ford stated he examined appellant three (3) times including the morning of the guilty plea and appellant's physical condition neither prevented him from understanding the nature of the charges against him, nor from participating with counsel in preparing his defense at trial. Dr Ford further stated appellant suffered from no physical condition that would prevent him from competently participating in a trial or plea. Judge Goodstein also noted appellant's attorneys believed their client was clearly competent to plead or go to trial based on their interactions with appellant before the trial and on the morning of the guilty plea. Judge Goodstein then noted in the order that she had found appellant was competent. Judge Goodstein found appellant had both a rational as well as a factual understanding of the proceedings against him and was able to consult with counsel and assist in his defense.

### *C Factual Background*

Judge Goodstein then briefly recited the factual background of the case after noting the basic

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<sup>2</sup>Appellant has hepatitis C

facts were not in dispute. She pointed out appellant was incarcerated at Lieber Correctional Facility in July of 2005 while serving two (2) life sentences and two thirty (30) year sentences as a result of two (2) murders and two (2) armed robberies which occurred in Oconee County. She noted the victim Justin was also housed at Lieber serving a sentence for escape after walking away from a litter detail while serving a YOA sentence. Judge Goodstein noted that on July 26<sup>th</sup>, just after 10:00 pm, the victim's body was discovered in a pool of blood in his own cell. Justin had been severely beaten and repeatedly stabbed with a fatal stab wound to the heart. SLED processed the crime scene, and numerous items were recovered which were later directly linked to appellant, including fingerprints in the victim's cell, one of which was in the victim's blood. Judge Goodstein also pointed out the murder weapon was found in the toilet in the victim's cell and the corresponding handle was found in the prison sewer system, which was forensically matched to the murder weapon. Judge Goodstein also noted there was a trail of blood from the victim's cell to an area of the prison where appellant resided. She noted a bloody footprint and a palm print matched appellant. Judge Goodstein also pointed out that during a search of appellant's cell a bloody towel and a bloody SCDC uniform were found in appellant's locker. She also pointed out SLED matched several blood samples on this clothing to the victim. Judge Goodstein noted there were also boots located in appellant's locker to which SLED matched the tread positively to the boot print leading from the victim's cell to appellant's cell. Judge Goodstein also highlighted that in addition to the evidence provided by the State, appellant admitted his guilt to the murder of Justin during the guilty plea.

#### *D Defendant's Guilty Plea*

Judge Goodstein next summarized in detail appellant's guilty plea of December 11, 2008. She noted at the start of the plea an *in camera* hearing was conducted with appellant and his

attorneys to determine appellant's position concerning the waiver of his 5<sup>th</sup> Amendment rights. During this hearing, Mr. Bailey examined appellant about his desire to waive his 5<sup>th</sup> Amendment rights along with other constitutional rights. Judge Goodstein noted appellant affirmatively stated he wished to waive his 5<sup>th</sup> and 6<sup>th</sup> Amendment rights and all his rights to enable him to plead guilty, including his right to trial by jury, right to call witnesses, right to cross-examine witnesses, to object to evidence, to challenge testimony, and to offer experts. After stating he wished to waive all these rights and others, appellant stated he wished to waive all rights he had commensurate with a jury trial in order to enter a plea of guilty to murder.

Judge Goodstein further highlighted she then examined appellant to determine his position concerning his attorneys' ability to make certain statements which would waive his 5<sup>th</sup> and 6<sup>th</sup> Amendment rights, since they would be acting as his agents during the proceedings. Judge Goodstein pointed out appellant affirmatively stated he understood his rights and consented to his attorneys making statements that would waive his 5<sup>th</sup> Amendment rights.

Judge Goodstein further noted after concluding the *in camera* examination she collected personal information from appellant as follows. Appellant was 41 years old and completed the 10<sup>th</sup> grade in school at Walhalla High School before dropping out, and he never got his GED. He worked after dropping out of school at a number of companies, each length of employment ranging from one (1) to two (2) and a half (½) years. His last job was apparently ten (10) years ago just before he was arrested for the crimes in Oconee County. He had one child who was sixteen (16) years old.

Judge Goodstein also noted she reviewed appellant's past drug, alcohol, and mental health history, which included the following. In the early 1990's, appellant completed drug and alcohol treatment. In 1998, appellant stated he was evaluated by a psychiatrist and was placed on

medication, but was taken off that medication in 1999 with the consultation of a doctor. While located in Lieber, appellant stated he took two (2) or three (3) medicines for his health care. Currently, appellant takes Remeron nightly to deal with chronic anxiety. Judge Goodstein noted appellant was clear that he had no problem that might interfere with his ability to understand the proceedings.

In the sentencing order, Judge Goodstein further highlighted she examined appellant concerning the waiver of his constitutional rights. She pointed out she inquired about his desire to waive his right to remain silent, his right not to incriminate himself, his right to require the state to prove his guilt beyond a reasonable doubt, and his right to confront witnesses, and he understood each of these rights and wished to waive them.

#### *E The Aggravating Circumstance*

In the sentencing order, Judge Goodstein found the State proved the aggravating circumstance it alleged beyond a reasonable doubt. Judge Goodstein found the murder of Justin Breganzer was committed by a person with a prior conviction for murder. Judge Goodstein found appellant was previously convicted of the murders of Randall Eades and Kitty Smith in 1998 in Oconee County, the State having introduced appellant's prior criminal record into evidence. She also noted appellant admitted the same by his plea of guilty, the facts were undisputed in the testimony, and appellant admitted their existence. Judge Goodstein also recounted in detail the facts surrounding the two (2) Oconee County murders, including that appellant had been in Ms. Smith's store on an occasion previous to her murder, and she had extended credit to him, and that appellant confessed to both the murder of Ms. Smith and the murder of Mr. Eades after his arrest for the Oconee County murders. Judge Goodstein also recounted in the sentencing order that following his

guilty pleas to the two (2) murders and two (2) armed robberies in Oconee County, appellant received a life sentence for each murder and thirty (30) year sentences for armed robbery and, as a result, was taken into the custody of SCDC. Judge Goodstein affirmatively found the murder of Justin Breganzer was committed by one with a record of having committed a previous murder (Sentencing Order, pp 7-12)

#### *F Mitigating Factors*

In the sentencing order, Judge Goodstein noted appellant was engaged, appropriate, concerned, made notes, and responded to the Court's questions along with his own counsel's questions, and was cooperative at all times in the process. She noted he was intently paying attention during the hearings pre-trial, during the guilty plea, and sentencing phase.

Judge Goodstein pointed out appellant prohibited his attorneys from offering any evidence in mitigation or arguing against the imposition of the death penalty. Judge Goodstein found based on appellant's testimony and the other evidence bearing on his competency, as well as, by statements of his attorneys, and the court's observations, it was clear appellant freely, voluntarily, knowingly, and intelligently waived his right to present mitigation evidence and to contest the aggravating circumstance.

Judge Goodstein also pointed out counsel for appellant informed the court they were ready and willing to present evidence in mitigation had appellant allowed them to proceed. She also noted counsel had secured experts in appellant's behalf along with a plan to present an affirmative contest on his behalf on aggravating circumstances with a mitigating circumstance case. Judge Goodstein also highlighted that at closing arguments, both of appellant's attorneys reiterated that this was their client's wishes, this decision was not their wishes for their client, they had attempted for well over

a year to convince appellant to present some case even if he was going to enter a guilty plea to the murder of Justin Breganzer, but they were unsuccessful in those efforts. Continuing, Judge Goodstein explained that counsel stated they reviewed their client's options and all his rights during each step of the process and the rights he would be waiving by entering a guilty plea. Judge Goodstein found that despite counsel's efforts, appellant was firm in his decision to plead guilty and seek the death penalty and not allow or present mitigation evidence. Judge Goodstein also noted she questioned appellant extensively regarding his taking such a position. Judge Goodstein found the record abundantly showed appellant was competent and made this decision freely, voluntarily, intelligently, and knowingly.

Judge Goodstein also found she was not bound by appellant's wishes regarding sentencing. She determined, as fact finder and sentencer, she must search the record to find any mitigating circumstances and review those in light of the aggravating circumstances before rendering a sentence. She noted, as previously stated, appellant was at all times appropriate in his conduct during the proceedings.

Judge Goodstein considered appellant's mental health, which she noted was discussed extensively. She noted that initially she made a determination that appellant was competent. Judge Goodstein pointed out this determination was reviewed and reaffirmed throughout the entire proceeding. She also highlighted she had been aware of appellant's physical condition, specifically, his having hepatitis C.

Judge Goodstein pointed out the forensic psychiatrist found appellant suffered from no mental illnesses and appellant's internist found his medical health did not adversely affect his competency to participate in the guilty plea or trial. Judge Goodstein found there was no affirmative

evidence of what role, if any, substance abuse played in appellant's conduct. However, she found that given appellant's numerous disciplinary infractions for drug use while at SCDC, his drug use may have played a role, however the evidence was insufficient for the court to so find.

In the sentencing order, Judge Goodstein pointed out she had reviewed all the statutory mitigating circumstances outlined in S.C. Code Ann. Section 16-3-30(C)(b)(1)-(10)(Supp. 2001). After careful study of the record, the testimony of the forensic psychiatrist and appellant's internist, the factual basis of the guilty plea, examination of appellant by the court, and the lack of mitigating circumstances presented by appellant under his specific direction, Judge Goodstein could not find any statutory mitigating circumstance which would apply to appellant in the present case. (R. 595, Sentencing Order, p. 11)

Judge Goodstein did find the evidence supported a non-statutory mitigating circumstance, acceptance of responsibility. She found appellant confessed his guilt after being arrested and steadfastly maintained his desire to be punished. She also found appellant in his allocution took responsibility for all three (3) murders, the Oconee County murders, and Justin's murder, and expressed his concern for the victim's families' closure. She noted his allocution "may be the antithesis of hubris. However, it was not controlling on the court's decision" as to sentence. (R. 595, Sentencing Order, p. 11)

#### *G. Victim Impact*

Judge Goodstein noted she heard from Sandra Carter, the mother of Justin Breganzer. Mrs. Carter testified about the victim's upbringing, the challenges he encountered, how he had turned a corner in his life, and how his incarceration had rehabilitated his life. She also testified the victim had taken the GED after dropping out of high school a couple of years earlier and scored in the top

four percent (4%) Continuing, she testified how the victim had become a teaching assistant while at Lieber and about the victim's desire to open a book shop after serving his sentence Mrs Carter testified to having a close loving relationship with her son even through the tough stretches of his parents' divorce Mrs Carter also told the court how Justin's murder had left her broken hearted Judge Goodstein also noted she heard from Steve Smith, Ms Smith's loving son, who described his mother for the court

#### *Sentencing Decision*

Having carefully considered all relevant facts and circumstances, including the existence of the statutory aggravating circumstance beyond a reasonable doubt, as well as the presence of mitigating circumstances, Judge Goodstein found and concluded appellant should be sentenced to death Judge Goodstein further found and concluded the death penalty was warranted under the evidence in this case, and it was not the result of prejudice, passion, or any other arbitrary factor ( R 596, Sentencing Order p 12)

## ARGUMENT

**Judge Goodstein did not abuse her discretion in removing appellant's court-appointed 2<sup>nd</sup> chair capital counsel and replacing her with Norbert Cummings more than two (2) years and nine (9) months prior to trial, nor given this record can appellant show prejudice from the removal of appointed counsel entitling him to a new trial (vacation of his guilty plea) or sentencing hearing**

### *The Issue*

Appellant raises only one (1) issue on appeal from his guilty plea and resulting death sentence. Appellant alleges Judge Goodstein committed reversible error in excusing his earlier court-appointed 2<sup>nd</sup> chair capital-defense counsel Maite Murphy in February of 2006.

Ms. Murphy was excused more than two (2) years and nine (9) months before appellant's guilty plea and sentencing hearing. After Ms. Murphy was removed, Norbert Cummings was appointed to represent appellant. Walter Bailey also represented appellant from late February of 2006 until his guilty plea and sentencing proceeding in December of 2008.

As the record shows, Judge Goodstein did not abuse her discretion in removing 2<sup>nd</sup> chair appointed counsel. Additionally, given this record, appellant cannot show prejudice from the removal of appointed counsel entitling him to a new trial (i.e. vacation of his guilty plea) or sentencing proceeding.

### *How the Issue Arose Below*

**Appellant was indigent** (See Orders of Appt.) Pursuant to S.C. Code Ann. Section 16-3-26 (B)(1), the circuit court **appointed** two (2) attorneys to represent appellant. Originally, Marva Hardee-Thomas and Maite Murphy were appointed to represent appellant. (R. 1-11, 611-13, Tr. 2/16-17/06, pp. 1-11 & Orders of Appt.) Ms. Hardee-Thomas was originally appointed *as counsel* on August 9, 2005 *before* the State filed its Notice of Intent to Seek the Death Penalty. After the

State filed its Notice of Intent to Seek the Death Penalty, a hearing was held into the appointment of death penalty counsel on October 26, 2005 ( R 611-13, See Orders of Appt ) The Court formally appointed Ms Hardee-Thomas as first chair capital defense counsel on November 30, 2005 The Court substituted former 1<sup>st</sup> Judicial Circuit Solicitor Walter M Bailey as first chair capital defense counsel on February 16, 2006 due to the illness/pregnancy of Ms Hardee-Thomas ( R 540-44, 613, Tr 2/16-17/08, pp 6-10 & Order Substituting Counsel, February 16, 2006)

*Maite Murphy* learned that she would be representing appellant around September 4th to September 20th, 2005 when she filed a motion for discovery ( R 11, 74-75, Tr 2/16-17/06, pp 11, 74-75) *Ms Murphy* was formally appointed by the court to represent appellant on October 26, 2005 ( R 11, Tr 2/16-17/06, p 11 & Order of Appt , November 10, 2005) The formal Order appointing her as counsel was issued on November 10, 2005 and filed with the Dorchester Clerk of Court on November 15, 2005 (Order of Appt , November 10, 2005)

In the same month, November of 2005, three (3) to four (4) months after appellant's arrest for this murder, Solicitor David Pascoe informed Judge Goodstein that there may be a conflict of interest in *Ms Murphy* serving as appointed capital counsel ( R 12, 18, Tr 2/16-17/06, p 12, 18) Solicitor Pascoe informed the court *Ms Murphy* was currently representing Solicitor Pascoe's chief investigator, Tim Stephenson, in his divorce, and the chief investigator was a potential witness and may be called in this capital case ( R 101-102, Tr 2/16-17/06 pp 101, 119 -102, 13)

#### *The Motion*

On November 22, 2005, just three (3) to four (4) months after appellant's arrest, the Solicitor asked Judge Goodstein to determine whether there was a conflict of interest or not by filing a "Motion to have the Court Determine Whether Defense Counsel has an Actual Conflict of Interest "

( R 12, 18, 579, Tr 2/16-17/06, p 12, 18, & Motion filed November 22, 2005) At this time, Solicitor Pascoe did not ask Judge Goodstein to remove Ms Murphy from the case, but, as an officer of the court, made the court aware of the issue and asked the court to determine whether a conflict existed or not ( R 101-102, Tr 2/16-17/06 p 101, 119 -p 102, 113) The Motion was based on concerns the Solicitor had in light of this Court's recent decision in State v Gregory, 364 S C 150, 612 S E 2d 449 (2005) (See Motion)

*The Hearing on the Motion*

Judge Goodstein convened a hearing into the matter on *February 16<sup>th</sup> and 17<sup>th</sup> 2006* (See R 1-111, Tr 2/16-17/06, pp 1-111) Appellant was present at the hearing along with Mr Bailey, Ms Murphy, Solicitor Pascoe, his chief investigator, the Deputy Solicitor, and an attorney appointed to represent the investigator<sup>3</sup> ( R 1, 10, Tr 2/16-17/06, p 1, 10) Also present at the hearing was William "Bill" Nettles who had been appointed by the court to represent appellant solely for the purposes of this hearing ( R 10, Tr 2/16-17/06, p 10)

Testimony was taken from Professor John Freeman and Professor Robert Wilcox of the University of South Carolina School of Law ( R 31-52, 65-70, Tr 2/16-17/06, pp 31-52, 65-70) Testimony was also taken from the Solicitor's chief investigator, appellant, and Ms Murphy ( R 19-30, 52-59, 83-85, 87-91, 71-77, Tr 2/16-17/06, pp 19-30, 52-59, 83-85, 87-91, 71-77) Based on the testimony at the hearing, and the arguments and representations of counsel, including Bill Nettles, Judge Goodstein removed Ms Murphy from the case ( R 111, Tr 2/15-16/06, p 111)

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<sup>3</sup>Ms Hardee-Thomas was also present at this hearing and was formally relieved as counsel at the beginning of the hearing due to a high-risk pregnancy, and **Mr Bailey was appointed** to replace Ms Hardee-Thomas ( R 6-10, 613, Tr 2/15-16/06, pp 6-10, Order Substituting Counsel, February 16, 2006) Appellant agreed to this substitution

In ruling on the motion, Judge Goodstein stated as follows

THE COURT Okay I am prepared to rule if anybody has anything else they need to tell me

(No response audible)

THE COURT I am satisfied under these circumstances that I cannot risk the possibility of Mr Stevenson [the chief investigator] being called in this case and needing to be cross-examined

I cannot do that in this case At the end of the day, that is what makes the difference That is what makes the difference, based on what Mr Nettles tells me

Do I think that the representation terminated? I think it doesn't really matter because it is the potentiality of Mr Stevenson being called and it is the attorney-client privilege information that Ms Murphy possesses as a result of her representation in the context of the preparation of the separation agreement

In these circumstances and in this case, that is a concern for the ability of Mr Justus to be fully represented that I cannot allow

So that would be the decision of the Court, and I will have to get an Order on that What I would like to do is I am - - what I've got to do now is - - I really would like to talk to counsel because I don't want this to languish I want to substitute counsel and move this case along

That is going to be the Order of the Court

(R 111, Tr 2/15-16/06, p 111, ll 1-22) Mr Cummings was appointed to replace Ms Murphy as 2<sup>nd</sup> chair capital counsel on **February 22, 2006** (See Order Substituting Counsel, issued March 2, 2006, filed March 6, 2006) The case proceeded forward toward trial for more than **two (2) years and nine (9) months** with Mr Bailey and Mr Cummings as capital counsel (See all transcripts)

*The Guilty Plea*

Prior to jury selection **in December of 2008**, appellant indicated he wished to plead guilty

( R 261-275, 277-352, Tr 10/1/2008, pp 1-16, Tr 12/11/08 pp 1-76 ) Appellant also indicated long before the scheduled trial date that he did not wish for his attorneys to present any mitigation case, and he wanted to receive the death penalty ( R 511-526, 553-56, Tr 12/15/08, pp 157-172, 12/16/08 pp 19-22) <sup>4</sup> Despite appellant's wishes, Walter Bailey and Norbert Cummings conducted a full mitigation investigation and had experts and witnesses prepared to testify to mitigation if appellant changed his mind ( 511-526, 535-542, 553-56, Tr 12/15/08, pp 157-172, 12/16/08 pp 1-8, 19-22 ) Appellant did not change his mind and pled guilty on December 11, 2008 and would not offer any mitigation evidence during the penalty phase ( R 277-352, 355-526, 535-558, Tr 12/11/08, pp 1-76, 12/15/08, pp 1-172, & 12/16/08, pp 1-24 )

During his guilty plea, appellant informed the court he was fully satisfied with Mr Bailey and Mr Cummings as his attorneys, they had done everything he had asked them to do, and, there was nothing he wanted them to do that they had not done ( R 342-46, Tr 12/11/08, pp 66-70) Appellant informed Judge Goodstein several times during his death penalty proceeding he had instructed his attorneys not to offer mitigation evidence in his case ( R 296-309, 511-526, 535-542, Tr 12/11/08, pp 20-33, 12/15/08, pp 157-172, 12/16/08, pp 1-8) Judge Goodstein found appellant's decision in this regard was made of his own free will and was knowingly and intelligently made with the advice of competent counsel <sup>5</sup> ( R 296-309, 511-526, 535-542, Tr 12/11/08, pp 20-

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<sup>4</sup>Trial counsel had appellant evaluated due to his persistence in wanting to plead guilty and his instructions not to offer any mitigation Trial counsel also sought and obtained advice or an opinion on their ethical duty in regard to their client's wishes from Desa Ballard, Esq ( R 261-275, 277-352, 511-526, 535-542, 553-56, Tr 10/1/2008, pp 1-16, Tr 12/11/08 pp 1-76, 12/15/08, pp 157-172, 12/16/08 pp 1-8, 19-22)

<sup>5</sup>Mr Bailey and Mr Cummings advised Petitioner against not offering any mitigation, however, appellant would not waiver in his decision in this regard ( R 296-309, 511-526, 535-542, Tr 12/11/08, pp 20-33, 12/15/08, pp 157-172, 12/16/08, pp 1-8)

33, 12/15/08, pp 157-172, 12/16/08, pp 1-8) In his allocution at the close of the penalty phase, appellant informed Judge Goodstein that he was pleading guilty because he wanted to accept responsibility for his actions, and he believed the death penalty was the only appropriate sentence in this case ( R 603, 535-542, 556-58, See Court's Exhibit 1, Tr 12/16/08, pp 1-8, 22-24)

### ***Standard of Review***

The question whether court-appointed counsel should be relieved or discharged is a matter addressed to the discretion of the trial judge State v Graddick, 345 S C 383, 548 S E 2d 210 (2001), State v Sims, 304 S C 409, 405 S E 2d 377 (1991), State v Hyman, 276 S C 559, 281 S E 2d 209 (1981), State v Marshall, 273 S C 552, 257 S E 2d 740 (1978), State v Childers, 358 S C 614, 595 S E 2d 872 (Ct App 2004), *affirmed in part reversed in part*, 373 S C 367, 645 S E 2d 233 (2007)

### ***The Law***

The right of an accused to assistance of counsel does not include the right to the appointment of counsel of choice, or to a special rapport or even a meaningful relationship with appointed counsel Williams v United States, 486 U S 153 (1988), Morris v Slappy, 461 U S 1, 103 S Ct 1610 (1983) *See also* United States v Gonzalez-Lopez, 548 U S 140, 126 S Ct 2557 (2006) (" the right to counsel of choice does not extend to defendants who require counsel to be appointed for them *See* Wheat, 486 U S at 159, 108 S Ct 1692, Caplin & Drysdale, 491 U S at 624, 626, 109 S Ct 2646 ")

Even where the issue is the Sixth Amendment right to the choice of retained counsel, which is not before this Court, a defendant does not have an absolute right to be represented by preferred counsel State v Sanders, 341 S C 386, 534 S E 2d 696 (2000) Even where the issue is the Sixth

Amendment right to retained counsel of choice, the right of the defendant to choose his counsel must be balanced against the court's need to maintain the highest ethical standards of professional conduct. Id. In balancing these interests, the court will consider whether the defendant's constitutional right to counsel is outweighed by the government's interest in disqualifying his attorney. Id. See also Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692 (1988) (even when Sixth Amendment counsel of choice is at issue, the trial court has discretion to disallow first choice counsel that would create serious risk of conflict of interest). Nor may a defendant demand that a court honor his waiver of conflict-free representation. Gonzalez-Lopez, supra, referencing Wheat 486 U.S. at 159-160, 108 S.Ct. 1692.

#### ***Failure to Preserve and Waiver of the Issue***

The issue appellant raises to this Court was waived and abandoned when appellant pled guilty on December 11, 2008. State v. Easler, 584 S.E.2d 117 (S.C. 2003) (the South Carolina Supreme Court does not recognize conditional guilty pleas). The guilty plea in state court acts as a waiver of all *non-jurisdictional defects* and defenses *occurring prior to the plea* including *alleged* statutory and *constitutional violations*. Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975), State v. Passaro, 567 S.E.2d 862, 866 (2002). (A free and voluntary guilty plea acts as a waiver of *all non-jurisdictional defects* and defenses.) See also State v. Oleary, 393 S.E.2d 186, 187 (1990) (impermissible for a defendant to preserve constitutional issues while entertaining a guilty plea, the trial court may not accept the plea on such terms). Because this issue was waived and abandoned by Petitioner's guilty plea, and because it cannot be preserved, this ground must be dismissed with prejudice.

Additionally, this issue was waived and abandoned by appellant, and not preserved for

appellate review, when appellant pled guilty on December 11, 2010 and raised no objection at his guilty plea or sentencing proceeding preserving this issue ( R 277, 355, See Tr 12/11 08, Tr 12/15/08, & Tr 12/08) State v Lopez, 352 S C 373, 574 S E 2d 210 (2002)(defendant challenging free and voluntary nature of plea was procedurally barred on appeal where the issue was not raised to the court that accepted the plea) “It is clear that the proper avenue in which to challenge a guilty plea which is not objected to at the time of its entry is through post conviction relief” In the Interest of Antonio H., 324 S C 120, 122, 477 S E 2d 713, 713 (Ct App 1996)(holding issue whether trial court erred in determining competency was procedurally barred on appeal where the issue was not raised at the time of the plea), *citing Jeter v State*, 308 S C 320, 417 S E 2d 594 (1992), *See also State v Barton*, 325 S C 522, 481 S E 2d 439, 443 n 6 (Ct App 1997)(stating that “any challenge to the knowing and voluntary nature of a guilty plea could be raised only in a petition for post-conviction relief”) Appellant raised no objection at his guilty plea to a violation of his Sixth Amendment Right to counsel Appellant raised no objection during his entire sentencing proceeding alleging a violation of his Sixth Amendment Right to counsel The issue appellant raises to this Court was waived and abandoned and is not preserved for appellate review Therefore, this appeal must be dismissed

### ***The Lack of Merit of the Issue***

Appellant argues in his brief that Judge Goodstein committed reversible error in excusing appointed counsel Ms Murphy because he had developed a working relationship or rapport with her, and her removal violated his Sixth Amendment right to counsel (See BOA) Appellant cannot show his Sixth Amendment right to counsel was violated because the Sixth Amendment does not guarantee a “meaningful relationship” between an accused and his attorney Morris v Slappy, *supra*,

n 6 (reversing the lower appellate court for trying to create a constitutional right that the Supreme Court had never recognized) Nor does the Sixth Amendment right to counsel guarantee the right to appointed counsel of choice or a special rapport with appointed counsel Williams v United States, supra, Morris v Slappy The underlying basis of appellant's claim in this appeal is not constitutionally recognized This appeal must be dismissed

Nor did Judge Goodstein abuse her discretion in removing appointed counsel from the case and replacing her with Mr Cummings, even if this had been a case which involved counsel of choice, i e first choice retained counsel State v Gregory, 364 S C 150, 612 S E 2d 449 (2005) In Gregory, this Court *reversed the conviction* of the defendant where the defendant's counsel simultaneously represented the defendant in a criminal case, and the assistant solicitor who was handling the defendant's case, in an unrelated family court case This Court found there was an actual conflict, because the defense attorney placed himself in a situation inherently conducive to divided loyalties Id, relying on Duncan v State, 281 S C 435, 315 S E 2d 8009 (1984), Zuck v State of Alabama, 588 F 2d 436, 439 (5<sup>th</sup> Cir 1979), and People v Castro, 657 P 2d 932 (Colo 1983) And, there being an actual conflict of interest, this Court found the defendant was not required to demonstrate prejudice to obtain relief Id The conviction was vacated and the case remanded for a new trial Id This case is no different

There is no question the Solicitor's chief investigator was an employee of the 1st Circuit Solicitor's Office and an integral member of the prosecution team in this capital case ( R 11-12, 52-63, Tr 2/15-16/06, pp 11-12, 52-63) The chief investigator testified that he had already begun investigating this death penalty case in preparation for trial, he had interviewed one (1) witness at Lieber and taken photographs of portions of the prison the morning after Justin's murder ( R , Tr

2/16-17/06, pp 11-12, 52-63) The record also shows the chief investigator was to interview all witnesses in preparation of this death penalty case for trial and testify if necessary if any witness contradicted their statements at trial ( R , Tr 2/16-17/06, pp 52-63)

Appellant's earlier appointed counsel, Ms Murphy, had an actual conflict of interest in simultaneously representing appellant in this capital case and the Solicitor's chief investigator in a domestic matter Id The chief investigator testified Ms Murphy represented him *in his divorce*, which was ongoing, and he was unwilling to waive that conflict of interest and allow her to represent appellant in this matter while simultaneously representing him in the domestic case ( R , Tr 2/16-17/06, pp 19-30, 52-63) The record shows the chief investigator retained Ms Murphy in June of 2005, approximately two (2) months before appellant's arrest in this capital murder case ( R , Tr 2/16-17/06, p 19) The chief investigator testified that Ms Murphy never withdrew from her representation of him in the divorce ( R , Tr 2/16-17/06, p 20) The chief investigator testified Ms Murphy quoted him a \$1,000 fee to handle the entire divorce ( R , Tr 2/16-17/06, p 21) The chief investigator testified Ms Murphy agreed to allow him to pay the entire amount over time, and he had paid around \$600 to \$700 of the agreed fee ( R , Tr 2/16-17/06, pp 22-23)<sup>6</sup> The chief investigator testified he sought legal advice from Ms Murphy or her law firm regarding both the separation and the divorce approximately a month and a half to two (2) months after the separation agreement was filed ( R , Tr 2/16-17/06, pp 20, 25, ln 15 - 26, ln 3, 27) The chief investigator also testified he

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<sup>6</sup>Appellant produced an invoice from Ms Murphy's firm which purported to bill the chief investigator only for the separation agreement and not the divorce (i.e. a divisible divorce), however, the invoice was not generated until after the filing of the State's Motion regarding the conflict The chief investigator testified he had never seen the invoice until it was shown to him on the stand in February of 2006 ( R , Tr 2/16-17/06, p 23, 27) According to the record, the invoice was generated on December 6<sup>th</sup>, 2005 which would have been after the Solicitor called Ms Murphy about the conflict ( R , Tr 2/16-17/06, p 27, ln 17 -ln 4)

and Ms Murphy had discussed in her office “ - that if she was to represent Mr Justus and represent me that that would be a conflict She asked me how I felt about that, and I told her how I felt about that ” ( R , Tr 2/16-17/06, p 28, ll 24 - 25, l 4) The chief investigator also testified that between June of 2005, when he retained Ms Murphy, and August 2<sup>nd</sup> (when appellant was arrested), he had conversations with Ms Murphy that he felt were privileged In fact, the investigator testified he felt like all of his conversations with his attorney regarding his divorce proceeding were privileged ( R , Tr 2/16-17/06, pp 4-12)

Ms Murphy admitted that prior to representing appellant she was retained to represent and did represent the chief investigator ( R , Tr 2/16/07, p 17) She admitted there was no written agreement of representation ( R , Tr 2/16/07, p 71, ll 15-17) She asserted the chief investigator only retained her to do the separation agreement ( R , Tr 2/16-17/06, p 71-72) She testified she quoted him a \$1,000 fee only for the separation agreement, and told him they would talk about the divorce later on ( R , Tr p 2/16-17/06, pp 71-72) She claimed there was no written agreement of representation because the chief investigator did not have all of the money to pay for the separation ( R , Tr 2/16-17/06, pp 71-72) However, she admitted that she never sent a letter terminating the representation ( R , Tr 2/16-17/06, p 75, ll 4-6) She also admitted she never told the chief investigator that she was no longer representing him ( R , Tr 2/16-17/06, p 75, ll 8-12) She also admitted she talked to the chief investigator on November 22, 2005, and at that time she did not tell the chief investigator or the Solicitor that she no longer represented the chief investigator ( R , See Tr 2/16-17/06, p 75, l 13 - p 76, l 10) Her explanation was that she was not asked that question during the phone conversation with the Solicitor and the chief investigator ( R , Tr 2/16-17/06, p 76, ll 7-9)

Professor Freeman testified there was an actual conflict of interest ( R , Tr 2/16-17/06, pp 31-52) Professor Freeman testified the representation was simultaneous ( R , Tr 2/16-17/06, p 38, ln 17 - p 39, ln 4) Professor Freeman pointed to the facts that the client (the chief investigator) talked with Ms Murphy about the divorce, he testified she is representing him *in the divorce* and there was *no notice of withdrawal from Ms Murphy to the client* and no notice *to the court* that she was withdrawing from the representation ( R , Tr 2/16-17/06, p 41, l 18 - p 44, l 1) Professor Freeman testified there was an *actual conflict* of interest in Ms Murphy *simultaneously* representing appellant in this capital case and the Solicitor's chief investigator in the domestic matter ( R , Tr 2/16-17/06, pp 31-52) Professor Freeman also testified that even if the representation had terminated, there was a potential conflict of interest because the attorney (Ms Murphy) could have to impeach the chief investigator at the capital trial ( R , Tr 2/16-17/06, pp 34-36) Accordingly, appellant cannot show an abuse of discretion by Judge Goodstein given the testimony in the record Id., Wheat, Gonzalez-Lopez, State v Graddick, 345 S C 383, 548 S E 2d 210 (2001), State v Sims, 304 S C 409, 405 S E 2d 377 (1991), State v Hyman, 276 S C 559, 281 S E 2d 209 (1981)

Furthermore, Rule 1 7 of the Rules of Professional Conduct provides that “ a lawyer shall not represent a client if the representation involves a concurrent conflict of interest A concurrent conflict of interest exists if

(1) the representation of one client will be directly adverse to another client, or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to *another client*, *a former client* or a third person or by a personal interest of the lawyer ”

(*emphasis added*) Notwithstanding this section, a lawyer may represent a client if “(4) each affected client gives informed consent, confirmed in writing” Rule 1 7, (b)(1)-(4), S C Rules of

Professional Conduct The chief investigator refused to give consent to the representation or give consent in writing ( R , Tr pp 19-30, 52-63) There is no merit to this ground Wheat, Gonzalez-Lopez, Gregory, Graddick, Sims, Hyman, Rule 1 7, (b)(1)-(4), S C Rules of Professional Conduct

Furthermore, Professor Wilcox testified there was at least a potential conflict of interest and possibly an actual conflict of interest in Ms Murphy representing appellant and representing the chief investigator in the domestic case ( R , Tr pp 65-69) And, Professor Wilcox was not prepared to say the representation of the chief investigator was over, and he also testified that in this case a waiver would be needed from both appellant and the chief investigator ( R , Tr pp 65-69) Again, Judge Goodstein did not abuse her discretion in removing Ms Murphy from this case and replacing her with Mr Cummings <sup>7</sup>

Additionally, William “Bill” Nettles, who was appointed to represent appellant at the hearing on this issue, informed the court that he believed there was a spoliation issue regarding the chief investigator’s potential trial testimony that he would be unwilling to waive because it was not in appellant’s best interests to waive that issue <sup>8</sup> ( R , Tr 2/16-17/06, pp 78-83, 85-86, 90-91) The

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<sup>7</sup>In his brief, appellant states Judge Goodstein held the representation of the chief investigator was over after the filing of the separation agreement (BOA, p 7, *quoting* R , Tr 2/16-17/06, p 47, ll 7-48, l 1) However, this statement by Judge Goodstein was made before Professor Wilcox testified, and before Ms Murphy testified and was cross-examined Additionally, at the close of the hearing when Judge Goodstein finally ruled, she stated as follows “Do I think that the representation [of the chief investigator] terminated? I think it doesn’t really matter because it is the potentiality of Mr Stevenson being called and it is the attorney-client information that Ms Murphy possesses as a result of her representation in the context of the preparation of the separation agreement In these circumstances and in this case, that is a concern for the ability of Mr Justus to be fully represented that I cannot allow ( R , Tr 2/15-16/06, ll 7-15)

<sup>8</sup>The Solicitor’s chief investigator had gone to Lieber the morning after the murder of Justin Breganzer and taken pictures of the crime scene and other areas of the prison After receiving SLED’s crime scene photographs, the Solicitor’s chief investigator deleted his

trial judge stated on the record, that if the chief investigator was not a material witness in the capital murder case, counsel had probably made the chief investigator a material witness by his questioning of him on this issue ( R , Tr 2/16-17/06 p 64, l 25 - p 65, l 2, p 109, ll 4-8) Mr Nettles also told the Court *there was a conflict of interest*, that his client (appellant) wished to waive the conflict, but that he did not agree with that waiver ( R , Tr 2/16-17/06, pp 85-86, 90-91, 106-108)<sup>9</sup>

The learned trial judge, in an abundance of caution, chose to remove Ms Murphy and replace her with Mr Cummings based on Mr Nettles' statement to the court that there was a conflict of interest and the potential for a conflict evolving further as the case proceeded to trial and at trial<sup>10</sup> ( R , Tr 2/16-17/06, p 111) Judge Goodstein simply did not abuse her discretion Wheat v United States, 486 U S 153, 159, 108 S Ct 1692 (1988)(even when Sixth Amendment counsel of choice is at issue, the trial court has discretion to disallow first choice counsel that would create serious risk of conflict of interest) Similarly, a defendant may not demand that a court honor his waiver of conflict-free representation Gonzalez-Lopez, supra, referencing Wheat 486 U S at 159-160, 108 S Ct 1692 In his brief, appellant relies on State v Sanders, 341 S C 386, 534 S E 2d 696 (2000), in support of his position that his death sentence should be overturned and his guilty plea vacated Appellant's reliance on Sanders is misplaced Sanders is not controlling on this issue

Sanders involved the violation of *the right to counsel of choice*, not appointed counsel Id

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photographs from his camera ( R , Tr 2/16-17/06, pp 19-30, 52-63)

<sup>9</sup>Additionally, in a later hearing, Mr Bailey conceded there was a conflict of interest ( R 144, See Tr 4/27/06, p 26, ll 6-13)

<sup>10</sup>While Mr Nettles told the court appellant would waive the current conflict, he made clear appellant would not waive any future conflict that might develop ( R , Tr 2/16/06, pp 106-108)

Furthermore, Sanders involved the disqualification of an attorney because *the attorney was a [alleged] potential witness*, not because of a conflict of interest in the attorney representing the defendant and simultaneously representing a potential witness in the case in a domestic matter where the witness was also a member of the prosecution team Gregory is controlling on these facts and the issue before Judge Goodstein. See Gregory, supra (counsel could not simultaneously represent criminal defendant and assistant solicitor who was prosecuting the case in a domestic matter, a conflict of interest existed and holding defendant was not required to show prejudice and the conviction must be vacated), *relying on Duncan, Zuck, and Castro*. As such, Judge Goodstein did not abuse her discretion in removing appointed counsel two (2) years and nine (9) months before the eventual trial date, for the reasons stated, and replacing her with experienced capital litigation counsel Norbert Cummings.

Furthermore, appellant's assertion in his brief that the Solicitor had improper motives for removal of Ms. Murphy is not supported by the record. First, the Solicitor had nothing to do with the removal of Ms. Hardee-Thomas. She was removed at her own request and with her client's consent due to her high risk pregnancy. Walter Bailey was substituted as appellant's first chair capital counsel with appellant's consent. (R., See Tr. 2/16-17/06)

Second, the record shows the Solicitor notified Ms. Murphy and the court of the conflict issue just a few months after both Petitioner's arrest and Ms. Murphy's beginning to represent appellant. This was one (1) month or less after she was formally appointed as 2<sup>nd</sup> chair capital defense counsel (R., Tr. 2/16-17/06 p. 101, 19 - p. 102, 13 & Order of Appointment, November 2005). The record also shows the Solicitor notified the court of the conflict issue as an officer of the court (R., Tr. 2/16-17/06 p. 101, 19 - p. 102, 13). Further, the record shows the Solicitor did not

immediately move or request that Ms Murphy be relieved but asked the court, by way of a motion, to determine if there was a conflict or not in light of Gregory ( R , Tr 2/16-17/06 p 101, l 19 -p 102, l 3 & Motion) <sup>11</sup> It was only after consulting with numerous attorneys and two (2) ethics experts and hearing the testimony and representations of counsel at the February 16-17, 2006 hearing, that the Solicitor asked Judge Goodstein to remove Ms Murphy ( R , Tr 2/16-17/06, p 102, ll 4-14) <sup>12</sup> The Solicitor was not acting improperly but was instead protecting the integrity of any conviction or death sentence he might obtain on behalf of the State. *See* Gregory (conviction reversed where there was actual conflict in representing the criminal defendant and the assistant solicitor who prosecuted the case in an unrelated domestic matter, holding no prejudice need be shown)

As this Court is well aware, a trial judge is concerned with many important factors in making a decision such as the one in this case. A trial judge's duty is to see that the defendant and the State receive a fair and impartial trial. A trial judge must be concerned with the efficient use of judicial resources, must protect the integrity of the court, and prevent the appearance of impropriety or a conflict of interest. A trial judge should insure there are no divided loyalties between the attorney and the defendant. Given this record, Judge Goodstein did not abuse her discretion in removing Ms Murphy for the reasons stated on the record (Tr 2/15-16/06, p 111, ll 1-22) Wheat, Gonzalez-

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<sup>11</sup>Gregory, was decided April 18, 2005, approximately seven (7) months before this issue arose and before the Solicitor filed his motion in this case

<sup>12</sup>At the close of the hearing on the motion, Solicitor Pascoe stated that it was only after the filing of the motion, "and after talking to half a dozen criminal attorneys who currently practice death penalty law, and solicitors who try death penalty cases, two ethics experts, and Don Zelenka of the Attorney General's Office " who all thought this issue was not even "a close call ," that he took the position that "in the interest of these proceedings, Ms Murphy needs to be taken off the case" ( R , Tr 2/16-17/06, pp 6-10)

Lopez, Gregory This appeal must be dismissed

*Lack of Prejudice*

Nor can appellant show any prejudice from *the removal of appointed counsel* given this record. *Contrast United States v Gonzalez-Lopez*, 548 U S 140, 126 S Ct 2557 (2006)(where the Court held when the defendant is deprived of his Sixth Amendment right to *first choice retained counsel*, he need not show prejudice) Ms Murphy was *court-appointed counsel* due to appellant's indigency and pursuant to South Carolina statutory law. See S C Code Ann Section 16-3-26 (B)(1) Ms Murphy was removed two (2) years and nine (9) months prior to appellant's trial date and eventual guilty plea and sentencing proceeding. Ms Murphy was replaced by another appointed attorney, Norbert Cummings, an experienced capital litigator.<sup>13</sup> Walter Bailey, a recognized death penalty expert,<sup>14</sup> also defended appellant and remained on the case from his appointment in mid-February 2006 until and through appellant's guilty plea and sentencing proceeding in December of 2008. The record shows Mr Bailey and Mr Cummings conducted a complete and thorough mitigation investigation and had mitigation witnesses and experts prepared to testify should appellant change his mind prior to the conclusion of his guilty plea and sentencing proceeding. The record shows appellant told Judge Goodstein he was completely satisfied with the services of Mr Bailey and Mr Cummings, and they had done everything they had asked him to do in the case.<sup>15</sup>

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<sup>13</sup>The record shows Mr Cummings is an experienced capital litigator ( R 268, See Tr 10/1/08, p 9, ll 1-6)

<sup>14</sup>See *The South Carolina Capital Trial 2<sup>nd</sup> Edition*, S C Bar 2009

<sup>15</sup>Appellant argues in his brief, that he pled guilty and asked for the death penalty as a result of Judge Goodstein's ruling on this issue (See BOA, p 11, ll 3-4, *citing* R , 299, Tr 12/11/08, p 23, ll 4-9) **The record does not support this assertion**. The record on this cited page contains no reference to Judge Goodstein's ruling on this issue and does not indicate

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Additionally, appellant, of his own free will and accord chose to enter a knowing, voluntary, and intelligent plea of guilty and not contest guilt. Even if he had not entered a plea, the evidence against appellant was overwhelming. (See Respondent's Statement of Facts)

Approximately a year before his trial, appellant indicated he would not offer any mitigation evidence. (R 535, Tr 12/16/08) During his sentencing proceeding, appellant refused to allow his attorneys to offer mitigation evidence even though Mr. Bailey and Mr. Cummings had conducted a full and thorough mitigation investigation and were prepared to offer a mitigation case at the sentencing proceeding. (R 355, 535, Tr 12/15/08 & Tr 12/16/08) Appellant refused to allow his attorneys to offer mitigation evidence even though his attorneys recommended and counseled appellant to offer mitigation evidence. (R 277, 355, 535, Tr 12/11/08, 12/15/08 & Tr 12/16/08)

In the sentencing phase, the State established the aggravating circumstance, *the prior murder conviction*, beyond any doubt. In the sentencing phase, the State established appellant had an extensive criminal record, and was serving two (2) life sentences for two separate murders from Oconee County at the time he brutally murdered Justin. The State also established appellant's incarceration in a maximum security institution for life did nothing to dissuade appellant from committing his third (3) unrelated murder of another human being. Finally, in his allocution, appellant told Judge Goodstein the death penalty was the only appropriate penalty for the murder of

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appellant pled guilty and sought the death penalty because of Judge Goodstein's ruling on this issue. (R 299, Tr 12/11/08, p 23, ll 4-9) Appellant also asserts that Judge Goodstein recognized that her decision on this issue influenced appellant's decision to plead guilty and seek the death penalty. (See BOA, p 11, ll 4-6, *citing* R 516-17, Tr 12/15/08, p 162, l 18 - p 163, l 5) **The record does not support this assertion either.** The record on these cited pages does not indicate Judge Goodstein recognized that her decision on this issue caused appellant to plead guilty or seek the death penalty. The court discusses its ruling on this issue only as it relates to a *delay* in Petitioner's trial. (See R , 516-17, Tr 12/15/08, p 162, l 18 - p 163, l 5) Appellant cannot demonstrate prejudice.

Justin (R 603, Court's Exhibit 1)

Quite simply, appellant cannot demonstrate prejudice from the removal of *appointed counsel* where appellant was represented by two (2) extremely competent appointed capital defense attorneys for two (2) years and nine (9) months before his plea and sentencing proceeding, appellant stated he was completely satisfied with their services, appellant pled guilty, the evidence of his guilt was overwhelming, the aggravating circumstance was established beyond any doubt, the evidence of his bad character and future dangerousness was proven, against the advice of counsel he refused to offer mitigation evidence by his own choice, and appellant asked the sentencing court to impose the death penalty. This appeal must be dismissed.

**CONCLUSION**

The issue appellant raises to this Court is not preserved for appellate review because appellant pled guilty, could not preserve any objection below, and preserved no objection below. Additionally, appellant waived and abandoned this issue when he pled guilty. Furthermore, the underlying basis of appellant's claim in this appeal is not constitutionally recognized. Finally, given this record, Judge Goodstein did not abuse her discretion in removing Ms. Murphy as appointed counsel for the reasons stated and replacing her with Norbert Cummings, nor can appellant show prejudice from her removal and replacement with Mr. Cummings. For the above stated reasons, appellant's conviction of murder and resulting death sentence should be affirmed and this appeal dismissed.<sup>16</sup>

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<sup>16</sup>Respondent also respectfully submits the sentence in this case was appropriate under the facts and not the result of passion, prejudice, or any arbitrary factor. State v. Gaskins, 284 S. C. 105, 326 S. E. 2d 132 (1985)(death penalty properly imposed for murder of fellow inmate by a defendant with prior convictions for murder), State v. Atkins, 397 S. E. 2d 87 (1990)(death sentence properly imposed for murder where defendant had prior conviction for murder), State v.

Respectfully submitted,

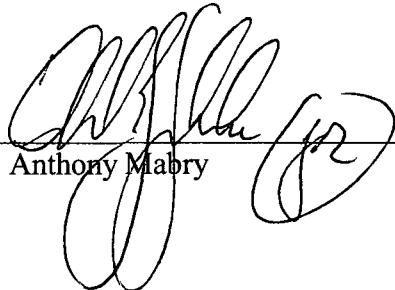
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Solicitor, 1<sup>st</sup> Judicial Circuit

By  \_\_\_\_\_  
Anthony Mabry

December 9, 2010

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Locklar, 341 S C 352, 535 S E 2d 420 (2000)(death penalty properly imposed where defendant had prior conviction for murder)

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

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Appeal from Dorchester County  
Diane S Goodstein, Circuit Court Judge

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**STATE OF SOUTH CAROLINA,**

Respondent,

;

v

**KENNETH HARRY JUSTUS,**

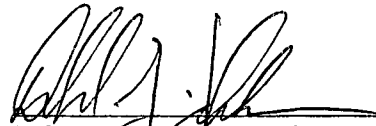
Appellant

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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled “Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings”




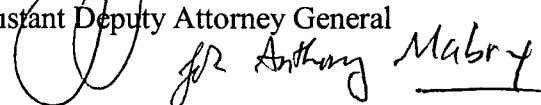
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December 9, 2010

**CERTIFICATE OF SERVICE**

I, **Donald J Zelenka**, hereby certify that I have served the *Final Brief of Respondent* in the foregoing action by depositing copies in the Interagency Mail to Joseph L Savitz, III, Senior Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 9<sup>th</sup> day of December, 2010

  
DONALD J. ZELENKA  
Assistant Deputy Attorney General  
 for Anthony Mabry