STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2015-000731

STATE OF SOUTH CAROLINA..... *Respondent*

v.

LUZENSKI ALLEN COTTRELL..... *Appellant*

FINAL BRIEF OF APPELLANT

KEIR M. WEYBLE
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
607 255 3805

SHERI LYNN JOHNSON
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
607 255 3805

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Office of
Appellate Defense
P.O. Box 11589
Columbia, SC 29211
803 734 1330

Attorneys for Appellant

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STATEMENT OF THE CASE

Appellant, Luzenski Allen Cottrell, was originally convicted and sentenced to death in 2005 for the December, 2002 killing of a police officer in Horry County. This Court reversed that conviction and sentence in 2008, finding that the trial court erred by preventing the jury from deciding whether the officer's conduct in the moments preceding the shooting gave rise to legal provocation sufficient to reduce the homicide offense to voluntary manslaughter. *State v. Cottrell,* 376 S.C. 260, 264-65, 657 S.E.2d 451, 453-54 (2008) *(Cottrell I).* The case went to trial for the second time in September, 2014, and Cottrell was again convicted and sentenced to death. The proceedings which led to that judgment are the subject of this appeal.

The road to retrial began on January 29, 2009 - nearly a year to the day after this Court's decision in *Cottrell I* - when Circuit Judge L. Casey Manning appointed attorneys Stuart Axelrod and Melissa Armstrong to represent Cottrell. *See* Order Appointing Replacement Counsel (Mar. 15, 2012). During the ensuing thirty-seven (37) months, the two lawyers continued to serve as Cottrell's counsel, meeting with him, gathering and analyzing evidence, preparing and arguing numerous pretrial motions, and earning and maintaining their client's trust. *See, e.g.,* Pretrial Hrgs. (10/14/11; 11/09/11; 12/7/11; 1/6/12; 3/5/12; 3/8/12). R. 6; 29; 190; 240; 334; 363.

On March 8, 2012, however, with the retrial scheduled to begin in two weeks, Circuit Judge Larry Hyman (who had replaced Judge Manning as the assigned trial judge) announced during a brief hearing that both of Cottrell's attorneys were to be removed and that the trial would be continued indefinitely pending appointment of new counsel. Pretrial Hrg. 3/8/12. R. 363. While the court made reference to an exchange of unspecified allegations between defense counsel as the basis for its ruling, it took no evidence and made no findings before declaring that its own concerns

for the effectiveness of Cottrell's defense and the viability of any trial judgment that might later be rendered against him necessitated a change of counsel. *See id.* at 11; *see also* Order Removing Defense Counsel and Continuing Case (3/13/12). R. 380. For his part, Cottrell made clear that he did not share the court's concerns, Pretrial Hrg. 3/8/12. R. 372-373, and subsequently lodged a formal written motion expressing his faith in attorney Axelrod and requesting that Axelrod remain as lead counsel. *Pro Se* Motion to Retain Attorney Axelrod (3/14/12). R.383. Cottrell's wishes notwithstanding, the trial court adhered to its ruling, and soon appointed new counsel, Teresa Norris and Bill McGuire, who remained throughout the trial.[1] *See* Order Appointing Replacement Counsel (3/15/12). R. 388.

Jury selection began on September 15, 2014, and lasted approximately one week. Aware that their penalty phase evidence would feature information, both "good" and "bad," about Cottrell's background, defense counsel sought to ensure that all members of the panel could give such information at least some mitigating weight. The trial court, however, took a different view, insisting that because evidence of a defendant's background did not fall within any of the categories drawn by South Carolina's *statutory* mitigating circumstances, and instead fell into what the court regarded as a lesser class of *nonstatutory* mitigation, a juror need not be willing to consider such evidence in order to be qualified. Adhering to that view in the face of repeated explanations that it contradicted long-settled law, the trial court qualified a number of panelists who had admitted that the defendant's background would not be "relevant" to their sentencing decision. While defense counsel exhausted all ten of their allotted peremptory strikes, two of the jurors-450 and 148 - for

[1] Cottrell later renewed his objection to Axelrod's removal at a pretrial hearing in 2014, to which the court responded with the assurance that, "everything I did in that regard was to protect you."PretrialHrg.(7/17/14)R.418.

whom the core of Cottrell's mitigation case was, by their own admission, irrelevant, were seated and remained throughout both phases of the trial.

With one notable and highly consequential exception (described below), the guilt-or-innocence phase evidence was reminiscent of the first trial. According to the testimony, Cottrell and two friends, Fred Halcomb and Dianne Lawson, entered a Dunkin' Donuts store in Myrtle Beach late in the evening of December 29, 2002. R. 3607-08. Shortly after their arrival, police officers Joseph McGarry and Michael Guthinger also entered the Dunkin' Donuts. R. 3608. By all accounts, Cottrell's demeanor inside the store was upbeat, jovial, and entirely non-threatening. *See, e.g.,* R. 3365, 3367. Nevertheless, after exiting the store carrying coffee for friends waiting outside, Cottrell was intercepted by Officer McGarry. *See* R. 3610-11; 3632; 3636. Officer McGarry asked for Cottrell's identification and Cottrell complied, R. 3318; as Officer Guthinger recounted at trial, this interaction was "civil" and "professional," and Cottrell was "polite" and "compliant." R. 3365, 3367. Officer McGarry then placed a call on his police radio to determine whether Cottrell had any outstanding warrants. R. 3322.

The events that followed happened "very, very quickly." R. 3380. After the radio inquiry but before the response (there were no outstanding warrants), Cottrell turned away from Officer McGarry and began walking in the direction of his friends' car, R. 3376, presumably to deliver the coffee he still held in his hands, R. 3611. For reasons no testifying witness could pinpoint, Officer McGarry reacted by commanding Cottrell to "freeze," R. 3610; when Cottrell failed to immediately comply, the officer drew his gun and repeated his command. R. 3610. Cottrell stopped momentarily, then continued walking toward his friends' car. R. 3611. Officer McGarry "reholstered" his firearm, R. 3611, pursued Cottrell to the car, and grabbed him from behind, R.

3325; 3380. Physically mismatched- Officer McGarry stood 6'4" and weighed 285 pounds while Cottrell is 5'10" and weighed 180 pounds, *see* R. 3397 - the two men struggled against the parked car, R. 3380; 3612, with Cottrell asking, "Why are you harassing me?" R. 3380. Moments later, the men separated, either because they lost their balance and stumbled, *see* R. 3337, because Officer McGarry had shot Cottrell in the leg,[2] *see* R. 3831, or both. When they "squared up" again, Cottrell had drawn a gun from his waistband; he fired at Officer McGarry, striking him in the face and killing him immediately. R. 3337.

The central dispute at trial was not whether Cottrell shot Officer McGarry- all agreed he did -but was instead whether the shooting was murder, manslaughter, or self-defense. That question turned on the legality of Officer McGarry's conduct toward Cottrell during their encounter. At the first trial in 2005, the prosecution took the position that Officer McGarry came to the encounter with no legal basis for seizing Cottrell, and persuaded the trial judge to rule as a matter of law that the officer must have *developed* probable cause for an arrest *during* the encounter by catching a glimpse of Cottrell's gun under his shirt.[3] As this Court later held, however, the question whether Officer McGarry "was effectuating a lawful arrest in a lawful manner when he tackled [Cottrell] from

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[2] As described more fully *infra,* there was conflicting evidence concerning whether Officer McGarry shot Cottrell in the leg before Cottrell returned fire. Both Officer Guthinger and Cottrell believed Cottrell's leg wound had been inflicted by Guthinger after McGarry was killed, but the forensic scientific evidence indicated otherwise.

[3] There has never been any direct evidence for this proposition; no witness has ever claimed to have overheard Officer McGarry mentioning detection of a gun in Cottrell's possession before tackling him. Thus, while "[i]t is certainly permissible to infer, as did the [2005] trial judge, that [Officer McGarry] acted as he did because he observed a gun in [Cottrell's] possession[,] ... an alternative and reasonable inference was that [Officer McGarry] reacted in an impermissibly aggressive manner, physically assaulting and then shooting [Cottrell] when he exercised his constitutional right to walk away." *Cottrell I,* 376 S.C. at 265, 657 S.E.2d at 453-54. at 265, 657 S.E.2d at 454.

behind" was a factual question for the jury, not a legal question for the judge. *Cottrell I,* 376 S.C.

Having lost the undue advantage it enjoyed at the first trial, the prosecution changed its approach on remand. Mindful of the imperative to portray Officer McGarry's detention of and use of force against Cottrell as *lawful* - and suddenly obligated to persuade a jury to see it that way- the prosecution now took the position that the officer actually had *arrived* at the encounter *already* armed with "articulable suspicion" necessary to "stop and frisk" Cottrell pursuant to *Terry v. Ohio,* 392 U.S. 1 (1968). If accepted, this new theory would mean Cottrell was never free to walk away from Officer McGarry, and that the officer was therefore legally justified in pursuing and tackling him; if not accepted, then the prosecution would be returned to the much more difficult posture of trying to convince the jury- with no direct evidence - that the officer had seen Cottrell's concealed gun.

Success or failure for the prosecution's changed theory of the case depended upon what the jury would be permitted to hear about Officer McGarry's alleged articulable suspicion to detain Cottrell. The State's evidence on that critical question came from Lt. Amy Prock of the Myrtle Beach Police Department. She testified that she had received "an email communication" from Lt. Daniels in her department, in which Daniels reported having "received a call from Detective Johnson from Horry County Police Department." R. 3288. According to Prock's account of Daniels' message about Johnson's call, "Johnson was investigating a shooting incident ... and needed some information in reference to some suspects ... specifically ... Cottrell and a white male ...." R. 3288-89. Prock went on to testify that, based on the Daniels email about the Johnson phone call, she informed Officer McGarry that "Horry County ... were looking at Cottrell for a shooting incident where he was a suspect." R. 3291. Over defense objection, the prosecution was also permitted to elicit Prock's opinion that, based on "the same information that [Officer] McGarry had," she would have reacted to seeing Cottrell inside the Dunkin' Donuts store just as

Officer McGarry did- *i.e.,* by reciting police "ten codes" signifying "suspect, shooting, gun," R. 3361, to Officer Guthinger, R. 3291; *see also id.* (Prock: "I would have said the same thing.").

To counter Prock's fact and opinion testimony for the prosecution, the defense sought to present Horry County Police Detective Nathan Johnson, who was the original source of the inquiry that had wended its way through Daniels and Prock before arriving at Officer McGarry. Relying on the well-settled Fourth Amendment rule that a stop based on information received from another officer is valid only if that other officer had reasonable, particularized suspicion sufficient to justify his or her own stop, *see, e.g.,* R. 3680-81; 3737, defense counsel proposed to demonstrate that Johnson's knowledge had, in fact, been "very scant," and insufficient to warrant a stop. R. 3672; *see also* Pretrial Hrg. (9/8/14). R. 725-726. (Johnson testimony acknowledging he had at least two opportunities to approach and question Cottrell after communicating with Daniels, but declined to do so).

Disregarding the governing rule, the trial court maintained that "how much information Mr. Johnson had" was not "relevant," and that "how much information ... Officer McGarry had" was all that mattered. R. 3685. Professing to determine for itself what was best for Cottrell's defense, the court further observed that allowing Det. Johnson's testimony might require a more detailed exploration of the Horry County offense which "could be highly prejudicial to Mr. Cottrell." R. 3688. In keeping with these views - and at the urging of the prosecution - the court ruled the proposed testimony of Det. Johnson inadmissible under SCRE 401,402, and 403. In so ruling, the court eliminated the defense's only evidentiary basis for challenging the prosecution's new theory that Cottrell had never been free to walk away from Officer McGarry, and that the officer was therefore authorized to use force against him when he did. *See* R. 3852-56 (jury charge prohibiting finding of provocation during "lawful" detention, and effectively eliminating Cottrell's defenses to murder).

Once the guilt-or-innocence phase evidence had closed, defense counsel made one more effort to secure jury consideration of a verdict less than murder by requesting a charge prohibiting an inference of malice based exclusively on Cottrell's use of a firearm. R. 3727; *see also* Defendant's Requested Jury Instructions, R. 4422-4423. The trial court refused, reasoning that the jury had the right to "make that inference from the evidence if [it] chooses to do so." R. 3728. Seizing the opportunity, the prosecution took full advantage in closing argument by repeatedly urging the jurors to handle Cottrell's gun, to "feel how heavy" and "how intentional" it was, and to find that the mere presence of the gun on Cottrell's person was "malice." R. 3797-98. The message of the argument was clear: the circumstances of the encounter instigated by Officer McGarry did not matter, and neither did the officer's conduct during the encounter; all that mattered- all the jury need find to return a murder conviction - were the undisputed facts of Cottrell's possession of a firearm and the use of that firearm in the death of the officer. With no instruction to direct them otherwise, and having been prevented from considering the lawfulness *vel non* of the alleged *Terry* stop, the jury quickly returned a conviction for murder.

The penalty phase evidence focused on negative and positive elements of Cottrell's past conduct and character, and on the impact of Officer McGarry's death upon his family members. The prosecution's testimony established that Cottrell had been involved in other criminal pursuits including prostitution and the drug trade, and featured a detailed account of his commission of the separate homicide which was the original subject of Det. Johnson's inquiry. The defense case in mitigation showed that Cottrell was regarded as a pleasant, polite, and non-violent young man who was well-liked by others, and that his troubles began only when he fell in with, and fell under the influence of, Fred Halcomb- the same Fred Halcomb who was with Cottrell at the Dunkin' Donuts store on the night of the homicide. *See generally,* R. 4174-4201. A series of additional defense

witnesses, many of whom were employed by or affiliated with the Department of Corrections, further established that since he had been incarcerated (and separated from Halcomb), Cottrell had adjusted well, undergone a sincere religious conversion, and earned an unblemished reputation as a respectful, rule-abiding prisoner. *See generally,* R.4201-4264.

Approximately two hours after retiring to deliberate, the jury sent a note indicating that they were divided over the appropriate sentence for Cottrell and asking, "What is the next step?" R. 4370. While the note specified the numerical division, the trial court refused defense counsel's request to disclose the numbers to the attorneys and instead sent the following note over defense objection: "Please continue your deliberations. Do not advise of the verdict count on future notes to the Court." R. 4373. Nearly an hour later, the trial court proposed the idea of offering to order dinner for the jurors. R. 4374. Defense counsel suggested the alternative of allowing the jury to adjourn for the evening, but the trial court ignored that suggestion entirely, sought and obtained the prosecution's agreement to the dinner order proposal, and followed through with a note to the jury. R. 4374. Just over an hour later, the jury returned with a recommendation that Cottrell be sentenced to death. R. 4375.

ARGUMENT

I. THE TRIAL COURT'S REMOVAL OF THE LAWYERS APPOINTED TO REPRESENT APPELLANT, OVER THE OBJECTION OF BOTH APPELLANT AND HIS LAWYERS, AND IN THE ABSENCE OF ANY FINDINGS JUSTIFYING THIS INTERFERENCE WITH AN ESTABLISHED ATTORNEY-CLIENT RELATIONSHIP, VIOLATED APPELLANT'S RIGHTS TO COUNSEL AND DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. I, § 14 OF THE SOUTH CAROLINA CONSTITUTION.

On the eve of trial, based solely upon the Solicitor's assertion that a rift had developed between Cottrell's two appointed attorneys, Armstrong and Axelrod, the trial court held a brief hearing to inquire into the matter. At that hearing, both lawyers stated that they could put aside differences of opinion and work with each other. More importantly, Cottrell affirmed his belief that they could work together and twice stated that he had confidence in Axelrod, whose work he thought could not be matched by any other attorney. Nonetheless, without making any factual findings, the trial court removed both lawyers and appointed two new lawyers. Cottrell objected to the removal of Axelrod in a *prose* motion to this Court, an objection that substituted counsel renewed in pretrial hearings.

Although indigent defendants have no right to choose who is appointed to represent them, once counsel is appointed and an attorney-client relationship is established, that relationship is entitled to the same protection as is an established retained counsel relationship. Because "the Sixth Amendment right to counsel of choice [] commands ... that the accused be defended by the counsel he believes to be best," *United States v. Gonzales-Lopez,* 548 U.S. 140, 148 (2006), the trial court's unnecessary termination of Cottrell's existing attorney-client relationship over his objection violated the Sixth Amendment.

A. Relevant facts.

Pursuant to S.C. Code Ann. § 17-3-20, Stuart Axelrod and Lisa Armstrong were appointed to represent Cottrell, who is indigent. From the date of his appointment on January 29, 2009 until March 8, 2012, Axelrod met with Cottrell, developed a strategy with him, Pretrial Hrg. (3/8/12), R. 371, and filed and argued numerous motions for the retrial on his behalf. *See* Pretrial Hrg. (11/9/11); (3/5/12); (3/8/12); R. 29; 334; 363. On March 8, 2012, the court convened a hearing to address the Solicitor's allegation of a "serious rift or problem developing" between the two defense lawyers. Pretrial Hrg. (3/8/12), R. 365. The court first spoke to Cottrell's defense team privately, but regarding that meeting, stated on the record: "I have made, let me make this clear, absolutely no investigation to determine whether or not there was any truth to the allegations. My only concern was whether the allegations had been made." Pretrial Hrg. (3/8/12) R. 366.

The court then questioned Armstrong, Axelrod, and Cottrell on the record. Pretrial Hrg. (3/8/12) R. 368-372. Defense counsel Armstrong stated, "I would like to reiterate, that as far as I'm concerned I can set aside my personal misgivings about dealing with co-counsel and one thing I have never questioned is his commitment to Mr. Cottrell." *Id.* at 7. R. 369. She added her belief that, "notwithstanding our differences, Mr. Axelrod wants to give Mr. Cottrell the best possibl[e] defense." *Id.* at 8. R. 370. Axelrod then said, "I think the Court's right, that what's most important is [Cottrell's] defense ... I want Allen [Cottrell] to be here, I think that maybe the Court should inquir[e] of Allen." *Id.* R. 370.

When the court first permitted him to speak, Cottrell asserted his familiarity with both Axelrod and his strategy, and then expressed his confidence in Axelrod:

> [F]rom ... speaking with both my attorneys ... I know Mr. Axelrod's strategy. I know that he's been preparing diligently for my trial. We've spoken on numerous occasions about how he would like to proceed and I feel confident in his ability to represent me as the attorney for this trial.

Pretrial Hrg. (3/8/12) R. 371.

The court then declared a recess to allow Cottrell to speak privately with his attorneys. Upon returning, Cottrell reported that he had spoken with both of them, "and they said they would be able to work together." Pretrial Hrg. (3/8/12) R. 372. He then added, "I would just like to reiterate that I do feel confident about the representation." *Id.* at 11. R. 373. He also expressed his belief that "the work that Mr. Axelrod has done in the first part of the trial of this case, I don't think it can be matched by anyone else." *Id.* R. 373.

Although the trial court acknowledged that it was not "certain what [its] ethical responsibility was," other than to "report it and let it be flushed out by someone else," the court nonetheless removed both Axelrod and Armstrong. Pretrial Hrg. (3/8/12) R. 374. The court made no findings of incompetence or irreconcilable conflict, and told Cottrell only that, "I want you to receive the best defense possible," and "I am really concerned that [Armstrong and Axelrod's] differences of opinion as to the way to proceed in this case and that perhaps the theories shared by [your] co-counsel may be in conflict." *Id.* at 9. R. 371. The court also speculated that new attorneys would, "I'm sure, proceed in the same fashion or very much the same fashion." *Id.* at 13. R. 375.

Six days after the trial court's announcement that both of his lawyers would be removed, on March 14, 2012, Cottrell filed a *prose* motion in this Court seeking to reinstate Axelrod as lead counsel and to remove Armstrong from his case.[4] *Pro Se* Motion to Retain Attorney Axelrod

[4]To undersigned counsel's knowledge, no action was taken on Cottrell's *prose* submission.

(3/14/12). R. 383. That request was later renewed by replacement counsel. *See* Defense Motion to Protect Record on Defendant's Pro Se Motion (4/11/14); Supp. R. 1-6. Pretrial Hrg. (7/17/14) R. 558-560. At a July 17, 2014 hearing on the motion, Cottrell's new counsel pointed out that if the issue "was one of dysfunction between the two [dismissed lawyers], it would seem that if Mr. Axelrod stayed alone or paired up with new counsel, the problem would have been resolved." Pretrial Hrg. (7/17/14) R. 559. Counsel further argued that excusing Axelrod was a violation of the Sixth Amendment right to counsel, because once a relationship between the defendant and appointed counsel is established, "it is entitled to constitutional protection and respect." *Id* .R. 559.

Counsel also made clear that the motion reflected Cottrell's desires, and Cottrell then confirmed the accuracy of that representation. Pretrial Hrg. (7/17/14) R. 559-560. In response, the court neither explained why removing Armstrong would not have resolved any possible issue of conflicting views, nor made any findings questioning Axelrod's competence. Instead, the court maintained only that it knew what was best for Cottrell's defense: "Let me assure you that everything I did in that regard was to protect you. Let me assure you of that." *Id.* at 143. R. 560.

B. Relevant legal principles.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee that"a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." *Faretta v. California,* 422 U.S. 806,807 (1975); *Reed v. Ozmint,* 374 S.C. 19, 28,647 S.E.2d 209,213 (2007). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic,* 466 U.S. 648, 654 (1984); *State v. Thompson,* 355 S.C. 255, 261, 584 S.E.2d 131, 134 (Ct. App.

2003).

1. The "personal character" of the right to the assistance of counsel.

As the Supreme Court held in *Faretta,* because the Sixth Amendment "right to make a defense" is a right to "the *assistance* of counsel," proffered assistance can be rejected:

> The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. The counsel provision supplements this design. It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant- not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master, and the right to make a defense is stripped of the personal character upon which the Amendment insists.

Faretta, 422 U.S. at 819-20 (footnote omitted).

For the same reason that a defendant may reject all assistance- the "personal character" of the right - a defendant has a Sixth Amendment right to choose the attorney who will assist him. "The Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 624-25 (1989); *Wheat v. United States,* 486 U.S. 153, 159 (1988). "The right to select counsel of one's choice ... has been regarded as the root meaning of the constitutional guarantee." *Gonzalez-Lope,* 548 U.S. at 147-48. Although "the Sixth Amendment right to choose one's own counsel is circumscribed in several important respects," including the defendant's ability to pay, when the right to choose has been violated, no additional showing of prejudice is required. *Id.* at

146. Because the consequences of depriving a defendant of this Sixth Amendment right "are necessarily unquantifiable and indeterminate," the error is structural. *Id.* at 150.

2. The indigent defendant's right to continued representation by appointed counsel.

As the Supreme Court has recognized for over eighty years, all capital defendants have a constitutional right to "the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama,* 287 U.S. 45, 69 (1932). When a capital defendant is unable to pay to retain an attorney, he is entitled to have counsel appointed for him. *Id.* at 65; *see also Gideon v. Wainwright,* 372 U.S. 335,345 (1963) (recognizing "the sound wisdom upon which the Court's holding in Powell *v. Alabama* rested," and extending right to appointed counsel to noncapital felonies).

The indigent defendant's right to counsel does not include the right to have a particular appointment made. *Gonzalez-Lopez,* 548 U.S. at 151. However, after an appointment is made, critical aspects of the right to counsel, such as the right to the effective assistance of counsel, apply equally to defendants represented by retained and appointed counsel. *See Cuyler v. Sullivan,* 446 U.S. 335, 344-45 (1980) ("[W]e see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.").

More particularly, "the considerations that may preclude recognition of an indigent defendant's right to choose his own [court-appointed] counsel, such as the State's interest in economy and efficiency, ... should not preclude recognition of an indigent defendant's interest in continued representation by an appointed attorney with whom he has developed a relationship of trust and confidence." *Morris v. Slappy,* 461 U.S. 1, 23 n.5 (1983) (Brennan, J., concurring in

the result). "[A]ny meaningful distinction between indigent and non-indigent defendants' right to representation by counsel ends once a valid appointment of counsel has been made." *State v. Huskey,* 82 S.W.3d 297, 305 (Tenn. Crim. App. 2002); *accord Lane v. State,* 80 So.3d 280, 295 (Ala. Crim. App. 2010) ("With respect to continued representation, however, there is no distinction between indigent defendants and nonindigent defendants."); *People v. Davis,* 449 N.E.2d 237, 241 (Ill. App. 1983) ("[F]or purposes of removal by the trial court, a court-appointed attorney may not be treated differently than privately retained counsel."). "To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused." *Smith v. Super. Ct. of L.A. Cnty.,* 440 P.2d 65, 74 (Cal. 1968); *accord Lane v. State,* 80 So.3d at 297 (quoting *Weaver v. State,* 894 So.2d 178, 189 (Fla. 2004) ("'To allow trial courts to remove an indigent defendant's court-appointed counsel with greater ease than a non-indigent defendant's retained counsel would stratify attorney-client relationships based on defendants' economic backgrounds.'"); *Stearns v. Clinton,* 780 S.W.2d 216, 223 (Tex. Crim. App. 1989) ("[T]he power of the trial court to appoint counsel to represent indigent defendants does not carry with it the concomitant power to remove counsel at his discretionary whim [because] to hold otherwise would be to discriminate between retained and appointed counsel without a semblance of rationality.").

Thus, "[o]nce counsel has been appointed, and the defendant has reposed his trust and confidence in the attorney assigned to represent him, the trial judge may not, consistent with the United States ... [C]onstitution[], rend that relationship by dismissing the originally appointed attorney and then thrusting unfamiliar and unwelcome counsel upon the defendant." *McKinnon v. State,* 526 P.2d 18, 22-23 (Alaska 1974); *accord Clements v. State,* 817 S.W.2d 194, 200 (Ark. 1991) ("[W]here, as here, a trial court terminates the representation of an attorney, either private or

appointed, over the defendant's objection and under circumstances which do not justify the lawyer's removal and which are not necessary for the efficient administration of justice, a violation of the accused's right to particular counsel occurs."); *People v. Harlan,* 54 P.3d 871, 878 (Colo. 2002) (quoting *Williams v. District Court,* 700 P.2d 549, 555 (Colo. 1985)) (an indigent defendant is entitled to "continued and effective representation by court-appointed counsel in the absence of a demonstrable basis in fact and law to terminate that appointment."); *Harling v. United States,* 387 A.2d 1101, 1106 (D.C. 1978) ("The court's discharge of appellant's [appointed] attorney [without cause] was not only an encroachment on appellant's right to counsel, but also a threat to the independence of the bar which represents indigent defendants."); *Grant v. State,* 607 S.E.2d 586, 587 (Ga. 2005) (interest in appointing local counsel was not sufficient "to overcome the strong interest of the defendant and of the court system in sustaining an existing, close relationship between a death penalty defendant and his counsel"); *English v. State,* 259 A.2d 822, 826 (Md. 1969) ("[O]nce counsel has been chosen, whether by the court or the accused, the accused is entitled to the assistance of that counsel at trial.") (emphasis in original); *People v. Johnson,* 547 N.W.2d 65, 69 (Mich. 1996) ("[O]nce an attorney is serving under a valid appointment by the court and an attorney-client relationship has been established, the trial court may not arbitrarily remove the attorney over the objection of both the defendant and counsel."); *Huskey,* 82 S.W.3d at 311 (removal of appointed counsel in response to counsel's motion practice was unwarranted because it failed to accord sufficient weight to court's "obligation to protect the defendant's right to the effective assistance of his counsel of choice"); *Stearns* ,780 S.W. 2d at 225 ("Once a valid appointment has been made, the trial court cannot arbitrarily remove him as attorney of record over the objections of the defendant and counsel."); *see also Amadeo v. State,* 384 S.E.2d 181, 183 (Ga. 1989) (trial court's refusal to

appoint prior counsel for retrial of case was abuse of discretion because it failed to give sufficient weight to the defendant's "relationship of trust and confidence with prior counsel"); *Davis v. State,* 403 S.E.2d 800, 801 (Ga. 1991)(same).

3. Justifications for removal of counsel over the defendant's objection.

A trial court's discretion to remove counsel-retained or appointed- over the objection of the defendant is "severely limited." *Huskey,* 82 S.W.3d at 308; *People v. Courts,* 693 P.2d 778, 781 (Cal. 1985). "Gross incompetence or physical incapacity, or contumacious conduct that cannot be cured by a citation for contempt may justify the court's removal of an attorney[] over the defendant's objection." *Harling,* 387 A.2dat 1105 *(quotedinHuskey,* 82 S.W.3dat308); *accord Lane,* 80 So.2d at 299; *Smith,* 440 P.2d at 72-74; *Weaver,* 894 So.2d at 189; *Burnett v. Terrell,* 905 N.E.2d 816, 824-25 (Ill. 2009); *Johnson,* 547 N.W.2d at 69. A trial court is also justified in removing counsel who has an actual or serious potential conflict of interest. *Gonzalez-Lopez,* 548 U.S. at 152; Lane, 80 So.3d. at 299. Finally, it may be that "difficulties in the trial calendar that threaten the State's right to a fair trial" also justify removal of counsel. *Lane,* 80 So.3d at 299 (citing *Weaver,* 894 So.2d. at 189). "However, mere disagreement as to the conduct of the defense certainly is not sufficient to permit the removal of any attorney." *Huskey,* 82 S.W.3d at 309 (quoting *Harling,* 387 A.2d at 1105); *accord McKinnon,* 526 P.2d at 22; *Clements,* 817 S.W.2d at 200; *Stearns,* 780 S.W.2d at 223.

"Courts should [] disqualify counsel with considerable reluctance, and only when no other practical alternative exists." *Huskey,* 82 S.W.3d at 309 (quoting *In re Ellis,* 822 S.W.2d 602, 605 (Tenn. Ct. App. 1991) (citations omitted); *accord Lane,* 80 So.3d at299; *McKinnon,* 526 P.2d at 23; *Cannon v. Comm'non Judicial Qualifications,* 537 P.2d 898, 911 (Cal. 1975); *Harlan,* 54 P.3d

at 877; *see also United States v. Gearhart,* 576 F. 3d 459, 464 (7th Cir. 2009) (quoting *United States v. Diozzi,* 807 F.2d 10, 12 (1st Cir.1986)) ("[D]isqualification of [retained] defense counsel should be a measure of last resort.").

C. Argument.

A dozen states have already faced the question now before this Court: Whether an indigent defendant has a constitutionally protected interest in continued representation by an appointed attorney with whom he has developed a relationship of trust and confidence. Because the trial court neither had nor stated any substantial justification for the removal of Cottrell's counsel over his objection, unless this Court rejects the precedent from all of the states catalogued above, it must reverse Cottrell's conviction.

When the Solicitor alleged a "serious rift or problem developing" between Axelrod and Armstrong, Cottrell's two appointed lawyers, it was appropriate for the trial court to hold a hearing concerning that allegation. *See* Memorandum from Solicitor Hembree to Trial Court (dated Feb. 21, 2012) Pretrial Hrg. Exhibits (3/8/12), R. 378-379. Indeed, *State v. Sanders,* 341 S.C. 386, 534 S.E.2d 696 (2000), mandates just such an evidentiary hearing "to determine whether there is evidence to support counsel's removal," and to "provide a record for meaningful review of the issue on appeal." *Sanders,* 341 S.C. at 390-91, 534 S.E.2d at 698. The hearing, however, revealed no basis upon which either Axelrod or Armstrong could be removed over Cottrell's objection, and made the merits of Cottrell's objection plain.

Armstrong said she could work with Axelrod, and Axelrod - appropriately - wanted to consult Cottrell. Cottrell's statements left no doubt that he had formed an attorney-client relationship with Axelrod; Cottrell reported that he had met with Axelrod "numerous" times, expressed the belief that Axelrod had been "preparing diligently," and described himself as

"confident in [Axelrod's] ability to represent me as the attorney for this trial." Pretrial Hrg. (3/8/12). R. 371. Then, after a recess in which Cottrell, Armstrong, and Axelrod all spoke together, Cottrell stated that Armstrong and Axelrod told him "they would be able to work together," Pretrial Hrg. (3/8/12), R. 372, and added that he felt "confident about the representation," Pretrial Hrg. (3/8/12). R. 373. Finally, Cottrell reiterated his strong feelings about the quality of Axelrod's work, which he did not think could be matched by another lawyer. Pretrial Hrg. (3/8/12). R. 373.

Assuming that Armstrong and Axelrod had indeed had significant disagreements, this hearing should have resolved any question as to whether those disagreements warranted judicial interference. Some disagreements between co-counsel are inevitable, and even heated, bitter disagreements are not unusual. Despite such disagreements, however, counsel generally find a way to move forward. Cottrell and his counsel agreed that they could all work together, and there was no basis in the record for the trial court to find otherwise. Moreover, the trial court made no finding that they could not do so, but stated only that he was "really concerned that [Armstrong's and Axelrod's] differences of opinion as to the way to proceed in this case and that perhaps the theories shared by co-counsel may be in conflict." Pretrial Hrg. (3/8/12). R. 371.

Being "really concerned" about the potential for counsel's disagreement is far too speculative a basis for interfering with Cottrell's Sixth Amendment right to continued representation by counsel of his choice. Nor is it comparable to the kinds of reasons other courts have found weighty enough to disrupt an existing attorney-client relationship: serious conflicts of interest, *Gonzalez-Lopez,* 548 U.S. at 152; *Lane,* 80 So 3d. at 299, or "gross incompetence or physical incapacity, or contumacious conduct," *Huskey,* 82 S.W.3d at 308 (quoting *Harling,* 387 A.2d at 1105); *accord Lane,* 80 So.2d at 299; *Smith,* 440 P.2d at 72-74; *Weaver,* 894 So.2d at 189; *Burnett,* 905 N.E.2d at

824-25; *Johnson,* 547 N.W.2d at 69. Moreover, the third kind of reason that other courts have suggested might justify such disruption - "difficulties in the trial calendar that threaten the State's right to a fair trial," *Lane,* 80 So.3d. at 299- actually argued *against* rather than for removal. As the trial court acknowledged, removal of Cottrell's counsel would result in "a substantial ... delay of a year or more." Pretrial Hrg. (3/8/12) at 5. R. 367. Just as "mere disagreement as to the conduct of the defense" is insufficient to justify removal, *Huskey,* 82 S.W.3d at 308 (quoting *Harling,* 387 A.2d at 1105); *accord McKinnon,* 526 P.2d at 22; *Clements,* 817 S.W.2d at 200; *Stearns,* 780 S.W.2d at 222-23, "concern" about differences in approach between two counsel is too flimsy and too speculative to force the disruption of a functioning attorney-client relationship.

Furthermore, even if the possibility of an untraversable gulf between counsel were sufficient justification for the trial court to take some action, it could not justify the action the trial court took here. Because "disqualification should be a measure of last resort," *Gearhart,* 576 F.3d at 464 (quoting *Diozzi,* 807 F.2d at 12), removal of both attorneys cannot be justified when removal of one would suffice. At most, the trial court should have removed Armstrong and appointed another attorney to assist Axelrod. Cottrell' s specific expression of confidence in Axelrod and his stated belief that no other lawyer would be able to match Axelrod, Pretrial Hrg. (3/8/12), R. 373, made it plain that if put to the choice, Cottrell would choose Axelrod. Cottrell's *prose* motion, filed with this Court after the trial court removed both attorneys, reiterated that preference. Substitute counsel later filed a motion once more reasserting Cottrell' s desire to be represented by Axelrod, and at the hearing on that motion, pointed out that if the issue "was one of dysfunction between the two, it would seem that if Mr. Axelrod stayed alone or paired up with new counsel, the problem would have been resolved." Pretrial Hrg. (7/17/14). R. 558-560.

The trial court never offered any explanation for its removal of both attorneys. It never stated

any doubt about the qualifications or competence of Axelrod. In short, the court never provided any justification for dissolving a functioning attorney-client relationship, and refusing to honor Cottrell's desire for continued representation by an appointed attorney with whom he had developed a relationship of trust and confidence. The trial court's proffered assurance to Cottrell that "everything I did in that regard was to protect you," Pretrial Hrg. (7/17/14), R. 560, reflected a misconception of its proper role; it simply was not for the court to decide what lawyer or what strategy was best for Cottrell. Once a defendant is represented by counsel, our system allocates responsibility for determining what is best for the defendant to the defendant and his counsel. The trial court's unnecessary interference with an existing attorney-client relationship violated the Sixth Amendment, regardless of the motives behind that interference.

The trial court's opinion that the attorneys it appointed to replace Axelrod would, "I'm sure, proceed in the same fashion or very much the same fashion," Pretrial Hrg. (3/8/12), R. 375, was impossible to evaluate or credit. As the Supreme Court explained in *Gonzalez-Lopez,*

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," - or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings.... Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

548 U.S. at 150 (quoting *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991)). Because erroneous deprivation of the right to counsel of choice has "consequences that are necessarily unquantifiable

and indeterminate," the error is structural. *Id.* Consequently,"[a] choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied," *id,* and no inquiry into prejudice is required.

Because the trial court disrupted an ongoing attorney-client relationship without justification and over the objection of Cottrell, reversal is required. *See, e.g, McKinnon,* 526 P.2d at 24; *Clements,* 817 S.W. at 200; *Harlan,* 54 P.3d at 878-79, 882; *Williams,* 700 P.2d at 555-56; *Harling,* 387 A.2d at 1106; *Grant,* 607 S.E.2d at 587; *English,* 259 A.2d at 826, 828; *Johnson,* 547 N.W.2dat 72; *Huskey,* 82 S.W.3d at 311; *Stearns,* 780 S.W.2d at 226; *Lane,* 80 So.3d. at 303; *Davis,* 403 S.E. 2d at 801; *Amadeo,* 384 S.E.2d at 183.

II. APPELLANT'S RIGHT TO A FAIR AND RELIABLE SENTENCING DETERMINATION, AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 3, 14 AND 15 OF THE SOUTH CAROLINA CONSTITUTION, WAS VIOLATED AS A RESULT OF THE QUALIFICATION AND SEATING OF TWO JURORS WHOSE EXPRESSED VIEWS PREVENTED OR SUBSTANTIALLY IMPAIRED THEIR ABILITY TO CONSIDER CONSTITUTIONALLY RELEVANT MITIGATING EVIDENCE.

During *voir dire,* the trial court articulated and adhered to the belief that a capital juror need only be capable of considering and giving weight to evidence offered to support *statutory* mitigating factors, and that evidence of *nonstatutory* mitigation fell into a separate, somehow less significant category to be considered- or not - at the exclusive discretion of the individual jurors. Consistent with that belief, the court, over defense objection, qualified and seated two jurors - Juror 450 and Juror 148 - who stated unequivocally that they would not regard evidence of a defendant's "background characteristics"- which did not fit within any enumerated statutory mitigating factor -as "relevant" in selecting an appropriate penalty for murder. As discussed below, the trial court's conception of a capital juror's obligations with respect to nonstatutory mitigation evidence conflicted with long-settled Eighth Amendment law, and the resulting participation of two jurors

whose views prevented or impaired their own compliance with that law requires reversal of Cottrell's death sentence.

A. Relevant facts.

Understanding the constitutional error in qualifying and seating the two jurors at issue here. requires attention to several sets of facts appearing across the trial record: (1) the *voir dire* questions and responses of the challenged jurors themselves; (2) the trial court's statements elaborating on its views concerning the law of capital sentence-selection and the attributes a juror must possess to be legally fit for that task; and (3) the instructions given to the jury prior to penalty phase deliberations. The relevant record information in each of these categories is set forth below.[5]

1. The *voir dire* of the challenged jurors.

a. Juror 450

Juror 450 was the fourth prospective juror to be questioned on the first day of jury selection. *See* R. 1355. The trial court began the *voir dire* by taking Juror 450 through a series of questions and statements about her status, her general willingness to follow the law, and the mechanics of a capital trial. That process included the following exchange about the role of mitigation evidence:

[5]It is also relevant to note that defense counsel exhausted their allotted peremptory strikes before the final juror was seated, *see* Pretrial Hrg. (9/11/14); R. 1030-1031; R. 3227-33, thereby preserving the errors associated with Jurors 450 and 148 for appellate review by this Court. *See State v. Bixby,* 388 S.C. 528, 542, 698 S.E.2d 572, 580-81 (2011).

Q: But if ... the State were able to establish [an aggravating factor] beyond a reasonable doubt to the unanimous satisfaction of the jury, then the jury would be obligated, must consider any mitigating or attenuating, anything that extenuates this offense. Do you understand that?

A: Yes, sir.

Q: And there are some that are statutory, that is, established by law. But the unique thing about the mitigating circumstances is you, as the jury, *could also consider any nonstatutory factors* about the case that *you felt were appropriate in mitigation.* And even if could you not find any mitigating justification there, the jury could still grant mercy even if there had been a finding of an aggravating circumstance and recommend a life sentence. Do you understand that?

A: Yes, sir.

Q: Okay. Now, would you be able to follow my instructions and the law in that regard? Could you engage in that process?

A: Yes, sir.

R. 1465-66(emphasis added).

Later, during questioning by defense counsel, Juror 450 was asked about her views concerning the relevance of a defendant's background to the sentence-selection decision:

Q: When it comes to fixing punishment in this type of case, ... the background characteristics of the person who committed the murder, like if they grew up poor, if they were a drug addict in their past or something like that, *would background characteristics of the defendant be relevant in. fixing that punishment?*

A: *No, sir.*

Q: Okay. It's because the facts of the crime are what control?

A: Yes, sir.

Q: And basically how sort of evil or heinous the facts of the murder was, that's what would determine the punishment?

A: I think we all know right from wrong.

R. 1472-73. Although Juror 450 had just made plain that she regarded the entire (and relatively vast) category of a defendant's "background characteristics" as not "relevant" to sentencing, neither the prosecution nor the trial court sought to rehabilitate her.

When the questioning was over, defense counsel moved to excuse Juror 450 for cause because she was "mitigation impaired," and had "indicated that background characteristics of the defendant would not be relevant in determining punishment for murder." R. 1485. The trial court's first response was to declare, "I didn't hear that." *Id.* Later, after a brief argument from the prosecution, the court emphasized that Juror 450 appeared to be free from bias or prejudice, had professed her willingness to "follow the law," and was therefore "a qualified juror." R. 1486-87. Her position with regard to nonstatutory mitigating evidence of a defendant's background received no further scrutiny by the trial court, and she was subsequently seated on the panel that heard and decided the case. R. 3228.

b. Juror 148

The *voir dire* of Juror 148 began immediately after Juror 450 was qualified, making him the fifth prospective juror to be examined. The trial court again began the questioning, which included this exchange about mitigation evidence and the juror's ability to follow the law:

> Q: Okay. Even after that, the State would not be entitled to a recommendation of the death penalty until the jury had also considered evidence of mitigation. Mitigation means things that make something less culpable, less serious, extenuating circumstances. Do you understand what I mean by that?
>
> A: Yes, sir.
>
> Q: Okay. So unless - or if that evidence was put up, you would be

required as a juror to consider it. And even when the State had established beyond a reasonable doubt and if the State can do that. I'm not suggesting they can. But if that was done, an aggravating circumstance, the *jury could consider* not only the legally established mitigation but *any mitigating circumstance that the jury found appropriate. You could decide what would be an appropriate mitigator.* Or for no reason at all. Just because the jury wanted to grant mercy, the jury could say life instead of death. Do you understand that?

A: Yes, sir.

Q: Okay. And ifl were to instruct you as to the law, could you follow it that way?

A: Yeah.

R. 1494-95(emphasis added).

Once the trial court concluded its questioning, defense counsel examined Juror 148 about a variety of matters, including his willingness to consider a capital defendant's background as mitigation evidence:

Q: The judge was talking to you about mitigating circumstances. What do you think that means?

A: I'm not sure.

Q: Okay. Let me ask you this. If you were to find somebody, you and 11 other jurors convicted somebody of murder, that malice killing, would the *background characteristics of a defendant* - his walk in life, how he grew up - *would those things be relevant in determining punishment?*

A: Would they be relevant to my decision?

Q: Yes.

A: *No, sir.*

Q: I'm sorry?

A: No.

R. 1503. As with Juror 450 a short time earlier, neither the prosecutor nor the trial court made any attempt to revisit Juror 148's declaration that he regarded "background characteristics of a defendant" as not "relevant" "in determining punishment." *See* R. 1508-1509.

Defense counsel moved to strike Juror 148 "for cause based on mitigation impairment." R. 1509; *see also id.* at 1509-10 (defense counsel: "When I asked him about the background characteristics of the defendant, a person's walk in life, he indicated that would not be relevant in determining punishment in a capital case."). The trial court responded by rejecting the suggestion that Juror 148 was "mitigation impaired," and insisted instead that"[t]he issue here is whether or not he can follow the law." R. 1511. The court then expressed its faith that, "ifl instruct this [juror] as the other [jurors], that those are factors to be considered, ... they will consider them." *Id.* The court went on to find Juror 148 "qualified in this case," *id.*, and he was later selected for a seat on the jury that convicted Cottrell and sentenced him to death. R. 3228.[6]

2. The trial court's views on the law governing mitigation evidence and juror qualification.

At the time Jurors 450 and 148 were questioned, the trial court said little about why they had been qualified despite their responses indicating that a defendant's background would not be "relevant." Later in the jury selection process, however, the trial court made a series of statements detailing its views about the law of capital sentencing and juror qualification, and shedding new light on its willingness to accept panelists for whom an accused's past held no meaning as mitigation. For

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6 After the panel was seated, defense counsel renewed their objections to Jurors 450 and 148. *See* R. 3237 (renewing objection to qualification and seating of Jurors 450 and 148, "who said they would not consider mitigation").

example, while denying a defense motion to remove another panelist who regarded background information as irrelevant, the court offered this illuminating explanation:

> This is how I see that. You could ask him questions about everything. But *there's nothing that says he has to consider that. Show me where, if it's not a statutory mitigator, where there's anything that says he must consider it.* My understanding of the law is there are statutory mitigators. And I will tell them, "These are things you must." But I also tell them, "You can consider anything else." And I have made that very clear to them.... *[I]f it's not statutory, I can't make this juror consider background information or things that may have occurred in Mr. Cottrell's background. If you say it's not statutory, well, then the legislature didn't think that it should be made mandatory that they should do it.* But this juror should be given the *option* to do that. And I will tell this juror that he *may consider absolutely anything or nothing* in determining whether or not the death penalty is proper.

R. 2520-2521 (emphases added); *see also* R. 2521 ("Because unless you can point me to something that [says] he's bound and must consider those things, then it would disqualify him.").

Responding to the court's request for "something" mandating consideration of non-statutory mitigation by a capital sentencer, defense counsel cited, *inter alia, "Lockett v. Ohio, Eddings v. Oklahoma,* Fifth, Sixth, Eighth, Fourteenth Amendment." R. 2523. She then explained that, "a juror who says that what matters to me is the facts surrounding the murder and nothing else cannot consider mitigation." *Id.* After faulting counsel for not asking the juror, "'Would you refuse to do it?"'- which counsel rightly noted would have been prohibited as "staking out," R. 2524 - the court quickly made clear that its view of the law had not changed:

> And there's *nothing that says that he must or has to consider that.* Again, that would be staking him out. He's going to consider all the - is free to consider all the relevant testimony and *he decides what is a relevant mitigator.*

R. 2524 (emphases added).[7]

Later, in rejecting a defense motion to remove yet another mitigation impaired panelist, the court reconfirmed its view that jurors possess complete discretion to decide whether to regard evidence of a defendant's background as mitigation:

> The defense is taking the position that these background factors should be mitigators. *Nothing says they have to.* They can certainly consider them. And if they think they're appropriate mitigators, they can certainly use them as mitigators.

R. 2766 (emphasis added).

Defense counsel responded by directing the court's attention to the rule of *Lockett v. Ohio,* 438 U.S. 586 (1978), which "defined mitigation as any aspect of a defendant's character or record that is there as a basis for a sentence less than death." R. 2766; *see also* R. 2767 (counsel referring to "a whole line of U.S. Supreme Court case law" which "makes it clear that a defendant's background certainly falls well within mitigation defined by *Lockett* under the Eighth Amendment"). Counsel then explained that *"Eddings v. Oklahoma* ... makes it very clear that a sentencer may not refuse to consider, *i.e.,* merely hearing it or listening isn't enough, any proper mitigation," and that, pursuant to *Morgan v. Illinois,* 504 U.S. 719 (1992), a juror who "can't consider proper mitigating evidence[] is not qualified." R. 2767-68. Bringing the concepts together, counsel read *from Abdul-Kabir v. Quarterman,* 550 U.S. 233 (2007), where the Supreme Court observed that it had long been "'firmly established that sentencing juries must be able to give meaningful consideration and effect

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[7]As the above-quoted remark confirms, defense counsel's wariness of a "staking out" accusation was well-founded. *See* R. 2216-17 (the court: "I don't have any problem with you saying 'would you' or 'could you look outside the statute.' I, in fact, have told them that. But even I have been careful not to point out anything specific. And when you say things like 'mental illness,' you are pointing to mental illness and you are asking her for a commitment as to that specific mitigator. And that's just how I see it. Even if you say 'could,' I think you're pointing to it.").

to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual.'" R. 2768. Finally, counsel added that, "whether the statute prohibits it or a juror refuses to consider it, it is the same difference. We're not meaningfully considering mitigation." R. 2768-69.

The trial court remained unmoved, insisting that a juror's personal inclination to disregard evidence of a defendant's background offered as mitigation does not affect his or her fitness to serve. Instead, the court maintained that, "it's entirely up to [the jurors] as to whether or not they think [such evidence] establishes a proper mitigating circumstance." R. 2769.

3. Penalty phase jury instructions on mitigation.

As detailed above, the trial court justified its refusal to remove Jurors 450 and 148 for cause, in part, on the ground that they could "follow the law," such that, "if I instruct [them] ... that those are factors to be considered, ... they will consider them." R. 1511.[8] Whether or not it could have been sufficient to overcome the jurors' admitted biases, no such instruction was given. While the court did tell the jurors that they "must also consider any nonstatutory mitigating circumstances," R. 4361, and "any other circumstances that you find of any nature whatsoever relating either to the offense or to the defendant as a reason not to impose the death penalty," R. 4362, nothing in the charge directed the jurors to classify any aspect of the defendant's background as relevant mitigation.[9] Instead, the instructions as a whole reflected the trial court's view that only *statutory*

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[8]See *also, e.g.,* R. 2519 (by the court: "What's controlling is whether or not this juror, if instructed to consider those things, can do so."); R. 1486 (stating when qualifying Juror 450, "I have not discussed with her any specific mitigating circumstances, but I am confident she will follow my instruction in that regard.").

[9]In fact, to the extent the charge provided any specific direction with regard to consideration of Cottrell's background, it did so only to encourage the jurors to utilize his prior bad acts to make

mitigating factors had to be considered, and left any juror so inclined entirely free to disregard other mitigation evidence not falling within their ambit.

B. Relevant legal principles.

"[T]he fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender ... as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976). To that end, "the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record ... that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 586, 604 (1978). For more than thirty five years, it has been settled law that this requirement applies regardless of whether a defendant's proffered mitigation evidence falls within a category specifically enumerated by a state's legislature in its capital sentencing statute, or within the larger universe commonly referred to as non-statutory mitigation. *Lockett,* 438 U.S. at 608; *see also, e.g., Hitchcock v. Dugger,* 481 U.S. 393, 398-99 (1987) (holding that trial court's refusal to consider non-statutory mitigation evidence "did not comport with" the Eighth and Fourteenth Amendments).

Consistent with this broad mandate, the Eighth Amendment entitles a capital defendant to consideration of anything proffered as "mitigating evidence so long as the defendant has met a 'low threshold for relevance,' which is satisfied by 'evidence which tends logically to prove or disprove

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adverse judgments about his character. *See* R. 4350-51 ("Additionally, the State presented evidence that the defendant has a previous murder conviction and may have committed other crimes. The facts and details of these crimes are relevant only to your consideration of the defendant's characteristics as they may bear logical relevance to the crime in this case. Your recommendation is to be based on the circumstances of this crime and on the background and characteristics of the defendant.").

some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" *Smith v. Texas,* 543 U.S. 37, 44 (2004) (quoting *Tennard v. Dretke,* 542 U.S. 274, 284-85 (2004)) (additional internal quotation marks omitted); *see also Tennard,* 542 U.S. at 284 ("When we addressed directly the relevance standard applicable to mitigating evidence in capital cases *in McKoy v. North Carolina,* 494 U.S. 433, 440-441 (1990), we spoke in the most expansive terms."). Evidence of a defendant's "background" - whether troubled or suggestive of otherwise good character - unquestionably meets this standard. *See, e.g., Wiggins v. Smith,* 539 U.S. 510, 535 (2003) ("Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability."); *Tennard,* 542 U.S. at285 (condemning court of appeals' relevance test for its tendency to "screen out any positive aspect of a defendant's character" in contravention of *Skipper v. South Carolina,* 476 U.S. 1, 5 (1986), and *Lockett, supra).*

Where relevant mitigation evidence is presented, the sentencer does not possess discretion to "refuse to consider" it. *Eddings v. Oklahoma,* 455 U.S. 104, 114 (1982). On the contrary, while a sentencing judge or juror "may determine the weight to be given relevant mitigating evidence ... they may not give it no weight by excluding such evidence from their consideration." *Id.* at 114-15; *see also Skipper,* 476 U.S. at 4 (quoting *Eddings,* 455 U.S. at 114) ("[T]he sentencer may not refuse to consider ... 'any relevant mitigating evidence.' These rules are now well established, and the State does not question them."). For this reason, the Supreme Court has insisted that "sentencing juries *must* be able to give *meaningful consideration and effect* to all mitigating evidence that might provide a basis for refusing to impose the death penalty ...." *Abdul-Kabir v. Quarterman,* 550 U.S. 233, 246 (2007) (emphases added).

In addition to setting the terms by which capital sentencing must be conducted, these rules

also operate as qualification criteria for the equally important step of selecting the sentencer. Where state law delegates the task of capital sentencing to a jury- as South Carolina does via S.C. Code § 16-3-20(C)- the Sixth and Fourteenth Amendments forbid participation by a juror who cannot be impartial, *Morgan v. Illinois,* 504 U.S. 719, 728 (1992), *i.e.,* one whose "views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt,* 469 U.S. 412,424 (1985) (quoting *Adams v. Texas,* 448 U.S. 38, 45 (1980)). This requirement of impartiality specifically extends to a juror's willingness to consider and give at least some weight to constitutionally relevant mitigating evidence. In *Morgan,* the Supreme Court expressed sharp disapproval of jurors who "deem mitigating evidence to be irrelevant to their decision to impose the death penalty," explaining that "[t]hey not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." *Morgan,* 504 U.S. at 736.[10] Importantly, while *Morgan* addressed the scenario in which a juror's predisposition to favor death made *all* mitigation evidence irrelevant, *Eddings* makes clear that a sentencer's refusal to consider *even one sub-class* of mitigation evidence is intolerable. *See Eddings,* 455 U.S. at 108-09 (reversing death sentence where sentencer found one statutory mitigating factor "[b]ut ... would not consider in mitigation the [other] circumstances" defendant proffered in mitigation).

Finally, the Supreme Court has been unequivocal in prohibiting participation by a sentencer unwilling to consider properly admitted mitigation evidence: "Any juror to whom mitigating factors

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[10]*See also Morgan,* 504 U.S. at 738 ("such a juror will not give mitigating evidence the consideration that the statute contemplates" and therefore lacks the impartiality demanded by the Due Process Clause of the Fourteenth Amendment); *Skipper,* 476 U.S. at 8 (observing that "sentencing jury's ... task [is to] consider[] all relevant facets of the character and record of the individual offender").

are ... irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Morgan,* 504 U.S. at 739; *see also id.* at 730 (quoting *Rosales-Lopez v. United States,* 451 U.S. 182, 188 (1981) (plurality opinion)) (noting "'trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the [mitigation] evidence'"). In fact, "[i]f even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Morgan,* 504 U.S. at729; *see also Ross v. Oklahoma,* 487U.S. 81, 85 (1988) (acknowledging that trial court's refusal to excuse one juror for cause in light of disqualifying *voir dire* responses was "error" under *Witt,* and would have required that "sentence ... be overturned" if juror had not been peremptorily struck).

C. Argument.

The trial court in this case operated under a fundamental misconception about the law governing what constitutes mitigation evidence and how that evidence must be treated by a sentencer. According to the court, consideration of information fitting within a *statutory* mitigating circumstance was mandatory, but whether to consider or give any weight to other, *non-statutory* information offered in mitigation was a matter for the exclusive discretion of the individual jurors themselves.[11] That view of the law could not have been more wrong; it had been squarely considered

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[11] *See, e.g.,* R. 2520 ("But there's nothing that says he has to consider [non-statutory mitigation]. Show me where, if it's not a statutory mitigator, where there's anything that says he must consider it. ... If you say it's not statutory, well, then the legislature didn't think that it should be made mandatory that they should do it. But this juror should be given the option to do that."); R. 2521 ("... I don't think it's disqualifying as to this juror. Because unless you can point me to something that he's bound and must consider those things, then it would disqualify him."); R. 2524 ("And there's nothing that says that he must or has to consider that. Again, that would be staking him out. He's going to consider all the - is free to consider all the relevant testimony and he decides what is a relevant mitigator.").

and repudiated by the Supreme Court in *Lockett* fully thirty-six years before the trial in this case, and the resulting rule that *all* relevant mitigation *must* be meaningfully considered has remained a bedrock principle of capital sentencing law ever since. *See, e.g., Abdul-Kabir, supra; Smith v. Texas, supra.* Defense counsel certainly understood that and made a concerted effort to correct the trial court's error. *See, e.g.,* R. 2767-69. Inexplicably, however, the court would not budge. *See* R. 2766; 2769.

The trial court's refusal to acknowledge or enforce the *Lockett* rule led directly to the qualification (and later the seating) of Jurors 450 and 148, both of whom provided uncontradicted *voir dire* responses which revealed them to be unfit for the constitutionally mandatory "task of considering all relevant facets of the character and record of the individual offender." *Skipper,* 476 U.S. at 8. Each juror was asked whether the defendant's "background characteristics" would be "relevant" to them in selecting punishment, and each answered unequivocally that they would not. *See* R. 1472-1473 (Juror 450); R. 1503 (Juror 148). As the Supreme Court recognized in *Eddings,* a sentencer's treatment of proffered mitigation evidence as "not relevant" constitutes a refusal to "consider" that evidence, and such a refusal amounts to a violation of the *Lockett* rule. *See Eddings,* 455 U.S. at 113 (equating sentencer's treatment of defendant's evidence as "not relevant" with refusal to "consider" that evidence in violation of *Lockett).*

The consequences of proceeding with a sentencer predisposed to dismiss as irrelevant- and therefore not to consider - evidence of a defendant's background are significant. As a practical matter, a juror so disposed imposes the same obstacle to an Eighth Amendment-compliant sentencing determination as would a judicial ruling formally excluding a defendant's proffered background evidence as mitigation, or an instruction directing jurors not to consider such evidence

as favoring a sentence other than death. In any of these permutations, the effect is to prevent evidence whose relevance *as mitigation* is constitutionally undeniable, *see, e.g., Tennard, supra,* from influencing the sentencer's verdict. *See Abdul-Kabir,* 550 U.S. at 248 (explaining that Court's "reference to 'exclusion' of the [mitigating background] evidence [in *Hitchcock, supra]* did not refer to its admissibility, but rather to its exclusion from meaningful consideration by the jury"); *Skipper,* 476 U.S. at 4 (quoting *Eddings,* 455 U.S. at 114) (reiterating "rule that the sentence may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'"). By every available indicator, that is what happened in this case.

Furthermore, setting aside whether a properly crafted jury instruction could *ever* adequately offset the seating of a juror unable to impartially consider and give effect to relevant mitigation - *Morgan* strongly suggests otherwise - the instructions given in this case did nothing to repair the damage done by the error in qualifying and seating Jurors 450 and 148. While the trial court maintained that both jurors were qualified because they could "follow the law," and insisted that, "if I instruct [the jury] ... that those are factors to be considered, ... they will consider them," R. 1511, the record makes plain that no such instruction was ever given. To be sure, the jurors were told that they "must also consider any nonstatutory mitigating circumstances," R. 4361, and "any other circumstances that you find of any nature whatsoever relating either to the offense or to the defendant as a reason not to impose the death penalty," R. 4362. Without more, however, neither juror- both of whom had already declared without contradiction or correction that the defendant's "background" was not "relevant" to them - would have perceived any obligation to treat the evidence any differently than they had said they would, *i.e.,* as information that they did not find "relevant" or mitigating. Thus, while they may have professed a general willingness to "follow the

law," the law they were told to follow did not require them to treat evidence of Cottrell's background as mitigating or to give it any weight in the sentencing calculation.

But for the trial court's adherence to a qualification standard contradicted by decades of Supreme Court jurisprudence, Jurors 450 and 148 would never have been seated on the jury that heard Cottrell's evidence - which included facts about his background offered as mitigation, *see supra* at 8-9- and decided his fate. On the contrary, as *Morgan* made clear, "[a]ny juror to whom mitigating factors are ... irrelevant should be disqualified for cause ...." *Morgan,* 504 U.S. at 739; *see also Eddings, supra* (death sentence reversed due to sentencer's failure to consider defendant's background as mitigation). Because both jurors were seated despite their inability to impartially consider and give meaningful effect to the mitigation evidence, and because both did contribute to the penalty phase verdict, "the State is disentitled to execute the sentence," *Morgan,* 504 U.S. at 729, and that "sentence [must] be overturned," *Ross,* 487 U.S. at 85.

III. THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS, COMPULSORY PROCESS, CONFRONTATION, AND JURY TRIAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND HIS FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEIZURE, BY EXCLUDING THE TESTIMONY OF DETECTIVE NATHAN JOHNSON, WHO HAD PERSONAL KNOWLEDGE OF FACTS ALLEGED BY THE STATE TO CONSTITUTE REASONABLE SUSPICION AND DID NOT BELIEVE THAT REASONABLE SUSPICION WAS PRESENT, AND BY ADMITTING THE OPINION OF LT. AMY PROCK THAT REASONABLE SUSPICION WAS PRESENT, DESPITE HER LACK OF ANY PERSONAL KNOWLEDGE OF THE UNDERLYING FACTS.

In South Carolina, causing the death of a police officer while resisting legal detention is murder; causing an officer's death to resist an illegal detention is manslaughter; and causing an officer's death to repel excessive, deadly force when the officer lacks justification for a detention is self-defense, and therefore no crime at all. Because it has never been disputed that Cottrell shot Officer McGarry, determining his criminal responsibility for the officer's death required resolution

of two issues: Whether Officer McGarry had adequate legal justification to detain Cottrell, and whether the officer used excessive, deadly force in the detention.

Cottrell was first tried for the McGarry homicide in 2005. At that trial, the State maintained that when Officer McGarry arrived at the scene, he had no legal basis for detaining Cottrell, and did not detain him until he told Cottrell to "freeze." According to the State, that order was a legal one because Officer McGarry had just then caught a glimpse of Cottrell's gun concealed under his shirt, a glimpse that established probable cause. Although there has never been any direct evidence for this proposition - such as a witness testifying that Officer McGarry said something about a gun before tackling Cottrell - the State nonetheless persuaded the first trial court to rule as a matter of law that the officer had probable cause. Not surprisingly, the jury returned a verdict of murder. On appeal, however, this Court held that whether Officer McGarry "was effectuating a lawful arrest in a lawful manner when he tackled Appellant from behind" was not a legal question, but a factual question for the jury. *Cottrell I,* 376 S.C. at 265, 657 S.E.2d at 454.

On retrial, this time needing to convince the *jury* that Officer McGarry's detention of and use of force against Cottrell was lawful, the prosecution took the position that the officer actually had *arrived* at the encounter *already* armed with "articulable suspicion" necessary to "stop and frisk" Cottrell pursuant to *Terry v. Ohio,* 392 U.S. 1 (1968). If the jury accepted this new theory, it would mean Cottrell was never free to walk away from Officer McGarry, and that McGarry was therefore justified in pursuing and tackling him. However, if the jury concluded that the officer did not have reasonable suspicion when he first confronted Cottrell, then in order to convict Cottrell of murder, the prosecution would have to convince the jury- without any direct evidence with which to do so - that the officer had seen the concealed gun.

Once again, the trial court's rulings relieved the prosecution of its burden. This time, the trial court did so not by usurping the jury's role in resolving a critical question of fact, but by excluding the defense's evidence showing the absence of reasonable suspicion at the start of the encounter. Under the prosecution's new theory, Officer McGarry had no personal knowledge of the facts constituting reasonable suspicion, but appropriately relied upon facts communicated to him by Lt.-Prock. Prock, however, also had no personal knowledge-of any evidence against Cottrell, but relied instead upon information conveyed to her by Lt. Daniels, who in turn relied upon information conveyed by Det. Nathan Johnson. Despite the fact that it was Johnson, and Johnson alone, who had personal knowledge of the facts that would- or would not- constitute reasonable suspicion, the trial court refused to let Johnson testify about what he knew or the conclusions he drew. Instead, the jury heard only Prock's testimony for the prosecution about the information that was conveyed to her, and, over defense objection, heard Prock's opinion that those facts constituted a sufficient basis upon which to stop Cottrell.

The Fourth Amendment prohibition against unreasonable searches and seizures is not satisfied by such a pass-the-buck approach to reasonableness. While an officer may rely upon facts observed and relayed by another officer, or even upon a bare legal conclusion, he may do so *only if some law enforcement officer had personal knowledge requisite to meet the legal standard.* Where information upon which the arresting officer acts originates from another officer, the stop is only lawful if the instructing officer has sufficient knowledge and facts to comprise reasonable suspicion that the person stopped has committed an offense. *United States v. Hensley,* 469 U.S. 221 (1985). Good faith on the part of the arresting officer, standing alone, cannot substitute for the articulable facts necessary to constitute reasonable suspicion. *Whitely v. Warden,* 401 U.S. 540, 568 (1971)

("[A]n otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest."); *cf United States v. Leon,* 468 U.S. 897 (1984) (Fourth Amendment exclusionary rule does not bar introduction of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid). Consequently, the trial court's exclusion of the testimony of the only officer with personal knowledge of the basis for suspicion violated Fourth Amendment principles as well as Cottrell's Fifth, Sixth, and Fourteenth Amendment rights to due process, compulsory process, confrontation and trial by jury.

A. Relevant facts.

1. The evidence concerning the homicide.

Shortly after Cottrell and two friends, Fred Halcomb and Dianne Lawson, entered a Myrtle Beach Dunkin' Donuts late on the night of December 29, 2002, police officers McGarry and Guthinger arrived. R. 3607-08. Officer Guthinger testified that when Officer McGarry noticed Cottrell, McGarry whispered "10-61, 10-32, county," a code which signified that Cottrell was a suspect in a shooting. R. 3300, 3305. Cottrell was cheerful and non-threatening, but after he left the store carrying coffee for other friends waiting outside, Officer McGarry stopped him. *See* R. 3609-11; 3632; 3636. When Officer McGarry asked Cottrell for identification, Cottrell produced it. R. 3318. According to Officer Guthinger, Cottrell was both "polite" and "compliant," and the interaction was not unpleasant. R. 3365; 3367. Officer McGarry then made a radio call to determine whether Cottrell had any outstanding warrants, R. 3322 - a point at which Officer Guthinger described Cottrell as "not free to leave." R. 3307; 3357. However, before Officer McGarry had received a response to his radio call, Cottrell turned to walk toward his friends' car, R. 3376, still

carrying coffee, R. 3611; *see also* R. 3319; 3325.

Officer McGarry ordered Cottrell to "freeze," drew his gun, and repeated the order. R. 3610. When Cottrell did not comply, R. 3611, Officer McGarry holstered the gun, R. 3611, chased Cottrell, and grabbed him from behind as he reached the car, R. 3325; 3380. As the two men struggled against the car, Cottrell was heard to ask, "Why are you harassing me?" R. 3380. Who shot whom first is unclear; eyewitnesses thought Cottrell fired first but the forensic evidence and expert testimony suggested Officer McGarry did.[12] It is undisputed, however, that Cottrell fired a shot that hit Officer McGarry in the face and killed him, and the forensic evidence established that Cottrell was hit in the leg by a bullet that came from Officer McGarry's gun. R. 3337; 3541.

2. The State's evidence concerning reasonable suspicion.

The State's evidence on the critical question of reasonable suspicion came from Lt. Prock of the Myrtle Beach Police Department. She testified that she had received "an email communication" from her colleague Lt. Daniels, who reported having "received a call from Detective Johnson from Horry County Police Department." R. 3288. According to Prock's account of Daniels' message about Johnson's call, "Johnson was investigating a shooting incident ... and

[12]There was conflicting evidence concerning who shot first. Scientific analysis established that a bullet struck Cottrell in his lower left leg, that the bullet impacted the front part of the leg, and that it traveled in a downward trajectory before exiting the calf, all of which was consistent with a shot having been fired-perhaps accidentally-while the left-handed Officer McGarry struggled with Cottrell from behind, R. 3333; 3700-3703. Expert testimony also suggested that Officer McGarry was instantly incapacitated by the shot to his face, and could not have returned fire with his own weapon. R. 3499-3500. The other witnesses gave differing accounts. Eyewitness Diane Lawson claimed to have seen Officer McGarry "fire his weapon as he was falling back," R. 3626, but, as defense counsel pointed out, that claim had never appeared in any of her prior statements or testimony spanning twelve years. Additionally, both Cottrell and Officer Guthinger believed Cottrell's leg wound had been caused when Guthinger shot Cottrell from behind while he was running away. *See* R. 3338-40. That, however, did not square with the scientific evidence confirming that Cottrell had been shot from the front, not from behind.

needed some information in reference to some suspects ... specifically ... [Cottrell] and a white male ...." R. 3288-89.

Prock testified that in response to this request, she searched the Myrtle Beach Police Department system for information on Cottrell, and found that "Officer McGarry ... had had contact with Mr. Cottrell, so [she] made contact with [McGarry,] ... explain[ed] to him the information [she] had, and asked if he had any additional information in reference to Cottrell." R. 3290. She later requested that Officer McGarry complete a report with the information that he had regarding Cottrell so that she could "forward it to Horry County." R. 3290. Lt. Prock explained the information she gave Officer McGarry was "that [she] had received information from Horry County that they were looking at Cottrell for a shooting incident where he was a suspect ...." R. 3290-91.

Over defense objection, Prock was also permitted to offer her opinion that, based on "the same information that [McGarry] had," she would have reacted to seeing Cottrell just as Officer McGarry did: by reciting police "ten codes" signifying "suspect, shooting, gun," R. 3361, to Officer Guthinger, R. 3291; *see also id.* ("I would have said the same thing.").

3. The dispute over Det. Johnson's proffered testimony.

To respond to Prock's fact and opinion testimony for the prosecution, the defense sought to present Horry County Police Detective Nathan Johnson, the original source of the inquiry that had gone from Daniels to Prock to McGarry, and the only person in the chain who had personal knowledge of whatever suspicious facts existed. Relying on well-settled Fourth Amendment law that a stop based on information received from another officer is valid only if that other officer had reasonable, particularized suspicion sufficient to justify a stop, *see, e.g.*, R. 3679-81; 3737, defense counsel sought to prove that Johnson's knowledge in fact had been "very scant," and consequently

insufficient justification for a stop. R. 3672; *see also* Pretrial Hrg. (9/8/14), R. 725-728, (Johnson stating that after his phone call to Daniels he had at least two opportunities to approach and question Cottrell, but did not do so).

If permitted to do so, Johnson would have told the jury that when he made the request for information on Cottrell, the information Johnson possessed did not justify classifying Cottrell as a "suspect" because he was merely a "person of interest" in an Horry County homicide. R. 3672. Johnson also would have testified that the only information he knew about Cottrell was "that he had been a former driver for the escort service ... was friends and acquaintances with [the Horry County victim], they rode Wave Runners together, and that he also supplied marijuana to [the victim]." R. 3672. Johnson's description of his own assessment of the significance of this information was corroborated by the fact that a month before Officer McGarry detained Cottrell, Johnson himself had seen a person whom he believed to be Cottrell, but did not take the opportunity talk to him. Pretrial Hrg. (9/8/14). R. 725-726.[13]

The trial court excluded Johnson's testimony on the ground that "how much information ... Officer McGarry had" was all that mattered, R. 3685, and "what Officer Johnson knew" would do nothing to expand the jury's knowledge of what had been in Officer McGarry's mind, R. 3686. The court noted that the defense had the "opportunity to cross-examine Officer Prock, who was responsible for passing [the information from Daniels] on," R. 3687-88, and added that it would permit the defense to "put up a witness who would contradict [Prock's testimony], who would offer testimony that ... information was not passed on to the Myrtle Beach Police Department and

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[13]Johnson testified to the facts surrounding his investigation and his communication with Daniels at a pretrial hearing concerning the admissibility of his testimony.

consequently not passed on to Officer McGarry." R. 3688. Those matters, however, were not in dispute (nor were they relevant, as discussed below).[14]

The trial court also offered a further justification for excluding Johnson's testimony: that allowing it would result in a more detailed exploration of the Horry County offense, the subject of Johnson's interest in Cottrell. R. 3688-89. According to the court, admitting Johnson's testimony would permit the prosecution on cross-examination to delve into the facts implicating Cottrell in the Horry County crime, which would confuse the issue, might mislead the jury, and "could be highly prejudicial to Mr. Cottrell." R. 3688. The court then ruled Johnson's proposed testimony inadmissible under Rules 401, 402, and 403, SCRE. R. 3689.[15]

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[14]Cottrell filed a motion for new trial claiming that he was denied a fair trial by the trial court's exclusion of Johnson's testimony. In response to that motion, the trial court issued an order that expanded upon its trial ruling:

> [T]he number of witnesses against Cottrell for the prior murder, the reliability of the witnesses, even other physical evidence, if it existed, linking Cottrell to the prior murder investigation does not make it more or less likely that Cottrell killed McGarry with malice aforethought. Whatever detailed and specific facts existed in Johnson's mind concerning [the Horry County] murder were unknown to McGarry, were not relevant to the reasonableness of McGarry's mindset in detaining Cottrell for a warrants check and a pat down for weapons.

Order Denying New Trial. R. 4518. The new order, like the trial court's original ruling, does not address the relevant Fourth Amendment law.

[15]In its post-trial order, the trial court added that "the testimony of Johnson would have created substantial unfair prejudice to the Defendant," and that under Rule 403, SCRE, "a trial within a trial" about whether "law enforcement had probable cause to arrest Cottrell for the prior murder when the state concedes that no probable cause existed [would] only serve[] to confuse the issues and mislead the jury." Order Denying New Trial. R. 4518.

4. Jury instructions concerning reasonable suspicion.

The court's charge to the jury on the question of reasonable suspicion was correct as far as it went:

> A police officer may stop and briefly detain and question a person for investigative purposes without treading on his Fourth Amendment rights when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity. Reasonable suspicion for purposes of a Terry stop require a particularized and objective basis that would lead one to suspect another of criminal activity.... The reasonableness of the investigative stop may be determined by examining whether the police were aware of specific and articulable facts giving rise to reasonable suspicion and whether the degree of intrusion was reasonably related to the known facts. In other words, the issue is whether police conduct, giving their suspicions and surrounding circumstances, was reasonable.

R. 3853. Importantly, however, this instruction did nothing to inform the jury that the communication to Officer McGarry could not supply reasonable suspicion unless the other party to that communication - or someone who provided information to that party- himself or herself had personal knowledge of facts sufficient to create reasonable suspicion.[16]

As defense counsel pointed out at the charge conference, the instructions just "blow[] right on past" "the essence of what the jury has to decide": "whether this was a proper *Terry* stop" supported by reasonable suspicion. R. 3737. Counsel reiterated their position that the *Terry* stop was not proper, and alluded to the improper exclusion of Johnson's testimony. R. 3737. The court's reply incorporated its view that the Fourth Amendment issue was resolved by Officer McGarry's

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[16]Although the trial court's order in response to the motion for new trial contains its own conclusion that "McGarry was acting with a reasonable and articulable suspicion that Cottrell may have a weapon on his person and may have outstanding warrants based on[McGarry' s] briefing from [Prock]," Order Denying New Trial, R. 4517-4518, the court did not so instruct the jury.

reliance upon the third hand information supplied by Prock: "Well, what the jury does have before it is that this officer, rightly or wrongly, had in his mind certain evidence that this was a person involved in a shooting, he was a suspect, and that he was armed." *Id.* R. 3737.

B. Relevant law and argument.

Because the trial court's reason for excluding Johnson's testimony rested on a fundamental misunderstanding of Fourth Amendment law, it was wrong to conclude that the testimony was irrelevant; the court was also wrong to take upon itself the determination of whether Johnson's testimony was detrimental to the defense. In excluding the testimony, the court eliminated the defense's only evidentiary basis for contesting the propositions that Cottrell had never been free to walk away from Officer McGarry, and that the officer was therefore authorized to use force against him when he did. *See* R. 3853-56 Gury charge prohibiting finding of provocation during "lawful" detention). In so doing, the trial court violated Cottrell's Fifth, Sixth and Fourteenth Amendment rights to present evidence in his own defense, and to counter the State's case for a sentence of death.

1. Under the Fourth Amendment, the reasonableness of the Officer McGarry's *Terry* stop could only be determined by considering the information Johnson had at the time he contacted the Myrtle Beach Police Department.

The trial court excluded Johnson's testimony because it agreed with the prosecution that Officer McGarry's reasonable belief that Cottrell was a suspect in a shooting was enough to justify an investigatory stop. *See* R. 3684-86. But the proposition that Officer McGarry' s good faith belief, standing alone, could justify the stop is contrary to well-established Fourth Amendment law. Because McGarry's sole basis for believing that Cottrell was a suspect was

Johnson's communication with the Myrtle Beach Police Department, *see* Exhibit 6, R. 971, Pretrial Hrg. (9/8/14)R. 677 (email from Daniels to Prock, dated 11/25/02, titled "RE: County Shooting"), only Johnson's knowledge could have supplied the objective basis necessary for reasonable suspicion. Consequently, his testimony was necessary to the determination as to whether reasonable suspicion supported McGarry's actions.

"[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. ... This demand for specificity in the information upon which police action is predicated is the central teaching of [the Supreme] Court's Fourth Amendment jurisprudence." *Terry v. Ohio,* 392 U.S. 1, 21, n.18 (1968); *see also, e.g., Robinson v. State,* 407 S.C. 169, 182, 754 S.E.2d 862, 868 (2014) ("[R]easonable suspicion requires there be an objective, specific basis for suspecting the person stopped of criminal activity."). A stop made in reliance on the information and instruction of another officer is lawful *only* if the instructing officer had sufficient knowledge and facts to justify that stop. *Hensley,* 469 U.S. at 232 ("[I]f a flyer or a bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information. If the flyer has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment.") (internal citations omitted).

Thus, however reasonable Officer McGarry' s reliance on other officers' characterization of Cottrell as a suspect, the lawfulness his stop turns, as a matter of law, on the facts behind that reliance. *Hensley,* 469 U.S. at 231; *United States v. Robinson,* 536 F.2d 1298, 1299 (9th Cir. 1976)

("A facially valid direction from one officer to another to stop a person or a vehicle insulates the complying officer from assuming personal responsibility or liability for his act done in obedience to the direction. But the direction does not itself supply legal cause for the detention, any more than the fact of detention supplies its own justification."). *Hensley* requires looking behind Officer McGarry's belief to determine whether objective, articulable facts warranted detaining Cottrell at the time the stop was made. Because Johnson was the only officer with any objective, articulable facts related to the shooting at the time of the stop, his testimony was essential to a determination of whether there was reasonable suspicion to justify the stop. *See, e.g., Joshua v. DeWitt,* 341 F.3d 430, 445 (6th Cir. 2003) (concluding that state court decision was contrary to clearly established Supreme Court precedent because it failed to acknowledge the necessity of inquiring into the instructing officer's knowledge to justify the validity of the acting officer's stop).

2. The facts surrounding Johnson's request and those known to Johnson rendered Officer McGarry's detention of Cottrell unreasonable.

Whether the intrusion of an investigatory stop is reasonable and thus lawful under the Fourth Amendment is determined by balancing the intrusion on the stopped person's Fourth Amendment interests against the interests of law enforcement. *Terry,* 392 U.S. at 20-21. Without an examination of all relevant factors, the reasonableness of a Fourth Amendment seizure cannot be properly determined. *See Florida v. Royer,* 460 U.S. 491,500 (1983) ("Itis the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.").

Where a stop is based on suspicion of a completed crime, the balancing of intrusion versus law enforcement imperatives must reflect this fact. *Hensley,* 469 U.S. at 228. In *Hensley,* the Court determined that, for several reasons, the interests of law enforcement are lower during an

investigatory stop related to a completed crime than during a stop based upon suspected ongoing criminal activity: First, investigating a completed crime is less directly related to *Terry's* stated goal of "effective crime detection and prevention" than is the investigation of "crime afoot"; second, the exigencies that warrant quick action to prevent crime are less pressing when the crime at issue has already occurred; and third, the interest of public safety is lower when crime is not fresh and the suspect appears to be going about his lawful business. *Id.* Here, the facts known to Johnson related to a completed crime, which weighs against intrusion on a person's Fourth Amendment interest.

Moreover, where a stop is based on the instruction of and information possessed by another officer or law enforcement agency, the urgency of the instruction and the strength of the information must be considered in determining the reasonableness of the stop. *See Hensley,* 469 U.S. at 235 (stating that an instructing agency's request may not exceed the strength of its information and suggesting that an acting officer who followed an overly intrusive instruction would violate Fourth Amendment); *United States v. Blair,* 524 F.3d 740, 751 (6th Cir. 2008) (holding a stop unreasonable where officer with information gave no concrete direction to acting officer nor conveyed the reason why the subject should be stopped); *Feathers v. Aey,* 319 F.3d 843, 849 (6th Cir. 2003) (deeming fact that instructing officer's information was based on an anonymous tip relevant to determination that investigatory stop by acting officer was unlawful).

In this case, Johnson's phone call to Daniels, R. 2144, conveyed to Prock through an email, R. 3288-89, and then conveyed to Officer McGarry through a phone call from Prock, R. 3290, and the information Johnson had at the time he called Daniels, all weigh against the conclusion that McGarry's detention of Cottrell was reasonable. *See* Pretrial Hrg. (9/8/14) R. 713-727. The email from Daniels, entered into evidence during pretrial hearings, recounts Johnson's communication

to Daniels, which was very informal. Exhibit 6, R. 971 , Pretrial Hrg. (9/8/14) R. 677. While the email describes Cottrell as a "suspect," the context of the email shows that the term is used loosely. *Id.* R. 971. First, "suspect" is used only once in the email, to say that the Sheriffs Office "had some information on a couple of suspects." *Id.* R. 971. The terms in this sentence - "some," "couple" - are inexact and reflect the fact that the conversation between Johnson and Daniels was brief and informal. *Id.* R. 971. These inexact terms also work to lessen the gravity of the term "suspect," instead communicating the fact that the investigation was new and not much information had been gathered. *Id.* R. 971.The resulting implication of a lack of urgency is strengthened by the rest of the email, which contains no request from Johnson to speak with Cottrell nor any request to Daniels to look for Cottrell or to gather any new information about him. *Id.* R. 971. Johnson simply asked the Myrtle Beach Police Department to relay any existing information it had about Cottrell. *Id.;* Pretrial Hrg. (9/8/14) R. 727-728. The email also conveys Johnson's awareness of Cottrell's involvement with drugs, and because it was directed specifically to the Myrtle Beach narcotics officers, suggests that Johnson was mainly looking for information on past drug offenses in Myrtle Beach. Exhibit 6, R. 971, Pretrial Hrg. (9/8/14) R. 671.

This limited request contrasts with one in which an officer detains a suspect in reliance upon a specific instruction to do so. In *Hensley,* for example, the instructing agency requested that an officer encountering the suspect detain him for the instructing agency, 469 U.S. at 223, a request that conveyed the fact that the instructing agency was actively seeking Hensley in relation to a crime and wanted to take direct and immediate action to detain him. Johnson's request was more similar to the one in *Blair,* where an officer watching a known drug house sent a message to another officer that he had seen Blair take something from another's hands at the drug house. 524 F.3d at 745 - The *Blair* court was unpersuaded that the stop was reasonable under *Hensley,* based largely on the fact that the instructing

officer "never communicated why Blair should be stopped, or even that he should be stopped at all." *Id.* at 751-52. Johnson's communication to Daniels likewise provided little information about the shooting he was investigating, no objective facts linking Cottrell to the shooting, and no request for action other than the request to narcotics officers for existing information on Cottrell. *See* Exhibit 6, R. 917. Pretrial Hrg. (9/8/14) R. 677; *see also* Pretrial Hrg. (9/8/14) R. 727-728.

More importantly, the limitation on Johnson's request reflects the weakness of the evidence he then had linking Cottrell to the Horry County shooting. *See* Pretrial Hrg. (9/8/14). R. 727-728. Johnson's notes and interviews reveal the scantiness of hard facts he had at that time. *See* Exhibit 5, R. 945. Pretrial Hrg. (9/8/14) R. 683-686 (Det. Johnson's Report of Investigation 11/23/02). Specifically, at the time he spoke with Daniels (as well as later, at the time Officer McGarry conducted the stop), Johnson said he had reason to believe only that Cottrell had been involved in selling drugs to the victim, and that Cottrell "had driven for [the victim's] escort service and rode Wave Runners" with the victim. *See* R. 3672; Pretrial Hrg. (9/8/14). R. 694-696, 699.

Indeed, excluding Cottrell and his companion Halcomb, there were nineteen (19) other people that Johnson was investigating for the Horry County shooting. *See* Pretrial Hrg. (9/8/14), (listing them). R. 710-712. Johnson explained that he was looking into so many people because "at that point in time we had no information on [the victim], so therefore anything we could get would be helpful." *Id.* at 38. R. 712.

Johnson's own conduct with respect to Cottrell underscores the conclusion that he viewed the information he had concerning Cottrell to be of limited probative value. Johnson had phone numbers and two addresses for Cottrell but had not called him or visited either address. *See* Pretrial Hrg. (9/8/14) R. 715. Indeed, not long before Officer McGarry's stop, Johnson saw Cottrell in a

parking lot under circumstances that would have been conducive to either an investigatory stop or an informal encounter, but did not even bother to approach him. *See* Pretrial Hrg. (9/8/14) R. 725-726. Johnson's behavior therefore also reinforces the informality with which he used the term "suspect" in his phone call with Daniels, *see* Pretrial Hrg. (9/8/14); R. 729-730; he was not actively pursuing Cottrell as a suspect, nor was he even actively pursuing him as a source of information in the investigation.

Thus, Johnson's limited information connecting Cottrell to the case he was investigating, his limited request to Daniels, Pretrial Hrg. (9/8/14), R.727-730, and the lack of urgency (given that he was investigating a completed crime rather than criminal activity that was "afoot") all point to the conclusion that Officer McGarry's detention of Cottrell was unreasonable. The jury, however, had none of this information in determining the reasonableness of McGarry's actions. *See* R. 3684-86. It also had no opportunity to evaluate Johnson's reliability as it would have if he had testified. *Id.* R. 3684-86. Because Officer McGarry did not have personal knowledge of objective, articulable facts that linked Cottrell to the shooting, only Johnson's knowledge could supply the objective basis for reasonable suspicion, and his testimony was essential to the determination of whether Officer McGarry's stop was lawful. *See, e.g., United States v. Coward,* 296 F.3d 176, 179-80; 184 (3d Cir. 2002) (remanding to district court after holding that evidence of instructing officer's knowledge was necessary to suppression hearing and that prosecution improperly failed to introduce such evidence); *United States v. Cutchin,* 956 F.2d 1216, 1218 (D.C. Cir. 1992) (remanding to district court for new suppression hearing because district court improperly excluded evidence of what instructing law enforcement dispatcher knew when she spoke with acting officers).

3. The trial court's exclusion of Johnson's testimony violated Cottrell's Fifth, Sixth and Fourteenth Amendment rights to present a defense and to respond to evidence used to support a sentence of death.

In South Carolina, a complete defense to murder requires that the defendant be without fault in creating a situation in which he reasonably believed himself to be in imminent danger of death or serious bodily injury and could not avoid that danger without the use of deadly force. *State v. Santiago,* 370 S.C. 153, 159, 634 S.E.2d 23, 27 (2006) (citing *Jackson v. State,* 355 S.C. 568, 570-71, 586 S.E.2d 562, 562 (2003)). An unlawful arrest, or an attempt to make an unlawful arrest, stands upon the same footing as any other nonfelonious assault, or as a common assault and battery. "The person who is so unlawfully arrested, or against whom such an unlawful attempt is directed, is not bound to yield, and may resist force with [proportionate] force ..." *State v. Francis,* 152 S.C. 17, 34-39, 149 S.E. 348, 355-56 (1929); *accord State v. McGowan,* 34 S.C. 618, 624, 557 S.E.2d 657, 660 (2007). A partial defense to murder reducing the crime to voluntary manslaughter is established when the defendant acted "in sudden heat of passion upon sufficient legal provocation." *State v. Cole,* 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000). Moreover, "[t]he killing [of a law enforcement officer] may be only manslaughter where a legal arrest is attempted in an unlawful manner, as when the passion of the accused is aroused by employment of unnecessary violence." *State v. Linder,* 276 S.C. 304,308,278 S.E.2d 335, 337 (1981).

Given these principles, the unreasonableness of a *Terry* stop can, where the defendant's use of force was necessary and not excessive, form the basis of a self-defense claim; and where the defendant's response to an unreasonable stop was excessive, the unreasonableness of the stop may form the basis of a partial defense that renders the homicide manslaughter rather than murder. Under Rule 401, SCRE, "relevant evidence" is defined as "any evidence having a tendency to make the

existence of any fact that is of consequence more or less probable than it would be without evidence." Because Johnson's testimony was, as discussed above, central to determining the reasonableness of Officer McGarry's actions under the Fourth Amendment, and because the reasonableness of McGarry's actions may have been dispositive in determining whether Cottrell's actions constituted murder, manslaughter, or self-defense, the trial court's decision to exclude Johnson's testimony as irrelevant under Rule 401 plainly was error,[17] and an abuse of discretion.

That decision also violated Cottrell's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina,* 547 U.S. 319,324 (2006) (quoting *Crane v. Kentucky,* 467 U.S. 683,690 (1986) (quoting, in tum, *California v. Trombetta,* 467 U.S. 479,485 (1976)); *see also, e.g., Chambers v. Mississippi,* 410 U.S. 284 (1973); *Washington v. Texas,* 388 U.S. 14, 23 (1967); *Davis v. Alaska,* 415 U.S. 308 (1974). The opportunity to present a complete defense "would be an empty one if the state were permitted to exclude competent, reliable evidence ... when such evidence is central to the defendant's claim of innocence." *Crane,* 474 U.S. at 690. "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Id.* at 690-91 (quoting *United States v. Cronic,* 466 U.S. 648, 656 (1984)).

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[17]The trial court also excluded Johnson's testimony as more prejudicial than probative, relying on Rule 403, SCRE. As discussed below, however, reliance upon that ground for exclusion was also erroneous.

The Court in *Crane* did not "pass on the strength or merits of [Crane's] defense," *id.* at 690, and Cottrell is not asking this Court to pass on the merits of his defense; that task was properly the jury's. *Cf Cottrell I.* However, as in *Crane,* it is "plain that introducing [the withheld evidence] was all but indispensable to any chance of [the defense] succeeding." *Id.* Thus, as in *Crane,* the lower court deprived Cottrell of the "meaningful opportunity to present a complete defense," *id,* that the Sixth and Fourteenth Amendments promise.

The error in the trial court's exclusion of Johnson's testimony was exacerbated by its admission of Lt. Prock's opinion that she would have done the same thing Officer McGarry did. While Prock's communication with McGarry could not, standing alone, supply reasonable suspicion for the reasons discussed in C.l, *supra,* her testimony describing that communication was relevant, though only to establish that McGarry was acting on Johnson's information. However, her opinion regarding McGarry's actions was completely irrelevant. Nonetheless, the trial court permitted the jury, over the objection of defense counsel that her testimony would be irrelevant and speculative, to hear that she would have responded as McGarry did. R. 3291; 3361. Because the trial court refused to allow the jury to hear Johnson's testimony, which both disagreed with Prock's opinion and would have supplied the factual basis for undercutting the third-hand information she reported, the jury was left with no choice but to rely upon Prock's assessment. "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes,* 547 U.S. at 331.

Additionally, because this is a capital case, the trial court's exclusion of Johnson's testimony not only violated Cottrell's Fifth, Sixth and Fourteenth Amendment rights to present a meaningful defense, but also violated due process of because he was "sentenced to death, at least in part, on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida,* 430 U.S.

349, 353 (1977). Prock was permitted to give her opinion regarding the reasonableness of Officer McGarry's actions, and to testify as to the information she had relayed to McGarry, testimony which was the only basis upon which the jury could have found reasonable suspicion justifying Cottrell's detention. Johnson's testimony constituted Cottrell's only basis for rebutting Prock's claims, and due process required that he be permitted to present it. *Id.*

4. To the extent the trial court's decision rested on its assessment that Johnson's testimony would do the defense more harm than good, it trounced upon Cottrell's Sixth Amendment right to counsel.

In addition to deeming Johnson's testimony inadmissible as irrelevant, the trial court held it excludable as unduly prejudicial. The court found that Johnson's testimony would be "highly prejudicial" to the defense, R. 3688, and that it would not "pass muster under 403 ...." R. 3689. This, too, was error, for it usurped the right of Cottrell and his counsel to make the strategic decision regarding whether Johnson's testimony was more beneficial than harmful.

In evaluating the Sixth Amendment right of a criminal defendant to the effective assistance of counsel, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington,* 446 U.S. 668, 689-90 (1984). "A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is ... the presumption that the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (citing *Michel v. Louisiana,* 350 U.S. 91, 100-01 (1955)). Strategic choices "about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based." *Id.* at 681.

A court's unwarranted interference with counsel's obligation to make independent decisions regarding how to conduct a defense violates the Sixth Amendment right to counsel. *See, e.g., Geders*

v. United States, 425 U.S. 80, 91 (1976) (finding that prohibiting defendant from conferring with counsel during seventeen-hour recess between direct and cross-examination "impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment"); *Herringv. New York,* 422 U.S. 853,860,863 (1975) (finding that preventing defense from making closing argument violated Sixth Amendment).

Relatedly, this Court has held that even if "Appellant's testimony may have been prejudicial to his case ... that cannot serve as a basis for the trial court to prevent him from taking the stand." *State v. Rivera,* 402 S.C. 225,245, 741 S.E.2d 694, 703 (2013). This Court explained that regardless of whether a defendant's decision to testify would have been detrimental to his case, "it must be honored out of that respect for the individual which is the lifeblood of the law." *Rivera,* 402 S.C. at 245, 741 S.E.2d at 704.

Certainly there was a risk in introducing Johnson's testimony; the jury might be prejudiced by the belief that Cottrell had committed another crime.[18] But there was also an enormous upside: That the jury, correctly applying the law, would have found Cottrell guilty only of manslaughter- or even acquitted him. Because the decision to introduce Johnson's testimony was a strategic one, the trial court was obligated to honor it. Thus, its determination that Johnson's testimony was excludable under Rule 403 trounced on Cottrell's right to counsel, and upon the "respect for the individual which is the lifeblood of the law." *Rivera,* 402 S.C. at 245, 741 S.E.2d at 704.

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[18]The trial court's calculation of risk also overlooked its own power to cabin the testimony to permit introduction of the information responsive to Prock without throwing the doors open to a full mini-trial on the Horry County homicide.

* * *

In sum, the trial court labored under the misimpression that it was irrelevant whether anyone actually had personal knowledge of facts sufficient to justify Cottrell's detention. But under the Fourth Amendment, Officer McGarry's detention of Cottrell was only justified if the facts Johnson knew made detention reasonable, and therefore, Johnson's testimony concerning those facts was not only relevant but essential. Because a finding that McGarry's actions were unreasonable - and only such a finding- could have led the jury to acquit Cottrell, or to convict him only of manslaughter, the trial court's exclusion of Johnson's testimony violated his Fifth, Sixth and Fourteenth Amendment rights to a meaningful opportunity to present a defense, and requires reversal of his murder conviction.

IV. APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A RELIABLE JURY DETERMINATION ON EVERY ELEMENT OF THE OFFENSE, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY NOT TO INFER MALICE EXCLUSIVELY FROM THE USE OF A DEADLY WEAPON.

Prior to closing arguments, defense counsel requested a charge, consistent with the principles of this Court's holding in *State v. Belcher,* 385 S.C. 597, 685 S.E.2d 802 (2009), that the jury not infer malice exclusively from Cottrell's possession and use of a deadly weapon. The trial judge refused the request, and the State interpreted that refusal as an invitation to tell the jury that the element of malice was satisfied by the mere existence of a gun in Cottrell's possession. Through repeated and emphatic assertions of that proposition in closing argument, the State effectively relieved itself of the burden of proof on the element of malice, and made all but certain that the jury would perceive no reason to consider the alternatives of manslaughter or self-defense. As explained below, the trial court's refusal to give the proposed instruction and the prosecution's exploitation of that refusal deprived Cottrell of a fair determination of his guilt or

innocence of murder in violation of his right to due process of law.

A. Relevant facts.

In the guilt-or-innocence phase of Cottrell's second trial, the jury was tasked with deciding whether his actions constituted murder, the lesser included offense of voluntary manslaughter, or self-defense. *See* R. 3846-3848. The judge instructed the jury that for the defendant to be guilty of murder, he must have "unlawfully killed another person with malice aforethought." R. 3846. For the lesser included offense of voluntary manslaughter, the jury was told it would have to find that the defendant "took the life of another person in the sudden heat of passion based on sufficient legal provocation." R. 3847. And for self-defense, the jurors were told that the defendant must

> be without fault in bringing on the difficulty, . . . have actually believed he was in imminent danger of losing his life or sustaining bodily injury, or ... was actually in such imminent danger.... If his defense is based upon his belief of imminent danger ... a reasonably prudent man of ordinary fitness and courage would have entertained the same belief ... if the defendant actually was in imminent danger, the circumstances were such as would warrant a man ... to strike the fatal blow in order to save himself from serious bodily harm or losing his own life ... [and] the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury.

R. 3848-50. Because malice aforethought is defined, in part, as the *absence* of justification or legal provocation, the existence *vel non* of malice necessarily dictated the scope and course of the jury's deliberations. If malice were proved - or if the jury were led to *believe* it had been proved - then manslaughter and self-defense were, by definition, off the deliberation table.

During the charge conference, defense counsel requested that in conjunction with an implied malice instruction the jury be told that it "may not infer or determine that malice is present simply

because of the use of a deadly weapon." R. 3727; Defendant's Requested Jury Instructions at 12. The judge replied that he had taken out the original *"Belcher* charge" because it "does not allow[] a charge on the inference of malice arising from a deadly weapon where self-defense, manslaughter, provocation is raised," but refused to affirmatively tell the jury "not to infer [malice] from the use of a deadly weapon." R. 3727. Instead, the judge observed that the jury has the "right to look at the evidence, look at the circumstances of the case," and "make that inference from the evidence if the jury chooses to do so." R. 3728.

Immediately following the charge conference the prosecution gave its closing argument, *see* R. 3764, in which it repeatedly urged the jury to conclude that the "malice" element of murder was conclusively proved - and the alternatives of manslaughter and self-defense were therefore conclusively eliminated- by the simple fact of Cottrell's possession of a firearm. After summarizing the testimony, *see* R. 3764-96, the State directed the jury's attention to the "absolute proof of malice represented by "Luzenski Cottrell's gun ...." R. 3797. The prosecutor continued:

> When we're talking about malice aforethought, one of the things we're talking about is the preparation for the crime or intense indifference to human life. This actual preparation, going about and doing what you're doing and actually preparing for it, is evidence of malice, that you intended the act as it happened, what you're accused for.
>
> So this is his handgun. This is the magazine that was in the handgun. It was fully loaded, and I'll show you how we know that beyond a shadow of a doubt. Ultimately, seven rounds in the magazine, okay.
>
> I want you to go back there and feel this. I want you to feel it. Feel how heavy it is. Feel how cumbersome this thing is. Feel how intentional it is, that this thing is in a man's waistband in the Dunkin' Donuts. This is malice. This is intending to do what he did. It's heavy. It's malice. And he has a spare. He has a spare. So this isn't enough.

R. 3797.

Several pages later, the theme was repeated:

> In this case, a .45-caliber handgun was used. We talked about that before, and that's why I want you to feel it. That is malice, the use of that, the way he used it, the way he had it in his waistband in preparation for it. ... This was a deliberate act to put the pistol in somebody- and let's talk about this.
>
> ...
>
> So the only issue is malice, what his criminal intent is. Well, you can take a look at the instrumentality that's used and think, was this an accident, like did you electrocute yourself or, you know, did you get mercury poisoning or something? The instrumentality, the mechanism that causes the death, can be used to think, "Hmm, I wonder if that's malicious?"

R. 3805.

Linking the argument to the instruction the court would later give, the prosecutor added:

> [The court] will charge you that malice may be inferred from conduct showing a total disregard for human life. He will talk about acts in preparation to do the act that was later accomplished. You can use that to say there is malice. This is malice. Tuck in that gun. The heft of that weapon is malicious. That preparation, going to a Dunkin' Donuts for coffee is malicious.

R. 3812.

Finally, as the closing argument neared its end, the prosecutor urged the jury to "handle[]" the guns: "And I want you to feel them. I want you to think about what that's like to get a cup of coffee with this weapon right here in preparation. Feel it. Feel the malice in it." R. 3820.

After closing arguments, the judge instructed the jury. As relevant here, the malice instructions provided as follows:

> Malice is something which springs from wickedness, from hatred,

> from depravity, from a heart devoid of social duty and fatally bent on mischief. Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must extend in the mind - must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous ill intent - evil intent and the act.
>
> Again, malice aforethought may be express or inferred. ...
>
> Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared before hand to do the act which was later accomplished, for example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind would be expressed. Malice may be inferred from conduct showing a total disregard for human life.

R. 3846-47. Nothing in the charge contradicted the prosecution's firearm-possession-constitutes-malice argument.

B. Relevant legal principles.

To secure a valid conviction for murder, the State must prove beyond a reasonable doubt that the defendant killed another "person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003); *see also Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975). Malice is an essential element of murder, and is defined, in part, as "the absence of justification, excuse, and mitigation." *Belcher,* 385 S.C. at 609, 685 S.E.2d at 808 (citation omitted).

As a matter of due process, "a State must prove every ingredient of an offense beyond a reasonable doubt, and ... it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." *Patterson v. New York,* 432 U.S. 197, 215 (1977) (discussing the holding of *Mullaney); see also Sandstrom v. Montana,* 442 U.S. 510, 524 (1979) (finding due process violation where "jury may have interpreted the judge's instruction as

constituting either a burden-shifting presumption ... or a conclusive presumption," either of which would have impermissibly relieved the prosecution of its burden of proof).

Consistent with *Mullaney, Patterson* and *Sandstrom,* this Court held in *Belcher* that "where evidence is presented that would reduce, mitigate, excuse or justify a homicide ... caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." *Belcher,* 385 S.C. at 612, 685 S.E.2d at 810. After acknowledging that such an inference had long been in use in South Carolina, this Court found that it could not be maintained because it constituted only a "half-truth" in cases where proof of intentional homicide is accompanied by evidence "that would reduce, mitigate, excuse or justify the killing ...." *Belcher,* 385 S.C. at 610, 685 S.E.2d at 809. This was so, the Court explained, because the inference would "permit[]" a finding of malice based only on the presence of the deadly weapon while leaving no room for the mitigating facts to persuade the jury to reject murder in favor of a lesser offense or an acquittal.[19] Because of this impermissible effect, this Court went on to declare that a jury charge permitting an inference of malice from use of a deadly weapon was "no longer good law in South Carolina," and "has no place in a murder ... prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing." *Belcher,* 385 S.C. at 600, 610, 385 S.C. at 804, 809.

Finally, although the issue was not presented in *Belcher,* this Court observed in a footnote that its holding did not "restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon." *Belcher,* 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9. As this case

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[19]*See Belcher,* 385 S.C. at 612, 685 S.E.2d at 810 (quoting *State v. Elmore,* 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983)) ("Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because 'if one intentionally kills another with a deadly weapon, the implication of malice may arise.'").

demonstrates, however, at least in the absence of an instruction which would properly guide the jury's analysis of the evidence and the range of relevant legal options, a closing argument urging the jury to find malice solely from the defendant's possession of a firearm can have the same burden-shifting and deliberation-distorting effect that this Court condemned in *Belcher*. That is what happened here.

C. Argument.

1. The trial court erred in refusing to instruct the jury not to infer malice solely from the defendant's possession of a firearm.

Recognizing the parallels between *Belcher* and this case, defense counsel requested that the trial court instruct the jury not to infer malice from the existence of a deadly weapon alone. *See* R. 3727; Defense Proposed Jury Instructions, R. 4422-23. The trial court refused, asserting that while *Belcher* prohibits a charge affirmatively authorizing a malice inference from a deadly weapon, it does not allow an instruction warning a jury away from that inference. *See* R. 3727-28. Contrary to the trial court's remarks, however, that conclusion is neither compelled by *Belcher* nor consistent with the objective this Court sought to further through that decision.

The threat to fairness recognized in *Belcher* is that a jury given judicial authorization to infer malice from the mere possession of a deadly weapon might accept that invitation and use it as a shortcut to a murder verdict without considering other, mitigating evidence that could favor a different outcome. While that risk may be most acute where, as in *Belcher,* the opportunity to make an inappropriate finding is highlighted by the judge in the charge, simply removing mention of that opportunity from the charge provides no assurance that a jury will not, either on its own or with help from the prosecution, find another path to the same improper conclusion. It follows that if it is

important to ensure that jurors consider duly presented evidence mitigating a homicide - and *Belcher* makes plain that it is - then they must be told *not* to bypass that evidence by embracing the "half- truth" that possession of a deadly weapon constitutes malice *ipso facto.*

In this case, there was every reason to fear the jury might, without proper direction, mistake Cottrell's possession of a firearm for conclusive proof of malice. As in *Belcher,* the evidence here established both the fact of a homicide and the identity of the shooter, and required the jury to make the all-important determination whether the killing was murder, manslaughter, or self-defense. That determination turned on the jury's decision about the presence or absence of malice. By requesting that the jury be charged that it "may not infer or determine that malice is present simply because of use of a deadly weapon," R. 3727, defense counsel sought no more than to ensure that the jury would consider *all* of the relevant evidence and available inferences bearing upon the malice question. By refusing that charge and choosing to stay silent instead, the trial court left the jury free to wander - or be led - onto the wrong path. At least in the context of this case, that silence amounted to a form of "purposeful ambiguity" that should have "no place" in a disputed murder trial. *Belcher,* 385 S.C. at 611,685 S.E.2d at 809.

2. The prosecution's closing argument cemented the trial court's error.

Once it was clear that the trial court would not direct the jury away from the firearm-possession-constitutes-malice inference, the prosecution got right to work leading the jury to embrace the "half-truth" *Belcher* condemned and rely upon it to find Cottrell guilty of murder.[20]

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[20]A comment from the prosecutor during the charge conference suggests that he misunderstood *Belcher* as having condemned only a *conclusive* presumption of malice while actually endorsing a *permissive* inference on the same issue. *See* R. 3727 (Mr. Hixson: "They absolutely may [infer malice from use of a deadly weapon], and it's important that they do

As catalogued *supra,* through multiple passages of his closing argument, the prosecutor repeatedly implored the jury to "feel" how "heavy" and "intentional" the gun was, to regard Cottrell's mere possession of it as "preparation" for murder, and to treat that preparation as conclusive proof of "malice."

The purpose and effect of these arguments was unmistakable: to induce the jury to return a murder verdict without scrutinizing the prosecution's proof (or lack thereof), and without considering the evidence suggesting manslaughter or self-defense. In the parlance of *Mullaney, Patterson, Sandstrom* and *Belcher,* that maneuver was a classic "burden shift," executed to relieve the State of its obligation to prove every element of murder beyond a reasonable doubt. Those decisions make clear that a jury instruction having that effect violates due process. At least in a case like this one, where the risk of burden-shifting is real and the trial court refuses to warn the jury away, there is no principled reason not to treat a closing argument having the same effect as equally incompatible with due process.

There is also ample reason to believe that the combination of the prosecutor's argument and the trial court's silence had the effect *Belcher* sought to avoid. The evidence at Cottrell's trial raised genuine possibilities of manslaughter or self-defense: Cottrell was already in the Dunkin' Donuts store before the officers entered; the officers initiated the contact with Cottrell; that contact remained friendly until Cottrell began to walk away and Officer McGarry tackled him; and Cottrell's leg wound was linked to Officer McGarry's gun, suggesting the officer shot Cottrell before Cottrell shot the officer. Furthermore, there was no direct proof of malice, nor did the rapid sequence of events

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infer it by the mechanism of injury or death. It's just that the Court can't tell them that you have an automatic inference from it.").

immediately preceding the shooting compel a malice finding.

Thus, as in *Belcher,* "[i]t is entirely conceivable that the only evidence of malice was [Cottrell]'s use of a handgun." *Belcher,* 385 S.C. at 612, 685 S.E.2d at 810. That fact was not lost on the prosecution, which sought to compensate for its less than overwhelming case for murder by distorting the jury's view of the law to lighten its own burden of proof. Because there is no functional difference between that form of burden-shifting and the one condemned in *Belcher,* the error in this case, like the error there, "cannot be considered harmless." *Id.* Cottrell is therefore entitled to reversal of his murder conviction.

V. THE TRIAL COURT'S REFUSAL TO INFORM DEFENSE COUNSEL OF THE CONTENTS OF A JURY NOTE THAT DISCLOSED THE JURY'S NUMERICAL DIVISION DURING DELIBERATIONS VIOLATED APPELLANT'S RIGHTS TO ADEQUATE REPRESENTATION, A FAIR JURY TRIAL, A NON-ARBITRARY VERDICT, AND DUE PROCESS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

When the jury sent a note expressing internal disagreement and revealing the number of jurors in favor of life and the number in favor of death, the trial court informed the solicitor and defense counsel of the note, but did not show it to them. Despite defense counsel's specific request for the numerical split communicated by the jury, the trial court would not disclose it. Because refusal to disclose the contents of a jury note violates a criminal defendant's rights to the assistance of counsel, adequate, a fair jury trial, a non-arbitrary verdict, *Rogers v. United States,* 422 U.S. 35 (1975); *Tuckerv. Catoe,* 346 S.C. 483, 552 S.E.2d 712 (2001), the trial court's decision to withhold the requested information in this case requires reversal of Cottrell's death sentence.

A. Relevant facts.

Two hours into sentencing phase jury deliberations the jury sent a note to the court. Rather

than reading the note to counsel, the judge relayed only a censored version: "'Blank jurors are for the death penalty; blank jurors for life.' I will not share that with you. 'What is the next step?' Signed 'Forelady.'" R. 4370. Defense counsel Norris responded by requesting the jury's numerical division to better inform her requests and objections: "Your Honor, under *Tucker v. Catoe* out of the state Supreme Court, I think that once they have disclosed to you the number, that we're entitled to know that, because if we're talking about one juror and you're sending them back, that's a different situation." R. 3481.

The trial judge answered that he was aware of the cited authority, but did not grant defense counsel's request. R. 3481. Counsel then asked for an overnight recess, but the trial court refused that request as well, stating that the jury had not definitively expressed that they were deadlocked. R. 4371-72. Defense counsel responded: "How about if they become deadlocked? I mean, they've got to be told that there is an end point here, that we just can't keep them here until the end of time unless they decide." R. 4373. The court still declined to order an overnight recess, *id.*, and instead sent a note back to the jury instructing them to continue deliberations and to refrain from sharing their numerical split in the future. R. 4373. Defense counsel Norris objected to the court's response to the jury note. *See id.*

An hour later, at 6:31 p.m., the judge announced that he wanted to ask the jury whether they would like the court to order dinner. R. 4373-74. When defense counsel McGuire urged the judge to instead allow the jury to go home for the evening, the judge ignored him and spoke solely to the Solicitor, saying "Jimmy [Richardson], do you have any objection to me just sending a note back saying, 'Would you like for us to order dinner?'" When the Solicitor replied, "Not a bit in the world," the judge again addressed the Solicitor by and name, saying, "Jimmy [Richardson], we'll

just do whatever they like. We don't need to bring them back in, do we? We'll just order it." R. 4374. After the Solicitor replied, "Yes, sir," the judge wrote and sent the note - without asking whether defense counsel objected to his planned course of action, or to the content of the note. *Id.* Shortly after the note was sent, at 7:41 pm, the jury returned with a verdict of death. R. 4374-75. After the trial judge read the verdict, sentenced Cottrell, and dismissed the jury, defense counsel requested that the judge reveal the jury's numerical division at the time of the note. R. 4376-85. Only then did the trial judge reveal that the jury had reported a split of eleven to one in favor of death. R. 4385.

B. Relevant legal principles and discussion.

A trial court should fully disclose a jury's note that pertains to ongoing deliberations, and should give counsel the opportunity to be heard before the judge addresses the jury. *Rogers v. United States,* 422 U.S. 35 (1975). In *Rogers,* the Supreme Court of the United States reversed the defendant's conviction because, without notice to the defendant and outside of his presence, the trial court responded affirmatively to a note sent by the jurors during their deliberations inquiring whether the court would accept a verdict of guilty as charged "with extreme mercy of the Court." As the Supreme Court explained, "the jury's message should have been answered in open court and [Rogers'] counsel should have been given the opportunity to be heard before the trial judge responded." *Rogers,* 422 U.S. at 39. Applying *Rogers,* another state court noted, "it is difficult to imagine a situation in which a court would be justified in declining to show or read a juror's note to counsel." *People v. O'Rama,* 579 N.E.2d 189, 193 (N.Y. 1991) (reversing where defendant was prejudiced by court's decision to withhold contents of jury note because it deprived defendant of the opportunity to have input into court's response).

Not surprisingly, the law in South Carolina tracks the same course. This Court has held that a trial court's refusal disclose "pertinent information" denies the defendant "a meaningful opportunity to protect [his or her] rights." *Tucker,* 346 S.C. at 495, 552 S.E.2d at 718. Moreover, the "pertinent information" withheld in *Tucker* included a note describing the jury's numerical split. As this Court reasoned, withholding such information "deprived [defense counsel] of the facts necessary to make informed decisions." *Id.; see also United States v. Mara},* 947 F.2d 520, 525 (1st Cir. 1991) (censoring a jury note violates defendant's right to a fundamentally fair trial and adequate representation because it leaves defense counsel powerless to respond to "the exigencies of the moment").

Although a court itself should not inquire into the jury's numerical division, *State v. Middleton,* 218 S.C. 452, 63 S.E.2d 163 (1951), when the jury volunteers its division, the court will consider and may act upon this information in determining its subsequent actions. Consequently, when a court learns of the numerical division, it must share that knowledge with counsel so that counsel can marshal the facts and advocate for the defendant's interests appropriately. "Without knowledge of the jury's numerical split, [a defendant holds] less than all the facts disclosed to the court and, therefore, [is] not afforded an opportunity to be adequately heard before the court respond[s] to the inquiry ...." *State v. Tremblay,* 820 A.2d 571, 575-76 (Me.2003).

Here the trial court, informed by defense counsel of this Court's holding in *Tucker,* gave no ground for distinguishing it and no excuse for not complying with it. Instead, the court defied *Tucker* by denying defense counsel the information they needed to adequately protect Cottrell's interests; it then added insult to injury by effectively shutting out defense counsel from subsequent decisions regarding communications with the jury, and electing instead to communicate and seek input only from the Solicitor. *See* R. 4373-74. The court's censorship of the jury note ignored both

the holding of the United States Supreme Court in *Rogers,* and this Court's clear precedent. It also interfered- again - with the prerogative of Cottrell and his counsel to make their own informed, strategic decisions on behalf of the defense. The sentence of death must therefore be reversed.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Cottrell's conviction and death sentence should be reversed, and the matter remanded for a new trial.

Respectfully submitted,

KEIR M. WEYBLE
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
607 255 3805

SHERI LYNN JOHNSON
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Office of
Appellate Defense
P.O. Box 11589
Columbia, SC 29211
803 734 1330

By: _____
Attorney for Appellant

February 6, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 6, 2017.

Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2015-000731

STATE OF SOUTH CAROLINA..... *Respondent*

v.

LUZENSKI ALLEN COTTRELL..... *Appellant*

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and in the above-captioned case has been served upon Donald J. Zelenka, Esquire and Anthony Mabry, Esquire, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 6th day of February, 2017.

Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

SWORN TO BEFORE ME this 6th day of February, 2017.

(L.S.)
Notary Public for South Carolina
My Commission Expires: November 3, 2026.