

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Horry County
Larry B. Hyman, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

LUZINSKI ALLEN COTTRELL,

Appellant

Appellate Case No. 2015-000731

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
APPELLANT’S STATEMENT OF ISSUES ON APPEAL	iv
RESPONDENT’S STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	4

ARGUMENT I.

Judge Hyman did not abuse his discretion in removing original appointed counsel Lisa Kimbrough and Stuart Axelrod and replacing them with Bill McGuire and Teresa Norris over two (2) years prior to Cottrell’s re-trial and sentencing proceeding, and Cottrell cannot show prejudice. This discretion act was appropriate where original appointed counsel had developed irreconcilable differences and personal distrust and ethical issues between each other which impacted upon their individual ability to jointly prepare a defense. Since there was no constitutional or statutory right to appointed counsel of choice, the replacement with qualified and competent counsel with the ability to prepare a defense for two years adequately preserved Cottrell’s Sixth Amendment right to counsel. 18

ARGUMENT II.

Where Appellant failed to use available peremptory challenges against two (2) jurors that he now challenges on appeal as being disqualified because of a claimed inability to consider mitigation, Appellant is procedurally barred from complaining about the seating of the jurors which he had the opportunity and ability to remove by the available strikes. Further Judge Hyman did not err in qualifying two (2) prospective jurors given their entire individual *voir dire* responses which conclusively showed that they would meaningfully consider all mitigating circumstances, including statutory and nonstatutory circumstances by following the instructions of the trial judge. 30

ARGUMENT III.

Judge Hyman did not err in limiting the guilt phase testimony of Detective Johnson on the Hartman’ murder investigation as the proffered evidence was not relevant and its potential for undue prejudice to Cottrell outweighed any probative value by injecting detailed evidence of the other murder and Cottrell’s criminal activity into the guilt phase determination when it had minimal probative value as to the culpability of Cottrell in the Officer McGarry homicide and would have confused issues before the jury in the guilt phase. The limitation did not deprive Cottrell of his right to present a meaningful defense and preserved his right to due process and a fundamentally fair trial.....51

ARGUMENT IV.

Judge Hyman did not err in refusing to instruct the jury an incorrect statement of the law that it could not infer malice from the use of a deadly weapon. Pursuant to State v. Belcher, although it is now improper for a trial judge to instruct on the inference of malice through the use of a deadly weapon under certain circumstances, a prosecutor may argue that the use of a deadly weapon may show the existence of malice and a jury may base its conclusion about malice on the particular use of a deadly weapon in the individual case 89

ARGUMENT V.

Judge Hyman did not err in not fully disclosing the premature actual numerical split contained in a note sent to Judge Hyman by the jury as the jury did not indicate it was hopelessly deadlocked after only two (2) hours of deliberation and Judge Hyman did not give the jury an Allen charge. The trial court's paraphrasing of the note leaving out the actual split gave defense counsel a meaningful opportunity to address the issues presented by the note.....94

CONCLUSION.....102

TABLE OF AUTHORITIES

Cases

<u>Abdul Kabir v. Quarterman,</u> 550 U.S. 233, 127 S.Ct. 1654 (2007)	37
<u>Adams v. Texas,</u> 448 U.S. 38, 100 S.Ct. 2521 (1980)	37
<u>Adams v. Williams,</u> 407 U.S. 143, 92 S.Ct. 1921 (1972)	75
<u>Allen v. United States,</u> 164 U.S. 492, 17 S.Ct. 154 (1896)	98
<u>Barber v. State,</u> 393 S.C. 232, 712 S.E.2d 436 (2011)	91
<u>Briggs v. Commonwealth,</u> 82 Va. 554 (1886)	86
<u>Brinegar v. United States,</u> 338 U.S. 160, 69 S.Ct. 1302, (1949)	64
<u>Brown v. Texas,</u> 443 U.S. 47, 99 S.Ct. 2637 (1979)	66
<u>Brown v. United States,</u> 159 U.S. 100, 16 S.Ct. 29 (1895)	86
<u>California v. Hodari D.,</u> 499 U.S. 621, 111 S.Ct. 1547 (1991)	62, 63
<u>California v. Trombetta,</u> 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)	56
<u>Caplin & Drysdale Chartered v. United States,</u> 491 U.S. 617, 109 S.Ct. 2646 (1989)	25
<u>Chambers v. Mississippi,</u> 410 U.S. 284, 93 S.Ct. 1038 (1973)	56, 58, 79
<u>City of Spartanburg v. Wortman,</u> 310 S.C. 1, 425 S.E.2d 18 (1992)	65
<u>Cone v. Nettles,</u> 308 S.C. 109, 417 S.E.2d 523 (1992)	62, 63
<u>Crane v. Kentucky,</u> 476 U.S. 683, 106 S.Ct. 2142 (1986)	56
<u>CSX Transp., Inc. v. Hensley,</u> 556 U.S. 838, 129 S.Ct. 2139 (2009)	50
<u>Eddings v. Oklahoma,</u> 455 U.S. 104, 102 S.Ct. 869 (1982)	37

<u>Galvin v. State,</u>	
46 Tenn. 283 (1869)	86
<u>Gardner v. Florida,</u>	
430 U.S. 349, 97 S.Ct. 1197 (1977)	25
<u>Gideon v. Wainwright,</u>	
372 U.S. 335, 83 S.Ct. 792 (1963)	24
<u>Green v. Maynard,</u>	
349 S.C. 535, 564 S.E.2d 83 (2002)	34
<u>Greer v. Miller,</u>	
483 U.S. 756, 107 S.Ct. 3102 (1987)	50
<u>Hitchcock v. Dugger,</u>	
481 U.S. 393, 107 S.Ct. 1821 (1987)	37
<u>Holmes v. South Carolina,</u>	
547 U.S. 319, 126 S.Ct. 1727 (2006)	56, 78
<u>Illinois v. Gates,</u>	
462 U.S. 213, 103 S.Ct. 2317 (1983)	64
<u>Illinois v. Taylor,</u>	
484 U.S. 400, 108 S.Ct. 646 (1988)	79
<u>Johnson v. United States,</u>	
840 A.2d 1277 (D.C. 2004)	94
<u>Key v. Currie,</u>	
305 S.C. 115, 406 S.E.2d 356 (1991)	24
<u>Krische v. Smith,</u>	
662 F.2d 177 (2d Cir.1981)	100
<u>Lockett v. Ohio,</u>	
438 U.S. 586, 98 S.Ct. 2954 (1978)	38
<u>Lowenfeld v. Phelps,</u>	
484 U.S. 231, 108 S.Ct. 546 (1988)	98
<u>Maryland v. Pringle,</u>	
540 U.S. 366, 124 S.Ct. 795 (2003)	64, 65
<u>McCoy v. North Carolina,</u>	
494 U.S. 433, 110 S.Ct. 1227 (1990)	37
<u>Mempa v. Rhay,</u>	
389 U.S. 128, 88 S.Ct. 254 (1967)	25
<u>Miller v. State,</u>	
31 Tex.Crim. 609, 21 S.W. 925 (1893)	86, 87
<u>Morgan v. Illinois,</u>	
504 U.S. 719, 112 S.Ct. 2222 (1992)	31, 37, 40
<u>Morris v. Slappy,</u>	
461 U.S. 1, 103 S.Ct. 1610 (1983)	25, 27

<u>Mu'Min v. Virginia,</u>	
500 U.S. 415, 111 S.Ct. 1899 (1991)	32
<u>Nevada v. Jackson,</u>	
___ U.S. ___, 133 S.Ct. 1990 (2013)	56, 78, 79
<u>Nix v. Williams,</u>	
467 U.S. 431, 104 S.Ct. 2501 (1987)	78
<u>Ornelas v. United States,</u>	
517 U.S. 690, 116 S.Ct. 1657 (1996)	68
<u>Parker v. Randolph,</u>	
442 U.S. 62, 99 S.Ct. 2132 (1979)	39, 48
<u>Penry v. Johnson,</u>	
532 U.S. 782, 121 S.Ct. 1910 (2001)	50
<u>People v. Jones,</u>	
57 Cal.4th 899, 306 P.3d 1136, 161 Cal.Rptr.3d 295 (2013)	83
<u>People v. Masters,</u>	
62 Cal.4th 1019, 365 P.3d 861, 199 Cal.Rptr.3d 85 (2016)	83
<u>Powell v. Alabama,</u>	
287 U.S. 45, 53 S.Ct. 55 (1932)	84
<u>Rafferty v. People,</u>	
72 Ill. 37 (1874)	86, 87
<u>Rock v. Arkansas,</u>	
483 U.S. 44, 107 S.Ct. 2704 (1987)	56, 58, 79
<u>Rogers v. United States,</u>	
422 U.S. 35, 95 S.Ct. 2091 (1975)	99
<u>Ross v. Oklahoma,</u>	
487 U.S. 81, 108 S.Ct. 2273 (1988)	37
<u>Smith v. Texas,</u>	
543 U.S. 37, 125 S.Ct. 400 (2004)	37
<u>Skipper v. South Carolina,</u>	
476 U.S. 1, 106 S.Ct. 1669 (1986)	37
<u>Sheppard v. State,</u>	
357 S.C. 646, 594 S.E.2d 462 (2004)	90
<u>Sikes v. State,</u>	
323 S.C. 28, 488 S.E.2d (1994)	62
<u>State v. Abrams,</u>	
322 S.C. 286, 471 S.E.2d 716 (Ct. App. 1996)	76
<u>State v. Alexander,</u>	
303 S.C. 377, 401 S.E.2d 146 (1991)	57
<u>State v. Alexander,</u>	
309 S.C. 495, 424 S.E.2d 526 (1992)	63

<u>State v. Atkins,</u>	
303 S.C. 214, 399 S.E.2d 760 (1990).....	98
<u>State v. Baccus,</u>	
367 S.C. 41, 625 S.E.2d 216 (2006).....	65
<u>State v. Banda,</u>	
371 S.C. 245, 639 S.E.2d 36 (2006).....	76
<u>State v. Belcher,</u>	
385 S.C. 597, 685 S.E.2d 802 (2009).....	89, 90, 91, 92
<u>State v. Bell,</u>	
302 S.C. 18, 393 S.E.2d 364 (1990).....	39
<u>State v. Bell,</u>	
305 S.C. 11, 406 S.E.2d 165 (1991).....	50
<u>State v. Bellamy,</u>	
293 S.C. 103, 359 S.E.2d 63 (1987).....	50
<u>State v. Bennett,</u>	
256 S.C. 234, 182 S.E.2d 291 (1971).....	65
<u>State v. Bixby,</u>	
388 S.C. 528, 698 S.E.2d 572 (2010).....	30, 35
<u>State v. Black,</u>	
400 S.C. 10, 732 S.E.2d 880 (2012).....	83
<u>State v. Blassingame,</u>	
338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999).....	64, 76
<u>State v. Bowie,</u>	
360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004).....	64
<u>State v. Boykin,</u>	
324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996).....	25
<u>State v. Brandt,</u>	
393 S.C. 526, 713 S.E.2d 591 (2011).....	90, 91
<u>State v. Brockman,</u>	
339 S.C. 57, 528 S.E.2d 661 (2000).....	77
<u>State v. Bryant,</u>	
372 S.C. 305, 642 S.E.2d 582 (2007).....	35
<u>State v. Burkhardt,</u>	
350 S.C. 252, 565 S.E.2d 298 (2002).....	91
<u>State v. Butler,</u>	
343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000).....	64, 66
<u>State v. Cain,</u>	
297 S.C. 497, 377 S.E.2d 556 (1988).....	36, 38, 40, 47, 50
<u>State v. Chaffee,</u>	
285 S.C. 21, 328 S.E.2d 464 (1984).....	35, 37

<u>State v. Childers,</u>	
358 S.C. 614, 595 S.E.2d 872 (Ct. App. 2004)	24
<u>State v. Commander,</u>	
396 S.C. 254, 721 S.E.2d 413 (2011)	91
<u>State v Cottrell,</u>	
376 S.C. 260, 657 S.E.2d 451 (2008)	passim
<u>State v. Cottrell,</u>	
2009 W.L. 9524547 (Ct. App. 2009)	4
<u>State v. Culbreath,</u>	
300 S.C. 232, 387 S.E.2d 255 (1990)	61, 62, 63
<u>State v. Dean,</u>	
282 S.C. 155, 317 S.E.2d 746 (1984)	64
<u>State v. Dean,</u>	
292, S.C. 136, 317 S.E.2d 744 (1984)	63
<u>State v. Dickerson,</u>	
395 S.C. 101, 716 S.E.2d 895 (2011)	35, 36, 37, 47
<u>State v. Drayton,</u>	
293 S.C. 417, 361 S.E.2d 329 (1987)	36
<u>State v. Drutzer,</u>	
928 S.W.2d 854 (Mo. 1996)	41, 42
<u>State v. Dupree,</u>	
319 S.C. 454, 462 S.E.2d 279 (1995)	64
<u>State v. Evins,</u>	
373 S.C. 404, 645 S.E.2d 904 (2007)	35, 36
<u>State v. Foster,</u>	
269 S.C. 373, 237 S.E.2d 589 (1977)	61, 62, 63, 66
<u>State v. Fowler,</u>	
322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996)	65
<u>State v. Garner,</u>	
304 S.C. 220, 403 S.E.2d 631 (1991)	58
<u>State v. Gaskins,</u>	
284 S.C. 105, 326 S.E.2d 132 (1985)	36, 38, 47
<u>State v. Gilbert,</u>	
277 S.C. 53, 283 S.E.2d 179 (1981)	36, 37, 40
<u>State v. Gillian,</u>	
373 S.C. 601, 646 S.E.2d 872 (2007)	57, 79
<u>State v. Graddick,</u>	
345 S.C. 383, 548 S.E.2d 210 (2001)	24
<u>State v. Green,</u>	
301 S.C. 347, 392 S.E.2d 157 (1990)	passim

<u>State v. Gregory,</u>	
198 S.C. 98, 16 S.E.2d 532 (1941).....	57, 58
<u>State v. Gregory,</u>	
364 S.C. 150, 612 S.E.2d 449 (2005).....	24
<u>State v. Halcomb,</u>	
382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009).....	4
<u>State v. Hamilton,</u>	
344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001).....	58
<u>State v. Hess,</u>	
279 S.C. 14, 301 S.E.2d 547 (1983).....	57
<u>State v. Hicks,</u>	
330 S.C. 207, 499 S.E.2d 209 (1998).....	50
<u>State v. Hill,</u>	
331 S.C. 94, 501 S.E.2d 122 (1998).....	31, 32, 40, 41
<u>State v. Hughes,</u>	
336 S.C. 585, 521 S.E.2d 500 (1999).....	98, 101
<u>State v. Hughes,</u>	
336 S.C. 585, 521 S.E.2d 500 (1999).....	98, 99
<u>State v. Hyman,</u>	
276 S.C. 559, 281 S.E.2d 209 (1981).....	24
<u>State v. Justus,</u>	
392 S.C. 416, 709 S.E.2d 668 (2011).....	24, 28, 29
<u>State v. Khingratsaipon,</u>	
352 S.C. 32, 572 S.E.2d 456 (2002).....	63, 64, 75
<u>State v. Kirkpatrick,</u>	
320 S.C. 38, 462 S.E.2d 884 (Ct. App. 1995).....	62
<u>State v. Lesley,</u>	
326 S.C. 641, 486 S.E.2d 276 (Ct. App. 1997).....	64, 65, 67, 82
<u>State v. Lewis,</u>	
255 S.C. 466, 179 S.E.2d 616 (1971).....	27
<u>State v. Linder,</u>	
276 S.C. 304, 278 S.E.2d 335 (1981).....	1, 85
<u>State v. Locklair,</u>	
341 S.C. 352, 535 S.E.2d 420 (2000).....	27
<u>State v. Lyle,</u>	
125 S.C. 406, 118 S.E. 803 (1923).....	58
<u>State v. Marin,</u>	
415 S.C. 475, 783 S.E.2d 808 (2016).....	90
<u>State v. Marshall,</u>	
273 S.C. 552, 257 S.E.2 740 (1978).....	24

<u>State v. Matthews,</u>	
296 S.C. 379, 373 S.E.2d 587 (1988).....	48
<u>State v. Mattison,</u>	
388 S.C. 469, 697 S.E.2d 578 (2010).....	91
<u>State v. McGowan,</u>	
347 S.C. 618, 557 S.E.2d 657 (2001).....	85
<u>State v. McGrady,</u>	
232 N.C. App. 95, 753 S.E.2d 361 (N.C. App. 2014).....	81
<u>State v. Morris,</u>	
312 S.C. 116, 439 S.E.2d 291 (Ct. App. 1993).....	63
<u>State v. Patterson,</u>	
324 S.C. 5, 482 S.E.2d 760 (1997).....	41
<u>State v. Peters,</u>	
271 S.C. 498, 248 S.E.2d 475 (1978).....	64
<u>State v. Pierce,</u>	
289 S.C. 430, 346 S.E.2d 707 (1986).....	39, 48
<u>State v. Pittman,</u>	
373 S.C. 527, 647 S.E.2d 144 (2007).....	91
<u>State v. Plemmons,</u>	
286 S.C. 78, 332 S.E.2d 765(1985).....	35, 36
<u>State v. Porter,</u>	
389 S.C. 27, 698 S.E.2d 237 (Ct. App. 2010).....	78
<u>State v. Powers,</u>	
331 S.C. 37, 501 S.E.2d 116 (1998).....	31, 32, 41, 42
<u>State v. Pruitt,</u>	
260 S.C. 396, 196 S.E.2d 107 (1973).....	65
<u>State v. Queen,</u>	
264 S.C. 515, 216 S.E.2d 182 (1975).....	50
<u>State v. Rodriquez,</u>	
323 S.C. 484, 476 S.E.2d 161 (Ct. App. 1996).....	66
<u>State v. Sams,</u>	
410 S.C. 303, 764 S.E.2d 511 (2014).....	85
<u>State v. Sanders,</u>	
341 S.C. 386, 534 S.E.2d 696 (2000).....	25
<u>State v. Sapp,</u>	
366 S.C. 283, 621 S.E.2d 883 (2005).....	35
<u>State v. Schmidt,</u>	
288 S.C. 301, 342 S.E.2d 401 (1986).....	57
<u>State v. Sims,</u>	
304 S.C. 409, 405 S.E.2d 377 (1991).....	24

<u>State v. Singleton,</u>	
258 S.C. 125, 187 S.E.2d 518 (1972).....	65
<u>State v. Singleton,</u>	
284 S.C. 388, 326 S.E.2d 153 (1985).....	40
<u>State v. Skipper,</u>	
337 N.C. 1, 446 S.E.2d 252 (N.C. 1995)	41, 42
<u>State v. Smith,</u>	
300 S.C. 216, 387 S.E.2d 245 (1989).....	57
<u>State v. Stanko,</u>	
402 S.C. 252, 741 S.E.2d 708 (2013).....	91, 92
<u>State v. Stanley,</u>	
365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005).....	58
<u>State v. Starnes,</u>	
388 S.C. 590, 698 S.E.2d 604 (2010).....	86
<u>State v. Sullivan,</u>	
267 S.C. 610, 230 S.E.2d 621 (1976).....	74
<u>State v. Taylor,</u>	
401 S.C. 104, 736 S.E.2d 663 (2014).....	69
<u>State v. Torrence,</u>	
305 S.C. 45, 406 S.E.2d 315 (1991).....	34
<u>State v. Torres,</u>	
390 S.C. 618, 703 S.E.2d 226 (2010).....	80
<u>State v. Tremblay,</u>	
820 A.2d 571 (Me. 2003)	99
<u>State v. Tucker,</u>	
324 S.C. 155, 478 S.E.2d 260 (1996).....	34
<u>State v. Williams,</u>	
262 S.C. 186, 203 S.E.2d 436 (1974).....	64
<u>State v. Wilson,</u>	
74 Ohio St.3d 381, 659 N.E.2d 292 (1996).....	41, 42
<u>State v. Wright,</u>	
416 S.C. 353, 785 S.E.2d 479 (Ct. App. 2016).....	66
<u>State v. Yates,</u>	
280 S.C. 29, 310 S.E.2d 805 (1982).....	98
<u>Strickland v. Washington,</u>	
466 U.S. 668, 104 S.Ct. 2052 (1984)	84
<u>Tennard v. Dretke,</u>	
542 U.S. 274, 124 S.Ct. 2562 (2004)	37
<u>Terry v. Ohio,</u>	
392 U.S. 1, 88 S.Ct. 1868 (1968)	passim

<u>Texas v. Brown,</u>	
460 U.S. 730, 103 S.Ct. 1535 (1983)	64
<u>Tucker v. Catoe,</u>	
346 S.C. 483, 552 S.E.2d 712 (2001)	passim
<u>United States v. Arvizu,</u>	
534 U.S. 266, 122 S.Ct. 744 (2002)	65, 82
<u>United States v. Blackmon,</u>	
839 F.2d 900 (2d Cir. 1988)	100
<u>United States v. Brignoni-Ponce,</u>	
422 U.S. 873, 95 S.Ct. 2574 (1975)	66
<u>United States v. Brown,</u>	
785 F.3d 1337 (9th Cir. 2015)	26
<u>United States v. Brugal,</u>	
209 F.3d 353 (4th Cir. 1999)	68
<u>United States v. Coffman,</u>	
94 F.3d 330 (7th Cir.1996)	100
<u>United States v. Cortez,</u>	
449 U.S. 411, 101 S.Ct. 690 (1981)	64, 65, 66, 82
<u>United States v. Cunningham,</u>	
672 F.2d 1064 (2nd Cir. 1982)	26, 28
<u>United States v. Edwards,</u>	
885 F.2d 377 (7th Cir. 1989)	74
<u>United States v. Ensign,</u>	
491 F.3d 1109 (9th Cir. 2007)	26
<u>United States v. Gonzalez-Lopez,</u>	
548 U.S. 140, 126 S.Ct. 2557 (2006)	25, 26, 27
<u>United States v. Henry,</u>	
325 F.3d 93 (2d Cir. 2003)	94
<u>United States v. Hensley,</u>	
469 U.S. 221, 105 S.Ct. 675 (1985)	59, 60, 63, 66
<u>United States v. Howard,</u>	
115 F.3d 1151 (4th Cir. 1997)	25, 28
<u>United States v. Iles,</u>	
906 F.2d 1122 (6th Cir.1990)	26
<u>United States v. Lancaster,</u>	
96 F.3d 734 (4th Cir. 1996)	58
<u>United States v. Laughman,</u>	
618 F.2d 1067 (4th Cir. 1980)	74
<u>United States v. Maraj,</u>	
947 F.2d 520 (1st Cir. 1991)	99

<u>United States v. Marrero,</u> 651 F.3d 453 (6th Cir.2011).....	26
<u>United States v. Massenburg,</u> 654 F.3d 480 (4th Cir. 2011).....	74
<u>United States v. Mendenhall,</u> 446 U.S. 544, 100 S.Ct. 1870 (1980).....	61, 62, 63
<u>United States v. Navarrete-Barron,</u> 192 F.3d 786 (8 th Cir. 1999).....	66
<u>United States v. Olano,</u> 507 U.S. 725, 113 S.Ct. 1770 (1993).....	50
<u>United States v. Parent,</u> 954 F.2d 23 (1st Cir.1992)	99
<u>United States v. Place,</u> 462 U.S. 696, 103 S.Ct. 2637 (1983)	63
<u>United States v. Prince-Oyibo,</u> 320 F.3d 494 (4th Cir. 2003).....	80
<u>United States v. Ramirez,</u> 473 F.3d 1026 (9th Cir. 2007).....	74
<u>United States v. Rivera-Corona,</u> 618 F.3d 976 (9th Cir. 2010).....	26
<u>United States v. Robinson,</u> 119 F.3d 663 (8 th Cir. 1997).....	66
<u>United States v. Robinson,</u> 560 F.2d 507 (2d Cir. 1977).....	94
<u>United States v. Scheffer,</u> 523 U.S. 303, 118 S.Ct. 1261 (1998)	56
<u>United States v. Shareef,</u> 100 F.3d 1491 (10th Cir. 1996).....	74
<u>United States v. Sharpe,</u> 470 U.S. 675, 105 S.Ct. 1568 (1985)	68
<u>United States v. Sokolow,</u> 490 U.S. 1, 109 S.Ct. 1581 (1989).....	65, 82
<u>United States v. Sprinkle,</u> 106 F.3d 613 (4 th Cir. 1997).....	78
<u>United States v. Terry,</u> 400 F.3d 575 (8th Cir. 2005).....	74
<u>United States v. Tipton,</u> 90 F.3d 861 (4th Cir. 1996).....	41
<u>United States v. Wade,</u> 388 U.S. 218, 87 S.Ct. 1926 (1967)	25

<u>United States v. Warren,</u> 594 F.2d 1046 (5th Cir. 1979).....	95
<u>United States v. Widgery,</u> 778 F.2d 325 (7th Cir.1985).....	99
<u>United States v. Williams,</u> 81 F.3d 1321 (4th Cir. 1996).....	25, 26, 28
<u>United States v. Woods,</u> 544 F.2d 242 (6th Cir. 1976).....	74
<u>Utecht v. Brown,</u> 551 U.S. 1,127 S.Ct. 2218 (2007).....	36
<u>Wainwright v. Witt,</u> 469 U.S. 412, 105 S.Ct. 844 (1985).....	35, 36, 38
<u>Washington v. Texas,</u> 388 U.S. 14, 87 S.Ct. 1920 (1967).....	56, 79
<u>Wheat v. United States,</u> 486 U.S. 153, 108 S.Ct. 1692 (1988).....	25, 26, 27
<u>Wiggins v. Smith,</u> 539 U.S. 510, 123 S.Ct. 2527 (2003).....	37
<u>Witherspoon v. Illinois,</u> 391 U.S. 510, 88 S.Ct. 1770 (1968).....	36
<u>Woodson v. North Carolina,</u> 428 U.S. 280, 96 S.Ct. 2978 (1976).....	38
<u>Ybarra v. Illinois,</u> 444 U.S. 85, 100 S.Ct. 338 (1979).....	65, 75
<u>Youmans v. State,</u> 608 S.E2d 300 (Ga. Ct. App. 2004).....	94

Constitutions and Statutes

18 U.S.C. Section 922 (g)(1) & 924 (a)(2)	10
S.C. Code Ann. § 16-3-40 (2003)	85
S.C. Const. art. I, § 10.....	59
U.S. Const. amend. IV	59
U.S. Const. amend. VI	24, 84

Rules

N.C. R. Evid. 702.....	81
Rule 401 of the SCRE.....	57, 78, 79
Rule 402 of the SCRE.....	79
Rule 403 of the SCRE.....	57, 79, 80, 83
Rule 404(b) of the SCRE	57

Other Authorities

3A Charles Alan Wright, *Federal Practice and Procedure* § 724, at 30 (2d ed.1982)..... 99

The Art of Malice,

60 Rutgers L. Rev. 435 (2008)..... 89

Murder Victims by Weapon, 2009-2013, Federal Bureau of Investigation,

[https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded)
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homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2009-2013.xls.....76

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Whether 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?
- II. Whether 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?
- III. Whether 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 personal knowledge of the underlying facts?
- IV. Whether 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?
- V. Whether 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?

STATEMENT OF THE CASE

On December 29, 2002, appellant Luzenski “Allen” Cottrell murdered Myrtle Beach police officer Joseph McGarry in the City of Myrtle Beach in Horry County. Cottrell then attempted to kill Myrtle Beach police officer Michael Guthinger at the same location. Cottrell was arrested minutes later after fleeing the crime scene in a car belonging to another individual. (R. 3270-71; 3350-51, 3399-3418, 3430, 3639-45; State v Cottrell, 376 S.C. 260, 264-65, 657 S.E.2d 451, 453-54 (2008)).

Cottrell was indicted in 2003 by the Horry County grand jury in a multi-count indictment for Officer McGarry’s murder, assault with intent to kill (AWIK) [Officer Guthinger], resisting arrest, and grand larceny. (R. 4485-87, Ind. # 2003-GS-26-00020). The State sought the death penalty for the murder of Officer McGarry.

At his first trial, Cottrell was convicted of all charges including murder and sentenced to death for murder. This Court reversed the murder conviction and death sentence and remanded for a new trial due to the trial court’s failure to instruct the jury on the lesser included offense of voluntary manslaughter. State v Cottrell, 376 S.C. 260, 264-65, 657 S.E.2d 451, 453-54 (2008).¹

¹ This Court found in viewing the evidence in the light most favorable to appellant there was evidence from which the jury could infer the victim, Officer McGarry, “reacted in an impermissibly aggressive manner, physically assaulting and then shooting appellant when appellant exercised his constitutional right to walk away.” Therefore, since the evidence was susceptible to more than one (1) inference, the trial judge “erred in holding as a matter of law the victim [Officer McGarry] was effectuating a lawful arrest in a lawful manner when he tackled appellant from behind. The evidence in this case presented a jury question whether the arrest was lawful but effectuated through the victim’s unnecessary use of violence, thereby entitling appellant to a voluntary manslaughter charge under Linder.” Id., *citing* State v. Linder, 276 S.C. 304, 308, 278 S.E.2d 335, 227 (1981). In a footnote to its holding, this Court stated: “We are confident that the victim’s acts are explained by his knowledge that appellant was a suspect in a murder case and therefore likely to be armed. The jury, however, heard no evidence of this other crime and thus it cannot be used to bolster the lawfulness of appellant’s detention or the victim’s use of force in determining whether the evidence warranted a voluntary manslaughter charge.” Cottrell, 376 S.C. 260, 657 S.E.2d 451, 454, n. 3.

The convictions and sentences for AWIK [Guthinger], resisting arrest, and grand larceny were not reversed or vacated. Id.

The Re-trial and Sentencing Proceeding

Upon remand, this Court appointed the Honorable Larry B. Hyman, Circuit Court Judge, to preside over this capital case. Cottrell was originally represented by court appointed attorneys Lisa Kimbrough (1st chair) and Stuart Axelrod (2nd chair); however, they were both removed by Judge Hyman after Kimbrough and Axelrod both accused each other of unethical or unprofessional conduct in the representation of Cottrell. (R. 361-62, Tr. March 5, 2012; Ex. 1 & 2 March 5, 2012; R. 380-82, Tr. March 8, 2012; Order Relieving Counsel and Continuing Case). Judge Hyman immediately appointed Bill McGuire and Teresa Norris, Esquires, to represent Cottrell and continued the case for two (2) and a half (1/2) years so new counsel could adequately prepare and represent Cottrell. (R. 388, Order Appointing Counsel; Tr. Vol. I.). Cottrell proceeded to a jury trial from September 15–24, 2014,² at the conclusion of which Cottrell was again found guilty of murder. (R. 3870-71; 4484-87; Ind. # 2003-GS-26-00020; Verdict Form).

After the required twenty-four (24) hour waiting period, the penalty phase was conducted from September 26-27, 2014. At its conclusion, the jury found the State proved three (3) statutory aggravating circumstances beyond a reasonable doubt:

- (1) The murder of a police officer in the performance of his official duties;

² In the re-trial, in the guilt phase, the jury heard the evidence that Officer McGarry was aware Cottrell was a suspect in a crime involving a shooting of another person in Horry County; **and**, at the close of the guilt phase, Judge Hyman instructed the jury on the lesser included offense of voluntary manslaughter and on the defense of self-defense. (R. 3288-3301, 3838-60; Verdict Form).

(2) The murder was committed by a person with a prior conviction for murder;³

3) The defendant by his act of murder created a great risk to the lives and safety of others.

(R. 4374-75). The jury recommended a sentence of death. (R. 4375-77). Judge Hyman found the sentence was not the result of passion, prejudice, or any arbitrary factor; the penalty was proportionate to that imposed in similar cases, and imposed the death sentence. (R. 4378-80).

This appeal follows.

³Prior to the re-trial and sentencing proceeding in this case, Cottrell was convicted of the murder of Jonathan Love in Marion County. State v. Cottrell, 2009 W.L. 9524547 (Ct. App. 2009)(Unpublished).

RESPONDENT'S STATEMENT OF FACTS

Background

(The Murder of Jonathan Love)

In 2002, before the murder of Officer Joe McGarry, appellant Allen Cottrell ("Cottrell") and Fred Halcomb ("Halcomb") murdered Jonathan Love ("Love") in Marion County. Cottrell and Halcomb were engaged in the illegal drug trade, and Love had failed to properly execute the arson of another drug dealer's home to Halcomb's satisfaction. Halcomb directed Cottrell to kill Love. Cottrell fired the fatal shots that killed Love with a **.357 magnum revolver**. Cottrell had purchased the **.357** from another person, who asked Cottrell at the time of purchase what Cottrell needed the gun for. Cottrell responded if police ever came to arrest him he would shoot the police. (R. 3991-94, 4026-41, 4070-72, 3994-98, 4042-45, 3998-4007, 4009-11, 4047-65, 3959-68, 4073-76). See State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009), *cert. denied*; See also Cottrell, 2009 W.L. 9524547 (Unpublished).

(The Murder of Richard Hartman)

In the early morning hours of November 23, 2002, Richard Hartman ("Hartman") was fatally shot to death [murdered] in Horry County. Cottrell shot Hartman to death in Hartman's truck on a secluded road after Hartman arrived for what he believed was a drug transaction. Fred Halcomb was also involved in this murder and was driving the getaway vehicle owned by Donnie Morgan ("Morgan") parked nearby. Morgan was also in the car at that time along with Halcomb's girlfriend, Diane Lawson [now Diane Serio]. (R. 3899-3943, 3957-4025, 4066-70).

Horry County Police Department ("HCPD") Detective Nathan Johnson ("Det. Johnson") and others with HCPD investigated the Hartman murder beginning the morning of November 23rd after Hartman's body was discovered in his truck. Based on that investigation, HCPD

developed Cottrell as a suspect in Hartman's murder along with an associate of Cottrell known only as "Red" [Halcomb].⁴ Investigators also developed information that "Red" drove a gold or champagne colored Acura [Morgan's car]. (R. 675-906, 945; State's Ex. 5, Sept. 8, 2014 hearing; R. 3900-58, 3974-75).

Two (2) days later, on November 25th, Det. Johnson contacted Myrtle Beach Police Department ("MBPD") Lt. Frank Daniels requesting information on the two (2) men, specifically Cottrell and his white male associate that went by the nickname "Red," who drove a champagne or gold car. This request included asking for assistance in determining "Red's" identity. Det. Johnson indicated to the MBPD the investigation had determined Cottrell and "Red's" trade of choice was illegal drugs. This information, including that Cottrell was a suspect in the Hartman shooting [murder] and the request for additional information, was passed on to Officer Joe McGarry by MBPD Lt. Amy Prock because McGarry had arrested Cottrell the past June for possession with intent to distribute (PWID) marijuana and traffic violations. McGarry in turn provided the information he had on Cottrell to Lt. Prock, including a written supplemental report, which Prock then forwarded to Det. Johnson at HCPD. (R. 3288-93, 3899-3931, 4079-84, 691-762, Tr. Sept. 8, 2014, 17-88; R. 945, 975, 1021; Ex. 5, 7, 20, Sept. 8, 2014 hearing).

The Murder of Officer McGarry

Approximately four (4) weeks later, shortly after midnight on December 29th, Officer McGarry and Officer Michael Guthinger, also of the MBPD, entered the *Dunkin Donuts* at 30th Ave. in the City of Myrtle Beach to get a cup of coffee. Both officers were in uniform, on duty, and in their jurisdiction having just completed working a traffic stop together. McGarry had just

⁴ In addition to "Red," Halcomb is also referred to in the transcript as "Fred" and in police investigative reports as "Al's brother." Cottrell is referred to in the transcript and police investigative reports and known by others as "Luzinski," "Allen," "Al," and the nickname "Black."

told Guthinger he had gotten engaged and wanted Guthinger to be in his wedding. (R. 3294-3303, 659-61; Sept. 8, 2014 Tr. 89-91).

Upon entering *Dunkin Donuts*, Officer McGarry immediately recognized Cottrell, who was standing in line talking to the cashier, as a suspect in the Hartman shooting [murder]. In addition, because McGarry had arrested Cottrell for PWID in June, McGarry had previously run a rap sheet on Cottrell and was aware Cottrell had an outstanding charge in New York for attempted murder – a violent felony. McGarry also knew Cottrell because he had previous contact with Cottrell the past winter when it was reported to Officer McGarry by Lloyd Mangrum that Mangrum was being held in New York until he paid a debt owed to Halcomb and Mangrum's wife was being held hostage in her home in Myrtle Beach and would be killed if Mangrum did not pay the debt. Officer McGarry investigated the complaint going to the Mangrum' residence and finding Cottrell there with Mangrum's wife; but, she reported she was not in any distress. However, there was some type of small confrontation between Cottrell and Officer McGarry at the residence. At the time McGarry entered the *Dunkin Donuts* on December 29th, Halcomb was standing in line with Cottrell. Diane Lawson was in the restroom. Officer McGarry had not had any contact with HCPD since the information and request by Det. Johnson on November 25th regarding the Hartman murder. (R. 3294-3303, 3313-14, 3288-93; 629-60, 899-906, 975, 1025; Tr. Sept. 8, 2014, 59-88; 220-32; Ex. 7, Ex. 21 Sept. 8, 2014).⁵

Upon recognizing Cottrell after entering the *Dunkin Donuts*, Officer McGarry whispered to Officer Guthinger that Cottrell was a suspect in a "10-61, 10-32" in the County. This was

⁵ At Cottrell's re-trial, the jury was not informed of all of the information Officer McGarry knew about Cottrell so as to not prejudice Cottrell before the jury. The jury was simply told Officer McGarry had been informed Cottrell was a suspect in "a shooting" in Horry County and McGarry had previously charged Cottrell with some "tickets." Defense counsel in his opening statement told the jury the prior "shooting" was a murder of the owner of an escort service. (R. 3275-76).

police "ten codes" for Cottrell being involved in a shooting and a person with a gun. As a result of recognizing Cottrell as a suspect in the Hartman shooting, Officer McGarry indicated to Guthinger he was going to run a NCIC (National Crime Information Center) check on Cottrell to see if there were any outstanding warrants on Cottrell. For the safety of the patrons and employees of *Dunkin Donuts*, and so as to not embarrass Cottrell, Officers McGarry and Guthinger waited until Cottrell left the *Dunkin Donuts* to approach Cottrell outside. (R. 3300-08, 3369-70).

Officer McGarry approached Cottrell on the sidewalk and asked Cottrell if he remembered him. Cottrell acknowledged he did.⁶ McGarry asked Cottrell if he had disposed of the prior charges for which McGarry had arrested Cottrell. Cottrell said he had. Officer McGarry asked Cottrell for his identification and informed Cottrell that he [McGarry] was going to run an NCIC check on Cottrell to make sure there were no outstanding warrants on Cottrell and McGarry could not remember how to properly spell Cottrell's name.⁷ According to one (1) eyewitness inside the *Dunkin Donuts*, Cottrell told the officer that he would have to get his I.D. from the car he was in, and Cottrell turned and went toward a car parked in the parking lot and returned.⁸ Cottrell produced his identification. Officer McGarry, over his police radio, asked for an NCIC check on Cottrell for any outstanding warrants. All witnesses agree the conversation at

⁶ Officer Guthinger was leaning back against the wall of the *Dunkin Donuts* with his foot against the wall so as to be non-confrontational.

⁷ Officer Guthinger testified it is important to get the spelling correct when running an NCIC check otherwise the computer may not pick up an incorrect spelling.

⁸ Diane Lawson [a defense witness in the guilt phase] testified Cottrell came to Halcomb's black Acura, in which Lawson was seated, and retrieved his driver's license, dropped off some coffee, and returned to speak with Officer McGarry. Halcomb got in the driver's seat of his black car. The witness in the *Dunkin Donuts* testified Cottrell stated *he* had to go to *his* car to get his driver's license; he then turned and went toward *a* car and returned. (R. 3603).

this point was cordial and polite. The radio traffic of McGarry's NCIC request played for the jury corroborated this as well. (R. 3318-20, 3365-68, 3607-10, 3619, 3637-38, State's Ex. 10).

While this was occurring, Officer Guthinger approached the individuals with Cottrell [Halcomb and Lawson], who had gotten into the black car in the parking lot, because Officer McGarry wanted to run a NCIC check on the driver of this car as well. Guthinger asked for the driver's identification and determined it was Halcomb.⁹ Guthinger was holding Halcomb's I.D. in his hand because he was going to hand it to Officer McGarry to run the NCIC check on Halcomb. Diane Lawson was still sitting in the passenger seat of Halcomb's car. Another car was parked one (1) empty space over from Halcomb, the gold or champagne colored Honda, which belonged to Morgan. Morgan was in this car with his girlfriend along with Cottrell's girlfriend, Amber Counts. Officer Guthinger had no idea this car, which had tinted windows, was associated with Cottrell, Halcomb, and Diane Lawson. At this time, Officer McGarry and Cottrell were standing at the front of the black car, and McGarry was waiting on a response over the radio from NCIC. (R. 3318-25).

According to Cottrell's statement to police after the murder of Officer McGarry,¹⁰ while McGarry was waiting for a response from NCIC for any outstanding warrants, Officer McGarry informed Cottrell he was going to pat him down for weapons. [Cottrell was wearing an oversized football type jersey and baggy pants.]. Cottrell told McGarry: "No." Cottrell knew he was carrying an illegal firearm in his front waist band.¹¹ Cottrell then accused Officer McGarry of

⁹ Halcomb was convicted in a joint trial with Cottrell of the murder of Jonathan Love. *See Halcomb, supra*.

¹⁰ This statement was not introduced at Cottrell's first trial, but it was in this re-trial. (R. 3555-60, 4133-35; R. 571-660, Tr. Aug. 18, 2014, 1-90).

¹¹ Although Officer McGarry knew Cottrell was a suspect in the Hartman shooting murder, McGarry did not know Cottrell had committed the Love murder. Conversely, Cottrell knew he

harassing him. (R. 3555-60, 3933-35, 3318-26, 3331-33, 3335, 3357, 3375-76, 3379-80; R. 577-660, Tr. Aug. 18, 2014, pp. 7-90).

Cottrell turned his back on McGarry and began to walk away fast toward the “gold” or “champagne” car with tinted windows belonging to Morgan [hereinafter “the Morgan car”]. Cottrell now had his right hand down near or in his front waist band. (R. 3318-26, 3331-33, 3335, 3357, 3375-76, 3379-80, 3555-63).¹²

Officer McGarry hollered for Cottrell to stop and show McGarry his hands.¹³ Cottrell initially stopped, but then refused to remain stopped and continued walking toward the Morgan car. Officer McGarry followed Cottrell and continued to holler for Cottrell to show him his hands, and when Cottrell would not, McGarry grabbed Cottrell’s right wrist which was near or in Cottrell’s front waist band. McGarry had his left hand on Cottrell’s upper back or shoulder. There was no weapon in either of Officer McGarry’s hands at this time. As Officer McGarry struggled to control Cottrell’s right wrist and hand, he forced Cottrell up against the driver’s door frame/back passenger door area of the Morgan car, while continuing to grab Cottrell’s right wrist. Officer Guthinger moved toward the two (2) men because he could see Officer McGarry needed assistance with Cottrell because McGarry was struggling to control Cottrell’s right hand

had committed the Love’ murder and knew what weapon he had used to commit that murder and it was located in the Morgan car.

¹² The witnesses at trial disagreed whether Cottrell had coffee in his hand at this time.

¹³ According to Diane Lawson [a defense’ witness in the guilt phase], when Cottrell turned and walked away, McGarry drew his service weapon and told Cottrell to “freeze;” Cottrell stopped for a moment, briefly raised his hands, and then lowered them and continued to walk quickly toward the Morgan car; and, McGarry re-holstered his weapon and followed Cottrell. Officer Guthinger testified he did not see Officer McGarry draw his service weapon [Guthinger was talking to Halcomb] only following Cottrell toward the Morgan car as Cottrell quickly walked away, and Officer McGarry was attempting to grab or grabbing Cottrell’s right wrist or hand. Amber Counts [also a defense’ witness in the guilt phase] did not see McGarry draw his service weapon either only following Cottrell toward the Morgan car, which she was in. (R. 3607-29, 3332-33, 3376-81, 3387-88, 3630-45).

and could hear McGarry telling Cottrell to show McGarry his hands. (R. 3324-26, 3331-34, 3352, 3638).

Officer McGarry continued to attempt to control Cottrell's right hand. Cottrell was resisting McGarry's efforts and commands as the two (2) men moved down the side of the Morgan car toward its rear. Officer Guthinger was now close to the two (2) men and was attempting to grab Cottrell's left hand which was free. As all three (3) men approached the back end of the driver's side of the car, Officer McGarry and Cottrell both appeared to lose their balance and slid or stumbled off the end of the Morgan car. Neither man fell. (R. 3324-26, 3331-34, 3352, 3638).

As Cottrell and Officer McGarry separated behind the rear of the Morgan car, Cottrell was facing McGarry. Cottrell raised a .45 caliber pistol in his right hand that he had retrieved from his front waist band, pointed the pistol at Officer McGarry's head, and fired one (1) shot into the face of Officer McGarry from approximately eight (8) to twelve (12) inches away. (R. 3337-38, 3933-35, 3355, 3358, 3487-3501, 3503-36, 3615, 3621-23, 3626; R. 577-660, Tr. Aug. 18, 2014, 7-90).¹⁴

Officer Guthinger and Diane Lawson, the passenger in the Halcomb car, both witnessed Cottrell bring his gun up and shoot Officer McGarry. Officer Guthinger testified that when Cottrell shot Officer McGarry in the face, he [Guthinger] heard the gunshot and saw the flash from the gun's muzzle simultaneously. This was the first (1st) gunshot. He immediately heard a second (2nd) shot in quick succession but did not see a muzzle flash. Cottrell also later told

¹⁴ Cottrell did not have a permit to carry a concealed weapon and was on probation for PWID marijuana and could not lawfully carry a firearm under South Carolina law. It was also a violation of federal law for Cottrell to be carrying a firearm as he had been previously convicted of a crime carrying more than one (1) year in prison. *See* 18 U.S.C. Section 922 (g)(1) & 924 (a)(2). Cottrell's girlfriend, Amber Counts, testified Cottrell regularly carried the .45 caliber pistol in his waistband prior to the murder of Officer McGarry. (R. 3640).

police he thought he fired or may have fired two (2) gunshots at Officer McGarry. The victim, Officer McGarry, had in fact unholstered his police issued weapon with his left hand [McGarry is left-handed] and when he was shot by Cottrell in the face, or as he was falling backward after being shot, fired a shot into the parking lot pavement *or* Cottrell's lower leg. Diane Lawson, a defense witness in the guilt phase, confirmed this fact testifying that after Cottrell shot Officer McGarry in the face, as McGarry was falling backward, McGarry's gun discharged.¹⁵ Cottrell also told police at the hospital that Officer McGarry did not shoot him. Officer McGarry collapsed to the pavement immediately and died later from the gunshot wound to the face inflicted by Cottrell with the .45 caliber pistol. (R. 3337-38, 3355, 3358, 3487-3501, 3503-36, 3555-59, 3615, 3621-23, 3626, 3934-35; R. 577-660, Tr. Aug. 18, 2014, 7-90).

After seeing Officer McGarry shot, Officer Guthinger unholstered his gun and fired what he described as several "hip shots" at Cottrell and believed he struck Cottrell in the leg as Cottrell turned to flee or was fleeing behind the Morgan car. Guthinger testified Cottrell had no difficulty running or moving after Cottrell initially shot Officer McGarry; it was only some period of time after he [Guthinger] shot at Cottrell that Cottrell began to hop or limp. Cottrell also told police later that he was sure it was Guthinger who shot him, not the officer he killed. (R. 3337-50, 3556-60, 3333-35; R. 577-660, Tr. Aug. 18, 2014, 7-90).¹⁶

Cottrell then fired on Officer Guthinger. More gunshots were then exchanged between Cottrell and Officer Guthinger over the Morgan car. There were several customers in the

¹⁵ Ballistics confirmed Officer McGarry's gun only discharged one (1) time in the parking lot.

¹⁶ According to a defense expert, Cottrell was shot only one (1) time, a through and through gunshot wound that entered below the knee and exited the back of his calf.

Dunkin' Donuts and in cars in the parking lot during this exchange of gunfire, and car windows were shot out and vehicles were struck by fired bullets. (R. 3338-50, 3380-82, 3557-59).¹⁷

At some point, Cottrell hollered out he was wounded and "I'm done" and "I give up" or "I surrender." As a result, Guthinger approached the vehicle Cottrell was hiding behind. Officer Guthinger told Cottrell to show him his hands, but Cottrell would not do so. Cottrell was not "done" or surrendering and had in fact obtained another magazine for his .45 from within the Morgan car, reloaded the .45 with a fresh magazine, and began shooting at Officer Guthinger again when Guthinger got close to the Morgan car. Cottrell and Guthinger continued to exchange gunfire as Guthinger retreated and another officer arrived on the scene. Cottrell fired at least ten (10) shots in the *Dunkin Donuts*' parking lot including one (1) bullet striking the Calabash Seafood Restaurant across the street. (R. 3338-50, 3639-42, 3515-28, 3934-35).

Cottrell then got into the Morgan car, and Cottrell's girlfriend, Amber Counts, got out of the backseat of the Morgan car, ran around the car and got in the driver's seat and began driving.¹⁸ Amber and Cottrell fled from the *Dunkin Donuts* parking lot almost backing over Officer McGarry as he lay wounded and dying. Amber and Cottrell then engaged in a high speed chase with several police cars pursuing them with blue lights flashing. The Morgan car ran numerous red lights, crossed into oncoming lanes of traffic, and at times exceeded 90 mph. The car was eventually stopped at 76th Ave., but only after police deployed stop sticks flattening a tire and causing Amber to be unable to control the car. Amber and Cottrell were arrested. The

¹⁷ After Officer McGarry was shot, during the first exchange of gunfire between Officer Guthinger and Cottrell, Officer Guthinger retreated behind the Halcomb car. Halcomb then began to back out of the parking lot leaving Guthinger with no cover, and Halcomb fled the scene and the area in his black car taking Diane Lawson with him. The two (2) did not return. They were both arrested later. As a result, Officer Guthinger had to retreat further behind another car as the exchange of gunfire with Cottrell continued. Guthinger still had Halcomb's driver's license in his possession.

¹⁸ Morgan and his girlfriend fled from the Morgan car during the shooting.

.45 caliber murder weapon was recovered in the rear window deck of the Morgan car and was later forensically matched to the fired bullet taken from Officer McGarry's body at autopsy. Another loaded **.357 revolver** was recovered in the back floorboard of the Morgan car with Cottrell. This gun was later forensically matched to the murder of Jonathan Love. Also in the car was a red book bag containing two (2) boxes of .357 ammunition and (1) box of .45 caliber ammo. Amber testified Cottrell regularly carried this book bag with him prior to Officer McGarry's murder. (R. 3350-51, 3395-3418, 3430, 3639-45, 3934-35).¹⁹

At the conclusion of the guilt phase, Judge Hyman instructed the jury on murder, voluntary manslaughter, self-defense, and not guilty. The jury returned a verdict of guilty of murder. (R. 3838-60).

The Evidence in Aggravation

In the penalty phase, the State introduced additional evidence in aggravation. Cottrell's criminal record included convictions for distribution of cocaine and marijuana; and, he was on probation at the time of McGarry's murder for PWID marijuana. The State also introduced Cottrell's conviction for the murder of Love in Marion County. (R. 4082-83, 4077-79).

The Rick Hartman Murder

The State introduced evidence proving beyond any question Cottrell also murdered Rick Hartman. The jury learned Hartman, who operated "an escort service" [a prostitution ring], had hired Cottrell as a driver and bodyguard. Cottrell was also a friend of Hartman and the two (2)

¹⁹ After Cottrell's arrest, Diane Lawson informed police Cottrell had in fact murdered Rick Hartman. Police also questioned Morgan, and he gave police information regarding the Hartman murder. Both Lawson and Morgan were present when Cottrell murdered Hartman. Lawson also informed police Halcomb was involved in Hartman's murder. The jury did not hear this information until the penalty phase. (R. 3932-33, 3937, 3940-42, 4009-13, 4018-19, 4024-25).

men rode "wave runners" [jet skis] together. Cottrell also supplied Hartman with drugs. (R. 3899-3943, 3959-4025).

Hartman was last seen alive in the early morning hours of November 23, 2002 leaving the condominium out of which he operated his escort service. Witnesses who were present at that time later informed police, that prior to his disappearance, Hartman had been on the phone with a man that Hartman clearly knew seeking to purchase drugs. Hartman stated to this male over the phone that it was too cold for the two (2) of them to operate the jet skis that day. Hartman also stated he would meet the man he was talking to at a certain location. Hartman then left the condominium around 3:00 to 4:00 a.m. Testimony and phone records proved the person Hartman was talking to was Cottrell. (R. 3899-3943, 3959-90).

The next morning, Hartman was found dead in the driver's seat of his truck off a dirt road in a secluded location in Horry County. He had been shot multiple times by someone sitting in the passenger seat of the truck. Two (2) of the gunshot wounds were contact wounds including one (1) to the back of the head. Hartman's truck had gone into some woods, and the passenger door was blocked shut by a tree. (R. 3899-3943, 3959-90, 4066-70).

Diane Lawson ("Diane") testified in the penalty phase that earlier the night of Hartman's murder she was present when what she believed was going to be a drug transaction was arranged with Hartman by Cottrell and Halcomb. She and Morgan rode with Halcomb and Cottrell to the location of the transaction, and Cottrell was let out near some mailboxes. Halcomb was driving and parked the car, which was owned by Morgan. Cottrell got into the passenger seat of Hartman's truck when Hartman arrived. Cottrell then came over to the Morgan car and handed Halcomb a large sum of money, and Halcomb handed Cottrell a bag containing a sweat shirt but no drugs. Cottrell returned to Hartman's truck. (R. 3981-86).

Diane then heard and saw multiple gunshots being fired by Cottrell inside the interior of Hartman's truck. Hartman's truck sped off and crashed into some woods. Cottrell had to climb out the driver's window of the truck, and when he returned to the Morgan car, Cottrell was covered in blood. Halcomb, Cottrell, Morgan, and Diane then fled in Morgan's car. Diane and Morgan assisted Halcomb and Cottrell in cleaning Morgan's car after the murder; however, they could not get Hartman's blood off the seat belt, and it was cut out of the car. (R. 3981-91).

The Jonathan Love Murder

In the penalty phase, the State also proved the facts and circumstances surrounding the murder of Love. Diane informed the jury that in the summer of 2002, Cottrell and Halcomb had stolen drugs from a drug dealer named Brett Smalls ("Smalls") while at Smalls' home. After the theft, Halcomb and Diane fled in one (1) car, and Cottrell fled in another car driven by Amber Counts. The group was pursued down Hwy. 17 by associates of Smalls. During the chase, Cottrell stood up through his vehicle's sun roof and was firing a pistol back at the men pursuing them. (R. 3991-94, 4026-41, 4070-71).

Later, Smalls demanded the return of his drugs from Halcomb. Halcomb instructed Cottrell, Morgan, and Love to burn down Smalls' home with Smalls in it. Later one night, those three (3) men poured gasoline around Smalls' home and set it on fire. Halcomb and Diane were parked nearby watching. The fire department responded, and the fire was put out or extinguished itself because the house was made of asbestos siding. (R. 3994-98, 4026-41, 4042-46).

Halcomb was upset the home had not been successfully burned and directed Cottrell to kill Love, because Halcomb believed it was Love's fault the arson was not successful. Cottrell later reported to Halcomb in Diane's presence that he was unable to kill Love at one (1) location because there were too many people around. (R. 3998-4007).

Later, on another night, Halcomb took Diane to a rural area in Marion County, where she saw Cottrell and Love digging a grave in some woods. Diane testified Halcomb handed Cottrell a pistol when Love was not looking, and Cottrell then murdered Love after Diane and Halcomb returned to their car. Diane heard Cottrell shoot Love multiple times. Halcomb and Cottrell then buried Love in the grave. (R. 3998-4007).

After Cottrell, Halcomb, and Diane returned to Halcomb's home, Cottrell bragged to Diane and Halcomb that a mushroom cloud of steam erupted from Love's head when he shot him. Cottrell also bragged that Love was not dead when he and Halcomb buried Love. Cottrell laughed about these circumstances. (R. 3998-4007).

After Officer McGarry's murder, Diane informed police of Love's murder. Police did not know Love was missing or dead. Diane took police to the location of Love's body, and it was exhumed. Love's autopsy determined he died from multiple gunshot wounds to the head and chest. A fired bullet was recovered from Love's partially decomposed body. (R. 4009-11, 4047-65, 4070-72).

In the penalty phase, the State proved the gun Cottrell used to murder Love was purchased from a friend of Hartman. And, when Cottrell purchased the gun, he informed Hartman's friend, that if police ever tried to arrest him, he was going to use the gun to shoot the police. This statement was made before Officer McGarry was murdered. Finally, the State proved the gun used to murder Love was in the Morgan car at the time Officer McGarry approached Cottrell and was murdered at the *Duncan Donuts*. (R. 3959-68, 4073-76).

Jail Misconduct

During his pre-trial incarceration in maximum security, Cottrell was found in possession of a braided wire, a piece of string weighted with soap, and a braided rope made out of a prison

uniform. (R. 4085-90). Cottrell also left his cell on one (1) occasion, somehow removed his belly chain, went into another inmate's cell, and assaulted the inmate. When apprehended, Cottrell was sitting on the inmate and hitting the inmate with his fists. (R. 4133-36). Cottrell also threatened a jail guard on another date. (R. 4139-41).

Victim Impact

Officer Joe McGarry was the only child of Joseph J. and Anita McGary. Officer McGarry's father is a retired Lt. Colonel from the United States Army. As a result of Officer McGarry's murder, his parents are unable to have grandchildren. As a police officer, McGarry was involved with community policing. He was college educated, personable, and could communicate with individuals from different backgrounds. McGarry worked with members of the community to address increases in criminal activity in the Canal Street area of Myrtle Beach in which he worked. McGarry worked with children in the area through the Community Recreation Center. McGarry designed and sponsored the first annual Easter egg hunt for the children of that area and sponsored other holiday parties for those children, such as at Halloween. He was involved in community service efforts and street clean ups. As previously stated, Officer McGarry had just gotten engaged at the time of his murder, and his fiancé was planning their wedding. (R. 4080-81, 4098-4107, 4116-19, 4143-53, 4153-68).

ARGUMENT I.

Judge Hyman did not abuse his discretion in removing original appointed counsel Lisa Kimbrough and Stuart Axelrod and replacing them with Bill McGuire and Teresa Norris over two (2) years prior to Cottrell's re-trial and sentencing proceeding, and Cottrell cannot show prejudice. This discretion act was appropriate where original appointed counsel had developed irreconcilable differences and personal distrust and ethical issues between each other which impacted upon their individual ability to jointly prepare a defense. Since there was no constitutional or statutory right to appointed counsel of choice, the replacement with qualified and competent counsel with the ability to prepare a defense for two years adequately preserved Cottrell's Sixth Amendment right to counsel.

This case involves a unique situation due to the appointment of two (2) separate independent counsel in capital cases. Rather than irreconcilable differences with the client, initially appointed counsel development irreconcilable differences with each other which devolved into an inability to jointly prepare their defense for Appellant. When brought to Judge Hyman's attention after separate complaints and concerns by each suggesting individual disqualification would be appropriate, Judge Hyman made appropriate in camera ex parte inquiry of each concerning the effect of their personal animosity and disagreement with each other and its joint effect on the representation of Cottrell. Judge Hyman did not abuse his discretion in removing original appointed counsel Lisa Kimbrough and Stuart Axelrod and replacing them with Bill McGuire and Teresa Norris over two (2) years prior to Cottrell's re-trial and sentencing proceeding, and Cottrell cannot show prejudice. This discretion act was appropriate where original appointed counsel had developed irreconcilable differences and personal distrust and ethical issues between each other which impacted upon their individual ability to jointly prepare a defense. Since there was no constitutional or statutory right to appointed counsel of choice, the replacement with qualified and competent counsel with the ability to prepare a defense for two (2) years adequately preserved Cottrell's Sixth Amendment right to counsel.

What Occurred Below

Approximately three (3) weeks before the first scheduled trial date of this case [March 26, 2012], Judge Hyman was made aware Cottrell's original court-appointed trial counsel, Lisa Kimbrough (1st chair) and Stuart Axelrod (2nd chair), had made serious accusations against each other of unethical and unprofessional conduct. Solicitor Greg Hembree and then Deputy Solicitor Jimmy Richardson both provided Memoranda to Judge Hyman regarding the allegations of which they had been made aware. (R. 361 & 362, Ex. 1 & 2, March 5, 2012 hearing). The Memoranda of Deputy Solicitor Richardson stated as follows:

January 6th, 2012

Talked with Stuart [Axelrod] for a few minutes before our status conference. He repeated his dissatisfaction with his co-counsel Lisa Armstrong. He repeated that Lisa was lazy, not easily motivated and drank too much. Stuart said that he had to take the lead on getting started for this trial because Lisa would never request discovery, look into getting experts, and investigate the details of the shooting or possibilities of misconduct by the MBPD.

Stuart also said that he decided to storm ahead and take this case on himself. He realized he was second chair but that he was going to do the work because Armstrong was either incapable or too lazy to start.

I do not remember the first date that Stuart mentioned his problems with Armstrong to me but I know he has expressed concerns over her abilities more than a few times.

[Initialed] JAR
[Signed] Jimmy R. Richardson

The Memorandum of Solicitor Hembree read as follows:

MEMORANDUM

TO: State v. Cottrell File
FROM: J. Gregory Hembree, Solicitor [initialed] JGH
RE: Conversation with defense counsel
DATE: February 21, 2012

This morning we had a status conference scheduled for the case above referenced.

When I walked into my office at approximately 8:45 Lisa Armstrong was sitting in our lobby. Lisa asked me to confirm the time for our hearing and I advised her that it was scheduled for 9:30 and sat down for a minute to chat. We discussed a few of the things we intended to cover at the hearing and then Lisa offered how sorry she was that my office had to work with her co-counsel, Stuart Axelrod, on a regular basis. I agreed with her that he was very difficult to work with and that his clients frequently received stiffer prison sentences due to his advice and approach.

Lisa then went into a rather lengthy discussion that in her career practicing law she had never worked with any lawyer more dishonest or unethical than Mr. Axelrod. She went on to say that they were not working together at all and that she could not wait to get this case concluded just to get away from him. From her demeanor it was clear that she strongly disliked her co-counsel.

Ms. Armstrong also stated that Mr. Axelrod was fixated on the wrong strategy for this type of case and that he wouldn't listen to her advice regarding guilt phase strategy. I agreed with her that what I perceived his strategy was [was] not the strategy I would use if I were defending the case. She never specifically revealed any strategy and I made my judgment based on what Mr. Axelrod has revealed to others along with what I anticipate his strategy to be based on the discovery he has requested.

After that conversation and knowing what Mr. Axelrod said to Deputy Solicitor Richardson about Ms. Armstrong, I became very concerned about the defendant's ability to be effectively represented by this defense team.

(R. 361 & 362, State's Ex. 1 & 2, March 5, 2012 hearing; R. 379 Court's Ex. 2, March 8, 2012 hearing).

March 5, 2012 Hearing

On March 5, 2012, Judge Hyman held a status hearing at which he stated on the record he had been made aware of the allegations both trial counsel were making against each other. He stated he was going to meet with each trial counsel separately in chambers to discuss the matter.

The hearing was then adjourned so Judge Hyman could meet with counsel separately. (R. 363-64, 353-59, Tr. March 5, 2012).²⁰

March 8, 2012 Hearing

On March 8, 2012, Judge Hyman held a hearing regarding whether trial counsel needed to be relieved by the Court *and* the case continued indefinitely until new counsel could be appointed. At the hearing, Judge Hyman noted he had met in chambers separately with both capital defense counsel after the March 5th hearing. (R. 363-66, Tr. March 8, 2012, 1-4). Judge Hyman also noted that he was satisfied from his discussions with counsel [Kimbrough and Axelrod], that the memoranda provided to him by Solicitor Hembree and Deputy Solicitor Richardson were correct. Both members of the defense' team were each alleging serious misconduct against each other. Both counsel confirmed privately to Judge Hyman they had made the allegations against each other, and both counsel believed the allegations were true. (R. 366, Tr. March 8, 2012, 4, ll. 1-13).

Judge Hyman noted that he had inquired of each of the defense counsel whether or not he or she felt that this problem or issue that had developed between them was affecting Mr. Cottrell's defense, i.e. was Mr. Cottrell's defense being jeopardized. Judge Hyman stated both counsel told him in chambers on March 5th that in their opinion Mr. Cottrell's defense was being jeopardized. (R. 366, Tr. March 8, 2012, 4, ll. 10-20).

Second (2nd) chair counsel Stuart Axelrod affirmatively stated on the record that based on the allegations made by each defense counsel against each other, as made known to the Court by the Solicitor, the case if it went forward would probably be reversed on post-conviction relief

²⁰ Based on Respondent's appellate counsel's investigation, the *in camera* private meeting between Judge Hyman and Ms. Kimbrough and Judge Hyman and Mr. Axelrod was not recorded or transcribed.

(PCR). (R. 370, Tr. March 8, 2012, 8, ll. 18-22). Cottrell stated on the record he was not aware of the allegations being made by defense counsel against each other. After meeting with defense counsel privately, Cottrell stated that while he left it up to the Court whether to relieve counsel, he thought that counsel could still represent him, and he wanted Mr. Axelrod to stay on the case.

At the conclusion of the hearing, Judge Hyman ruled reluctantly that he had no choice but to relieve Axelrod and Kimbrough as counsel, continue the case indefinitely, and appoint new qualified counsel. Judge Hyman noted he was doing so in order to protect Cottrell's right to the effective assistance of counsel, and noted this was a capital case approximately three (3) weeks from trial.

Judge Hyman subsequently issued a written Order on March 13, 2012 confirming his ruling;

The Order Relieving Defense Counsel and Continuing the Case

This matter comes before the court at a scheduled status hearing held on March 5, 2012. Jury selection in this capital murder case was to begin on March 26, 2012. The purpose of the hearing was to resolve any outstanding motions or discovery matters. At the end of the hearing Solicitor Greg Hembree stated that he and his Deputy Solicitor James A. Richardson had recent conversations with the defense team which raised serious concerns about the defendant's ability to be effectively represented by defense counsel. After much consideration, I must agree.

Solicitor Hembree offered into the record two written statements by Deputy Solicitor Richardson and himself. The Solicitor's statement describes a lengthy conversation with defense counsel Lisa Armstrong, during which Mrs. Armstrong made serious allegations of dishonesty and unethical conduct against her co-counsel Stuart Axelrod. She further expressed her concerns about counsel's inability to coordinate trial strategy. Deputy Solicitor Richardson's statement referenced several conversations with Mr. Axelrod in which he made serious accusations against Ms. Armstrong. His accusations challenged her competence, worth ethic, and personal life.

The court is now placed in the very uncomfortable position of complying with its ethical responsibility as to these accusations. Due to the serious nature of the allegations, I spoke to each of the Defendant's attorneys privately in my chambers. Each acknowledged having made the statements against co-counsel and that they

believed the statements to be true. On further inquiry, both advised that they were of the opinion that conduct of co-counsel had jeopardized the defense of this case.

I re-convened the hearing on March 8, 2012, during which I expressed my concern that the defendant could not be effectively represented by his present attorneys. Ms. Armstrong stated that since having last talked with me, she and Mr. Axelrod had determined that they could try to set aside their differences and continue to represent the defendant. This is a capital case two weeks from trial. I see no way to repair the relationship of co-counsel and the damage done to the defense.

I have carefully explained my concerns to the defendant. He stated that he thought his attorneys could resolve their problems and continue with his defense. However, my duty at this point is to protect this defendant by taking the course most likely to assure he will be effectively represented and his constitutional rights will be preserved. I am not unaware of the delay and expense to be caused by my decision. Nevertheless, I must take the extreme measure of relieving counsel and appoint new counsel.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that attorney Lisa Armstrong and Stuart Axelrod are relieved as counsel for the defendant.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED upon notice of appointment of new counsel they shall turn over to new counsel all file-materials within 10 days.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Office of Indigent Defense Capital Case Division shall assume the duty of defense in this case. Upon assignment to specific attorneys the Office of Indigent Defense shall notify this court of such assignments to obtain formal appointment orders.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the trial of this case is continued until further order of this court.

AND IT IS SO ORDERED.

[Signed] Larry B. Hyman, Jr.
Larry B. Hyman, Jr., Presiding Judge
Fifteenth Judicial Circuit

Conway, South Carolina
March 13, 2012

(R. 380, Order Removing Defense Counsel and Continuing the Case).

Subsequently, on March 15, 2012, Judge Hyman appointed Bill McGuire and Teresa Norris, Esquires, as capital defense counsel of record for Cottrell, and McGuire and Norris

represented Cottrell from that date through the re-trial and sentencing. (R. 388, See Order Appointing Replacement Counsel, March 15, 2012). The case did not proceed to re-trial and sentencing until September 14th of 2014, some **two (2) years and six (6) months after the removal of Kimbrough and Axelrod**. (R. 1145-1353, Tr., September 15, 2014).²¹ Cottrell now alleges Judge Hyman erred in relieving Kimbrough and Axelrod. There is no merit to this argument.

Standard of Review

The question whether court-appointed counsel should be relieved or discharged is a matter addressed to the discretion of the trial judge. State v. Graddick, 345 S.C. 383, 548 S.E.2d 210 (2001); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991); State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981); State v. Marshall, 273 S.C. 552, 257 S.E.2 740 (1978); State v. Childers, 358 S.C. 614, 595 S.E.2d 872 (Ct. App. 2004), *affirmed in part, reversed in part*, 373 S.C. 367, 645 S.E.2d 233 (2007). Whether appointed counsel should be relieved is addressed to the discretion of the trial judge, and his decision on that issue will not be disturbed absent and abuse of discretion. State v. Justus, 392 S.C. 416, 709 S.E.2d 668 (2011), *citing* State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005), *quoting* Graddick, 345 S.C. at 385, 548 S.E.2d at 211.

Analysis

An accused has the right to the assistance of counsel. U.S. Const. amend. VI.; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963). “[T]he purpose of providing assistance of

²¹ On March 19, 2012, Cottrell filed in this Court a *pro se* motion to re-appoint Axelrod as lead counsel in the case. This Court dismissed the motion on April 3, 2012 pursuant to Key v. Currie, 305 S.C. 115, 406 S.E.2d 356 (1991). At a pre-trial hearing on July 17, **2014**, Cottrell renewed his *pro se* motion to reappoint Axelrod *or* objected to Judge Hyman’s removal of 2nd chair counsel Stuart Axelrod in March of 2012. Judge Hyman noted on the record at that time that his removal of Mr. Axelrod in 2012 was solely to protect Mr. Cottrell, and denied the renewed *pro se* motion or overruled the objection. (R. 558-60, Tr. July 17, 2014, 141-43).

counsel is simply to ensure that criminal defendants receive a fair trial” Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692 (1988) (citations and quotations omitted). The Sixth Amendment provides a right to counsel at all “critical stages” of criminal proceedings, United States v. Wade, 388 U.S. 218, 227–28, 87 S.Ct. 1926 (1967), which includes sentencing. Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197 (1977)(citing Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254 (1967)). However, the Sixth Amendment does not guarantee a criminal defendant a “meaningful relationship” with counsel. Morris v. Slappy, 461 U.S. 1, 14, 103 S.Ct. 1610 (1983).

“[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them.” United States v. Gonzalez-Lopez, 548 U.S. 140, 151, 124 S.Ct. 2562 (2006). The right of an accused to assistance of counsel does not include the right to the appointment of counsel of choice, or a special rapport or even a meaningful relationship with appointed counsel. Williams v. United States, 486 U.S. 153 (1988); Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610; State v. Boykin, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996). *See also* Gonzalez-Lopez, 548 U.S. at 151, 126 S.Ct. 2557 (“..the right to counsel of choice does not extend to defendants who require counsel to be appointed for them. *See* Wheat, 486 U.S. 159, 108 S.Ct. 1692; Caplin & Drysdale, 491 U.S. at 624, 626, 109 S.Ct. 2646.”).

This Court has recognized that even where the issue is the Sixth Amendment right to the choice of retained counsel, which is not before this Court, a defendant does not have an absolute right to be represented by a preferred attorney. State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000). “This right is circumscribed by the trial court’s obligation to safeguard the integrity of the proceedings and ensure trials are conducted according to the ethical standards of the profession.” Id., 341 S.C. 386, 534 S.E.2d at 697, (citing United States v. Howard, 115 F.3d

1151, 1155 (4th Cir. 1997); United States v. Williams, 81 F.3d 1321, 1324 (4th Cir. 1996)). Even where the issue is the right to retained counsel of choice, the right of the defendant to choose his counsel must be balanced against the court's need to maintain the highest ethical standards of professional conduct. Id., (citing United States v. Cunningham, 672 F.2d 1064, 1071 (2nd Cir. 1982)). In balancing these interests, the court will consider whether the defendant's constitutional right to counsel is outweighed by the government's interest in disqualifying his attorney. Id. See also Wheat, 486 U.S. at 159, 108 S.Ct. 1692 (even when Sixth Amendment counsel of choice is at issue, the trial court has the discretion to disallow first choice counsel that would create a serious risk of conflict of interest). Nor may a defendant demand that a court honor his waiver of conflict-free representation. Gonzalez-Lopez, *supra*, referencing Wheat, 486 U.S. at 159-60, 108 S.Ct. 1692.

“Although an indigent defendant under our case law does not have a right to counsel of choice, the Sixth Amendment requires the substitution of appointed counsel upon a showing of good cause.” United States v. Marrero, 651 F.3d 453, 477–78 (6th Cir.2011)(Clay, J., dissenting)(citing United States v. Iles, 906 F.2d 1122, 1130–31 (6th Cir.1990)).

A motion to substitute a retained or appointed counsel with retained counsel may be denied when denial is “compelled by ‘purposes inherent in the fair, efficient and orderly administration of justice.’” United States v. Brown, 785 F.3d 1337, 1340 (9th Cir. May 13, 2015) (citing United States v. Rivera-Corona, 618 F.3d 976 (9th Cir. 2010) (quoting United States v. Ensign, 491 F.3d 1109, 1115 (9th Cir. 2007)). In Gonzalez-Lopez, the United States Supreme Court “recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar.” 548 U.S. at 152

(citing Wheat, 486 U.S. at 163-164 and Morris v. Slappy, 461 U.S. at 11-12. The denial of the *right to retained counsel of choice* is structural error. Gonzalez-Lopez, 548 U.S. at 150.

When it becomes obvious that an accused's representation is patently inadequate and incompetent, the trial judge is under a duty to intervene to the extent of insuring that the rights of the accused are afforded adequate protection. State v. Lewis, 255 S.C. 466, 179 S.E.2d 616 (1971). The trial judge's obligation is to make sure that the representation of an accused is not an empty gesture, but is the fulfillment of the spirit and purpose of the constitutional guaranty of effective assistance of counsel; however, such obligation imposes upon the court no duty to intervene merely because it feels that counsel is not experienced and skillful. Lewis, 255 S.C. 466, 179 S.E.2d 616. A strong case of ineffective representation by counsel must appear to warrant the intervention by the trial judge, since such intervention itself may invade the accused's constitutional rights. Lewis, *supra*. See generally State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000)(recognizing the trial judge's authority to protect the legal process and preserve the integrity of the trial).

Judge Hyman did not abuse his discretion in removing appointed counsel, Kimbrough and Axelrod, approximately three (3) weeks before the original scheduled trial date, continuing the case indefinitely, and replacing them with new appointed counsel, McGuire and Norris, two (2) and a half (1/2) years before the eventual trial and sentencing proceeding. Both Kimbrough (1st chair) and Axelrod (2nd chair) had accused each other of unethical or unprofessional conduct in the representation of Cottrell. Both separately informed Judge Hyman in chambers that they had in fact made the allegations and believed them to be true. Both informed Judge Hyman at that time, that they believed the actions of their co-counsel and the problems they had with each other had prejudiced Cottrell's defense. Judge Hyman did not want to remove counsel or grant a

continuance; however, he felt he had no alternative given that approximately three (3) weeks before this capital trial Cottrell's two (2) trial attorneys were accusing each other of unethical or unprofessional conduct; their relationship had jeopardized Cottrell's defense; and, Judge Hyman was obligated to report the allegations against each attorney to the appropriate professional governing or investigating body. Judge Hyman did not abuse his discretion. Good cause for removal of appointed counsel and replacement with new appointed counsel was shown. Sanders (even the right to retained counsel of choice is circumscribed by the trial court's obligation to safeguard the integrity of the proceedings and ensure trials are conducted according to the highest ethical standards of professional responsibility of attorneys), *citing* Howard, 115 F.3d at 1155; Williams, 81 F.3d at 1324; and Cunningham, 672 F.2d at 1071.

Further, Cottrell cannot show any resulting prejudice. State v. Justus, 392 S.C. 416, 709 S.E.2d 668, 670 (2011)(noting the appellant was ultimately represented at trial by two (2) attorneys with substantial death penalty experience). Here, appointed attorneys Kimbrough and Axelrod were relieved as counsel of record two (2) years and six (6) months before Cottrell's re-trial and sentencing proceeding. The case was continued by Judge Hyman from the original scheduled trial date of March of 2012 until September of 2014 so newly appointed capital counsel could adequately prepare for trial. Attorneys Bill McGuire and Teresa Norris, who both had extensive experience as capital litigators, were immediately appointed to represent Cottrell and represented him from their appointment through his re-trial and sentencing proceeding. Id.

There has been no showing that McGuire or Norris presented a defense other than the one Kimbrough and Axelrod would have presented at trial. In fact, based on the entire record, including the pre-trial proceedings, it appears they presented the exact defense Axelrod wished to

present in the guilt phase. (R. 1-5; 192-93; 207-38; 240; 192-93; 205-19; 229-36; 258-93; 296-332; 145-48).

McGuire and Norris vigorously defended guilt arguing the killing of Officer McGarry was either voluntary manslaughter or self-defense and not murder. They vigorously contested the State's evidence in aggravation and presented evidence in mitigation. Furthermore, McGuire and Norris had an additional two (2) years and six (6) months to study and review the original trial and sentencing phase transcript, study and review Kimbrough and Axelrod's investigation and the work they had already done in preparation for trial and sentencing, and conduct their own further investigation and consult with Cottrell on his chosen defense. Cottrell cannot show any prejudice. Justus, *supra*. As a result, this ground has no merit and must be dismissed.

ARGUMENT II.

Where Appellant failed to use available peremptory challenges against two (2) jurors that he now challenges on appeal as being disqualified because of a claimed inability to consider mitigation, Appellant is procedurally barred from complaining about the seating of the jurors which he had the opportunity and ability to remove by the available strikes. Further Judge Hyman did not err in qualifying the two (2) prospective jurors given their entire individual *voir dire* responses which conclusively showed that they would meaningfully consider all mitigating circumstances, including statutory and nonstatutory, by following the instructions of the trial judge.

The Issue raised on Appeal

Cottrell argues Judge Hyman erred in qualifying two (2) prospective jurors after individual *voir dire*, not because the jurors could not impose a life sentence or a death sentence for murder²² depending on the circumstances, but because the two (2) prospective jurors were allegedly “mitigation impaired.” There is no merit to Cottrell’s argument.

First, this issue related to both jurors is not preserved for review. At the time each juror was presented, Cottrell had available peremptory challenges that he did not use to remove the questioned juror. Since exclusion of the juror was available, Respondent asserts that the issue is waived for the reasons more fully set forth below. See State v. Green, 301 S.C. 347, 352, 392 S.E.2d 157, 159, 160 (1990).

Second, upon consideration of the entire *voir dire* of these two (2) jurors, each juror conclusively revealed they would give meaningful consideration to all mitigating circumstances, including statutory and non-statutory and follow the instructions by the court as to what they should consider after the evidence and instructions are presented to them. This issue must be denied.

²² Following the suggestion of the dissent in State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010), Judge Hyman defined for each prospective juror the definition of murder under South Carolina law.

What Occurred Below

During the individual death penalty *voir dire* of the very first (1st) juror, Juror Darrell Reid, counsel for Cottrell sought to use this juror's *voir dire* as a "test case" to see how far he could go in questioning individual jurors. (R. 1375-1425).²³ Among other things, defense counsel sought to ask Juror Reid about **specific aggravating circumstances**, and other improper individual *voir dire* questions. (R. 1375-1425).²⁴

The State objected to the improper question about specific aggravating circumstances, and Judge Hyman agreed sustaining the objection that defense counsel was seeking to "stake out" the juror or the questions were improper. Following the United States Supreme Court's and this Court's prior rulings, Judge Hyman properly ruled that defense counsel could question the juror about general aggravating and general mitigating circumstances pursuant to Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222 (1992), State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998), and State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998), to determine if the juror was qualified to serve in a death penalty case; however, defense counsel could not ask about *specific aggravating* and *specific mitigating circumstances* because that would be improper under those decisions. Morgan, 504 U.S. 719, 112 S.Ct. 2222; Hill, 331 S.C. 94, 501 S.E.2d 122; Powers, 331 S.C. 37, 501 S.E.2d 116.²⁵

²³ The *voir dire* of Juror Reid, the first (1st) juror called for individual *voir dire*, including argument on objections and Judge Hyman's ruling, takes up fifty (50) pages of transcript.

²⁴ For example, in addition to asking improper questions about specific aggravating circumstances, defense counsel sought to educate the juror on what would happen if the jury was unable to reach a verdict, i.e. the judge would sentence the defendant and stake the juror out to reach a hung jury and a resulting life sentence. (R. 1404-13). Judge Hyman appropriately found this line of inquiry was improper. (R. 1405, 1408).

²⁵ In Mu'Min v. Virginia, 500 U.S. 415, 111 S.Ct. 1899, 1905 (1991), the United States Supreme Court held a defendant is entitled to specific questions only if the failure to ask them would render his trial "fundamentally unfair." Here Judge Hyman stated he would allow Cottrell to ask

Similar improper inquiry, to a more limited extent, continued with one (1) of the following two (2) jurors. There, defense counsel sought to inform or did inform this juror how to be removed from the case. (R. 1433, l. 25 – 1434, l. 16). There was an objection by the State, which Judge Hyman sustained. (R. 1433, l. 25 – 1434, l. 16). However, these two (2) jurors were dismissed because of personal biases they had in the case, unrelated to death penalty qualification. (R. 1426-62).

During the individual *voir dire* of the next two (2) jurors, the jurors at issue here, defense counsel asked the jurors what was important or relevant to them in determining the sentence in a murder case. (R. 1471, 1503). The jurors, who testified they could impose life or death in a murder case depending on all of the aggravating and mitigating circumstances, stated it would be important to them what the defendant actually did in this present crime. (R. 1472, 1503). Obviously, to the ordinary juror, this is what they believe they are there to determine, i.e. whether this defendant should be sentenced to death or life for the present crime.

Defense counsel also improperly asked each of these two (2) jurors about *specific mitigating circumstances* in contravention of Judge Hyman's previous ruling which was in accordance with this Court's prior opinions. Hill, 331 S.C. 94, 501 S.E.2d 122; Powers, 331 S.C. 37, 501 S.E.2d 116. When asked if they thought it was relevant or important in sentencing what kind of life the defendant had lived, his background, his walk in life, whether he was a drug addict, or mentally ill; however, these jurors had not been instructed on the law, and stated no;

whether a juror would consider mitigating circumstances as presented by the defense and as instructed by the court. "This general question covers whether a juror would refuse to consider mitigating circumstances and does not render appellant's trial unfair. Accordingly, this issue has no merit." State v. Hill, 332 S.C. 94, 501 S.E.2d 122 (1998).

that was not important or relevant to them. (R. 1472, 1503, & *See also* 3895, ll. 11-13 [Cottrell characterizing these jurors' responses]).²⁶

However, each of these jurors stated under oath, upon questioning by Judge Hyman that they would consider aggravating and mitigating circumstances before imposing a sentence in this case, and they would follow the trial court's instructions, including that they must consider any aggravating and any mitigating circumstances introduced in evidence in the penalty phase before deciding whether to impose a life sentence or a death sentence. (R. 1462-1512). Judge Hyman, viewing the two (2) jurors *voir dire* as a whole, specifically found the jurors were not mitigation impaired and were qualified to serve over Cottrell's objection. (R. 1486, l. 4 – 1487, l. 1; 1510, l. 22 – 1511, l. 17). Viewing these two (2) jurors' *voir dire* as a whole, Judge Hyman did not abuse his discretion in qualifying these two (2) jurors.

After individual *voir dire* of the jury panels, the jury was struck in order of qualification. When the two (2) challenged jurors here, Juror Moses and Decker, were presented for the jury strike, they were the second (2nd) and third (3rd) jurors presented; and, Cottrell had only exercised one (1) jury strike, and had nine (9) peremptory challenges remaining. Rather than striking these two (2) jurors, Cottrell seated them. They were the first two (2) jurors seated on Cottrell's jury. (R. 3227-28).

²⁶ The State objected to this improper questioning of the first challenged juror, and allowed the second challenged juror to clarify his response to this improper line of questioning. (R. 1472-73, 1508).

Lack of Preservation or Waiver of the Issue raised on Appeal

This issue is either not preserved for appellate review or waived. While case law requires that all strikes be exhausted before an argument may be made against a seated juror, *see State v. Tucker*, 324 S.C. 155, 162, 478 S.E.2d 260, 264 (1996), these two (2) jurors were not seated because they were mistakenly qualified and Cottrell exhausted all of his strikes. *See Green v. Maynard*, 349 S.C. 535, 564 S.E.2d 83 (2002); *State v. Green*, 301 S.C. 347, 392 S.E.2d 157, *cert. denied*, *Green v. South Carolina*, 498 U.S. 881 (1990). Rather, Cottrell still had nine (9) more of his peremptory challenges remaining when these two (2) jurors were presented for the jury strike. (R. 3227-28). In fact, these two (2) jurors were the second (2nd) and third (3rd) jurors presented for jury selection. (R. 3227-28). Rather, than strike the jurors with available peremptory challenges, Cottrell seated these two (2) jurors. These two (2) jurors were the first (1st) and second (2nd) jurors seated on Cottrell's jury. (R. 3227, l. 24 – 3228, l. 19).

If not unpreserved for appellate review, the issue should be deemed waived in these circumstances where counsel exercised professional judgment in using his strikes but determined not to strike the jurors at issue where they were the 2nd and 3rd jurors presented and he had nine (9) strikes remaining. *Cf. State v. Torrence*, 305 S.C. 45, 65, 406 S.E.2d 315, 326 (1991)(discouraging structure that allows counsel to hold back an issue for appeal). At bottom, the fault if any lies in Cottrell's decision not to strike the jurors, not with qualification, as they were the first (1st) and (2nd) jurors seated on his jury. At any rate, given the entire *voir dire* of the two (2) jurors, the record supports Judge Hyman's exercise of discretion.

Standard of Review
(General Appellate Standard)

Generally, “[i]n criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous.” State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010), *quoting* State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007).

Standard of Review
(Qualification of Capital Jurors)

Determinations of whether a juror or jurors are qualified to serve on a capital jury panel are left to the sole discretion of the circuit court. State v. Dickerson, 395 S.C. 101, 716 S.E.2d 895 (2011); State v. Evins, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007); State v. Green, 301 S.C. 347, 354, 392 S.E.2d 157, 160 (1990); State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985). Deference is paid to the trial judge who sees and hears the juror’s responses. Dickerson, 395 S.C. 1, 716 S.E.2d at 903. In making a determination as to whether a juror is qualified to serve in a capital case, a trial judge should not single out any one (1) question and answer, but rather review the questioning process in its entirety. State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984).

“[A] prospective juror may be excluded for cause when his views on capital punishment are such as would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” State v. Sapp, 366 S.C. 283, 290-91, 621 S.E.2d 883, 886 (2005)(*citing* Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844 (1985). “The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him.” Sapp, 366 S.C. at 291, 621 S.E.2d at 887.

In reviewing the circuit court’s decision on the qualification of a juror for capital jury service, this Court “must examine the juror’s responses in light of the entire *voir dire* and will

not reverse the circuit court's decision unless it is wholly unsupported by the evidence." Dickerson, 395 S.C. 101, 716 S.E.2d at 903; Evins, 373 S.C. at 418, 645 S.E.2d at 911; Green 301 S.C. at 354, 392 S.E.2d at 160-61; State v. Cain, 297 S.C. 497, 377 S.E.2d 556 (1988)(responses of challenged prospective jurors must be examined in context of the entire *voir dire*.); State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987)(same); Plemmons, 286 S.C. 78, 332 S.E.2d 765; State v. Gaskins, 284 S.C. 105, 112, 326 S.E.2d 132, 137 (1985). "This Court will not consider only isolated statements made during *voir dire* but will examine the entire colloquy with the venireman [or venirewoman] in order to review his [or her] qualifications." State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179, 180-81 (1981).

The Lack of Merit of Cottrell's argument

Cottrell's argument is without merit for the following reasons: It is undisputed these two (2) jurors were properly qualified regarding whether they could impose a life or death sentence. See Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968); Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985); Utecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218 (2007). Both jurors testified they could impose a life or death sentence depending upon the evidence or circumstances. They each testified they were "Type C" jurors as described in the "Juror Questionnaire." They were not jurors who would always vote for life or always vote for death regardless of the evidence. They stated they would wait until all the evidence was in and determine the appropriate sentence based on consideration of aggravating and mitigating evidence or circumstances. (R. 1462-1512).

Cottrell argues however that the two (2) jurors should not have been qualified because they were *allegedly* mitigation impaired. (BOA). He bases his argument on the jurors' limited responses to improper, leading, specific questions he asked about *a specific mitigating*

circumstance or circumstances, i.e. the defendant's background, mental health, or life history. (R. 1472-73, 1485, 1502-03, 1509-10). However, his argument is in contravention of the proper standard of review for the trial judge and for this Court on appellate review. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (in making a determination whether a juror is qualified to serve in a capital case, a trial judge should not single out any one question and answer, but rather review the questioning process in its entirety); Dickerson, 395 S.C. 101, 716 S.E.2d at 903 (this Court "must examine the juror's responses in light of the entire *voir dire* and will not reverse the circuit court's decision unless it is wholly unsupported by the evidence."); Gilbert, 277 S.C. 53, 283 S.E.2d at 180-81 ("This Court will not consider only isolated statements made during *voir dire* but will examine the entire colloquy with the venireman [or venirewoman] in order to review his [or her] qualifications.").

Cottrell makes his argument by piecing together language or various statements from United States Supreme Court decisions over the last forty (40) years. However, while Respondent does not dispute the specific holding in each of those cases, they are not controlling on the facts of this particular case. See Abdul Kabir v. Quarterman, 550 U.S. 233, 127 S.Ct. 1654 (2007); Smith v. Texas, 543 U.S. 37, 125 S.Ct. 400 (2004); Tennard v. Dretke, 542 U.S. 274, 124 S.Ct. 2562 (2004); Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003); Morgan v. Illinois, 504 U.S. 719 (1992); McCoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227 (1990); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982); Adams v. Texas, 448 U.S. 38, 127 S.Ct. 1654 (1980); Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273

(1988); Wainwright v. Witt, 469 U.S. 412 (1985); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978 (1976).²⁷

The entire record of each of these two (2) jurors' *voir dire* responses under oath shows Cottrell is incorrect, and the jurors were not mitigation impaired. (R. 1462-1512). Cain, *supra* (responses of challenged prospective jurors must be examined in context of the entire *voir dire*); Gilbert, *supra* (this Court will not consider only isolated statements made during *voir dire* but will examine the entire colloquy with the venireman or woman in order to review his or her qualifications); Gaskins, 284 S.C. at 112, 326 S.E.2d at 137 (same or similar).²⁸

When jurors are summoned for capital jury service, they have little if any idea what they will be asked or instructed by the court to consider as far as evidence in a capital sentencing proceeding. They have little if any idea what is relevant or required to consider in a capital sentencing proceeding, as they are not trained jurists or trained capital litigators or attorneys.²⁹

They have not reviewed years of United States Supreme Court or South Carolina Supreme Court precedent regarding what is relevant in determining whether to sentence a defendant to death or life without parole. They have not been trained or even instructed on the law.

And, they are not fully instructed on the law by the court after they are selected as potential jurors but only in a limited fashion. (See R. 1183, ll. 14-18; 1255, l. 23 - 1257, l. 7;

²⁷ The majority of the cases cited by Cottrell in support of this appellate issue deal with the limitation of the admissibility or consideration of mitigating circumstances by State law or procedure. See Abdul Kabir, 550 U.S. 233. Others deal with a state court judge who believed he was constrained by state law not to consider mitigation evidence. See Eddings, 455 U.S. 104.

²⁸ Of note, Cottrell conceded another juror who testified similarly to the two (2) disputed jurors was qualified to serve. (See R. 2335-38).

²⁹ This lack of knowledge is demonstrated by the individual *voir dire* of one (1) of the jurors challenged here and another juror questioned after the two (2) jurors at issue here. (R. 1503, ll. 1-8; 1769-73).

1288-89). Again, they are only instructed in a general limited sense after they are selected to serve on the jury panel itself. (See R. 3260, ll. 8-21; 3881-83). It is only before they retire to deliberate on a sentencing recommendation that they are fully instructed on the law and what they must consider in determining whether to impose a life or death sentence. (See R. 4346-68). Jurors are presumed to follow the law as instructed by the trial court. Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132 (1979); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986).

When jurors appear for capital juror service, they may have or have preconceived notions about what is important or relevant in capital sentencing. Again, they have not been instructed on the law and what they must consider in determining the appropriate sentence. Most all prospective jurors are being requested to answer broad questions about concepts and procedures that they know little or nothing about. It should be expected that many of the answers will demonstrate that disadvantage. *See, for example*, State v. Bell, 302 S.C. 18, 25, 393 S.E.2d 364, 368 (1990) (“the other two jurors initially misunderstood the bifurcation of the trial, but later, after clarification, responded that they could impose either the death penalty or a life sentence. The trial judge, therefore, did not abuse his discretion in qualifying the challenged jurors.”); Green, 301 S.C. at 354-55, 392 S.E.2d at 161 (“With regard to Mr. Brown, we find that while his responses indicated some confusion on his part, he demonstrated the ability to consider all evidence before reaching a decision.”). As Judge Hyman noted on the record during the questioning of these two (2) jurors, the *voir dire* process should be used to uncover real issues with juror qualification. A juror should not be disqualified just because a party may simply point to a misstep or a few missteps in the dialogue. Id. This is why the entire *voir dire* of the challenged juror or jurors must be reviewed. Dickerson; Cain; Gilbert. However, what is important with regard to the issue before this Court is whether the particular jurors can follow the

law as instructed by the court regarding what they are required to consider in determining the appropriate sentence in a capital case. And, additionally what they are instructed at the end of the case by the trial court.

Each of these two (2) challenged jurors specifically informed Judge Hyman under oath that they would not impose a death or life sentence until after first considering the aggravating **and** mitigating circumstances introduced in evidence as instructed by Judge Hyman. (R. 1462-1512). *See State v. Cain*, 297 S.C. 497, 377 S.E.2d 556 (1988)(a juror who initially stated that the mitigating factors of age and background would make no difference in her sentencing consideration, was qualified for service after she stated she would follow the law as the trial judge instructed, and vote for either life imprisonment or the death penalty); *State v. Gilbert*, 277 S.C. 53, 283 S.E.2d 179 (1981)(a juror that initially responded that she would not consider the lack of a prior criminal record as a mitigating factor, was properly qualified after stating that she would follow the instructions of the court as to the consideration of any mitigating factor); *See also State v. Singleton*, 284 S.C. 388, 326 S.E.2d 153 (1985)(juror was qualified to serve who initially stated he would be in favor of the death penalty in every murder case, but on questioning stated he would consider any mitigation circumstance, and would follow the judge's charge on the law).

A defendant is entitled to question a prospective juror *on the general subject of mitigating circumstances*, in order to determine if such juror would follow the instructions of the trial judge, i.e. to consider mitigating circumstances. *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222 (1992). Judge Hyman allowed this. However, a defendant does not have the right to question jurors whether or not they would consider *specific mitigating circumstances*, or what their opinion is of any *specific mitigating circumstance*. *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122

(1998); State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998); United States v. Tipton, 90 F.3d 861 (4th Cir. 1996). The underlying rationale for limiting such questioning is that it might cause a juror to believe that he has pledged or committed himself to a future course of action when considering evidence of such mitigating circumstances. Powers, 331 S.C. 37, 501 S.E.2d 116, referencing State v. Skipper, 337 N.C. 1, 446 S.E.2d 252, *cert. denied* 513 U.S. 1134, 115 S.Ct. 953 (N.C. 1995); State v. Wilson, 74 Ohio St.3d 381, 659 N.E.2d 292 (1996); State v. Drutzer, 928 S.W.2d 854 (Mo. 1996); Hill, 331 S.C. 94, 501 S.E.2d 122; State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997). Judge Hyman appropriately prohibited this improper inquiry.³⁰

That is exactly what occurred in this case. The questioning by Cottrell on these specific mitigating circumstances was not proper questioning, in contravention of Judge Hyman's prior ruling, in contravention of this Court's prior opinions, and an attempt to stake out the jurors. Additionally, Cottrell asked these jurors specifically if these specific mitigating circumstances were "relevant" or "important" to them or not. While the answer to this question may have been informative to defense counsel as to how Cottrell should exercise his peremptory challenges, i.e. what weight the juror would give a specific mitigating circumstance, it did not disqualify these two (2) particular jurors given their entire *voir dire*. (R. 1462-1512). Dickerson; Cain; Gilbert.³¹ Additionally, as Judge Hyman pointed out, Cottrell did not follow up with the critical question, i.e. if Judge Hyman instructed the juror he or she must give meaningful consideration to all

³⁰ Judge Hyman reiterated this proper ruling again later during individual *voir dire* of another juror when defense counsel wanted to ask about *specific mitigating circumstances*. (See R. 2213-20).

³¹ At this time, the two (2) jurors would not have known that the defendant's background or life history was a specific mitigating circumstance they must consider. They had only been charged *generally* and to a *limited extent* on mitigating circumstances. To the jurors, they were being asked what was important to them in sentencing, and they were being asked in a vacuum. (See R. 359, ll. 6-8). Further, they had been repeatedly told that there were no right or wrong answers to *voir dire* questions; they only need give honest answers to the questions posed.

mitigating circumstances, including the defendant's background or mental health, could this juror follow the trial court's instructions or would he or she be unable to follow the trial court's instructions in this regard. (R. 1510, l. 24 – 1511, ln. 1).³²

The entire record of the *voir dire* of these two (2) jurors shows they were not mitigation impaired, as Judge Hyman specifically and correctly found on the record. (1462-1512). In fact, they testified they would consider all mitigation in imposing any sentence, if the jury reached that stage. (R. 1462-1512).

Specifically, Juror Moses testified as follows under oath:

Q: Ms. Moses, I've looked at the forms you were kind enough to fill out this morning, and you have indicated to me that you are a C type juror; is that correct?

A: Yes sir.

Q: And just so we understand, a C type juror, generally speaking, is one who would need to hear the facts and circumstances in aggravation and in mitigation before you could make a decision regarding punishment; is that correct?

A: Yes, sir.

Q: And is that still your understanding - -

A: Yes, sir.

(R. 1463, ll. 8-19).

³² Cottrell contends in his brief that he could not ask this question because it would have been attempting to "stake out" the juror; however, this is simply not true. The improper "staking out" question had already been asked. Powers, 331 S.C. 37, 501 S.E.2d 116, *referencing* Skipper, 337 N.C. 1, 446 S.E.2d 252; Wilson, 74 Ohio St.3d 381, 659 N.E.2d 292; Drutzer, 928 S.W.2d 854; Hill, 331 S.C. 94, 501 S.E.2d 122; Patterson, 324 S.C. 5, 482 S.E.2d 760. And, nothing, not even Judge Hyman's prior ruling or this Court's prior opinions, stopped counsel from asking the improper question to two (2) different jurors. The question Judge Hyman noted Cottrell never asked would not have been improper, but whether the juror could follow the trial court's instructions or not. Counsel simply chose not to ask the question to which a negative response would have disqualified the juror.

After the Court explained the State first had to prove an aggravating circumstance beyond a reasonable doubt, Juror Moses testified as follows:

Q: But if they, the State, if the State were able to establish beyond a reasonable doubt to the unanimous satisfaction of the jury [an aggravating circumstance], **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 the law. But the unique thing about the mitigating circumstances is you, as the jury, could also consider non-statutory 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, l. 14 – 1466, l. 10)(emphasis added). This juror also testified she would follow Judge Hyman's instructions on the law; and, she would follow his instructions on the law even if she personally disagreed with the law. (R. 1467-68).

At the conclusion of her entire *voir dire*, Judge Hyman found as follows:

THE COURT: I am confident that this juror is qualified to serve on this jury. I questioned her and I listened very carefully as the defense and the State questioned her. I have no doubts in my mind that she is free of any bias or prejudice in this case. I do not hear anyone even suggest that. She was very clear in her responses to me that she could follow the law as I instructed her. She was familiar with the concept of the presumption of innocence. She understood the State must prove its case beyond a reasonable doubt. And there was no question in my mind that she understood the concept of aggravating and mitigating circumstances as well as the granting of a life sentence for no other reason than sheer mercy.

I believe that this juror has clearly indicated that she will follow the law as

instructed by the Court. As to any statement she may have made concerning the background of the defendant, she's indicated she will follow the law. I have not discussed with her any specific mitigating circumstances, but I am confident she will follow my instruction in that regard and I believe she is a qualified juror.

(R. 1486, ln. 4 – 1487, l. 1).

Similarly, Juror Decker testified he would have to hear the facts and evidence in aggravation and mitigation before deciding on the proper punishment. (R. 1492, ll. 1-2). He also indicated he was the type of juror who would want to hear the evidence in aggravation and mitigation before rendering a decision. (R. 1492, ll. 13-18). He also testified he considered the imposition of the death penalty "a last resort." (R. 1507, ll. 2-6). Specifically, Juror Decker testified as follows:

Q: And the first thing we ask you to do is indicate what kind of juror you were, and, you've indicated you were a C type juror; is that right?

A: Correct.

Q: Now simply stated, a C type juror is one that would need to hear the facts and circumstances in aggravation and mitigation before he or she could make a decision regarding punishment. Is that your feeling today?

A: Yes.

Q: And you think that best describes you as a juror?

A: Yes.

Q: Now since you indicated you are the type of juror that would want to hear about aggravation and mitigation, I would assume then that you recall our conversations yesterday about aggravating and mitigating circumstances?³³

A: Yes.

³³ The previous day, before the jury pool was split into panels of six (6) for individual *voir dire*, Judge Hyman generally defined aggravating circumstances as something that makes the offense worse and mitigating circumstances as something that lessens the severity of the offense or the defendant's culpability.

(R. 1492, ll. 1-18). After explaining the State must prove an aggravating circumstance beyond a reasonable doubt for the Defendant to be eligible for the death penalty, Juror Decker testified as follows:

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 in 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 if I were to instruct you as to the law, could you follow it that way?**

A. **Yeah.**

(R. 1494, l. 7 – 1495, l. 5)(emphasis added). Juror Decker also testified he would follow the law as Judge Hyman instructed him even if he disagreed with it. (R. 1495, ll. 6-18). Juror Decker also specifically testified as follows:

Q: All right, sir. A moment ago I explained to you what aggravating and mitigating circumstances was and how they were important in this case if we ever get to the sentencing phase. There again, I don't want to suggest to you that this defendant will be found guilty. I don't want to suggest to you that you will ever get to a sentencing phase. That will be up to the jury to determine.

But if we got to that phase and if the State were to produce evidence of aggravation and if the defendant were required to produce - - **or did produce evidence in mitigation, would you listen to the evidence offered by each party, the defendant and the State, would you consider all that evidence, would you consider the law as I give it to you and could you - - could you - - based upon**

consideration of the mitigating and aggravating circumstances and the application of the law impose either the life sentence or the death penalty?

A: Yes, sir.

Q: You could, under the proper circumstances, impose or vote for the death penalty?

A: Yes.

Q: You could, under the proper circumstances, vote for life imprisonment?

A: Yes, sir.

Q: **You would have no problem - - no bias in favor or against either sentence, you would base it on the evidence that was presented?**

A: Yes, sir.

(R. 1497, l. 15 – 1498, l. 19)(emphasis added). Juror Decker also reiterated later in *voir dire* that in determining whether to impose life or death he would consider both aggravating and mitigating evidence. (R. 1508, l. 3 – 1509, l. 2). He also testified he considered life in prison a severe penalty and the imposition of the death penalty “a last resort.” (R. 1507, ll. 2-6).

Judge Hyman specifically found at the conclusion of Juror Decker’s *voir dire* as follows:

THE COURT: I think that it is clear that he understands the process.

Mr. McGuire, you don’t ask him if he could follow my instruction to consider that if I were to instruct him in that fashion. The issue here is whether or not he can follow the law, whether he can - - whether there’s any bias that he might have that would prevent him or substantially impair his ability to do his duty as a juror. And I see none here.

I do not think that he is mitigation impaired. I believe that if I instruct this witness as the other witnesses, that those are factors to be considered, that they will consider them. I do not see any evidence that would suggest this witness has any prejudice interest or bias. He’s indifferent to this case. He’s one of the few witnesses were going to have that has never heard or knows nothing about the case. He is a C type juror, and I believe that he is capable of following the law, intends to follow the law, and is ready, willing and able to follow the law. So I’m going to find him to be qualified in this case.

(R. 1510, l. 22 – 1511, l. 17).

Considering the entirety of these two (2) jurors' *voir dire* responses, there is no merit to this appellate ground. Dickerson, *supra*; Cain, 337 S.E.2d at 558; Gaskins, 284 S.C. at 112, 326 S.E.2d at 137. In short, a juror's answers should be considered in light of their lack of training in the law, and the lack of instruction by the court, when considering qualification. The trial judge is in the best position to determine if the suspect answer is disqualifying or whether the juror can be fair. See Dickerson, 395 S.C. at 166 716 S.E.2d at 903 ("The circuit judge was more persuaded by the juror's consistent affirmation he would follow the law and wait to hear all of the evidence than by his apparent confusion over the State's burden, and we believe his ultimate determination of Juror 370's qualification to serve is supported by the record."); Green, 301 S.C. at 354, 392 S.E.2d at 161 ("we find that while his responses indicated some confusion on his part, he demonstrated the ability to consider all evidence before reaching a decision.").³⁴

Furthermore, the jurors were appropriately instructed by Judge Hyman on the law on numerous occasions. Prior to the jury being divided into panels of six (6) for individual *voir dire*, Judge Hyman instructed the entire jury pool on the difference between a non-capital and capital murder case, and how if the defendant is found guilty, the State must prove at least one (1) aggravating circumstance beyond a reasonable doubt in the penalty phase for the defendant to be eligible for the death penalty. Judge Hyman explained by the word "aggravate," he meant to

³⁴ After the qualification of these two (2) disputed jurors, and other individual jurors, on the third day of individual *voir dire*, in order to speed up the process, the parties agreed to allow Judge Hyman to give each panel of six (6) jurors a preliminary instruction regarding how a death penalty case proceeds, including consideration of aggravation and mitigating evidence, both statutory and non-statutory, in determining the appropriate sentence, instead of doing the same with each individual juror as Judge Hyman had done the first two (2) days. This was done as agreed. (See R. 1932-34, 1948-49, 2041-52, 2167-76, 2285-94, 2365-74, 2442-52, 2562-70, 2653-62, 2706-16, 2777-87, 2848-58, 2915-26, 3013-22, 3077-94, 3149-55). As a result, Cottrell's argument that his jury was permeated with misunderstanding about the law of consideration of mitigating evidence is simply not supported by the record. (See R. 1145-3214).

make worse or exacerbate the circumstance. (R. 1287-88). Judge Hyman also explained to the jury that it could return a life sentence even if the jury found the existence of an aggravating circumstance. (R. 1288, ll. 17-20). Judge Hyman also instructed the jury as follows:

Under the law, if we go into the second phase or the sentencing phase, the jury, even if it finds an aggravating circumstance, **is required to consider any mitigating circumstance of any nature whatsoever. "Mitigating" means to lessen, to reduce fault and culpability, to reduce punishment.**

(R. 1288, ll. 3-8)(emphasis added). Judge Hyman further instructed the jury: "For those of you who will serve in this case, **you must accept and apply the law exactly as I give it to you.**" (R. 1289, ll. 20-22). At that time, Judge Hyman did not specifically explain what all of the different kinds of mitigation evidence there are.

Prior to closing arguments in the sentencing phase, Judge Hyman instructed the jury as follows:

At the end of their argument, I will instruct you on the law. They are also entitled to speak to you concerning the law. But remember, I will give you the law and **you must be guided by the law as I give it to you.**

(R. 4307, ll. 16-20)(emphasis added).

At the close of the sentencing proceeding, before the jury retired to deliberate on its sentence recommendation, Judge Hyman instructed the jury on the law regarding what they must consider in determining the appropriate sentence in this case. (R. 4346-68). "Explaining specific legal points and thereby eliminating jurors' misconceptions is the very reason jury instructions exist." State v. Matthews, 296 S.C. 379, 384, 373 S.E.2d 587, 590 (1988). The law presumes all twelve (12) jurors followed Judge Hyman's instructions. Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132 (1979); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986).

Judge Hyman instructed the jury they are the judges of the facts, but he was the judge of the law, and under their oaths as jurors they must apply the law as he instructed it to them. (R.

4348, l. 19 – 4349, l. 3, 4367, ll. 12-13). Judge Hyman also instructed the jury: “Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all of the evidence in the case and that you will follow the law as I have explained it to you.” (R. 4367, ll. 9-13).

Judge Hyman instructed the jury they “**must**” consider both aggravating **and** mitigating evidence in determining the appropriate sentence. (R. 4358, ll. 17-25; 4360, l. 5 – 4362, l. 5). He defined what mitigating evidence is. (R. 4361, ll. 8-14). Judge Hyman instructed the jury they “**must**” consider both statutory **and** non-statutory mitigating evidence. (R. 4360, l. 5 – 4362, l. 5). He appropriately defined both statutory and non-statutory mitigating evidence. (R. 4360, l. 25 – 4362, l. 5).

Judge Hyman instructed the jury that in determining the appropriate sentence: “**you will consider** any statutory or nonstatutory mitigating circumstances which are supported by the evidence.” (R. 4365, ll. 16-19)(emphasis added). Judge Hyman instructed the jury that Cottrell had no burden of proof to prove mitigating circumstances. (R. 4362, ll. 17-18). Further, the jury was not required to find the existence of any such mitigating circumstance beyond a reasonable doubt; it need only be supported by the evidence. (R. 4362, ll. 14-17). Judge Hyman further instructed the jury, because Cottrell had no burden of proof on mitigating circumstances, the jury must independently search the evidence before determining what other information should be considered in fairness and in mercy on behalf of the defendant. (R. 4362, ll. 18-21).

Judge Hyman instructed the jury: “You **must consider** any other circumstance 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, ll. 21-24) (emphasis added). Judge Hyman also instructed the jury that any factor may be taken into account as a reason for not imposing the death penalty

on the defendant. (R. 4362, l. 25 – 4363, l. 1). Judge Hyman instructed the jury that in determining the appropriate sentence, they “**will consider** the aggravating circumstance or circumstances.... you found **and the mitigating circumstances**, and you will then decide whether you will recommend the death penalty or life imprisonment. (R. 4365, ll.19-23)(emphasis added). Judge Hyman also instructed the jury as follows:

You **must also consider any other fact in mitigation** of the offense and you can recommend a sentence of life imprisonment for any reason, for no reason, or simply as an act of mercy.

(R. 4365, l. 24 – 4366, l. 2)(emphasis added).³⁵

Judge Hyman also gave the jury a written copy of his jury instructions at the close of his charge in the penalty phase. (R. 4346). And, the “Statutory Instructions” provided to the jury, and read to the jury by Judge Hyman, also stated: “You **must also consider** any nonstatutory mitigating circumstances.” (R. 4361, ll. 16-23; 4365)(emphasis added). Jurors are presumed to follow the trial court’s instructions. See CSX Transp., Inc. v. Hensley, 556 U.S. 838, 129 S.Ct. 2139, 2141 (2009); Penry v. Johnson, 532 U.S. 782, 789, 121 S.Ct. 1910 (2001); United States v. Olano, 507 U.S. 725, 740, 113 S.Ct. 1770 (1993); Greer v. Miller, 483 U.S. 756, 766 n. 8, 107 S.Ct. 3102 (1987); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975). As a result, there can be no merit to this appellate issue.

Based on the entire *voir dire* of these two (2) jurors, along with the mandatory instructions given by Judge Hyman, the jurors would have meaningfully considered all mitigating circumstances, including statutory and non-statutory. This ground of Cottrell’s appeal has no merit and must be dismissed.

³⁵ Judge Hyman correctly charged/instructed the jury that it must consider all mitigating evidence before determining whether to impose a life or death sentence. State v. Hicks, 499 S.E.2d 209 (1998); State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991); State v. Cain, 297 S.C. 497, 377 S.E.2d 556 (1988); State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987).

ARGUMENT III.

Judge Hyman did not err in limiting the guilt phase testimony of Detective Johnson on the Hartman' murder investigation as the proffered evidence was not relevant and its potential for undue prejudice to Cottrell outweighed any probative value by injecting detailed evidence of the other murder and Cottrell's criminal activity into the guilt phase determination when it had minimal probative value as to the culpability of Cottrell in the Officer McGarry homicide and would have confused issues before the jury in the guilt phase. The limitation did not deprive Cottrell of his right to present a meaningful defense and preserved his right to due process and a fundamentally fair trial.

What Occurred Below

At trial, counsel for Cottrell sought to introduce additional testimony of Horry County Detective Nathan Johnson ("Det. Johnson") detailing his investigation of the murder of Richard Hartman, and how he identified Cottrell as a suspect in the Hartman murder, in an odd effort to show law enforcement *allegedly* lacked reasonable articulable suspicion to conduct a stop or Terry pat down of Cottrell.³⁶ Prior to trial, there had been a proffer of Det. Johnson's testimony. The limitation on the evidence as presented did not deprive Cottrell of his right to present a meaningful defense to the charges.

The September 8, 2014 hearing

On September 8, 2014, Judge Hyman conducted a pre-trial hearing to proffer the testimony of potential witnesses including Det. Johnson. At issue was the limits on admissibility of information developed during the Horry County investigation of the murder of Hartman, as relayed to the Myrtle Beach Police Dept. and eventually to the victim Officer McGarry. The articulable suspicion developed in the Hartman killing served as part of the basis for Officer

³⁶ Hartman was killed on November 23, 2002, roughly thirty-seven (37) days prior to Officer McGarry's murder at the hands of Cottrell on December 29th.

McGarry's brief stop of Cottrell to check for warrants and attempted Terry pat down for weapons the evening McGarry was killed. (R. 675-907, Tr. Sept. 8, 2014, 1-233).

At the pre-trial hearing, Det. Johnson testified witness Ryan Beal, as well as others who knew Hartman, informed Johnson after the discovery of Hartman's murder that Cottrell was one (1) of Hartman's small group of trusted friends. Cottrell worked for Hartman as a driver and security for the prostitutes in Hartman's illicit escort service. Cottrell also supplied Hartman with drugs. Beal stated Cottrell was scary; he had seen Cottrell with guns, and he did not like being around Cottrell. Cottrell was one of only two (2) male friends with whom Hartman shared social time riding Hartman's wave runner [jet ski] watercraft. The other friend, a local bondsman, Ware Kimmell, was cooperating with the investigation, did not provide or sell Hartman drugs, and was not a suspect. (R. 691-732; 945, Ex. 5, Sept. 8, 2014 hearing; See also R. 3919-58).

Further, Beal told Det. Johnson that Hartman and Cottrell had gotten into an argument the day before Hartman's murder. The basis for the disagreement was Cottrell's personal relationship with one (1) of Hartman's prostitutes, Amber Counts, and Hartman's anger with Cottrell and Counts for not showing up for work or calling in. (R. 691-732; 945, Ex. 5, Sept. 8, 2014 hearing; See also R. 3919-58).

Judge Hyman heard testimony that on the night of his death, Hartman spoke with a male drug source several times on the phone, to arrange a drug transaction, and Hartman had gone to buy those drugs when he was killed. A witness overheard this phone conversation and stated the victim was "cutting up" and joking with the man on the other end of the line, indicating a close relationship with the caller. During this conversation, Hartman had been speaking about how cold it was and said to the man on the other end of the line: "I guess we couldn't have taken the

wave runners out today.” Cottrell was the only male who would ride wave runners with Hartman and was not already cooperating with investigators in the murder investigation. SLED crime scene investigators had informed Det. Johnson that Hartman was shot several times in the head by an assailant, sitting in a position of trust, in the passenger seat of Hartman’s truck. The truck, with the victim still inside, was found in an isolated area consistent with a covert drug transaction. (R. 691-732; 945, Ex. 5, Sept. 8, 2014 hearing; See also R. 3919-58).

MBPD Lt. Amy Prock testified that, after speaking with Det. Johnson, she briefed Officer McGarry on the HCPD investigation because McGarry was personally familiar with Cottrell. McGarry, a street crimes officer, had recently arrested Cottrell on a felony PWID marijuana charge and a minor traffic offense. Lt. Prock testified that as a narcotics supervisor she reviewed McGarry’s “high court” case files before sending them to the Solicitor for prosecution. This review ensured McGarry had obtained Cottrell’s NCIC “rap sheet” and had reviewed it for any prior record for charging enhancements. McGarry obtained Cottrell’s August 2002 rap sheet which showed an arrest and pending charge for attempted murder in New York. During the briefing, Lt. Prock told Officer McGarry that Cottrell was a murder suspect based on HCPD’s investigation of the Hartman shooting. After this meeting, Prock called Det. Johnson back and updated him on the additional background information provided by McGarry. (R. 732-62).

MBPD Officer Mike Guthinger testified he and Officer McGarry entered the *Dunkin Donuts* when they both noticed Cottrell behaving loudly and somewhat boisterously at the service counter. According to Guthinger, Officer McGarry’s demeanor changed upon seeing Cottrell. McGarry whispered to Guthinger, “suspect 10-61, 10-32.” Guthinger testified about MBPD’s radio ten codes in use at that time, as well as his practical understanding of what this communication meant to him personally. Guthinger testified “10-61” is a “shooting suspect,”

which referred back to the HCPD investigation into Hartman's murder. The second, "10-32" is a "person with a gun" or "person with a concealed gun," which covered the present threat on December 29, 2002, facing McGarry and the innocent public in the *Dunkin Donuts*. (R. 763-870).

Based on Officer McGarry's prior dealings with Cottrell, his observations of Cottrell's behavior that night, and Lt. Prock's briefing of HCPD's ongoing investigation, Officer McGarry conducted a brief stop or detention of Cottrell to determine if there were any outstanding warrants on Cottrell and attempted a Terry pat down for weapons on Cottrell. The evidence indicated this occurred at the first available opportunity for Officer McGarry to investigate the concerns he possessed without endangering the public or embarrassing Cottrell. The initial interaction between McGarry and Cottrell was outwardly relaxed and non-confrontational. He asked for Cottrell's identification, received it, and called dispatch to check for pending warrants. A recording of McGarry's radio traffic corroborated this fact and demonstrated the Officer's initially benign demeanor. The entire interaction was very brief, roughly one and a half (1 ½) minutes from the time Officer McGarry asked Cottrell for his ID until Officer Guthinger called dispatch to announce that shots were fired and an officer [McGarry] was down [wounded]. (R. 763-870; State's Ex. 12 Sept. 8, 2012 hearing [NCIC Radio call and Traffic (R. 790-93)]).

Cottrell gave a post Miranda statement, which Judge Hyman found was voluntarily given at a previously held Jackson v. Denno hearing. (R. 571-660, Tr. Aug. 18, 2014, 1-90). Cottrell's statement corroborates the fact McGarry was attempting to conduct a brief investigative stop to determine if there were any outstanding warrants on Cottrell and an attempted Terry pat down for weapons. Cottrell stated that McGarry "asked for my I.D. and when I showed it to him he said he was going to pat me down. I told him no and I walked off." Cottrell told officers he was

carrying an illegal firearm, a pistol, in his waistband, and he did not want McGarry to pat him down. The record shows while walking away hurriedly, Cottrell reached in his front waistband, and Officer McGarry pursued Cottrell on foot and attempted to control Cottrell's right hand. Cottrell eventually pulled with his right hand the illegally carried handgun he was concealing under his baggy shirt and fatally shot Officer McGarry in the face. The evidence presented showed McGarry was waiting for the answer to this warrant check via a return call from dispatch when he became locked in the fatal struggle and was shot. When the call back came to inform McGarry there were no outstanding warrants, McGarry never answered that call because he had already been shot. (R. 577-660; 762-870, 871-93; 3555-63; 3934-36).

Additional argument was held on this issue on September 11, 2014 and at trial. Judge Hyman ruled the testimony of Det. Johnson regarding *the Hartman murder investigation* was not relevant, and even if it was relevant its prejudicial effect to Cottrell outweighed its probative value. Judge Hyman ruled Cottrell could call any witness he wished, including Det. Johnson, to contradict or impeach anything that Lt. Prock testified she related to Officer McGarry that Cottrell believed was not true regarding the Hartman murder investigation. (R. 3589-98, 3672-90). Cottrell chose not to call any witness including Det. Johnson to impeach Lt. Prock. Cottrell also raised this issue in a post-trial motion for a new trial. Judge Hyman denied the motion for a new trial at the hearing on the motion and by written Order, explaining his reasoning on the limitation on the testimony of Det. Johnson. (R. 4500-13 & R. 4514, Order Denying Motion for New Trial).

The Issue raised on Appeal

Cottrell argues Judge Hyman's ruling, preventing him from calling Det. Johnson to detail to the jury the evidence in the Hartman murder investigation, violated his constitutional right to

present a defense. Cottrell argues police did not have articulable suspicion to conduct a Terry stop, and as a result, neither did Officer McGarry, and as a result, if the jury heard the testimony of Det. Johnson, they could have found the murder of McGarry was either voluntary manslaughter or self-defense. This argument has no merit as Judge Hyman did not err in excluding the testimony of Det. Johnson.³⁷

Law

“The Constitution guarantees criminal defendant’s ‘a meaningful opportunity to present a complete defense,’” Crane v. Kentucky 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), but we have also recognized that “ ‘state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials[.]’ ” Nevada v. Jackson, 133 S.Ct. 1990 (2013)(quoting Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727 (2006)(quoting United States v. Scheffer, 523 U.S. 303 308, 118 S.Ct. 1261 (1998). “Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence.” Id., referencing 547 U.S. at 331, 126 S.Ct. 1727 (rule did not rationally serve any discernible purpose); Rock v. Arkansas, 483 U.S. 44, 61, 107 S.Ct. 2704(1987)(rule arbitrary); Chambers v. Mississippi, 410 U.S. 284, 302-03, 93 S.Ct. 1038 (1973)(State did not even attempt to explain the reason for its rule); Washington v. Texas, 388 U.S. 14, 22, 87 S.Ct. 1920 (1967)(rule could not be rationally defended)

³⁷ Under this appellate ground, Cottrell also argues Judge Hyman erred in admitting specific testimony of Lt. Amy Prock. This argument is completely without merit. Prock was simply asked to explain what police “ten codes” were, and if she had walked in to the *Dunkin Donuts* and saw Cottrell, how would she have described the situation to Officer Guthinger. She testified she would have said the same thing Officer McGarry said to Officer Guthinger, “10-61, 10-32 county.” (R. 3291). This testimony is not speculative, and there could be no prejudice in any event. Guthinger testified this is what McGarry said to him upon recognizing Cottrell.

Rule 401 of the SCRE states: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” This rule is identical to the federal rule and consistent with South Carolina common law. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

Rule 403 of the SCRE states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” This rule is identical to the federal rule and is consistent with the common law of South Carolina. Alexander, 303 S.C. 377 (relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice); State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (1983)(limitation of defense testimony upheld where it was merely cumulative to other testimony), *cert. denied*, 464 U.S. 827, 104 S.Ct. 100 (1983); State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941)(trial judge properly limited the defendant’s presentation of certain evidence to guard against confusion of the jury by the injection of collateral issues). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Gillian, 373 S.C. 601, 609 (2007).

Rule 404(b) of the SCRE states (in relevant part); “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Rule 404(b) SCRE does not set for the burden of proof required for the admission of evidence of bad acts not the subject of a conviction and, therefore, case law controls this issue. State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989). Evidence of a defendant’s crimes, wrongs,

or acts is generally not admissible. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Such evidence may be admissible for the limited purposes of proving identity, motive, intent, common scheme or plan, and lack of mistake or accident. Id. Even if evidence is offered for the limited purpose of proving identity, motive, intent, common scheme or plan, or mistake and is relevant and permissible for one (1) of the specific purposes enumerated in Lyle, a trial judge may exclude such evidence if the prejudicial effect of the evidence substantially outweighs its probative value. State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991).

A judge has a responsibility for safeguarding both the rights of the accused and the rights of the public in the administration of criminal justice. State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005). The conduct of a trial, including the admission and rejection of proffered testimony is largely within the sound discretion of the trial judge. State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534 (1941).

The right to present a defense is not unlimited, but must “bow to accommodate other legitimate interests in the criminal trial process.” State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001)(*overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2011)(*citing* Rock v. Arkansas, 483 U.S. at 55, 107 S.Ct. at 2711 (*quoting* Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038)). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules of evidence. *See* United States v. Lancaster, 96 F.3d 734 (4th Cir. 1996).

PART I: Reasonable Suspicion for stop and attempted Terry frisk

Cottrell first contends Officer McGarry lacked sufficient reasonable suspicion to detain him for an investigatory stop. He insists that because Det. Johnson *allegedly* lacked sufficient reasonable suspicion that therefore Officer McGarry also lacked sufficient reasonable suspicion. The facts and the law show otherwise.

The Fourth Amendment to the United States Constitution provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. The South Carolina Constitution of 1895 contains near exact language. S.C. Const. art. I, § 10. The Fourth Amendment governs those cases where a person is detained, even briefly, by the police even if ultimately they are not arrested. Terry v. Ohio, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877 (1968). Such a seizure is a reasonable one under the Fourth Amendment where the facts available to the officer at the time of the stop would cause another reasonable man to believe that the action taken was appropriate. Id. at 21-22, 88 S.Ct. at 1880. Put another way, the reasonable suspicion must be something more than an inarticulate hunch or simple good faith. Id.

Here, in the present case, Cottrell was briefly stopped based on suspicion of his involvement in the murder of Rick Hartman. Such stops, contrary to Cottrell’s assertions, are squarely within the limits of the Fourth Amendment. See United States v. Hensley, 469 U.S. 221, 229, 105 S.Ct. 675, 680 (1985)(Where police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, check identification, or check for outstanding warrants, in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice.). Cottrell correctly points out the interests of the person being detained must be weighed against the

interests of law enforcement. Terry, 392 U.S. at 20-21. Drawing off this statement, Cottrell then completely takes the Court's decision in Hensley completely out of context and makes the broad generalization that the investigation of a completed crime always weighs against the interests of law enforcement. This is simply not so.

The Court instead reasoned that leaving police action until probable cause is obtained would hinder investigations and may potentially allow suspects to escape. Hensley, 469 U.S. at 229, 105 S.Ct. at 680. The Court also explicitly recognized the more serious the felony the person being detained is suspected of gives a greater deference to the interest of law enforcement as it involves a greater threat to public safety. Id. Here Cottrell was suspected of having committed the most serious felony known to the law [murder] and therefore of posing a risk to the public's safety. Such a situation is exactly of the type which the Court considered in Hensley. Here "[t]he law enforcement interests at stake in these circumstances outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes." Id.

Cottrell contends that Officer McGarry was unaware of sufficient factual knowledge so the detention or stop by McGarry was unreasonable under the Fourth Amendment. Cottrell is wrong.

The testimony in the record is undisputed Horry County police had developed Cottrell as a suspect in the murder of Rick Hartman. This was communicated to Myrtle Beach City police by Det. Johnson, and to Officer McGarry, i.e. Lt. Prock informed Officer McGarry that based on Horry County's investigation Cottrell was a suspect in the shooting murder of Rick Hartman. The record shows Officer McGarry immediately recognized Cottrell as a suspect in the Hartman murder upon entering the *Dunkin Donuts* and communicated the same to Officer Guthinger.

Officer McGarry indicated to Officer Guthinger he was going to run an NCIC check on Cottrell to make sure there were no outstanding warrants, i.e. for the murder of Rick Hartman, on Cottrell. The record shows this is exactly what occurred. This was reasonable under the Fourth Amendment as Officer McGarry, aware Cottrell was a suspect in the Hartman' murder, had not heard back from Horry County in approximately four (4) weeks; and, there might be outstanding warrants on Cottrell for the murder.

For the safety of the patrons of the *Dunkin Donuts*, and so as not to embarrass Cottrell, Officer McGarry approached Cottrell outside the store on the sidewalk and asked Cottrell if he remembered him. After some brief conversation, Officer McGarry asked for Cottrell's identification informing Cottrell he was going to run an NCIC check to see if there were any outstanding warrants on Cottrell, and he could not remember how to spell Cottrell's name accurately. Cottrell went to a vehicle to get his identification [the Halcomb car according to Diane Lawson] and returned and handed it to Officer McGarry who immediately ran the NCIC check over the radio.

Not all personal encounters between police and citizens constitute a "seizure" of the person, thereby bringing into play the Fourth Amendment. State v. Culbreath, 300 S.C. 232, 387 S.E.2d 255 (1990); State v. Foster, 269 S.C. 373, 237 S.E.2d 589 (1977). The purpose of the Fourth Amendment is not to eliminate all contact between the police and citizenry, but to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980).

In determining whether an encounter between a law enforcement official and a citizen constitutes a seizure, and thereby implicates the protections of the Fourth Amendment, the correct inquiry is whether, considering all of the circumstances surrounding the encounter, a

reasonable person would have believed that he was not free to leave. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870. A “seizure” occurs when an officer, by use of physical force or show of authority, restrains an individual’s freedom of movement, even though the detention is short and falls short of an arrest. Sikes v. State, 323 S.C. 28, 488 S.E.2d 560 (1994); Cone v. Nettles, 308 S.C. 109, 417 S.E.2d 523 (1992); State v. Kirkpatrick, 320 S.C. 38, 462 S.E.2d 884 (Ct. App. 1995).

A seizure does not occur when an officer requests that a person produce a driver’s license or some identification, and nothing more. State v. Culbreath, 300 S.C. 232, 387 S.E.2d 255 (1990); State v. Foster, 269 S.C. 373, 237 S.E.2d 589 (1977). A seizure does not occur by an officer’s pursuit of a fleeing suspect. California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547 (1991); Cone, 308 S.C. 109, 417 S.E.2d 523. So long as the person who is approached and questioned by an officer remains free to disregard the officer’s questions and walk away, no intrusion upon the person’s liberty or privacy has taken place and, therefore, no constitutional justification for the encounter is necessary. Foster, 269 S.C. 373, 237 S.E.2d 589.

As a result of the above law, Respondent submits the initial encounter between Officer McGarry and Cottrell on the sidewalk immediately outside the *Dunkin Donuts* was not a seizure. Culbreath, 300 S.C. 232, 387 S.E.2d 255; Foster, *supra*. Officer McGarry approached Cottrell on foot in public and asked for Cottrell’s identification. According to two (2) witnesses, one (1) in the *Dunkin Donuts*, and one (1) in the Halcomb car, Cottrell went toward or to a car to retrieve his driver’s license and returned and provided it to Officer McGarry. While Officer McGarry was running the NCIC check and waiting on a response, he informed Cottrell he was going to pat him down for weapons. Cottrell said no, and turned and walked away. At this point, Cottrell obviously felt he was free to walk away, and did so. Based on the above case law, at this point

there still was not a seizure of Cottrell's person, despite Officer Guthinger's testimony that in his opinion Cottrell was not free to walk away. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870; Foster, 269 S.C. 373, 237 S.E.2d 589. Even the initial pursuit of Cottrell by Officer McGarry was not a seizure, as the pursuit of a fleeing suspect is not a seizure. Hodari D., 499 U.S. 621, 111 S.Ct. 1547; Cone, 308 S.C. 109, 417 S.E.2d 523. It was when Officer McGarry drew his weapon and told Cottrell to stop or freeze, if that occurred, or when Officer McGarry grabbed Cottrell's right hand, in an attempt to control it, that the seizure actually occurred. That seizure was reasonable under the Fourth Amendment as Cottrell was reaching in his front waistband for a concealed weapon.

However, even if this Court considered the entire encounter from its inception to be an investigative detention or Terry stop, the stop was reasonable under the Fourth Amendment. Under the seminal case of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, a law enforcement officer may briefly detain a suspect, if the officer has a reasonable suspicion that the person has been involved in or is wanted in connection with a completed felony, as well as in cases where there is a reasonable suspicion that a person is committing a crime, or is about to commit a crime. Hensley, 469 U.S. 221, 105 S.Ct. 675; United States v. Place, 462 U.S. 696, 103 S.Ct. 2637 (1983); State v. Khingratsaipon, 352 S.C. 32, 572 S.E.2d 456 (2002); State v. Alexander, 309 S.C. 495, 424 S.E.2d 526 (1992); State v. Culbreath, 300 S.C. 232, 387 S.E.2d 255 (1990); Foster, 269 S.C. 373, 237 S.E.2d 589; State v. Dean, 292, S.C. 136, 317 S.E.2d 744 (1984); State v. Morris, 312 S.C. 116, 439 S.E.2d 291 (Ct. App. 1993).

A reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" and requires a particularized and objective basis that would lead one to suspect another of criminal activity.

United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690 (1981); Khingratsaipon, 352 S.C. 32, 572 S.E.2d 456; State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999); State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (Ct. App. 1997); State v. Butler, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000). A reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or “hunch,” **but less than** the level of suspicion required for probable cause. Butler, 343 S.C. 198, 539 S.E.2d 414.

Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 155, 317 S.E.2d 746 (1984); State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978); State v. Williams, 262 S.C. 186, 203 S.E.2d 436 (1974). Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535 (1983). It is a fluid concept-turning on the assessment of probabilities in a particular factual context—nor readily, or even usefully, reduced to a neat set of legal rules. Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795 (2003); Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983). The probable cause standard is incapable of precise definition or quantification into percentages, because it deals with probabilities and depends on the totality of the circumstances. Pringle, *supra*; Gates, *supra*. In dealing with determinations of probable cause, as the very term implies, a just determination must deal with **probabilities**, which are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160, 169, 69 S.Ct. 1302, (1949); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). Probable cause “does not demand any showing that such a belief be correct or more likely true than false.” State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown, 460 U.S. at 742, 103 S.Ct. at 1535.

“Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person

under the circumstances to believe likewise.” City of Spartanburg v. Wortman, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). The substance of all definitions of probable cause is a reasonable ground for belief of guilt, and the belief of guilt must be particularized with respect to the person to be seized. Ybarra v. Illinois, 444 U.S. 85, 96 S.Ct. 2978 (1979). Stated another, more familiar way, probable cause exists when the totality of the circumstances within the officer’s knowledge “are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested.” State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Or, whether at the moment the arrest was made were the facts and circumstances within the officer’s knowledge, and of which he had reasonably trustworthy information, sufficient to warrant a prudent man in believing the suspect had committed a criminal offense. Pringle, 540 U.S. 366; Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223 (1964); State v. Pruitt, 260 S.C. 396, 196 S.E.2d 107 (1973); State v. Singleton, 258 S.C. 125, 187 S.E.2d 518 (1972); State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971).

Thus, in the present case, police did not have to have probable cause as defined above but less. Police must have had only an articulable and reasonable suspicion that Cottrell had been involved in, or was about to be involved in criminal activity. State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996).

In determining whether an investigative stop is justified, the totality of the circumstances, or “the whole picture” must be considered, which includes the inferences drawn from a set of facts, as understood by those versed in law enforcement. United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744 (2002); United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581 (1989); Cortez, 449 U.S. 411, 101 S.Ct. 690; Lesley, 326 S.C. 641, 486 S.E.2d 276. A seizure of a person must be reasonable and reasonableness depends on the balance between the public interest and the

individual's right to personal security free from arbitrary interference by law officers. United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574 (1975); Foster, 269 S.C. 373, 237 S.E.2d 589. Probabilities, not certainties, must govern the determination of a justified stop. Cortez, *supra*. The burden is on the State to articulate facts sufficient to support reasonable suspicion. Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979); Butler, 343 S.C. 198, 539 S.E.2d 414.

In State v. Rodriquez, 323 S.C. 484, 476 S.E.2d 161 (Ct. App. 1996), the Court of Appeals listed some of the circumstances to be considered when applying the balancing test between the public interest and the individual's right:

The applicable balancing test employs judicial review of all of the circumstances including but not limited to: (1) the seriousness of the offense; (2) the degree of likelihood that the person detained may have witnessed or been involved in the offense; (3) the proximity in time and space from the scene of the crime; (4) the urgency of the occasion; (5) the nature of the detention and its extent; (6) the means and the procedures employed by the officer; and (7) the presence of any circumstances suggesting harassment or a deliberate effort to avoid the necessity of securing a warrant.

Rodriquez, 323 S.C. at 493, 476 S.E.2d 161.

In deciding whether to conduct a Terry stop, an officer may rely on information provided by other officers as well as any information known to the team of officers conducting the investigation. United States v. Navarrete-Barron, 192 F.3d 786 (8th Cir. 1999)(citing United States v. Robinson, 119 F.3d 663, 666-67 (8th Cir. 1997)). Terry stops are not limited to crimes currently being committed or about to be committed, but are also permissible for crimes that have already been committed. See Hensley, *supra*, referencing Terry, 392 U.S. at 26; State v. Wright, 416 S.C. 353, 785 S.E.2d 479 (Ct. App. 2016), *Geathers, J., concurring*. If police have a reasonable suspicion ground in specific and articulable facts, that a person they encounter was

involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion. Id. at 229.

Officer McGarry had reasonable articulable suspicion to conduct an investigative or Terry stop of Cottrell. Officer McGarry was aware Cottrell was a suspect in the shooting murder of Richard Hartman in Horry County. Cottrell, 376 S.C. 260, 657 S.E.2d 451, 454, n. 3, (*Cottrell I.*) (“We are confident that the victim’s acts are explained by his knowledge that appellant was a suspect in a murder case and therefore likely to be armed.” However, this information was not before the jury). Officer Guthinger had not heard back from Horry County regarding the Hartman murder investigation in approximately four (4) weeks. Officer Guthinger was aware Cottrell had an outstanding charge from New York for attempted murder. Officer Guthinger was aware he had arrested Cottrell on a previous occasion for PWID marijuana. Officer Guthinger could see Cottrell was with a white male associate [Halcomb], and Cottrell moved toward a “gold” or “champagne” colored Honda parked near to Halcomb’s vehicle, consistent with the request for information from Horry County regarding the Hartman murder. Officer McGarry requested Officer Guthinger identify the driver of the black car [Halcomb], consistent with the Horry County request for assistance in identifying “Red”. Officer McGarry was aware Cottrell and Halcomb were allegedly involved in the loan shark business, and he had investigated an alleged kidnapping in which Cottrell was at the residence of the alleged victim. When Officer McGarry informed Cottrell at *Dunkin Donuts* he was going to pat Cottrell down for weapons for officer safety, Cottrell stated no and turned and walked away quickly toward the “gold” or “champagne” colored Honda. Cottrell reached into his front waistband with his right hand as he quickly walked away from Officer McGarry. Cottrell, 376 S.C. 260, 657 S.E.2d 451, 454, n. 3. See Lesley, *supra* (Terry stop was justified where facts gave rise to reasonable suspicion that

defendant may have been involved in drive by shooting two days before); United States v. Brugal, 209 F.3d 353 (4th Cir. 1999)(after checking defendant's driver's license and rental agreement, officers had reasonable suspicion to further detain defendant who left interstate after apparently noticing drug checkpoint).

Here, the initial encounter was minimal. Officer McGarry approached Cottrell in a public place in a conversational tone. The encounter was not confrontational. Officer McGarry asked for Cottrell's identification and allowed him to retrieve it from a vehicle. Officer McGarry informed Cottrell of what he was going to do, run an NCIC check over the radio. Officer McGarry did not handcuff or restrain Cottrell as he requested the NCIC check for outstanding warrants over the radio. Officer Guthinger remained leaning against the wall of the store or eventually went to the Halcomb vehicle, so Cottrell was not surrounded by police. Officer Guthinger informed Cottrell he was going to pat him down for weapons. Officer McGarry did not shoot Cottrell when he walked away and refused to stop or freeze, but [re-holstered his firearm if you believe Diane Lawson] tried to control Cottrell's right hand which had moved into his front waistband.

Cottrell completely disregards the standard to which police officers are to be held in regards to reasonable suspicion. Indeed reasonable suspicion itself is a nontechnical, commonsense concept. Ornelas v. United States, 517 U.S. 690, 695, 116 S.Ct. 1657, 1661 (1996). It is not probable cause. The Supreme Court has explicitly advised against unrealistic second guessing of the actions of law enforcement in such situations; and furthermore, the question to be asked is not whether there is some alternative means but whether police were unreasonable not to pursue it if in fact such an alternative existed. United States v. Sharpe, 470 U.S. 675, 686-87, 105 S.Ct. 1568, 1575-76 (1985). Furthermore, "courts must give due weight

to common sense judgments reached by officers in light of their experience and training.” State v. Taylor, 401 S.C. 104, 113, 736 S.E.2d 663, 667 (2014).

Here, Officer McGarry had received information from the Horry County police that Cottrell was a suspect in a shooting murder; McGarry had had previous contact with Cottrell in which he had arrested him for a drug distribution related offense, McGarry was aware Cottrell had an outstanding charge for attempted murder in New York; and McGarry had previously investigated Cottrell for operation of a loan sharking business and possible kidnapping.³⁸ All of these facts together, when viewed as a common sense judgment reached by McGarry in light of his experience and training, readily rise to the level of reasonable suspicion justifying a brief stop to determine if there were any outstanding warrants on Cottrell. Terry, *supra*; Cottrell, *supra*.

As to Cottrell’s argument that Officer McGarry could not conduct a Terry stop of Cottrell at the *Dunkin Donuts* because Det. Johnson, who was investigating the Rick Hartman murder, did not have articulable suspicion to conduct a Terry stop on Cottrell, Cottrell is incorrect because Det. Johnson did have articulable suspicion to conduct a Terry stop of Cottrell.

The Investigation of Hartman’s murder up to December 29th

The State established at the pre-trial hearing before Judge Hyman that Det. Johnson had developed the following information in the Hartman murder at the time Officer McGarry approached Cottrell outside the *Dunkin Donuts*:

On the morning of Saturday, November 23, 2002, the body of Rick Hartman was discovered in his pick-up truck on a secluded road in Horry County. Hartman was still seated in

³⁸ Although the information of the outstanding attempted murder charge in New York and the incident involving Mr. and Mrs. Mangum was known to Officer McGarry, the State did not seek to introduce this before the jury so as to not prejudice Cottrell. The State limited the testimony before the jury to the fact that Officer McGarry was aware Cottrell was a suspect *in a shooting* in Horry County. Cottrell brought out in his opening statement it was a murder in Horry County.

the driver's seat and had been shot four (4) times by someone inside his truck. An empty gym bag was found next to Hartman on the truck seat. Hartman normally carried in this bag his money or drugs. Hartman died as a result of the gunshot wounds, specifically one (1) to the back of the head. (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-58).

Interviews with numerous named witnesses, who knew Hartman and were present at his residence after midnight on November 23rd, revealed that in those early morning hours Hartman made several phone calls to and received several calls **from a man that Hartman knew** in an attempt by Hartman to purchase drugs. During the calls, Hartman referred to the man on the other end of the line as **"buddy"** and also told the man that it was **"too cold for us to ride wave runners [jet skis] today."** In the last call, Hartman told the man that he [Hartman] would not come to his [the man's] home, but would "meet him half-way." Several witnesses informed police Hartman would not have left his home at that time of the morning unless it was to meet someone he trusted. Hartman then left his residence at approximately 4:00 a.m. in his truck to buy drugs and never returned. His body was discovered the next morning after daylight by a passing motorist, and police were called to the scene. (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-58).

Police discovered through interviewing several witnesses who knew Hartman, that Hartman had employed Cottrell as a driver and **as security** for his escort service [prostitution business], and **Cottrell regularly sold or supplied marijuana and cocaine to Hartman.** Police also discovered through interviewing a named witness that **Cottrell was one (1) of only four (4) people that Hartman rode jet skis with and Cottrell was one (1) of only two (2) males Hartman rode jet skis with.** The other three (3) individuals who had ridden jet skis with Hartman in the past were cooperating with police and giving police information and indicated

they were not involved in Hartman's murder. The other male individual Hartman had rode jet skis with, Ware Kimmell, was a bondsman and did not sell drugs to Hartman. Several witnesses also told police **Hartman trusted Cottrell**. (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-75).

Police discovered through their investigation, that Cottrell was not physically at Hartman's residence when the above described phone calls took place. However, Cottrell did live at several different residences in the Myrtle Beach area. (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-75).

Police also discovered through interviewing several witnesses who knew Hartman *and* Cottrell, that **Cottrell and Hartman had exchanged angry words in the days leading up to Hartman's murder, over Cottrell getting a woman employed by Hartman's escort service pregnant [not Amber Counts]**. Police discovered **there was an altercation between Hartman and Cottrell on the Thursday night before Hartman's murder** on early Saturday morning, because Cottrell and Amber Counts, one (1) of Hartman's escorts, had disappeared for an entire day of work without explanation. (R. 691-732; 945, Ex. 5, Sept. 8, 2014; R. 3919-58).

Police discovered through interviewing several different witnesses who knew Hartman, Cottrell, *and* Amber Counts that **Cottrell and Amber were seeing each other romantically** in the days leading up to Hartman's murder, and in fact **Amber was pregnant with Cottrell's child**. When police interviewed Amber the afternoon immediately following Hartman's murder, **Amber was attempting to move out and leave her residence, and Amber told police she did not have a boyfriend**. Police also discovered through interviewing another witness that Cottrell stayed with Amber the Saturday evening immediately following Hartman's murder. That same

day, Amber called another witness and told that witness that Cottrell had given her [Amber] an engagement ring.³⁹ (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-58).

Police also discovered through interviewing another witness that prior to Hartman's death **Hartman and Cottrell were discussing Cottrell and Halcomb purchasing a large amount or load of marijuana in Pennsylvania.** Hartman had even contacted this witness in an attempt to arrange contact for Cottrell and Halcomb with a marijuana supplier in Pennsylvania. Another witness informed police that **in the days leading up to Hartman's death, Cottrell came to Hartman's home, and Cottrell and Hartman discussed confidentially some sort of transaction involving large sums of money and amounts.** At the end of this conversation, Hartman and Cottrell shook hands and Cottrell left. (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-58).

Police also discovered through interviewing another witness, that Cottrell and Halcomb had come to Hartman's home on another occasion in the past, and **Cottrell and Halcomb were bragging about robbing drug dealers.** In this witness' presence, **Cottrell and Halcomb showed Hartman money they had "ripped off" from a drug dealer including \$8,000 in cash and the guns they used to commit the robbery.** (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-58).

Police learned that **Cottrell had been arrested in the last year for possession with intent to distribute (PWID) marijuana.** And, that **Halcomb had paid Cottrell's bond to get**

³⁹ It is noted in the police investigation report of the Hartman murder introduced at the pre-trial hearing, that prior to Officer McGarry's murder, Amber Counts repeatedly denied during the investigation of Hartman's murder that she had a boyfriend and never gave police Cottrell's name as a person who was connected with Hartman or could have committed his murder. The investigation report also notes police believed Amber Counts was being deceptive with them regarding Cottrell and her relationship to him because other named witnesses had informed police Amber was dating or seeing Cottrell romantically. (R. 945, Ex. 5, Sept. 8, 2014).

Cottrell out of jail on the PWID charge. Police further learned that **Cottrell was residing with Halcomb** at various residences. (R. 732-62, 3919-58).

Police also learned through interviews with witnesses that **Cottrell was known to carry a gun and was considered “scary” or “dangerous”** by several of the individuals involved in the escort service. These witnesses indicated they did not want to have anything to do with Cottrell and tried not to associate with or be around him. (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-58).

The record also shows police had zeroed in on Cottrell as a suspect because they were attempting to locate him to interview him, had photographed one (1) address at which he had resided, and had subpoenaed his phone records and were waiting on receipt of the same when Officer McGarry was murdered by Cottrell. (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-58).⁴⁰

As a result, Cottrell’s claim that Det. Johnson did not have articulable suspicion to conduct a brief investigative or Terry stop is unfounded. The investigation of the murder of Rick Hartman had determined Cottrell had the means [Cottrell carried a gun and Hartman was shot to death], motive [robbery or animosity with Hartman over escorts], and opportunity to murder Hartman [Cottrell was not at Hartman’s home when the phone calls were taking place luring Hartman to his death], and Cottrell was the person who lured Hartman to his death [Cottrell was the only male who rode jet skis with Hartman and also sold him drugs including cocaine]. Det. Johnson’s testimony would have only further strengthened the State’s case that Officer

⁴⁰These phone records eventually revealed it was Cottrell who Hartman was talking to before he disappeared from his home in his truck and was murdered at the secluded location.

McGarry's stop and attempted Terry pat down of Cottrell was lawful.⁴¹ As a result, Officer McGarry had reasonable articulable suspicion to conduct a Terry stop of Cottrell on the night of December 29, 2002, whenever that Terry stop formally began.

The Reasonableness of the Attempted Pat Down for Weapons

Officer McGarry also had more than sufficient reasonable articulable suspicion to suspect Cottrell of being armed at the time sufficient to conduct an attempted Terry pat down for weapons and thus was sufficiently justified in detaining Cottrell for the purposes of a pat-down search that never occurred.

When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, it would

⁴¹ It is accepted that under the collective knowledge doctrine an officer is justified in acting on the instructions of another officer so long as that officer has sufficient information to act as well. United States v. Massenburg, 654 F.3d 480, 492 (4th Cir. 2011); *Cf.* State v. Sullivan, 267 S.C. 610, 615, 230 S.E.2d 621, 623 (1976). Similarly when an officer conducts an arrest or seizure under the Fourth Amendment it is acceptable to consider the knowledge of the group as a whole and not just the knowledge of the initiating officer. United States v. Woods, 544 F.2d 242, 260 (6th Cir. 1976). *See also* United States v. Laughman, 618 F.2d 1067, 1072 fn. 3 (4th Cir. 1980). Where there is at least communication, regardless of the amount of information actually conveyed, a court can aggregate the knowledge of all officers involved in order to find reasonable suspicion. United States v. Ramirez, 473 F.3d 1026, 1032 (9th Cir. 2007); *see also* United States v. Terry, 400 F.3d 575, 581 (8th Cir. 2005); United States v. Edwards, 885 F.2d 377, 383 (7th Cir. 1989); United States v. Shareef, 100 F.3d 1491, 1504 & n. 6 (10th Cir. 1996); *contra* Massenburg, 654 F.3d at 495 (finding that for collective knowledge to apply the government must show that there is some form of direct communication between directing officer with sufficient information and arresting officer who does not possess sufficient information). Under either theory, termed by the 9th Circuit to be vertical (as in Massenburg) or horizontal (as in Ramirez), Officer McGarry actions were justified. Officer McGarry directly received from Lt. Prock information possessed by Det. Johnson *via* Lt. Daniels. Therefore, we can import fully the information that Det. Johnson had onto Officer McGarry that was passed by Lt. Prock; and, when this is combined with the information possessed by Officer McGarry himself, provides ample reasonable suspicion under the vertical (Massenburg) theory. Under the horizontal (Ramirez) theory this becomes even more apparent as we can impart the full information known to Det. Johnson, Lts. Daniels and Prock, and Officer McGarry to find reasonable suspicion. When all of these officers knowledge is combined all together Officer McGarry had more than sufficient reasonable suspicion with which to detain Cottrell.

appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. Terry v. Ohio, 392 U.S. 1, 24 (1968). The officer need not be absolutely certain the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief his safety or that of others was in danger. Id. “[A]nd in justifying the particular intrusion the police officer must be able to point to specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion... And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief that the action taken was appropriate’?” Terry, 392 U.S. at 21-22.

It is accepted that a police officer has the authority to search an individual for weapons where the officer has reason to believe the person is armed and dangerous. Khingratsaiphon, 352 S.C. at 69, 572 S.E.2d at 459 (*citing* Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338 (1979)). An officer “need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” Terry, 392 U.S. at 27.

The purpose of the pat-down search authorized by Terry is not to discover evidence of some crime, but instead to allow an officer to conduct his investigation without fear of being harmed. Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923 (1972). The present case is squarely one where “a reasonably prudent man in the circumstances was warranted in the belief that his safety or that of others was in danger.” Terry, *supra*.

Officer McGarry was confronting a person he knew was a suspect in a murder. The most recent data clearly shows that firearms are used in almost 69% of all homicides and of those deaths handguns account for 68% of those deaths.⁴² Under such circumstances, Officer McGarry was completely justified in having a reasonable suspicion that Cottrell was armed. Also where there is a nexus between the crime believed to have been committed and guns then this too will give rise to a reasonable suspicion of a suspect being armed. Several cases have previously recognized that certain classes of crimes will help give rise to a reasonable suspicion due to the “indisputable nexus” between these crimes and weapons. State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006)(*citations omitted*)(drug offenses have an indisputable nexus with guns); State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999)(officer was reasonably prudent in giving pat-down search to suspect in armed robbery, carjacking, and kidnapping he met on the street); State v. Abrams, 322 S.C. 286, 288, 471 S.E.2d 716, 717 (Ct. App. 1996) (per curiam) (police were justified in giving pat down search to suspect when they were investigating a civil disturbance, it was in a known drug area, and it was early in the morning).

Here, Officer McGarry encountered Cottrell while he was a suspect in a **shooting murder**, knew Cottrell had an outstanding charge for attempted murder from New York, had previously arrested Cottrell for drug crimes involving possession with intent to distribute, and had investigated Cottrell for a case of potential kidnapping. Cottrell was wearing a baggy football type jersey and baggy pants. As a result, Officer McGarry could not definitively tell if Cottrell was armed without conducting a pat down for officer safety. All of these factors together clearly show that Officer McGarry had several articulable facts to show that he

⁴² Murder Victims by Weapon, 2009-2013, Federal Bureau of Investigation, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2009-2013.xls

reasonably believed Cottrell was armed and therefore his *attempted* “pat down” of Cottrell for officer safety was reasonable and lawful. Cottrell was the one who had no right to refuse to comply with Officer McGarry’s attempted pat down.

Finally, the pat down did not even occur. Cottrell stated he was not going to let Officer McGarry pat him down, turned and quickly walked toward the Morgan car, and put his right hand in his front waistband area. Officer McGarry was clearly justified in attempting to control Cottrell’s right hand as Cottrell reached to where Cottrell could have hidden and actually did have hidden a loaded firearm.

Cottrell raises these issues in an interesting manner. He contends that his Fourth Amendment rights were violated not because inadmissible evidence was introduced, but instead because the jury was not allowed to hear Det. Johnson’s testimony. Simply put, this theory is “novel.” First, whether or not an investigative stop and attempted Terry pat down was unreasonable under the Fourth Amendment is not a matter for the jury in South Carolina, but instead is an issue typically determined by the trial court. *See State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000).⁴³ It must be noted here, Cottrell does not argue on appeal he should have been granted a directed verdict of not guilty of murder.

Second, Cottrell mistakes the question that this Court stated the jury must answer in the re-trial. The question was not the reasonableness of the initial detention or stop and attempted Terry pat down or whether McGarry had the right to pat down Cottrell, but whether the seizure or arrest of Cottrell after he refused to comply was unlawful in force or manner. State v. Cottrell, 376 S.C. 260, 265, 657 S.E.2d 451, 454 (2008) (*Cottrell I*). This issue was fully vetted

⁴³ In fact, many of the cases cited by Cottrell in his brief on this issue, deal with a remand to the trial judge to determine in a *pre-trial suppression hearing* whether the investigating officer had reasonable articulable suspicion to conduct a Terry stop, not the relevance and admissibility of this evidence before the jury. (See IBOA).

before the jury with testimony from numerous eyewitnesses from both the State and Cottrell regarding what occurred at the *Dunkin Donuts*, and included expert witnesses offered by both the State and Cottrell. The jury was also correctly charged in this regard on the law of murder, voluntary manslaughter, and self-defense. Cottrell's argument fails for the reasons above and for the fact that this argument has no case law supporting it that a defendant may ask a jury to decide on the reasonableness of the initial detention or stop and attempted Terry pat down.⁴⁴ Instead the argument seems merely to try to prop up Cottrell's argument that the exclusion of Det. Johnson's testimony violated his right to present a complete defense.⁴⁵

PART II: Right to Present a Complete Defense

Cottrell next contends that Judge Hyman's exclusion of Det. Johnson's testimony under SCRE 401, 402, & 403 violated his rights under the Fourteenth and/or the Sixth Amendment. "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, 126 S.Ct. 1727, 1731 (2006)(citations omitted). The right is designed to protect the weighty interests of the accused from arbitrary rules that are disproportionate to the function that they serve. Id. However, both state and federal rule makers have broad authority to create rules which exclude evidence from criminal trials. Nevada v.

⁴⁴ Respondent would note that this potentially means the issue is abandoned on appeal. State v. Porter, 389 S.C. 27, 35, 698 S.E.2d 237, 241 (Ct. App. 2010).

⁴⁵ To the extent that Cottrell's argument is somehow construed as challenging any of the trial judge's decisions as it relates to exclusion of physical evidence, the evidence would still be admissible under the inevitable discovery rule. Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1987). As Judge Hyman correctly ruled, once Cottrell produced a firearm, he committed a crime and could be arrested and searched. Similarly, once he shot Officer McGarry, attempted to murder Officer Guthinger and fled from police, the same principle applies. United States v. Sprinkle, 106 F.3d 613, 619 (4th Cir. 1997).

Jackson, 569 U.S. ___, 133 S.Ct. 1990, 1992 (2013) (per curiam). “Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence.” Id.

Here Cottrell does not challenge that Rules 401, 402, and 403, SCRE, are *per se* unreasonable but instead that as applied to him they violate his rights. This is squarely against the precedent where the Supreme Court has found that a state rule of evidence violates a defendant’s right to present a complete defense. *E.g.* Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973)(State’s rule that defendant could not impeach his own witness was a violation of due process, state did not attempt to defend rule or explain its rationale); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920 (1967)(rule cannot be rationally defended); Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704 (1987)(rule prohibiting all hypnotically refreshed testimony was arbitrary). Under these precedents, the whole rule is what denies the defendant a right to a complete defense not an unfavorable application of a longstanding rule to the defendant. “The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” Illinois v. Taylor, 484 U.S. 400, 410, 108 S.Ct. 646, 653 (1988).

Here Judge Hyman ruled that the evidence was irrelevant to the matter at hand, i.e. what objective reasonable suspicion did Officer McGarry have. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. “The relevance of evidence is an issue within the trial judge’s discretion.” State v. Gillian, 373 S.C. 601, 612, 646 S.E.2d 872, 878 (2007). Here Judge Hyman did not abuse his discretion because the testimony of Det. Johnson was irrelevant to the

reasonable suspicion held by Officer McGarry. Both Lt. Prock and Officer Guthinger testified to the reasonable suspicion Officer McGarry had. “A defendant’s right to present a defense is not absolute: criminal defendants do not have a right to present evidence that the district court, in its discretion, deems irrelevant or immaterial.” United States v. Prince-Oyibo, 320 F.3d 494, 501 (4th Cir. 2003).

Secondly, even if the evidence was relevant to the matter at hand, Judge Hyman was still correct in excluding the evidence under Rule 403, SCRE. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE. A trial judge in South Carolina has wide latitude of discretion in the admission of evidence. State v. Torres, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). “The appellate court reviews a trial judge’s ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.” Id. at 625, 703 S.E.2d at 230. “A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” Jamison v. Ford Motor Co., 373 S.C. 248, 269, 644 S.E.2d 755, 766 (Ct. App. 2007), *cert. dismissed*.

Here Judge Hyman denied the introduction of Det. Johnson’s testimony for several reasons, including: the testimony would have opened up a “mini-trial” on the murder Cottrell was suspected of committing, which would have misled and confused the jury, and the introduction of Det. Johnson’s testimony would have had a substantially outweighed prejudicial effect on Cottrell. (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014). These reasons are amply supported through an examination of the whole record, were clearly within the discretion of the

trial court, and therefore cannot be a basis for a claim that Cottrell's right to present a complete defense were violated. *See State v. McGrady*, 232 N.C. App. 95, 106, 753 S.E.2d 361, 370 (N.C. App. 2014)(in context of N.C. R. Evid. 702, finding the trial court's exclusion was within the bounds of the rule and thus did not violate defendant's right to present a defense).

What Judge Hyman prevented from occurring was substantial undue prejudice to Cottrell from the jury hearing in the guilt phase Cottrell's past criminal behavior and bad acts including the following:

- (1) Cottrell was a security or body guard for an illegal prostitution ring;
- (2) Cottrell was also a driver for the illegal prostitution ring;
- (3) Cottrell was known to carry a gun;
- (4) Cottrell was considered to be "a scary individual" by people associated with the escort service who did not want to associate with Cottrell;
- (5) Cottrell had gotten two (2) of the escorts [prostitutes] pregnant;
- (6) Cottrell "beat up" the first prostitute he got pregnant, Lindsey;
- (7) Cottrell and Halcomb had bragged to Hartman they had robbed someone and showed Hartman the cash and guns they had stolen from the individual;
- (8) Cottrell provided Hartman with both cocaine and marijuana;
- (9) Cottrell also supplied cocaine to Michelle Hill another employee of the escort business in the past;
- (10) Cottrell and Halcomb were going to Pennsylvania to purchase a load of marijuana with the assistance of Hartman;
- (11) Hartman had allowed Cottrell to drive his truck to New Jersey to pick up large amounts of drugs;
- (12) Cottrell had previously been arrested by McGarry for possession with intent to distribute (PWID) marijuana;⁴⁶

⁴⁶ The State did not introduce the PWID marijuana charge before the jury, only that Officer McGarry had stopped Cottrell and written some "tickets."

- (13) McGarry was aware Cottrell had an outstanding criminal charge from New York for attempted murder;
- (14) McGarry had another previous run in with Cottrell involving a possible illegal loan-shark business and the possible kidnapping of husband and wife debtors;
- (15) Cottrell's driver's license had been suspended;
- (16) Cottrell and Rick Hartman had argued over Cottrell getting one (1) prostitute pregnant and taking another prostitute (Amber) away from her work on Thursday without explanation. Hartman was murdered early Saturday morning.
- (17) Hartman was attempting to purchase drugs the night of his murder; he knew the individual he was talking to over the phone; he and the individual rode wave runners or jet skis together, and the only other male individual who rode jet skis with Hartman did not supply Hartman with drugs, only Cottrell;⁴⁷
- (18) And, finally, Hartman was found dead just a few hours later shot multiple times by someone he met on a secluded road in Horry County and the shooter had been seated in the passenger seat of Hartman's truck when the murder was committed.

(R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-58).

And, as previously stated, whether Officer McGarry acted in an impermissibly aggressive manner in seizing or arresting Cottrell after Cottrell walked away, Cottrell, *supra*, was fully vetted before the jury. Both the State and Cottrell called numerous eyewitnesses and expert witnesses to what occurred at the *Dunkin Donuts* on December 29, 2001. And, the jury was appropriately charged on the law regarding murder, voluntary manslaughter, and self-defense.

Also here, Cottrell was allowed to cross-examine Lt. Prock as to the information relayed to Officer McGarry prior to the incident. Essentially, Cottrell was able to elicit most of what he

⁴⁷ The fallacy of Cottrell's argument is revealed in the transcript of the argument below on this issue where defense counsel sought to introduce only limited facts on the Hartman murder investigation and what police knew and limit the State on what it could elicit from Det. Johnson on cross-examination regarding the same, i.e. that Hartman and Cottrell rode jet skis together but the jury should not hear Cottrell was the only person who rode jet skis with Hartman and also sold Hartman drugs including cocaine. (R. 3589-98). Whether police have reasonable articulable facts to conduct an investigatory or Terry stop, depends on the totality of the circumstances available to the investigating officers. Arvizu, 534 U.S. 266, 122 S.Ct. 744; Sokolow, 490 U.S. 1, 109 S.Ct. 1581; Cortez, 449 U.S. 411, 101 S.Ct. 690; Lesley, 326 S.C. 641, 486 S.E.2d 276.

asked for from Lt. Prock. Where a defendant has the ability to cross-examine a witness and impeach a witness his rights are not violated, even if the defendant is unable to produce all of the testimony that they wish. People v. Masters, 62 Cal.4th 1019, 1079, 365 P.3d 861, 904, 199 Cal.Rptr.3d 85, 136 (2016). A routine application of evidentiary rules does nothing to implicate a criminal defendant's constitutional rights. Id. (citing People v. Jones, 57 Cal.4th 899, 957, 306 P.3d 1136, 161 Cal.Rptr.3d 295 (2013)). Here the trial court correctly applied Rule 403 to the testimony in question. There is ample reasoning to support the trial court's decision and no error.

Further, Judge Hyman ruled Cottrell could call any witness, including Det. Johnson, to contradict or impeach any testimony of Lt. Prock, if she testified to anything Cottrell believed was not true. Cottrell chose not to call Det. Johnson to contradict or impeach the testimony of Prock. (R. 3689-90).

Even should there be some error in the denial of the evidence, it should be analyzed for harmlessness under either the rules of evidence or constitutional claims. Under the rules of evidence, an abuse of discretion must result in prejudice to the appealing party to warrant reversal. State v. Black, 400 S.C. 10, 18, 732 S.E.2d 880, 885 (2012). Likewise, most errors which effect constitutional rights are reviewed for harmlessness. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013). Very few rights have been recognized to be so compelling as to fundamentally create error in the whole structure of the trial. Id. The right to present a complete defense is not one such right. Id., (compiling rights which mandate automatic reversal). Since the evidence to be presented was cumulative to the testimony of Lt. Prock, there is no reversible error. Further, there can be no reversible error where the testimony would have shown Horry County did have reasonable articulable suspicion to conduct an investigative detention or

stop and attempted Terry pat down for weapons, and Det. Johnson's testimony would have resulted in a wealth of evidence extremely prejudicial to Cottrell in the guilt phase.⁴⁸

Cottrell also contends the exclusion of the testimony of Det. Johnson violated his right to counsel as mandated by the Sixth Amendment. "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The right to counsel includes the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). "The government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Id. However, this right does not secure for a defendant the right to call whomever he wishes or to direct the proceedings of the trial as he believes best through the actions of counsel. As the Supreme Court explicitly recognized in Strickland "the judge must exert substantial control over the proceedings" in order that "truth and fairness are not...sacrificed." 466 U.S. at 87, 104 S.Ct. at 1335. The purpose of the right to effective assistance of counsel is to allow for tactical decisions to be made and strategies to be formulated. Id. at 88, 104 S.Ct. at 1335. A defendant's right to counsel grows out of the fact that: "He is unfamiliar with the rules of evidence" and "Left without the aid of counsel he may be...convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64 (1932). Contrary to Cottrell's assertion, the Sixth Amendment does not serve the function he assigns it, but is instead intended to protect Cottrell from the very same kind of evidence which he himself seeks

⁴⁸ The State called Det. Johnson in the penalty phase and introduced almost all of this evidence as aggravating character evidence, and the State called other witnesses in the penalty phase who established Cottrell murdered Rick Hartman. (R. 3919-68, 3971-4025, 4066-73, 3900-11).

to introduce. Cottrell was not denied the effective assistance of counsel, and there is no error here.

PART III: Illegal Arrest as Provocation for Manslaughter

This as a portion of Cottrell's case is solely based on the law of South Carolina. Manslaughter is defined as "the unlawful killing of another without malice." S.C. Code Ann. § 16-3-40 (2003). Voluntary manslaughter is a lesser included offense of murder. State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Id. Under South Carolina law an unlawful arrest or a lawful arrest accomplished with unlawful force may render the killing of a law enforcement officer to only be manslaughter. Cottrell, 376 S.C. at 264, 657 S.E.2d at 453. The use of unlawful violence or attempting an unlawful arrest is, at common law, sufficient provocation to potentially render the crime manslaughter. Rex v. Patience (1837) 173 Eng. Rep. 338, 7 Carrington and Payne 775, 776; *see also* Rex v. Mary Adey (1779) 168 Eng. Rep. 205, 207, 1 Leach 206, 209-10. Generally, whether or not a defendant's response to an unlawful arrest was sufficiently justified is a question for the jury. State v. McGowan, 347 S.C. 618, 624, 557 S.E.2d 657, 660 (2001). Likewise whether or not the underlying arrest was also lawful is again, generally, a question for the jury. Id. at 626, 557 S.E.2d at 662. However, as the South Carolina Supreme Court has pointed out, the fact that an arrest is unlawful does not *per se* reduce any slaying to manslaughter. "'The killing *may* be only manslaughter where a legal arrest is attempted in an unlawful manner, as when the passion of the accused is aroused by the employment of unnecessary violence.'" State v. Linder, 276 S.C. 304, 308, 278 S.E.2d 335, 337 (1981)(*quoting* 40 C.J.S. Homicide § 50a) (emphasis added).

However, the law in this country also recognizes that where a person kills a peace officer in such a barbarous or brutal manner while resisting arrest that it appears that the killing was done not solely to resist an unlawful arrest but to instead be the “execution of a wicked or malignant purpose to take life unnecessarily” this is murder. Brown v. United States, 159 U.S. 100, 102, 16 S.Ct. 29, 30 (1895). Furthermore, evidence of an express malice towards the deceased will also remove the case from manslaughter to murder. Rafferty v. People, 72 Ill. 37, 41 (1874). Where a defendant uses a weapon unnecessarily in the first instance this would render the one resisting arrest the aggressor and thus remove the case from one of manslaughter. See Miller v. State, 31 Tex.Crim. 609, 638, 21 S.W. 925, 927 (1893). Even should there be sufficient legal provocation from an unlawful arrest, the defendant still must have acted under the heat of passion, “the willful slayer (sic) cannot extenuate his cool, deliberate act of killing by the pretence (sic) that he had a right to be in a passion.” Galvin v. State, 46 Tenn. 283, 291 (1869); accord State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). Where a defendant kills a peace officer attempting an illegal arrest after having regained his freedom or immediately takes flight after the killing serves as indication of malice. Briggs v. Commonwealth, 82 Va. 554, 566 (1886).

Under the previous authorities, overwhelming evidence has been presented showing Cottrell acted with malice and therefore any error in the failure of Det. Johnson to testify was harmless. Det. Johnson’s testimony pre-trial and in the sentencing phase shows Horry County police had reasonable articulable suspicion to conduct a Terry stop or pat down on Cottrell. Further, the testimony of the guilt phase establishes Officer McGarry had reasonable suspicion to conduct a Terry stop and pat down. Here it was clear that Cottrell took the life of Officer McGarry unnecessarily.

Officer McGarry's sole purpose was to run a warrant check on Cottrell and give Cottrell a pat down search for weapons that may be used to harm him or Officer Guthinger. Cottrell's reaction in walking away, reaching in his waistband, refusing to show his hands, and fighting with and eventually pulling an unlawful firearm and shooting the officer in the face were grossly disproportionate to the threatened injury.

The undisputed evidence at trial was Cottrell fired the first (1st) shot, directly in Officer McGarry's face, even from Cottrell's own eyewitness, Diane Lawson. Where the force is disproportionate to the threatened injury, the killing cannot be manslaughter. Miller, 31 Tex.Crim. at 638. The prior interactions between Cottrell and the officer, along with Cottrell accusing the officer of "harassing" him, and stating to police later that he was angry with the officer, were clearly viewed by the jury as a previously formed sense of malice as discussed in Rafferty, *supra*. The evidence shows Cottrell did not lash out at Officer McGarry in a sudden heat of passion, but to avoid arrest for an unlawful firearm he had in his possession [his waistband] which he could not lawfully possess, to avoid discovery of the murder weapon in the Love murder which was located in Morgan's car, and after murdering McGarry, Cottrell moved quickly to fire on his partner. Later, while cornered, he attempted to lure the partner into a trap by pretending to surrender and then resumed firing. This does not show that Cottrell was moved by any sudden heat of passion, but to escape arrest. Instead it shows Cottrell was completely in control of his faculties at all times.

Under the principles laid down in Gavin and Starnes, this does not tend to show the crime to be manslaughter. Finally, Cottrell also continued to shoot at the partner of Officer McGarry even after he had broken free of the detention and immediately attempted flight from the scene. This, as in Briggs, is evidence from which the jury could infer malice either express or implied.

Cottrell also during his initial flight attempted to murder Officer McGarry's partner and shot a large volume of rounds indiscriminately next to a public place and along a major US highway. All of the evidence here easily allowed the jury to see that this barbarous crime was committed not in state of passion, but with clear malice.

Cottrell does not even attempt to say how things would have been different in this context had Det. Johnson testified. Instead, he vaguely asserts that the jury may have possibly thought the original stop and attempted Terry pat down was unreasonable if they had heard it. Reviewing this case for prejudicial error, it is clear from the overwhelming evidence of malice the jury would find this was murder regardless of Det. Johnson's testimony. In fact, the testimony from Det. Johnson would make malice more evident. Therefore, Cottrell's entire third contention, even should the trial court have committed error, is harmless and does not warrant reversal.

ARGUMENT IV.

Judge Hyman did not err in refusing to instruct the jury an incorrect statement of the law that it could not infer malice from the use of a deadly weapon. Pursuant to State v. Belcher, although it is now improper for a trial judge to instruct on the inference of malice through the use of a deadly weapon under certain circumstances, a prosecutor may argue that the use of a deadly weapon may show the existence of malice and a jury may base its conclusion about malice on the particular use of a deadly weapon in the individual case.

The request by the defense in this case for an instruction that would *preclude* the jury from determining the existence of malice from the use of a deadly weapon was an incorrect statement of law and an improper charge on the facts. The defense made a request that the jury be told “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 trial judge properly denied the request. (R. 3728, ll. 2-14). Judge Hyman found that “the jury has the right to make that inference from the evidence if the jury chooses to do so.” Judge Hyman correctly opined that “I don’t think that we can tell the jury that they cannot make that assumption or inference from the totality of the circumstances involved in the case.” *Id.* The determination is completely supported by this Court’s landmark decision in State v. Belcher, 385 S.C. 597, 612, n. 9, 685 S.E.2d 802, 810, n. 9 (2009). There, the Court acknowledged that the use of a deadly weapon may be evidence of the existence of malice in footnote 9:

9 *The standard implied malice charge remains valid, as does the general permissive inference instruction: “If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.” In addition, we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard. It is axiomatic that some matters appropriate for jury argument are not proper for charging. “Do jurors need the*

court's permission to infer something? The answer is, of course not.” Bruce A. Antkowiak, The Art of Malice, 60 Rutgers L. Rev. 435, 476 (2008).

State v. Belcher, 385 S.C. 597, 612, n.9, 685 S.E.2d 802, 810, n. 9 (2009). The trial court was therefore required to deny the request for the instruction because it was an incorrect instruction on the law, as well as the facts. The incorrect request turns reality on its head by requiring that malice is never and cannot be shown by the use of a deadly weapon. Belcher clearly holds just the opposite.

What Occurred Below

At the close of the guilt phase, Cottrell did not request that Judge Hyman remove the permissive inference of malice from the use of a deadly weapon as required by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), but instead requested that Judge Hyman specifically instruct the jury they could not infer malice from the use of a deadly weapon. Judge Hyman appropriately removed the permissive inference of malice from the use of a deadly weapon as required by Belcher, but declined the specific request of Cottrell. (R. 3727-28). Thereafter, Judge Hyman properly charged the jury on malice. (R. 3838-62).

The Issue Raised on Appeal

Cottrell *alleges* that pursuant to Belcher, 385 S.C. 597, 685 S.E.2d 802, Judge Hyman should have specifically instructed the jury at the close of the guilt phase that **it could not infer malice from the use of a deadly weapon**. Judge Hyman appropriately declined the request, as Cottrell was attempting and is still attempting to stand Belcher on its head. Id. (R. 3727-28).

Standard of Review

“‘[T]he trial court is required to charge only the current and correct law of South Carolina.’” State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)(alteration in original)(*quoting* Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)); State v.

Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016). This court will not reverse a trial court's decision to refuse a specific request to charge unless the trial court committed an error of law. See State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 421–22 (2011) (“An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion.”); State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007) (“An abuse of discretion occurs when the trial court's ruling is based on an error of law....”). The trial court is required to charge the correct law applicable to the case. State v. Mattison, 388 S.C. 469, 478–79, 697 S.E.2d 578, 583 (2010); State v. Burkhardt, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). When a party requests the trial court charge a correct and applicable principle of law, the court must charge it. Brandt, 393 S.C. at 549, 713 S.E.2d at 603. However, the court is not required to use any particular language in explaining the principle. *Id.*; Mattison, 388 S.C. at 479, 697 S.E.2d at 583; Burkhardt, 350 S.C. at 261, 565 S.E.2d at 303. When reviewing a challenge to a trial court's refusal to use the specific language in a request to charge, an appellate court must consider the charge as a whole in evaluating whether the trial court charged the correct law applicable to the case. Brandt, 393 S.C. at 549, 713 S.E.2d at 603; Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011). Therefore, there is no error of law in refusing to give a specific request to charge where the charge requested is an incorrect statement of law.

Judge Hyman properly declined Cottrell’s requested incorrect charge on the law and facts.

In Belcher, *supra*, this Court held the trial judge should not charge or instruct the jury on *the permissive inference of malice that arises from the use of a deadly weapon* “where evidence is presented that would reduce, mitigate, excuse or justify a homicide ...caused by the use of a deadly weapon,” as the charge was confusing and a charge on the facts. Belcher, 385 S.C. at 612, 685 S.E.2d at 810. See also State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). In Belcher,

this Court specifically held that **the State was still free to argue the inference of malice from a deadly weapon**, and the defense was free to argue the absence of malice. Belcher, 385 S.C. at 612, n. 9, 685 S.E.2d at 810 n. 9. It was the permissive inference of malice *jury charge or instruction* that was prohibited. Belcher, *supra*.

Below, Judge Hyman, following this Court's holding in Belcher, appropriately **removed the permissive inference of malice from a deadly weapon instruction from his jury charge** in this case. (R. 3727-28; 3838-62). The prohibited charge is contained nowhere in Judge Hyman's instructions to the jury. (R. 3838-62). However, Judge Hyman would not charge the jury as Cottrell requested because Cottrell's request was not the holding in Belcher or the law. (R. 3727-28; 3838-62).

Judge Hyman's refusal to instruct the jury as Cottrell requested was correct and was not an abuse of discretion. This Court did not hold in Belcher, as Cottrell requested below, that when the defendant offers evidence excusing the crime or reducing the crime from murder to some lesser included offense, the Court was to instruct the jury **it could not infer malice from the use of a deadly weapon**. Belcher, *supra*; Stanko, *supra*. To the contrary, Belcher allowed that the State was still free to argue the inference of malice from a deadly weapon and the defense was free to argue the absence of malice from the use of a deadly weapon alone. Id. More importantly, the jury was allowed to consider all the evidence, including the use of a deadly weapon to determine whether malice existed as a matter of law.

As a result, the State properly argued in its guilt phase closing argument the jury could find malice from the use of a deadly weapon. (R. 3797-99, l. 22). Judge Hyman correctly denied Cottrell's specific request. Belcher, 385 S.C. at 612, 685 S.E.2d at 810. Judge Hyman correctly

charged malice in compliance with Belcher. (R. 3838-62). This appellate ground has no merit and must be dismissed.

ARGUMENT V.

Judge Hyman did not err in not fully disclosing the premature actual numerical split contained in a note sent to Judge Hyman by the jury as the jury did not indicate it was hopelessly deadlocked after only two (2) hours of deliberation and Judge Hyman did not give the jury an Allen charge. The trial court's paraphrasing of the note leaving out the actual split gave defense counsel a meaningful opportunity to address the issues presented by the note.

Cottrell alleges on appeal that Judge Hyman should have disclosed the exact numerical split to him, mistakenly relying on Tucker v. Catoe, 346 S.C. 383, 552 S.E.2d 712 (2001). He claims that because Judge Hyman did not disclose the exact numerical split and alignment he is entitled to automatic vacation of the death sentence and a new sentencing proceeding. Cottrell is wrong. A new sentencing proceeding is not warranted under these circumstances. See Youmans v. State, 608 S.E.2d 300 (Ga. Ct. App. 2004) (Error, if any, in trial court's failure to disclose exact numerical count showing exact split of juror's votes during deliberations from note jury sent to judge was harmless; although defendant points to fact that defense counsel stated that depending on what specific jury vote was, he would probably have asked court to recharge on reasonable doubt, counsel did ask for recharge, and trial court refused on grounds that there was no suggestion by jury they were confused as to concept of reasonable doubt, and defendant did not assign error to trial court's refusal to recharge); United States v. Robinson, 560 F.2d 507, 511-21(2d Cir.1977)(en banc)(affirming where court revealed existence of note and its general contents but did not reveal the precise division indicated); Id. at 524 (Oakes, J., concurring) ("The trial court here should have revealed to counsel the substance of the juror's note, without disclosing ... the jury vote." (emphasis added)); United States v. Henry, 325 F.3d 93, 106 (2d Cir. 2003)(the failure to disclose the existence and nature of a jury split does not necessarily constitute an abuse of discretion); Johnson v. United States, 840 A.2d 1277 (D.C. 2004)(trial court's failure to disclose a jury note to counsel, which revealed jury's numerical division, did not

prejudice defendant); United States v. Warren, 594 F.2d 1046 (5th Cir. 1979)(Although as a general rule, district court should disclose to parties the contents of jurors' notes, court should not disclose the numerical division of jury because of threat of coercion during jury deliberations). Based upon the information in the note revealed to counsel, counsel had a meaningful opportunity to address the note and the trial court's response to the note. A new sentencing proceeding is not required.

What Occurred Below

After the jury had deliberated about two (2) hours on its sentencing recommendation, the jury sent Judge Hyman a note stating as follows:

"Eleven jurors are for the death penalty; 1 juror is for life. What is the next step?"

[Signed] Forelady

(R. 4479, Court's Ex. 20 & See R. 4370, ll. 15-19; 4384-86).

Judge Hyman informed the Solicitor and Cottrell and his attorneys of the note and its general contents but did not indicate the actual numerical split or alignment, stating to both parties as follows:

THE COURT: Okay, I have a note from the jury, and it improperly, in my view says, "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, ll. 15-21). The following then took place on the record:

[THE COURT:] They have only been deliberating - - has it been two hours?

MR. RICHARDSON: I don't think so.

MS. NORRIS: I think it's been right at two hours, your Honor.

THE COURT: What I want to do at this juncture is I don't want to give an Allen, charge, and I understand this would - - if it was Allen charge time, it would require a specially crafted Allen charge.

(Mr. Hixon [Deputy Solicitor] entered the courtroom.)

THE COURT: And I'm aware of the case law that regards that. I simply would - - I think that it would be appropriate to send a note back and ask them to continue their deliberations and to refrain from telling me what their split is in the future.

MS. NORRIS: 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.

THE COURT: I can assure you that under Tucker, any Allen charge I give will not focus in on the majority or the minority. It will be an even-handed charge. I am aware of Tucker, also the more recent case, the '99 case of Hughes, the Hughes case as well. I don't think it's Allen charge time now. I think this jury should just be told - - the question was: "What's the next step?" Period.

MS. NORRIS: All right. Your Honor, if we are just going to send them back and ask them to deliberate longer, I would also ask that they be told that if they want an over-night recess and to come back in the morning, that they can do that at any time.

THE COURT: No. It's 5:40, and they have been deliberating less than two hours.

MS. NORRIS: But they've also had a really long day, your Honor. I'm not saying let's send them home. Just make it clear to them that it's up to them if they want to take an overnight recess in the middle.

THE COURT: No. I don't - - they're not to that point. I think they will certainly let us know.

But right now I am just going to send a note - - well, I can - - I'm going to send a note back. "Continue with your deliberations."

They have not told me that they are hopelessly deadlocked or even deadlocked. They just told me what the vote is, and I will advise them not to tell me what it is in the future. What if I do this: "Please continue your deliberations. If you become hopelessly deadlocked, advise me of that fact"?

MR HIXSON: I think there's some concerns on the "hopelessly deadlocked" language. I don't think we can inject that at all. I think it's. "Please continue deliberation," or that becomes an Allen charge is the concern.

THE COURT: And that does give me some concern.

MS. NORRIS: 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.

MR. HIXON: They have to - - it has to be an unequivocal indication that they are deadlocked, and that is not what that is. And for the Court to inject that in there is improper.

So I think to continue deliberations is the appropriate response to the form of that question.

THE COURT: "Please continue your deliberations. Do not advise of the verdict count on future notes to the Court." That is all that I am going to send back to them at this juncture. Okay?

MR. RICHARDSON: Thank you, your Honor.

MS. NORRIS: Your honor, just please note our objection. Thank you, sir.

(WHEREUPON, Court's Exhibit 20 was marked for identification)

(Court in recess, pending verdict, from 5:46 p.m. until 6:31 p.m.)

(R. 4370, l. 15 – 4373, l. 24).

Approximately forty-five (45) minutes later, Judge Hyman re-took the bench and informed the parties as follows:

THE COURT: The Court is inquiring as to counsel, it's 6:30, and I want to send note back and inquire as to whether they jury would like to have dinner, would like for us to order dinner.

MR. McGUIRE: Or go home.

THE COURT: Jimmy, do you have any objection to me just sending a note back saying, "Would you like for us to order dinner?"

MR. RICHARDSON: Not a bit in the world.

THE COURT: Heather, do a note, if you would.

THE CLERK: Yes, sir.

THE COURT: "Madame Forelady, would you like for us to order dinner?"

(WHEREUPON, an off-the-record discussion was held.)

THE COURT: Jimmy, we'll just do whatever they like. We don't need to bring them back in, do we? We'll just order it.

MR. RICHARDSON: Yes, sir.

(Court in recess, pending verdict, from 6:32 p.m. until 7:41 p.m.).

(R. 4373, l. 25 – 4374, l. 20). The jury did not wish to order dinner. At 7:41 p.m., Judge Hyman re-took the bench and the following took place:

THE COURT: I see we have everyone in the courtroom. We have the defendant, his counsel: we have the attorneys for the State. Let me announce that I have a note from the foreman of the jury. It says they have reached a verdict. We will receive the jury into the courtroom in just a moment. Madam Court Reporter, would you mark that note also.

(WHEREUPON, Court's Exhibit 21 was marked for identification).

(R. 4374, l. 21 – 4375, l. 6). The jury then returned to the courtroom and their unanimous sentencing recommendation was received. (R. 4375-78).

Judge Hyman did not err or commit reversible error

Because the jury did not indicate that it was deadlocked or hopelessly deadlocked, and had only been deliberating two (2) hours, Judge Hyman informed counsel he was going to send a note back to the jury and sent the jury a note stating: "Please continue your deliberations. Do not advise of the verdict count on future notes to the Court." (R. 4373, Court's Ex 20). Judge Hyman did not give the jury an Allen⁴⁹ charge. (R. 4370-73). He indicated that he would give a modified Allen charge⁵⁰ if the jury indicated they were deadlocked or hopelessly deadlocked, but that charge would be balanced as required by Tucker v. Catoe, 346 S.C. 383, 552 S.E.2d 712 (2001), and State v. Hughes, 336 S.E.2d 585 (1999). (R. 4370-73). After receiving the note back from Judge Hyman, the jury continued its deliberations for approximately one (1) hour and then notified Judge Hyman that they had reached a unanimous verdict on the recommendation of sentence. (R. 4370-73).

Cottrell is wrong because what occurred in Tucker, *supra* did not occur in this case. In Tucker, *supra*, the jury informed the trial judge it was deadlocked or hopelessly deadlocked and gave its numerical split, and the trial court gave the jury a modified Allen charge that specifically

⁴⁹ Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 (1896).

⁵⁰ See Lowenfeld v. Phelps, 484 U.S. 231, 108 S.Ct. 546 (1988); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990); State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982).

targeted the minority juror. Id. In the present case, the jury did not indicate that it was deadlocked or even hopelessly deadlocked as in Tucker, and Judge Hyman did not indicate he was going to give an Allen charge nor did he give an Allen charge. (R. 4370-73).

The Appellant relies upon State v. Tremblay, 820 A.2d 571, 575-576 (Me. 2003). In Tremblay, the Maine court found error in the trial court's failure to reveal the numerical division revealed in the jury note he received to counsel. The Maine court relied upon United States v. Maraj, 947 F.2d 520, 525 (1st Cir. 1991), like Appellant, to support its conclusion that the court must apprise counsel of the numerical standing so that counsel may "respond to the exigencies of the moment." The Maine court opined that without knowledge of the jury's numerical split, Tremblay held less than all the facts disclosed to the court and, therefore, was not afforded an opportunity to be adequately heard before the court responded to the inquiry-a critical stage in the proceedings, citing Rogers v. United States, 422 U.S. 35, at 39, 95 S.Ct. 2091 (1975) (holding trial court committed prejudicial error when it answered a jury inquiry during deliberations without the defendant's knowledge or presence).

However, the failure to disclose the numerical split was found in Tremblay to be harmless error. A trial court's error in failing to reveal the existence or contents of a jury note to counsel does not require reversal if the error is harmless. *E.g.*, United States v. Parent, 954 F.2d 23, 25 (1st Cir.1992); see 3A Charles Alan Wright, Federal Practice and Procedure § 724, at 30 (2d ed.1982) (stating a rule that does not require a showing of prejudice to the defendant "goes too far"). Similarly, the Court in Maraj affirmed the conviction, finding the nondisclosure harmless. Maraj, 947 F.2d at 526. The Seventh Circuit, in a thoughtful disquisition on the subject, had also ruled that a court's error in failing to disclose the contents of a jury's note to counsel, without more, is not an error of constitutional magnitude. *See* United States v. Widgery,

778 F.2d 325, 329–30 (7th Cir.1985); *see also* Krische v. Smith, 662 F.2d 177, 178–79 (2d Cir.1981).

When evaluating whether a defendant suffered prejudice in this context, courts look to the nature of the jury's inquiry and the court's subsequent supplemental instruction. *See, e.g., United States v. Coffman*, 94 F.3d 330, 335-36 (7th Cir.1996)(observing the court's failure to inform counsel regarding the jury note, indicating impasse, before issuing a further instruction was harmless even though the instruction told the jury to keep deliberating); United States v. Blackmon, 839 F.2d 900, 915 (2d Cir.1988)(holding no prejudice to the defendant when the jury note informed the court “one juror cannot work past 6:30,” the court gave an ex parte response urging the jury to continue deliberating, and the jury returned a guilty verdict within twenty-five minutes).

As in Tremblay, if error, it was harmless. The attorneys were given the substance of the note that there was a split among the jurors on the sentence after only two hours of deliberation. The court gave counsel the opportunity to suggest a response. The trial court upon receipt did not issue a “deadlock busting” instruction. The instruction given was within the bounds of discretion because the court opined after that brief time that it had not been a reasonable deliberation under the facts or the length of the trial.

Because the jury had only been deliberating for two (2) hours and did not indicate it was deadlocked or hopelessly deadlocked, Judge Hyman merely properly instructed the jury to continue its deliberations *and* in the future not to inform him of the numerical split, whatever the split was. (R. 4370-73). Further, Judge Hyman stated on the record that if after further deliberations the jury notified him it could not reach a unanimous verdict or was hopelessly deadlocked, then and only then would he give them a modified Allen charge. And, when he did

give them a modified Allen charge, it would be fair and balanced as to the majority and minority jurors as required by Hughes, *supra* and Tucker, *supra*. (R. 4370-73; see also 4384-86). Thereafter, the jury never notified Judge Hyman it was deadlocked or hopelessly deadlocked; Judge Hyman never gave an Allen charge of any kind, and the jury returned with a unanimous sentencing recommendation in about one (1) hour. (R. 4374-78; 4385, l. 13 – 4386, l. 4). There was no coercive Allen charge, and the jury deliberated only three (3) hours total on the recommendation of sentence in a capital case. Moreover, had the full note been contemporaneously disclosed, there was nothing more that defense counsel could appropriately have done to protect their clients' rights. On this record, we fail to see any realistic possibility that the partial nondisclosure prejudiced the defense, contributed even fractionally to the sentence, influenced the jury en route to the sentence, swayed the trial's outcome, or adversely affected the appellants' substantial rights. In short, the error was harmless beyond any reasonable doubt. As a result, Cottrell cannot show either error or resulting prejudice. Therefore, there is no merit to this appellate ground for vacating the sentence, and it must be dismissed.

CONCLUSION

For the above stated reasons, Cottrell's conviction of the murder of Officer McGarry and the resulting sentence of death must be affirmed.

Respectfully submitted,

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February 6, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Larry B. Hyman, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

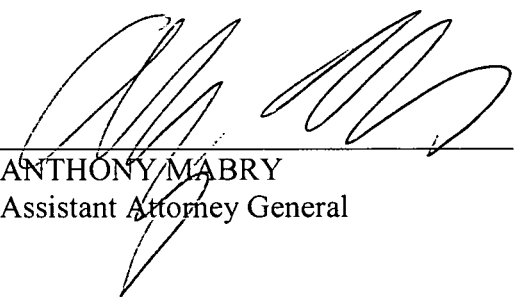
LUZINSKI ALLEN COTTRELL,

Appellant

Appellate Case No. 2015-000731

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”



ANTHONY MABRY
Assistant Attorney General

February 6, 2017

CERTIFICATE OF SERVICE

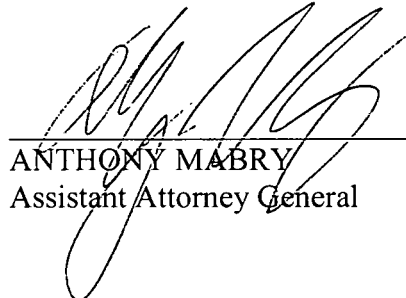
I, Anthony Mabry, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to his attorneys of record:

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I further certify that all parties required by Rule to be served have been served.

This 6th day of February, 2017.



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