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STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman, Circuit Court Judge

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Appellate Case No. 2015-000731

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

v.

LUZENSKI ALLEN COTTRELL..... *Appellant*

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# FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENT IN REPLY

Appellant, Luzenski Allen Cottrell, submits this Reply to the Initial Brief of Respondent. As discussed below, while the State's brief goes on at great length, it largely ignores the key issues Cottrell has raised for this Court's review. Where the State does manage to address those issues, it presents nothing from which this Court could properly conclude that the errors Cottrell has identified did not occur or do not require reversal.

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

The State's brief on this first issue argues that indigent defendants do not have the right to choose the lawyer(s) who will be appointed to represent them, a proposition with which Cottrell does not disagree. The brief does not, however, acknowledge that in most respects the protections of the right to counsel apply to defendants with and without means alike, and it does not explain why indigent defendants are not entitled to the only aspect of the right to counsel relevant here: the right to maintain an established attorney-client relationship. The State's brief cites five decisions of this Court that simply do not address court interference with established attorney client relationships, but completely ignores the unanimous view of the thirteen jurisdictions that have addressed that issue.[1] Moreover, in its assertion that because of counsels' prior disagreements, the trial judge "felt he had no alternative" but to relieve both counsel, the State both fails to address the evidence that counsel

[1]As cataloged in Cottrell's main brief at pp. 16-18, those jurisdictions include the District of Columbia and twelve states: Alabama, Alaska, Arkansas, California, Colorado, Florida, Georgia, Illinois, Maryland, Michigan, Tennessee, and Texas.

could work together despite their differences, and fails to explain how their prior strategic disagreements, however rancorous, could have justified dismissing them both. Finally, the State's brief argues that Cottrell has not shown how he was prejudiced by the denial, a task that Cottrell has not taken on because the error in question is structural, and consequently, neither permits nor requires such a showing.

### A. The Sixth Amendment precludes a trial court from interfering with any established attorney-client relationship without adequate justification.

True, an indigent defendant does not have the right to choose the lawyer(s) who will be appointed to defend him. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006). More narrowly, he does not have the right to the appointment of a lawyer with whom he can form a "meaningful relationship." *Morris v. Slappy*, 461 U.S. 1, 14 (1983). Recognizing either a broad or narrow right to choice would impose huge costs upon the State. However, "the considerations that may preclude recognition of an indigent defendant's right to choose his own [court-appointed] counsel, such as the State's interest in economy and efficiency, ... should not preclude recognition of an indigent defendant's interest in continued representation by an appointed attorney with whom he has developed a relationship of trust and confidence." *Morris v. Slappy*, 461 U.S. at 23 n.5 (Brennan, J., concurring in the result).

While the United States Supreme Court has not decided the question of whether an indigent defendant has such a right, thirteen jurisdictions, cited in Cottrell's opening brief, have all have concluded that there is no justification for treating an indigent's established relationship with assigned counsel as less worthy of protection than an attorney-client relationship involving retained counsel. The State's brief does not acknowledge any of those decisions, nor does it offer any

explanation why established attorney-client relationships are less worthy of protection when the defendant is indigent.

Instead, the State string cites – without discussion or parentheticals – five cases decided by this Court all purportedly holding that "whether court-appointed counsel should be relieved or discharged is a matter addressed to the discretion of the trial judge." Resp. Br. 24. However, all five of those cases involve a trial court's refusal to relieve counsel upon the defendant's request rather than its insistence on relieving counsel over the defendant's objection. Refusal to relieve counsel, however, does not involve interference with an established attorney-client relationship. Moreover, permitting a defendant to insist that counsel be relieved would be tantamount to assuring him choice of counsel, something to which he clearly has no right, and something which would impose great costs upon the state. Acknowledging, as other courts have, that an indigent defendant has an interest in an established attorney-client relationship would not require overturning (or even suggest reexamining) any of the cases involving indigent defendants' attempts to obtain counsel more to their liking. *See Stearns v. Clinton*, 780 S.W. 2d 216, 223 (Tex. Crim. App. 1989) ("[T]he power of the trial court to appoint counsel to represent indigent defendants does not carry with it the concomitant power to remove counsel.").

Only one South Carolina case cited in the State's brief involves relieving counsel over the defendant's objection. Examination of that case, *State v. Justus*, 392 S.C. 416, 709 S.E.2d 668 (2011), makes it obvious why the State's brief cites but does not discuss it. In *Justus*, a case in which the defendant ultimately pled guilty, the trial court granted the solicitor's motion for trial counsel's disqualification. That motion, however, was based upon a conflict of interest posed by counsel's representation of the solicitor's lead investigator, a potential witness for the prosecution,

in a civil suit. *Justus*, 392 S.C. at 417-18, 709 S.E.2d at 669. However, even a defendant with retained counsel may not insist upon going forward with conflicted counsel. *Wheat v. United States*, 486 U.S. 153 (1988). Thus, *Justus* is authority only for a proposition that Cottrell does not contest: That any defendant's right against interference with an established attorney-client relationship is not absolute.

### B. The trial court had no adequate justification for interfering with Cottrell's established attorney-client relationship with Axelrod.

The right against interference with an established attorney-client relationship, like the right to choice of retained counsel, must be weighed against "a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel." *Gonzalez-Lopez*, 548 U.S. at 152. Nor may a defendant "demand that a court honor his waiver of conflict-free representation." *Id*; *see also*, *Justus*, 392 S.C. at 419, 709 S.E.2d at 670 (given the evidence of a conflict before the trial court, and giving deference to its findings of fact, upholding the disqualification of counsel over the defendant's objection).

None of these countervailing considerations are present here. Nor did equally weighty obstacles to continued representation such as "gross incompetence or physical incapacity, or contumacious conduct," *State v. Huskey*, 82 S.W.3d 297, 308 (Tenn. Crim. App. 2002) (quoting *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. 1978)), support termination of the established attorney-client relationships. Counsel disagreed with each other, and apparently disliked each other. They said intemperate things. Disagreement and even rancor are not uncommon among counsel, but punishing such disagreement by removing counsel threatens the independence of counsel's

representation. By the end of the hearing, Armstrong had said she could work with Axelrod, the two lawyers had met with Cottrell, and Cottrell had stated that both told him "they would be able to work together." Pretrial Hrg. (3/8/12) R. 371-372. The trial court made no finding that they could not do so, but stated only that he was "really concerned that [ Armstrong and Axelrod' s] differences of opinion as to the way to proceed in this case and that perhaps the theories shared by co-counsel may be in conflict." Pretrial Hrg. (3/8/12) . R. 371. Just as a lingering "concern," standing alone, would not have been an adequate basis for disqualifying retained counsel, it was insufficient to justify relieving appointed counsel over Cottrell's objection.

Moreover, any "concerns" the trial court had could have been assuaged by means much less intrusive upon an established attorney-client relationship. The trial court could have ordered a continuance to ensure that the lawyers were right that they could work together. Such a continuance would have delayed the trial less than the appointment of new counsel did and would have accommodated the trial court's concerns while nonetheless respecting Cottrell's relationship with his counsel. Most importantly, even if their prior disagreements had rendered Armstrong and Axelrod unable to work together, Cottrell made it clear that he wanted to proceed with Axelrod. Neither the trial court nor the State's brief has offered a justification for interfering with both established attorney-client relationships, and none is contained within the record.

### C. Unjustified interference with an established attorney client relationship is structural error.

Lastly, the State contends that Cottrell has not shown that the interruption of his established attorney-client relationship prejudiced him, arguing that substitute counsel "vigorously defended" Cottrell. Resp. Br. 29. No doubt they did. But "[o]f all the rights that an accused person has, the

right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984); *State v. Thompson*, 355 S.C. 255, 261, 584 S.E.2d 131, 134 (Ct. App. 2003). Because of the foundational nature of the right to counsel, "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Gonzalez-Lopez*, 548 U.S. at 150. Consequently, as the Supreme Court held with respect to interference with an established retained attorney-client relationship, "[h]armless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Id.* The State concedes, as it must, that denial of the right to retained counsel of choice is structural error. Resp. Br. 26. It offers no reason to think that such error is not structural when the defendant is indigent – because there is none.

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

The State's brief on this issue first seeks to invoke a procedural bar that does not exist and would have perverse consequences if it did, and then carries on at length, purportedly about the merits, without ever managing to acknowledge or engage with the actual errors that occurred below. It therefore contributes nothing of value to a proper resolution of the matters Cottrell has put before the Court.

### A. The error in the trial court's improper qualification of Jurors 450 and 148 is preserved for direct review.

As noted in Cottrell's main brief, defense counsel both objected to the trial court's qualification of Jurors 450 and 148, and exhausted all of their peremptory strikes. As the State implicitly concedes, that is all this Court's cases require in order to preserve a challenge to juror qualification for appellate review. *See* Resp. Br. 33-34; *see also, e.g., State v. Bixby*, 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2011) (counsel must "exhaust all strikes" to preserve "juror qualification issues" for appellate review); *State v. Tucker*, 324 S.C. 155, 163, 478 S.E.2d 260, 264 (1996) ("Failure to exhaust all of a defendant's peremptory strikes will preclude appellate review of juror qualification issues."); *State v. Green*, 301 S.C. 347, 352, 392 S.E.2d 157, 160 (1990) (collecting cases) ("an appellant must show that he exhausted all of his peremptory challenges").

Notwithstanding Cottrell's compliance with this Court's long-settled preservation requirement, the State now asserts that his challenge to Jurors 450 and 148 should nevertheless be treated as "waived" because defense counsel could have removed the jurors with peremptory strikes before those strikes were exhausted. Resp. Br. 34. As suggested by the State's failure to cite *any* authority – local or foreign – supporting its proposal, the waiver rule it wishes to invoke has no basis in recognized law. There are good reasons for that. Given that "any claim that a jury was not impartial must focus on the jurors who ultimately sat at trial," *Tucker*, 324 S.C. at 162-63, 478 S.E.2d at 264 (citing *Ross v. Oklahoma*, 487 U.S. 81 (1988)), the State's rule would make qualification errors unreviewable unless and until they became so numerous in an individual case that they consumed all of a defendant's peremptory strikes and then some. Only then could an unqualified juror be "s[e]at[ed] at trial" and become the subject of an appellate challenge. That

would not only result in an unprecedented shift of all of the risk and cost of qualification error from the courts to defendants, but it would also dramatically burden defendants' legitimate interest in using their allotted strikes for strategic reasons *other than* the need to fend off the threat of trial by a legally unfit jury. The job of preventing that threat has always rested with trial judges applying the rules of juror qualification, and that is where it should stay.[2]

### B. Jurors 450 and 148 were constitutionally unqualified to serve, and their participation violated Cottrell's right to a fair trial and reliable verdict.

Cottrell's argument is straightforward: The trial judge approached jury qualification under the misconception that consideration of non-statutory mitigation was discretionary, not mandatory; because of that misconception, the judge saw nothing disqualifying in the statements of Jurors 450 and 148 that non-statutory mitigation in the form of "background characteristics of the defendant" would be irrelevant to them at sentencing; nothing in the jury instructions required the two jurors to set aside the views they had expressed and consider the evidence of Cottrell's background as mitigating; and consequently, his death sentence was imposed in violation of the Eighth Amendment mandate that *all* constitutionally relevant mitigating evidence be given at least some weight by the sentencer. *See generally* App. Br. 23-38.

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[2]Indulging the State's novel waiver theory in this case would also violate due process by foreclosing review of a federal constitutional violation for non-compliance with a procedural requirement that did not exist at the time of the alleged waiver. *See, e.g., Bouie v. City of Columbia,* 378 U.S. 347, 354 (1964) (citing *Wright v. Georgia*, 373 U.S. 284, 291 (1963); *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) ; *Barr v. City of Columbia*, 378 U.S. 146 (1964)) ("The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question."); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 458 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.").

In its brief, the State does not dispute that the jurors said what they said, or that their belief that evidence of a defendant's background is irrelevant was never corrected by the trial judge, in jury instructions or elsewhere. The State also does not dispute – or even acknowledge – that the trial judge's insistence that consideration of non-statutory mitigation was discretionary was wrong as a matter of law, or that it misled him to qualify Jurors 450 and 148 despite their disqualifying statements on *voir dire*. Instead, the State offers only a series of excuses and weak attempts to shift the blame. These arguments have no merit.

### 1. The State's complaints about "improper" *voir dire* questions are both baseless and irrelevant.

The State complains at some length that the disqualifying answers by Jurors 450 and 148 were given in response to improper *voir dire* questions. *See, e.g.*, Resp. Br. 31, 32, 36, 41. According to the State, defense counsel inappropriately inquired about "specific mitigating circumstances" in "an attempt to stake out the jurors." Resp. Br. 41. The record belies these claims. First, asking a prospective juror whether the "background characteristics of a defendant – his walk in life, how he grew up" would be "relevant" hardly constitutes a precision inquiry into specific mitigating factors; on the contrary, it is about as broad and *non*-specific as a question could be while still seeking to ensure the juror's ability to comply with *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and their progeny. And second, if the questioning had actually been improper, the trial judge could have intervened, but he did not. When the Solicitor complained during defense *voir dire* of Juror 450, the trial judge quickly overruled the objection, *see* R. 1473; and later, during similar defense *voir dire* of Juror 148, the Solicitor did not even raise an objection at all, *see* R. 1503.

Furthermore, even if there were something to the State's complaints about the questions posed by defense counsel, the jurors' disqualifying answers remain part of the record in this appeal. The State appears to wish that were not so, but it is, and no amount of grousing about questions counsel was permitted to ask and the prospective jurors were permitted to answer can have any bearing on the merits of the claim now before this Court.

### 2. Jurors' ignorance of the law is no excuse for improper qualification.

The State maintains that, "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." Resp. Br. 46. Whether or not that observation might have some force in another case, it is completely irrelevant in this one. The problem with Jurors 450 and 148 was not a lack of substantive legal knowledge, but a lack of personal capacity to perceive any mitigating value in a category of evidence – the defendant's "background characteristics" – that lies at the core of what the Supreme Court has held must be considered in a capital case. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'"). A juror lacking that capacity is simply unable to carry out the sentence-selection function in the manner envisioned by the Eighth Amendment, and is therefore legally unfit to serve. *Morgan v. Illinois*, 504 U.S. 719, 736 (1992).

To the extent the State's above-quoted assertion might be read to suggest that a juror with

a self-reported predisposition to see no mitigating value in a defendant's background might nevertheless be made fit through end-of-trial jury instructions, that suggestion would be wrong. As emphasized by the trial judge in this case, evidence of a defendant's background falls outside the list of mitigating circumstances specified in South Carolina's capital sentencing statute. *See, e.g.*, R. 2520-21. While that does nothing to diminish the constitutional relevance of such evidence, *see, e.g.*, *Tennard v. Dretke*, 542 U.S. 274, 285 (2004); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003), it does mean that the penalty phase instructions will not specifically direct jurors either to be receptive to evidence of a defendant's background proffered as mitigation, or to give such evidence any meaningful weight in the sentencing calculus. *See* R. 4361-62; *cf. Buchanan v. Angelone*, 522 U.S. 269, 279 (1998) (holding that Eighth Amendment does not require "an instruction on the concept of mitigation" or "instructions on particular statutorily defined mitigating factors"). Stated simply, unless a juror arrives at court *already* willing to regard a defendant's difficult background as mitigating, nothing that juror must be told about the law during a trial can be counted upon to change his or her disposition.

Given both the constitutional necessity that evidence of a defendant's background be considered and given mitigating weight, and the absence of a mandate that seated jurors be specifically instructed to do those things, the *only* method for ensuring an Eighth Amendment-compliant jury is through careful selection of each of its members during the qualification process. While prospective jurors need not express affirmative sympathy for a capital defendant with evidence of a troubled background, their *voir dire* responses must indicate a baseline level of personal receptivity to such evidence sufficient to facilitate a "reasoned moral response to the defendant's background, character, and crime.'" *Penry*, 492 U.S. at 319 (quoting *California v.*

*Brown*, 479 U.S. at 545 (O'Connor, J., concurring). When Jurors 450 and 148 declared that evidence of Cottrell's background would be irrelevant to them, they revealed an incapacity for the work of capital sentencing that should have resulted in their disqualification as a matter of law.

As discussed in Cottrell's main brief – and ignored in the State's – the source of the problem in this case was not the *jurors'* ignorance of the law, but was instead the *trial judge's* insistence that recognition or consideration *vel non* of non-statutory mitigation is a matter within the discretion of the jurors themselves. It was that legally indefensible belief that blinded the judge to the disqualifying effect of the answers given by Jurors 450 and 148. And that, in turn, led directly to the breakdown in the juror qualification mechanism built by the Supreme Court's decisions. In short, a trial judge with a proper understanding of core Eighth Amendment principles would have recognized that any juror for whom evidence of a defendant's background would be irrelevant could not possibly carry out the tasks mandated by *Lockett*, *Eddings*, and *Penry*. The correct response to such a prospective juror is disqualification. *See, e.g.*, *Morgan*, 504 U.S. at 736-38; *Eddings*, 455 U.S. at 108-09; *see also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007) ("Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence ...[,] the sentencing process is fatally flawed.").

### 3. Neither the "entire record" nor jurors' pledges to "follow the law" can cure the qualification errors in this case.

The State maintains that "the entire record" shows Jurors 450 and 148 were not mitigation impaired, Resp. Br. 37, but it never explains how or where that showing occurs. What the record actually shows is that Jurors 450 and 148 each said that evidence of a capital defendant's

"background characteristics" would not be "relevant" to them in sentencing. Neither juror ever retreated from those answers, contradicted them, or even sought to clarify them. Nor did either the State or the trial judge make any effort to follow up about them or otherwise rehabilitate the jurors. Given that, and absent further guidance from the State, Cottrell is at a loss to discern what the "entire record" might provide to negate the impression of mitigation impairment.

Finally, the State also insists that, "what is important ... is whether the particular jurors can follow the law as instructed by the court regarding what they are required to consider ... And, additionally what they are instructed at the end of the case by the trial court." Resp. Br. 39. Cottrell agrees, but that does not do the State any good. To begin with, Jurors 450 and 148 were never asked whether they could, if so instructed, set aside their views about the irrelevance of a defendant's background as mitigation, nor did either volunteer a willingness to do so.[3] Absent some record basis for doing so, there is no reason to assume either juror would have been amenable to or even capable of suppressing their honestly held instincts to the contrary. Furthermore, as explained in Cottrell's main brief – and confirmed by the tedious summary set forth in the State's brief, *see* Resp. Br 47-50 – even if the jurors had expressed a willingness to follow such an instruction, none was ever given. Thus, while the State is correct that a juror's ability to "follow the law" is important, a juror who is never instructed to set aside disqualifying beliefs and proceed according to law is destined to remain

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[3]The State's brief faults Cottrell for not "follow[ing] up" by posing that "critical question," Resp. Br. 41, and claims the question, if posed by defense counsel, would not have been opposed by the prosecution or the court as improper "staking out," *id.* at 41 n.32. Both of these assertions are disingenuous at best. It was not Cottrell's responsibility to rehabilitate the jurors once they had shown themselves to be mitigation impaired. That task could easily have been taken up by the prosecution or the trial judge – as happens routinely in capital jury selection – but neither bothered to do so here. Furthermore, given the extent to which the State complains about the defense *voir dire* allowed by the trial judge, its suggestion that Cottrell could have avoided a "staking out" objection by probing even *deeper* is laughable.

an unqualified juror.

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

Cottrell has never disputed that he shot Officer McGarry and the State has never disputed that McGarry was shot while detaining Cottrell. Consequently, the first question in determining the degree of Cottrell's criminal responsibility is whether McGarry had adequate legal justification to detain him. The trial court erred in excluding exculpatory evidence tending to establish that McGarry's actions were unjustified. This error was not harmless.

### A. The trial court erred in excluding the testimony of the only officer with personal knowledge of the facts relevant to the articulable suspicion determination.

At Cottrell's first trial, the State maintained that McGarry did not detain Cottrell until he saw a gun concealed under Cottrell's shirt, and obtained a ruling from the trial court that, as a matter of law, what McGarry himself saw constituted probable cause. This Court reversed, holding that whether McGarry "was effectuating a lawful arrest in a lawful manner" was a factual question for the jury. *State v. Cottrell*, 376 S.C. 260, 265, 657 S.E.2d 451, 454 (2008) (*Cottrell I*). At Cottrell's retrial, faced with the need to convince *the jury* that McGarry had seen the gun, and lacking any direct evidence that he had, the State changed course. This time it took the position that McGarry had *arrived* at the scene possessing the "articulable suspicion" that would justify Cottrell's detention.

Under this revised theory, McGarry had reasonable suspicion because Officer Johnson did. McGarry relied upon facts communicated by Officer Prock, who relied upon information conveyed by Officer Daniels, who relied upon information conveyed by Officer Johnson. As set forth in Cottrell's opening brief, McGarry's actions therefore were justified only if Johnson had reasonable suspicion that Cottrell had committed a crime. Yet the trial court refused to let Johnson testify as to either the facts he knew or the conclusions he drew from those facts. Instead, the jury only heard from Prock what was conveyed to her, along with Prock's opinion that the information conveyed provided a sufficient basis upon which to stop Cottrell.

The State spends 25 pages of its brief pressing the argument that Johnson (and therefore McGarry) had the articulable suspicion necessary to justify Cottrell's detention. That argument, however, is addressed to the wrong audience. Cottrell's opening brief argued that once again the trial court's rulings deprived him of a jury determination on the critical issue, this time by preventing the jury from hearing *all* of the relevant facts with which to resolve that issue.[4] The question in this appeal is not whether the members of this Court tend to believe that McGarry had reasonable suspicion, or even whether the record evidence was sufficient to permit a jury to find that he did. Rather, the question is whether the trial court erred in excluding defense evidence answering and undermining the evidence proffered by the State.

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[4]The State's brief asserts that Cottrell "mistakes the question that this Court stated the jury must answer in the retrial." Resp. Br. 77. In fact this statement mistakes the argument that Cottrell is making. Cottrell has not argued that the error in the second trial is the same error that compelled reversal of his first conviction, but rather that it is a related error. Indeed, the error could not be exactly the same because the State abandoned the theory it sold to the judge (as a matter of law) at the first trial when faced with the prospect of having to sell that same theory (as a matter of fact) to the jury. Rather, the errors are related in that in both trials, the lower court obstructed Cottrell's defense that McGarry's conduct was unjustified.

The trial court excluded Johnson's testimony because it agreed with the prosecution's trial contention that Mc Garry's reasonable belief that Cottrell was a suspect in a shooting was enough to justify an investigatory stop. *See* R. 3684-76. But Fourth Amendment law is clear that an officer's good faith belief, standing alone, cannot justify a stop. Where information upon which the detaining officer acts originates from another officer, the stop is only lawful if the instructing officer has sufficient knowledge and facts to comprise reasonable suspicion that the person stopped has committed an offense. *United States v. Hensley*, 469 U.S. 221 (1985). Because the sole foundation for McGarry's belief that Cottrell was a suspect was Johnson's personal knowledge, Johnson's testimony was necessary to the determination as to whether reasonable suspicion supported McGarry's actions.

The State's brief characterizes Cottrell's argument that his rights were violated "not because inadmissible evidence was introduced but because the jury was not allowed to hear [] Johnson's testimony" as "'novel.'" Resp. Br. 77. It then points out that the validity of a *Terry* stop is "typically determined by the trial court." *Id.* This is an accurate generalization, but it is true only because in most instances where the validity of a *Terry* stop is at issue, the defendant is asking the trial court to suppress evidence based upon a purported Fourth Amendment violation. Obviously, in such circumstances, no element of a crime or defense is being determined, and equally obviously, the defendant does not want the jury to make the determination. Here, however, the reason the question must be submitted to the jury is that, because of the theory of the case selected and pursued by the prosecution, whether Cottrell was lawfully detained determines the degree of his substantive criminal liability. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *In re Winship*, 397 U.S. 358 (1970).

### B. The error was not harmless.

The State argues that any error in excluding Cottrell's proffered evidence was harmless for several reasons. First it asserts that testimony of Officer Johnson would have been cumulative to the testimony of Officer Prock. Resp. Br. 83. This is simply ridiculous. The State proffered Prock and objected to the testimony of Johnson. Cottrell proffered Johnson and objected to part of the testimony of Prock. This was no accident; while some of what the two officers said would have overlapped, on the crucial point of whether Cottrell was a suspect and whether McGarry's actions were warranted, they diverged.

The State also argues that any error was harmless because Johnson's testimony would have established reasonable suspicion, and further, would have been harmful to Cottrell. It is hard to see why the State would have objected to Johnson's testimony if indeed it would have established rather than impeached the existence of reasonable suspicion. More importantly, however, it was for the *jury* to determine both who and what to believe, and what inferences to draw from the testimony. Moreover, it was not for the trial court – let alone the State – to decide whether Johnson's testimony would have been, on balance, harmful or helpful to Cottrell. Such strategic assessments are the prerogative of a defendant and his counsel; in this case, the assessment that Johnson's testimony was more beneficial than harmful was entirely reasonable, as it provided Cottrell with the only real chance to avoid conviction of murder and exposure to the death penalty.

Finally, the State's brief makes the point that even if McGarry were not justified in stopping Cottrell, it still would have been possible for the jury to find that Cottrell was guilty of murder. Yes, it would have been *possible*, but the State then urges the inference that any error in excluding Johnson's testimony was consequently harmless. That inference is incorrect. Without Johnson's

testimony, the jury had no reason not to find McGarry's action a legal detention, and therefore, would have had to find Cottrell guilty of murder. Absent a factual conflict – which the trial court foreclosed by excluding Johnson's testimony – the jury could not have reached the question of whether Cottrell acted legally in resisting an unjustified detention with proportionate force, and was therefore not guilty of any crime. Nor could the jury have reached the question of whether, even if Cottrell's use of force was disproportionate, he acted in the heat of passion and therefore was only guilty of manslaughter. In contrast, with Johnson's testimony, the jury would have had to answer these secondary questions, and under the circumstances, certainly could have concluded either that Cottrell had a complete defense to the charges, or that his heat of passion mitigated murder to manslaughter. Indeed, this Court's decision in *Cottrell I* implicitly acknowledged that the jury could have so concluded; unless it was possible to find that Cottrell acted either with justifiable force in response to an unjustified arrest, or in the heat of passion (either in response to an unjustified arrest or in response to the unjustified use of force in accomplishing the arrest), the error identified in *Cottrell I* would itself have been harmless.

## CONCLUSION

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

Respectfully submitted,

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February 6, 2017

CERTIFICATE OF COUNSEL

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

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STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman, Circuit Court Judge

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Appellate Case No. 2015-000731

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

v.

LUZENSKI ALLEN COTTRELL..... *Appellant*

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CERTIFICATE OF SERVICE

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

Robert M. Dudek
Chief Appellate Defender

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

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