ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Edgefield County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEVEN BARNES,

APPELLANT

Appellate Case No. 2010-178247

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by denying appellant's pre-trial request to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975), since this record shows appellant was capable of representing himself and he even exhibited an uncanny understanding of the rules of evidence prior to trial, and the court's refusal to allow appellant to represent himself, citing Indiana v. Edwards, 554 U.S. 164 (2008), was erroneous?

2.

Whether the court violated appellant's right to Due Process by relying on the pre-trial testimony of Dr. Price about appellant's ability to represent himself since appellant was evaluated by Dr. Price with the clear understanding that Dr. Price would exclusively be a penalty phase mitigation witness for him, particularly where one of appellant's two attorneys joined in appellant's objection to Dr. Price's pre-trial testimony under these circumstances?

3.

Whether the trial judge erred, in violation of appellant's rights under the Sixth, Eighth, and Fourteenth Amendments, by improperly limiting defense counsel's attempt to *voir dire* the jurors regarding their views on the death penalty, since this rendered appellant's trial fundamentally unfair?

4.

Whether the trial judge erred when he found Juror # 54 unqualified to sit as a juror where she was a qualified juror under Wainwright v. Witt, 469 US. 412 (1985), since her

views on the death penalty did not prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath?

5.

Whether the trial court erred by refusing to dismiss the indictments against appellant where the State's failure to comply with the Interstate Agreement on Detainers Act (IAD) rendered the indictments without force in effect?

STATEMENT OF THE CASE

Appellant was indicted by the Edgefield County grand jury for the offenses of murder and kidnapping. R. 2363. His case was called to trial on November 8, 2010 before the Honorable R. Knox McMahon, and a jury. Robert J. Harte and David B. Tarr represented appellant. Donald V. Meyers was the solicitor and Ervin J. Maye and H. Franklin Young, III were the assistant solicitors. R. 87. The jury found appellant guilty of murder and kidnapping. R. 1546, ll. 6-13.

The sentencing phase commenced on November 15, 2010. During the penalty phase of trial, the judge charged the jury to consider the statutory aggravating factors that (1) the murder was committed while in the commission of a kidnapping, and (2) the murder was committed while in the commission of physical torture. S.C. Code Ann. §16-3-20(B) (b) and (i). R. 2303, l. 5 - 2304, l. 6.

The judge charged the jury to consider the statutory mitigating circumstances that the murder was committed while the defendant was under the influence of mental or emotional disturbance, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and the age or mentality of the defendant at the time of the crime. S.C. Code Ann. §16-3-20(C)(2)(6) and (7).

The judge also charged the non-statutory mitigating circumstances of the background, sexual and physical abuse and neglect of the defendant as a child, and use and abuse of drugs. R. 2313, l. 24 - 2316, l. 5.

On November 17, 2010 the jury found the aggravating circumstances of kidnapping and physical torture, and sentenced appellant to death. R. 2330, ll. 2-24. Judge McMahon then sentenced appellant to death. R. 2338, l. 25 - 2339, l. 15.

This appeal follows.

ARGUMENT

The court erred by denying appellant's pre-trial request to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975), since this record shows appellant was capable of representing himself and he even exhibited an uncanny understanding of the rules of evidence prior to trial, and the court's refusal to allow appellant to represent himself, citing Indiana v. Edwards, 554 U.S. 164 (2008), was erroneous.

Relevant Facts – Friday, November 5, 2010

At the November 5, 2010 pretrial motions hearing, the judge first heard motions by defense attorneys Tarr and Harte. R. 4-29. The court then heard appellant's *pro se* motion to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975):

> THE COURT: All right. Let's talk about the first motion. What's your first motion?
>
> THE DEFENDANT: Okay. Yes, sir.
>
> First and foremost, I would like to say that – first and foremost, I'd like to say that, you know, Robert Harte and David Tarr, they're excellent people, but, you know, my life is on the line in this trial, and my first motion would be that I would like to put in a Faretta versus California motion.
>
> THE COURT: A what motion?
>
> THE DEFENDANT: Faretta versus California motion.
>
> THE COURT: All right. Faretta, yes, sir.
>
> THE DEFENDANT: Basically the motion is that I plan on in this trial representing myself.
>
> THE COURT: You want to represent yourself?
>
> THE DEFENDANT: Yes, sir. And I knowingly and intelligently waive my right to counsel.

> Now, the second issue will have to be ex parte if you don't mind. I'd like to bring issues up by way of ineffective assistance of counsel. Due to the fact of attorney/client information and, you know, due to the Solicitors, I'd like it to be in your presence.

R. 32, l. 4 – 33, l. 1.

The judge then asked Defense Counsel Harte and Defense Counsel Tarr to state their qualifications for being attorneys in a death penalty case. Harte stated he had practiced law for thirty-six years and he had prosecuted two death penalty cases while solicitor in the second circuit. He had tried numerous murder cases, and had been appointed on two previous death penalty cases "one of which went to trial." R. 34, ll. 5-23.

Defense Counsel Tarr stated that he had practiced law for fifteen years but that this was his first death penalty case. He had handled one previous capital PCR. "I've tried a lot of cases otherwise than death penalty cases. I've worked really hard on this case for four years and I'm ready to go to trial." The following then occurred between the trial court and appellant:

> THE COURT: Yes, sir, Mr. Appellant.
>
> THE DEFENDANT: I don't mean to be disrespectful.
>
> THE COURT: You're not being disrespectful.
>
> THE DEFENDANT: I think we pick the jury Monday; is that correct?
>
> THE COURT: We start with the jury on Monday.
>
> THE DEFENDANT: Okay.
>
> THE COURT: We're not going to pick the jury Monday. We're going to start with the jury Monday.
>
> THE DEFENDANT: I understand that.

> THE COURT: Yes, sir.
>
> THE DEFENDANT: Okay. And I'm not doing this for no delay tactics or anything like that. I do plan on proceeding with the jury process Monday.
>
> I also ask Your Honor for Counsel to hand over any and all documents to my case so I can study them over the weekend. So I can come through – and if you want me to write it down while in my cell I'll be glad to do so, the motions, if necessary.
>
> I do have, like I say, the second motion if you would like me to do it today or do it tomorrow –
>
> THE COURT: Well, I haven't –
>
> THE DEFENDANT: Excuse me, Monday, excuse me, but I'd like to do that in the presence of – basically the grounds for ineffective assistance of counsel.
>
> THE COURT: Ineffective assistance of counsel?
>
> THE DEFENDANT: Yes, sir, and my grounds why that they're ineffective basically.

R. 35, l. 7 – 36, l. 10.

Appellant is Questioned by the Trial Court

After the clerk put appellant under oath, appellant told the judge he was thirty-two years-old and that he had been to the eleventh grade in high school. However, appellant also added that he was self-educated. R. 40, l. 2 – 41, l. 4.

As for employment, appellant was co-owner "of this little carwash. I sold cars." R. 41, ll. 9-14. In response to the judge's question, appellant told the judge he was charged with "a serious capital offense in South Carolina called murder." R. 41, ll. 18-21. Appellant also said he was charged with kidnapping. When the judge asked appellant the punishment

for murder if he was convicted, appellant answered: "Well, it's my understanding by statute death, life, and I believe it's something like 30 years, if I'm not mistaken." R. 41, l. 18 – 42, l. 5. As to kidnapping, appellant referred to "my 2010 book over there" and told the judge he understood he could be sentenced to 30 years imprisonment for kidnapping. R. 42, ll. 6-11.

The judge informed appellant that if he allowed him to represent himself, he would be held to the same standard as an attorney as far as the Rules of Court and the Rules of Evidence. Appellant stated that he understood this fact. R. 44, ll. 7-11. The following occurred between the court and appellant:

> THE COURT: And you've studied the Rules of Evidence?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: What's Rule 803? Do you know what that is?
>
> THE DEFENDANT: Rule 803 – well, first of all, anything to do with the eight hundreds got to do with hearsay. 803 has something to do with – I believe like if I'm not mistaken, I think it's in the realm of *excited utterances, present sense impressions*.
>
> THE COURT: That's 803 (1), that's 803 (3).
>
> THE DEFENDANT: Yeah, 803, that's them.

R. 44, l. 20 – 45, l. 6. (emphasis added).

Appellant also told the judge he was mentally sound even though "I have been through some type of mental health while I was younger." Appellant said: "But I am mentally sound and I do know what's going on with the proceedings. I know what today is, I know who the President is. I know that the Republicans took over the Senate and the House and all of that stuff like that." R. 47, ll. 11-15.

The judge asked appellant if he had discussed self-representation with his attorneys, Tarr and Harte "or with both." Appellant answered, "For the record, yes. And also I talked with David Tarr. And I don't know how to say it because I'm not an emotional person, but he's emotional about it. Mr. Harte, he said he would assist me according to the law . . ." R. 48, ll. 14-22.

Appellant told the judge that he had no interest in delay and he was not trying to manipulate the system. Appellant also stated that he wanted the trial to begin Monday as scheduled, and he confirmed that he would like Counsel Harte appointed standby counsel. R. 49, ll. 12-20.

Defense Counsel Harte then asked the judge to allow Tarr to remain as standby counsel also. The judge asked appellant if he had any objection to both attorneys remaining as standby counsel, and appellant answered, "Actually, that sounds good to me." R. 49, l. 21 – 50, l. 8.

When the judge then began to explore possible defenses in a criminal case with appellant, appellant brought forth third party guilt pursuant to Holmes v. State, 547 U.S. 319 (2006) and the prior State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001) standard. The following occurred between the trial judge and appellant:

> THE COURT: Tell me about Holmes.
>
> THE DEFENDANT: Holmes was a situation where he had a bunch of experts – excuse me – he had a lot of forensic evidence, to make a long story short, and the Supreme Court stated that the standard that was used was arbitrary. They didn't give him basically the right to prepare a defense based on the cases, pretty much the standard used in South Carolina, that was used in Greg, I believe, Greg versus – I mean I've got it all here.

THE COURT: Gay?

THE DEFENDANT: Gay and all them cases right there. I can go through it.

THE COURT: Is there a lot of forensics in your case? I don't know.

THE DEFENDANT: No, no evidence. None whatsoever in my case.

Okay. Right now I guess that's pretty much the defenses I have.

THE COURT: Third-party guilt?

THE DEFENDANT: Third party.

THE COURT: Any other issues in your trial that you think is important to bring before the jury as far as the guilt phase is concerned?

THE DEFENDANT: Well, okay. The guilt phase, with that – I believe, what do you call it, the penalty phase is once you get found guilty, right?

THE COURT: Yes, sir.

THE DEFENDANT: I just want to make sure – in voir dire, is that what you all call it? Is that the proper way to say it, voir dire?

THE COURT: Voir dire, yes, sir.

THE DEFENDANT: There's an issue that I would like to – Witherspoon?

THE COURT: Yes, sir.

THE DEFENDANT: I would like to make sure that's done, to make sure that none of the jury's going to automatically vote for the death penalty.

R. 51, l. 13 – 52, l. 25.

Appellant further told the judge he understood a criminal defendant did not have to prove his innocence and that he was not required to testify. Appellant knew the State's burden of proof was "beyond a reasonable doubt." Appellant answered the judge that he understood the judge would tell the jury it could not hold it against appellant if he chose not to testify. R. 54, l. 12 – 55, l. 6.

The judge asked appellant for more specifics on his complaints about the ineffective assistance of counsel he thought he was receiving. Appellant responded that because of the interstate detainer agreement issue, he specifically told his attorneys not to file for a motion for a continuance. Appellant said he was hurt because he had asked his attorneys numerous times if they had filed any continuances and they told him that they had not made such a motion. Appellant said he recently found out that counsel had indeed asked for continuances. R. 65, l. 15 – 68, l. 7.

Appellant also complained about the pre-indictment delay, and he had informed his attorneys that he wanted a speedy trial. Appellant noted his case "has been going on since '01, okay? There's no excuse for it." Appellant said he understood he still had to show prejudice from the delay, and he again mentioned what he perceived to be the bungling of the handling of the interstate detainer agreement by his attorneys and he said it had become a "trust issue with his trial attorneys." R. 68, l. 8 – 72, l. 2.

The judge then asked Defense Counsel Tarr and Defense Counsel Harte if there was anything further they would like for him to cover with appellant about representing himself. Both Tarr and Harte responded that the judge had covered everything necessary regarding self-representation. R. 72, ll. 5-13.

Defense counsel Tarr then injected that there were about 1, 600 pages of discovery involved. The judge then asked appellant if he would be ready for trial given the number of documents in discovery. Appellant stated, "I'm ready." R. 72, l. 13 – 73, l. 7.

The judge then observed, siding with appellant: "I would suspect the defendant, this defendant knows as much about this case as anybody." The judge said he was not diminishing the hard work that Defense Counsel Harte had done on the case, but he added: "He [appellant] might not have seen documents and such like that, but he's had court appearances, he's [had] good lawyers over the years. He appears to have a grasp of the case." R. 73, ll. 5-19.

The judge also noted appellant did not want a continuance, "he's never wanted a continuance, and I'm sure now that the State's ready to give him a trial, but I appreciate your position [about the amount of discovery] in that regard, Mr. Tarr." R. 73, ll. 20-24. The following then occurred between the trial court and appellant:

> THE COURT: I have tried to review those factors in Faretta. It appears, and is well settled, that an accused has a right to counsel, but he may waive that right and proceed *pro se* under Faretta versus California.
>
> Although a defendant's decision to proceed *pro se* may be to the defendant's own detriment, it must be honored out of the respect for the individual, which is the lifeblood of the law also citing Faretta.
>
> The right to proceed *pro se* must clearly be asserted by the defendant prior to trial. The trial judge has the responsibility to ensure that the accused is informed of the dangers and disadvantages of self-representation and makes a knowing and intelligent waiver of the right to counsel.
>
> Mr. Appellant, let me ask you – stand again.

> Knowing the dangers and disadvantages of self-representation, do you knowingly wish to waive your right to counsel?
>
> THE DEFENDANT: Yes, sir, according to the law.
>
> THE COURT: Sir?
>
> THE DEFENDANT: Yes, sir, according to the law, yes, sir.
>
> THE COURT: And you make that waiver knowingly and intelligently?
>
> THE DEFENDANT: Yes, knowingly and intelligently.
>
> THE COURT: Of your own freewill and accord?
>
> THE DEFENDANT: Yes, sir.

R. 74, l. 1 – 75, l. 3.

The judge then told appellant, "I think you're making a mistake, but you have the right to make a mistake." He again stated he would advise appellant not to represent himself and he asked appellant to take a break for a few minutes to discuss the matter with his attorneys before he made his ruling. R. 75, l .24 – 77, l. 23.

After the break, the judge said he was taking the matter under advisement over the weekend: "I would like to discuss with you all the procedures. We can do it on the record or we can do it in chambers as far as Monday morning or we can do it quick right now." Defense Counsel Harte responded that he thought "in light of the Faretta motion, we ought to do it on the record." R. 82, ll. 3-9.

The judge then advised that he was going to call the juror panels in groups of four beginning at 11:30 in the morning and ending at 5:30 in the afternoon on Monday to begin

the jury selection process. R. 82, ll. 3-21. The judge said he expected the jury would be struck Thursday morning. R. 84, ll. 3-8.

Monday, November 8, 2010

On Monday, November 8, 2010, the judge broke the jurors up into panels for *voir dire* and then said he was going to "revisit the Faretta issue." R. 121, ll. 17-23.

Defense Counsel Harte asked that the further Faretta hearing be held *ex parte* and he said that Defense Counsel Tarr would handle the hearing. R. 124, ll. 4-23. Defense Counsel Tarr said he understood the judge had taken the matter of appellant representing himself under advisement. Defense Counsel Tarr then began his own crusade to stay on the case: "*I did find a case over the weekend*, Indiana versus Edwards, a 2008 Supreme Court case [Indiana v. Edwards, 554 U.S. 164 (2008).]. It stands for the proposition that the United States Constitution permits states to insist upon representation by counsel for those who are competent enough to stand trial, but may not have the competency to waive their right to counsel." R. 124, l. 24 – 125, l. 9. (emphasis added). Defense Counsel said that he had hired a couple of experts "to evaluate Mr. Barnes *for purposes of the sentencing phase* who are of the opinion that he is very competent to stand trial, but he lacks a competency to waive his right to counsel and conduct proceedings on his own." R. 124, l. 24 – 125, l. 9. (emphasis added)

Tarr then added that he had "Dr. Price here today who is prepared to testify to that extent." R. 125, ll. 10-18. The judge told Tarr he could call Dr. Price as a witness. Appellant asked to speak and the judge gave him permission.

Appellant then objected to Dr. Price testifying on the grounds that "it's doctor/client relationship and it's privileged information." Appellant explained the extent of his

conversation with Dr. Price "was for the penalty phase only. If I had known that he was going to be adverse to me, I wouldn't have talked to him." Appellant was already familiar with the Edwards case, and he told the judge: "[The] Edwards case is totally different from the factual situation of my case. And I have to object to Dr. Price getting on the stand, because, like I say, I'm not giving him no permission to say anything in regards to me, talking about me, 'cause like I say, my attorneys, that's part of my defense, you know, when we get to the penalty phase. *Once we get to that phase, then, you know, I consent for him to furnish that information to the jury for mitigation.*" R. 125, l. 22 – 126, l. 24. (emphasis added).

The judge asked appellant if he was asking him to make a decision without adequate information about him. Appellant repeated that he only talked to Dr. Price for purposes of his penalty phase mitigation. That was Dr. Price's role. Appellant said he had the right to represent himself and he cited State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997). R 127, l. 11 – 128, l. 13 as authority.

Defense Counsel Tarr then maintained that he was not trying to be adversarial nor was Defense Counsel Harte or Dr. Price, but that he thought the judge needed to hear the testimony of Dr. Price. Appellant then raised his Due Process objection to the judge considering hearing Dr. Price's testimony in this context since he only talked to Dr. Price for purposes of mitigation as will be seen in issue 2 infra. R. 129, l. 14 – 130, l. 24.

The judge then stated he did not know of any procedure whereby he could appoint a state official to determine competency for self-representation. The judge said he understood the standard for competency to stand trial, but not for competency to waive an attorney and proceed pro-se.

Defense Counsel Harte responded he was "baffled" by the Indiana v. Edwards standard. Appellant again argued the defendant in Indiana v. Edwards was sick and had two competency hearings in front of the judge. The trial judge here responded he understood the defendant in Indiana v. Edwards was schizophrenic and that he had "other competency hearings." However, the judge said that he had to make a determination of whether appellant was competent to represent himself. R. 131, l. 20 – 134, l. 8.

Appellant told the judge, "I am competent to stand trial. Everything that I told you Friday, I answered all of your questions, and it's on the record. I hope so, but I do object to the doctor/client privilege." The judge overruled appellant's objection and Defense Counsel Tarr called Dr. David Price as a witness. As will be seen infra, Defense Counsel Harte objected to his co-counsel, Tarr, calling Dr. Price over appellant's objection. It is readily apparent, as will be seen infra, that this decision deeply troubled Counsel Harte. R. 133, l. 9 – 134, l. 23.

As will also be seen infra, Solicitor Meyers chose not to bring out the fact, for competency to represent himself purposes, that Dr. Price was not even aware that appellant ran a major prostitution ring that dealt drugs also in Augusta, Georgia. The solicitor saved that jewel for the penalty phase of the trial with Dr. Price. Appellant did not have cognitive problems when it suited the solicitor's purposes. R. 2193, ll. 12-19.

Dr. Price then testified in camera he was a clinical psychologist. When Defense Counsel Tarr to qualify Dr. Price as an expert in clinical psychology, forensic psychology and forensic neuropsychology, appellant noted his continuing objection to the proceedings. R. 135, l. 15 – 137, l. 3.

Dr. Price testified he had seen appellant five times for approximately fourteen hours. He offered that appellant had had sixteen different psychiatric diagnoses throughout his lifetime, and six involuntary admissions, psychiatric admissions. Dr. Price said appellant had failed to finish high school and his IQs tested in the 70s to 82. R. 137, l. 17 – 138, l. 23.

Dr. Price testified he had diagnosed appellant with post-trauma stress disorder and a cognitive disorder not otherwise specified. R. 138, l. 24 – 139, l. 8. Dr. Price said there was no question that appellant was competent to stand trial. However, Dr. Price opined appellant's competency to waive his Sixth Amendment right to counsel was "impaired." R. 137, l. 25 – 139, l. 16.

Dr. Price said appellant's post-trauma stress disorder and his record showed he was distrustful of others, paranoid and he often felt betrayed. R. 139, ll. 17-24. Dr. Price noted that appellant had fired attorneys in the past and that appellant told him he was consulting with a member of the South Carolina Bar who was advising him "to have you guys fired and for him to hire that person and he had a clear plan when I talked to him yesterday of that person being the first chair or the second chair." R. 139, l. 17 – 140, l. 21. As will be argued infra, the fact appellant was consulting with outside sources and planning for his trial certainly weighed in favor of appellant's competence to represent himself.

Dr. Price also cited appellant's "cognitive issues." Dr. Price stated appellant sometimes lost his train of thought and lapsed into prayer. Dr. Price also said at times appellant had trouble thinking abstractly, and he doubted he could be ready for trial because

there were six thousand five hundred pages of discovery involved.[1] R. 141, ll. 1-22. Dr. Price said appellant appeared to have a grandiose way of thinking, and he did not think appellant appreciated how difficult it would be to represent himself. He then opined appellant was not competent to waive his right to counsel. R. 142, ll. 4-14.

Appellant told the judge that "nobody knows this case like I do." Appellant said Dr. Price was misrepresenting the facts and he felt betrayed: "[T]hese people right here that represent me would take a person that's also on my team, my defense team, and have you . . . if I had known something like that, I would have never brought forth that type of defense." Appellant repeated that whatever happened to him in the past did not have any effect on his decision to represent himself now,[2] and he repeated that he had answered every question the judge asked him on Friday. "I can represent myself in this trial." Appellant again cited the unfairness and betrayal he felt. R. 143, l. 17 – 145, l. 25. Appellant cited his desire to seek

[1] Dr. Price apparently was not present at the November 5, 2010 hearing where the judge dismissed the amount of discovery as a factor and stated appellant was more familiar with his case than anyone else.

[2] As seen above appellant told the judge his problems were behind him. Appellant was the product of a rape that occurred when his mother was 12 years old. Appellant's mother would often abandon him for periods up to a year. During this abandonment, appellant would often stay with his grandparents where there was inadequate food and supervision. Appellant was physically and sexually abused by multiple cousins and an uncle during the various periods he lived with his grandparents. R. 2035, ll. 16-20; R. 2031, l. 21 – 2032, l. 4; R. 2075, ll. 14-18; R. 2184, ll. 13-20. Appellant was sexually molested by a female babysitter at the age of six. R. 2031, ll. 18-20; R. 2035, ll. 23-25; R. 2075, ll. 14-18. Appellant was also physically abused by his mother, who would go into rages and would hit him with anything she could get her hands on, including her fists. R. 2035, ll. 9-13; R. 2184, ll. 5-7. Appellant's mother would make comments that appellant looked like her rapist and believed that there was "something evil inside her child." R. 2041, ll. 24-25; R. 2080, l. 23 – 2081, l. 1. Appellant tried to commit suicide on more than one occasion and was admitted to psychiatric hospitals before the age of eighteen. R. 2039, l. 23 – 2040, l.2. Appellant was thirty-two years old at the time of his trial. The trial occurred eight years after appellant's arrest.

an interlocutory appeal if the judge ruled he could not represent himself. R. 143, l. 17 – 145, l. 25.

Appellant also complained that he was not prepared for the hearing and he could have had "a rebuttal psychiatrist" if he had known this proceeding was going to take place. Appellant said he understood the judge had "almighty discretion over this matter. And the only way your cases get overturned, your rulings overturned is abuse of discretion. And I just feel that, like I said, my attorneys didn't consult with me with this matter. I don't even have nothing to rebut. I'm just a poor man trying to . . ." R. 146, l. 25 – 149, l. 18.

The judge interrupted appellant and asked what he meant about being a poor man. Appellant responded that he did not have the ability to rebut the testimony of Dr. Price at the hearing and apparently addressing Defense Counsel Harte, appellant said, "This man [Defense counsel] . . . you agree to this?" Defense Counsel Harte took exception to any assertion he was acting in concert with co-counsel Tarr: "I voiced an objection . . . "I voiced some concerns about it." R. 146, l. 25 – 149, l. 18.

Appellant then stated he had objected to Dr. Price's testimony, which revealed privileged matters, and he repeated he would not have talked to Dr. Price if he knew he was going to testify against his interests in the manner he just had done. R. 146, l. 25 – 149, l. 18.

Appellant then he turned his attention to Defense Counsel Tarr stating: "If I had known that my lawyer, David Tarr, was going to do something like that. I would have never hired any mitigation people. W ith family members and stuff like that for mitigation purposes or whatever statutory mitigation . . . from this day on I'm not going to talk to him, We have no relationship, that's what I'm saying, Your Honor." The judge then asked

Defense Counsel Tarr if he had anything further to say and Defense Counsel Tarr responded, "No, Your Honor." R. 146, l. 25 – 149, l. 18.

The judge then asked Dr. Price how appellant's "intelligence factor" related to him waiving his right to counsel. Dr. Price vaguely responded that he was concerned about appellant's "distractibility, the memory impairment he's demonstrated, intellectual function, difficulty in being able to abstract and apply that." Dr. Price also noted that since appellant was incarcerated he would have difficulty calling witnesses and managing a trial from a correctional institution twenty miles away, and being prepared for direct and cross-examination. R. 149, l. 19 – 150, l. 23. Dr. Price also claimed appellant feeling betrayed was an apparent sign of heightened paranoia. R. 151, ll. 2-16. Dr. Price apparently also did not know that the judge had promised appellant that he could help him subpoena witnesses – even out-of-state – if he needed them if he represented himself.

The judge then ruled, citing Indiana v. Edwards, that the ability to represent oneself presented a very different set of circumstances than the determination whether a defendant was competent to stand trial. The judge stated that mental state is not a static matter and that different stressors can have an affect on it. The judge said although he "[appellant] answered questions appropriately this past Friday, I am concerned about the information that was provided to the Court today [by Dr. Price]." The judge cited appellant's psychiatric diagnosis, his IQ, and his involuntary commitments as factors he considered. He also cited Dr. Price's testimony about appellant's feeling of betrayal, firing other lawyers, and his distrust of authority. R. 153, l. 13 – 159, l. 6.

The judge then seemingly reversed what had thought about the discovery just three days earlier: "With the background of 6,500 pages, it's just not possible, in my opinion, to

say, I am prepared with those pages, in this amount of time." The judge ruled that he found appellant "does not have a clear understanding of the dangers of self-representation in the guilt nor the penalty phase," and said he had noticed appellant being respectful although "not necessarily pleased at times, with his attorneys." The judge then denied appellant's motion to represent himself under Faretta v. California and reaffirmed the "appointment of Mr. Tarr and Mr. Harte." R. 153, l. 13 – 159, l. 6. Defense Counsel Tarr said he had no other motions, but Defense Counsel Harte stated "I'll place on the record that I do object to your ruling regarding Mr. Barnes." R. 159, ll. 7-19.

Discussion

An accused may waive his right to counsel and proceed *pro se*. Faretta v. California, 422 U.S. 806 (1975). The right must be preserved even where the court – as here and almost always – believes that the defendant will benefit from the advice of counsel. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999); State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1988).

In State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010), this Court noted that in addition to the United States Supreme Court interpreting the United States Constitution as providing a right to self-representation pursuant to Faretta v. California, the South Carolina Constitution also provides that every criminal defendant has the right to represent himself and it made no distinction between capital and non-capital defendants. See, S.C. Const. art. I, § 14.[3]

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[3] It was agreed pre-trial that there is no right to "hybrid" representation in this state. Under the state constitution a defendant has the right to be fully heard by self or counsel. Since this Court has ruled that this does not provide for "hybrid" representation the constitutional language can only be fairly interpreted to mean a constitutionally guaranteed

As has often been pointed out the Sixth Amendment, when naturally read, implies a right of self-representation and provides the right to counsel for a defendant's benefit if he chooses to exercise that right. The right to represent yourself is a recognition of the dignity of the individual. See, Faretta v. California, 422 U.S. 806, 821 (1975).

Here, appellant's requests to represent himself was repeatedly made prior to trial. State v. Fuller, supra. Cf. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010). This record fully supports the conclusion that the trial judge was almost positive he was going to allow appellant to represent himself on the Friday before the Monday trial.

Appellant undoubtedly answered the judge's questions intelligently. Appellant exhibited an understanding of hearsay and the rules of evidence when the judge asked appellant about Rule 803, SCRE and he correctly answered it referred to an excited utterance and a present sense impression. Appellant had a clear understanding of his right to a speedy trial, and he complained about trial counsel getting continuances against his wishes. He clearly understood this could also adversely affect his rights under the interstate detainer agreement. R. 45; 66-68. Appellant also complained of pre-indictment delay, and said there was no excuse for the age of his case.

Further, on the Friday before the Monday trial, the judge was not at all concerned about the discovery that Defense Counsel Tarr brought to his attention. The judge correctly observed that appellant knew his case better than anyone else. The judge told appellant he thought he was making mistake but that he had the right to make that mistake and represent

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right to self-representation. Any other approach would render the language meaningless. Thus the state constitutional guarantee is direct and clean.

himself. R. 75-76. The judge also advised appellant it would not be wise to refer to himself in the third person while representing himself during the trial.

Appellant also talked to the judge intelligently about Holmes v. South Carolina and State v. Gay as they related to the third party guilt. Appellant properly expressed his concern with *voir dire*, and not having a death prone jury, *citing* Witherspoon.[4]

Appellant repeatedly told the judge he was ready for trial on Friday and noted he had wanted a speedy trial. What happened between Friday and Monday was that Defense Counsel Tarr said that he had come upon Indiana v. Edwards, 554 U.S. 164 (2008) which held that a defendant may be competent enough to stand trial, but not competent enough to waive his Sixth Amendment right to counsel and represent himself. The Court in Indiana v. Edwards also held that the states had the right to prohibit defendants from waiving their right to counsel if they were not competent to conduct trials by themselves.

As seen above, Defense Counsel Harte stated that he objected to Defense Counsel Tarr calling Dr. David Price as a witness. Based upon Tarr's own admissions Dr. Price had only been retained by the defense to assist in the penalty phase of the trial. Appellant asserted the privilege of his conversations with Dr. Price, saying he would not have talked to Dr. Price if he had been told Dr. Price would be used in this adverse to interests manner.

Whatever Dr. Price's findings regarding appellant's sense of betrayal and distrust, appellant had every right to feel betrayed by the actions of Dr. Price in this case. Dr. Price noted that appellant had had six separate diagnoses and six involuntary admissions in the past, appellant countered that this did not affect his ability to represent himself *now*. Appellant lodged a "continuing objection" to Dr. Price's testimony and he showed a clear

grasp of proper courtroom procedure. When asked if he wanted to question Dr. Price as to his qualifications, appellant made it clear that he did not object to Dr. Price's qualifications, but his objection went to what was occurring at the hearing. That was a continuing objection, appellant said.

When appellant thought it became clear that the judge was not going to allow appellant to represent himself, appellant said he wanted to file an interlocutory appeal. That appellant would have even a rudimentary grasp of a writ of supersedeas in this instance, in this death penalty case, put him ahead of many criminal defense attorneys.

Further, Dr. Price's observation that appellant had not finished high school and tended to be distracted, and would have difficulty obtaining witnesses from jail were essentially all properly rejected by the trial judge on the Friday before when the judge said appellant knew his case better than anyone else, and the court could help appellant – as with any pro-se defendant – obtain necessary witnesses. The judge also stated his position clearly on Friday when the judge told appellant he thought he was making a mistake, but that he had the right to make a mistake. Further, logistical concerns about pro-se prisoners having access to books, witnesses, the scene, etc. are inherent in every case of pro-se representation. Nonetheless, Dr. Price thought Farreta is dead letter.

As seen, when appellant challenged Harte directly about the betrayal with Dr. Price having been called as a witness Defense counsel Harte answered appellant that he had objected to this procedure. Armed with the assurance that Defense Counsel Harte was on his side, appellant said he would no longer talk to Defense Counsel Tarr. R. 149.

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[4] Witherspoon v. Illinois, 391 U.S. 510 (1968).

Appellant also complained that the procedure was unfair because he would have had a rebuttal psychiatrist to Dr. Price ready if he had been put on notice that this hearing was going to occur with Dr. Price violating the confidences placed in him. Dr. Price was only going to be a penalty stage mitigation witness. Appellant's Due Process objection was well-placed over what occurred with Dr. Price, and that is Issue 2 infra.

With all this strong evidence of appellant's ability to represent himself, one of the most striking items speaking volumes of his knowledge of the system was when Defense Counsel Tarr presented the case of Indiana v. Edwards for the first time on Monday morning, and appellant was prepared to distinguish it. He noted that the defendant in Indiana v. Edwards was mentally ill, and the trial judge agreed with appellant that defendant in Edwards was schizophrenic. Appellant's earlier psychiatric problems and his post-trauma stress disorder stemmed from the unbelievable abuse he suffered as a child. However, appellant stated that was all behind him at this point. He was now thirty-two years old.

It is also interesting to note that Defense counsel Tarr did not call Dr. Donna Schwartz-Watts as a witness. During the penalty phase, Dr. Donna Schwartz-Watts noted "one of the things [appellant] does, quotes a lot of statutes and laws and federal laws, and he believes that the [prison] conditions were uncivil." R. 2096, ll. 1-9. Dr. Schwartz-Watts also testified appellant was "somewhat intelligent." R. 2102, l. 3.

Further, several of the judge's reasons for not allowing appellant to represent himself were either not supported by the record or actually were reasons under Faretta v. California, State v. Brewer, and State v. Fuller why appellant should have been allowed to represent himself. The judge said on Friday he was not concerned about the volume of discovery, noting appellant knew his case better than anyone else. Yet, on Monday the judge used the

discovery as a reason to support his ruling, stating he did not think appellant could be adequately prepared for trial.

Dr. Price's assertion that appellant was paranoid because he was talking to a member of the South Carolina Bar who was advising him how to fire his attorneys actually supported appellant's right to represent himself since he knew how to proceed within the system. R. 140, ll. 12-25. Further, as stated, appellant's feeling of betrayal with Defense Counsel Tarr's use of Dr. Price was not paranoia -- it was accurate. R 155, ll. 16-25.

The judge's observation that "preparation is the key to victory," citing the volume of discovery and stating that the attorneys should be prepared to meet with the witnesses, prepare witnesses, and cross-examine witnesses are all refuted as proper reasons under Faretta v. California to not allow a person to represent himself. R. 156, l. 20 – 157, l. 7. It seems intuitive that all judges are going to think that a defendant would be better off being represented by counsel. R. 158, ll. 1-20.

Even with appellant's legitimate reasons to feel betrayed, the judge noted that appellant was always respectful although he was "not necessarily pleased at times with his attorneys." R. 158, ll. 1-20. After the judge ruled appellant would not be allowed to represent himself, as seen, Defense Counsel Harte objected to the judge's ruling while Defense Counsel Tarr had nothing else to say since it was apparent he got the ruling in his favor, and adverse to appellant. R. 159, ll. 7-19.

The trial judge erred by refusing to allow appellant to represent himself in this case pursuant to Faretta v. California, State v. Brewer, State v. Reed, and State v. Fuller. The judge's reliance on Indiana v. Edwards, given appellant's obvious grasp of court proceedings, his right to represent himself, and his proper objections during the time it was

being determined whether he would be allowed to represent himself, show a clear abuse of discretion on the part of the trial judge. Appellant should be granted a new trial.

2.

The court violated appellant's right to Due Process by relying on the pre-trial testimony of Dr. Price about appellant's ability to represent himself since appellant was evaluated by Dr. Price with the clear understanding that Dr. Price would exclusively be a penalty phase mitigation witness for him, particularly where one of appellant's two attorneys joined in appellant's objection to Dr. Price's pre-trial testimony under these circumstances.

Relevant Facts

As seen above, defense counsel told the judge that Dr. Price had been retained to evaluate appellant "for purposes of the sentencing phase . . ." R. 124, l. 24 – 125, l. 9. Defense Counsel Tarr also told the judge Dr. Price was prepared to testify that appellant was competent to stand trial, but that he lacked the capacity to waive his right to counsel and proceed *pro se*. R. 124, l. 24 – 125, l. 18.

Appellant objected to Dr. Price testifying at the pre-trial hearing on the grounds of privilege. Appellant correctly stated that Dr. Price was only retained for purposes of the penalty phase mitigation case, and that was the only reason he talked to Dr. Price during the evaluation. "If I had known that he was going to be adverse to me, I wouldn't have talked to him." R. 125, l. 22 – 126, l. 24.

When Defense Counsel Tarr said he was not trying to be adversarial but he thought the judge should hear Dr. Price's testimony despite appellant's objection on the basis of privilege, appellant then raised his Due Process objection to the judge hearing Dr. Price's testimony pre-trial. R 129, l. 14 – 130, l. 24.

The judge stated he did not know of any procedure for him to appoint an expert to determine appellant's competency for self-representation and over appellant's repeated objections, as well as the objection of Defense Counsel Harte, Defense Counsel Tarr was allowed to use Dr. Price as an adverse witness to appellant. R. 131, l. 20 – 134, l. 23. After Dr. Price testified, appellant stated that Dr. Price was misrepresenting the facts and that he felt betrayed. Appellant also cited the fundamental unfairness of this procedure since he could have had a rebuttal psychiatrist of his own ready had he not been ambushed with this proceeding. R. 142, l. 4 – 149, l. 18.

Appellant told Defense Counsel Tarr after the pre-trial hearing, and immediately before the trial: "[F]rom this day on I'm not going to talk to him, we have no relationship. . ." R. 146, l. 25 – 149, l. 18.

Based largely on Dr. Price's testimony, the judge ruled appellant would not be allowed to represent himself, where only three days earlier it looked imminent that appellant would be allowed to represent himself as he so strongly desired. R. 153, l. 13 – 159, l. 6.

Discussion

In most cases in which an objection is made to an expert testifying over a defense objection, it involves a compelled evaluation and a Fifth Amendment violation objection. This is a very unusual case. Appellant and Defense Counsel Harte, on appellant's behalf, objected to Dr. Price testifying pre-trial in a manner adverse to appellant where Defense Counsel Tarr admitted Dr. Price had been retained as a penalty phase mitigation witness for appellant.

All of this occurred before the judge made his ruling that appellant could not represent himself. Meaning, appellant was on equal footing as far as his right to object. It is

eminently fair to conclude following the Friday hearing, and before Dr. Price's testimony, that it appeared imminent appellant was going to be allowed to represent himself. He answered all of the trial judge's questions correctly, and he showed a greater aptitude than some criminal defense attorneys with his knowledge of procedure and applicable case law (Holmes v. South Carolina, supra, State v. Gay, supra, Witherspoon v. Illinois, 391 U.S. 510, 521 (1968), continuing objections, ability to have a rebuttal psychiatrist, his complaints about continuances as they affected his interstate detainer issue his speedy trial issue, and his remarkably accurate knowledge of hearsay rules).

The issue here is one of a breach of fundamental fairness and a violation of Due Process. It is undisputed that Dr. Price was retained, and that appellant only agreed to talk to him, because he was going to be a penalty phase mitigation witness for the defense. Yet, all of that was turned on its head and Dr. Price testified as an adverse witness to appellant thereby effectively denying appellant his right to represent himself even given the apparent problems with his testimony discussed in issue one supra.

Knox v. Collins, 928 F.2d 657 (5th Cir. 1991), involved a situation where the defendant was promised that the court would give a parole instruction on life imprisonment at the conclusion of the trial. That instruction was not constitutionally mandated -- at least at that time -- but the trial court nonetheless agreed to charge it.

When the trial court refused to fulfill that promise at the close of the case, the Fifth Circuit held that while such an instruction was not constitutionally mandated under the unusual facts of that case it constituted "a breach of fundamental fairness in the procedure which governed the exercise of the defendant's peremptory challenges." Knox v. Collins, 928 F.2 at 662. The Court held this violated the defendant's Due Process right to select

jurors with the assurance that they would be instructed on life imprisonment, and for the court to renege on its promise.

In State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), this Court found reversible error where the trial court, at a charge conference, indicated it planned to give the reasonable doubt instruction outlined in State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991): "A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act." State v. Jones, 343 S.C. at 576, 541 S.E.2d at 820.

Defense counsel then made a closing argument stressing the fact that "a reasonable doubt was a doubt that would cause a reasonable person to hesitate to act." Following defense counsel's closing argument the solicitor then objected to the judge giving the State v. Manning "hesitate to act" instruction arguing it would confuse the jury.

The trial judge then agreed not to charge the State v. Manning "hesitate to act" charge. This Court held that this was fundamentally unfair to the defendant to alter the reasonable doubt instruction where defense counsel relied on that instruction in formulating his closing argument.

Here, appellant, as well the defendant in Knox v. Collins and State v. Jones, relied on the fact that he was only talking to Dr. Price because Dr. Price was going to be a penalty phase mitigation witness *for him*. It was fundamentally unfair and a violation of due process for the judge to then allow Dr. Price to testify against appellant's interests during the continuation of the pre-trial Faretta hearing.

Further, the fact that the judge was not aware of any procedure where he could appoint an expert to examine appellant for purposes of the Indiana v. Edwards standard of whether appellant was competent to stand trial but not competent to represent himself was

not grounds to allow Dr. Price to become a critical adverse witness against appellant during the Faretta hearing.

The judge certainly had the discretion to appoint an expert for that purpose just as he had the authority to have a defendant evaluated for competency if he had any reason to think the defendant was not competent to stand trial. See State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981); Pate v. Robinson, 383 U.S. 375 (1966). The judge here abused his discretion because he failed to exercise discretion because he did not believe he had that discretionary authority. See, State v. Alexander, 309 S.C. 495, 499-500, 424 S.E.2d 526, 529 (Ct. App. 1992).

Allowing appellant's penalty phase mitigation witness, Dr. Price, to testify against appellant's interests during the pre-trial Faretta hearing was fundamentally unfair, and it was Due Process violation.

In State v. Jones II, 383 S.C. 535, 681 S.E.2d 580 (2009), this Court dealt with the situation where there were only two recognized experts in the world on "barefoot sole impression" evidence. Bodziak and Kennedy were those experts.

Bodziak was retained by the defense. However, prior to trial the State subpoenaed Bodziak citing the unique nature of the situation because there were only two experts in the world on this "science."

While this Court found no reversible error in the judge's decision to allow Bodziak to testify for the State in camera only, and not to reveal anything he learned in confidence from the defense, this Court cautioned that its decision should not be perceived as allowing the State to subpoena and use a defense witness as a subversive tactic. This Court wrote that its opinion was limited to the highly unusual facts of State v. Jones II.

This Court concluded that "absent a showing of substantial need and undue hardship, the **government** should be precluded from eliciting testimony from the defense's consulted expert concerning the efforts he undertook at the request of the defendants' attorneys or the opinions and conclusions these experts develop at the behest of the defendants' attorneys' in the compilation of materials in preparations for trial." State v. Jones, 383 S.C. 535, 547-548, 681 S.E.2d 580, 586 (2009).

Here, the judge was a state actor. He agreed that defense counsel Tarr could have Dr. Price testify for the court adversely to appellant's interests.

This is a very unusual case since appellant's defense attorney's disagreed about calling Dr. Price as an adverse witness to appellant at a time when the judge was making a determination of whether appellant would represent himself, or whether Defense Counsel Tarr and Defense Counsel Harte would represent appellant. Allowing Dr. Price to testify against appellant's interests at the pre-trial Faretta hearing was an abuse of discretion, it was fundamentally unfair, and a violation of Due Process. Appellant should be granted a new trial.

3.

The trial court judge erred, in derogation of appellant's rights under the Sixth Amendment, the Eighth Amendment, and the Fourteenth Amendment, by improperly limiting defense counsel's attempt to *voir dire* the jurors regarding their views of the death penalty, and rendering appellant's trial fundamentally unfair.

On November 8, 2010, the parties began to select the jury. Previously, the trial court judge had potential jurors complete written questionnaires.

The *second* person to be questioned during individualized *voir dire* was Lynn Koening, Juror No. 157. R. 181, ll. 17-20.

> As the judge did throughout the *voir dire*, he conducted the initial questioning:
>
> Q. Ms. Koenig, good afternoon. Did you have the opportunity to review the categories of jurors?
>
> A: Yes, sir.
>
> Q: Do you have that document with you?
>
> A: I do.
>
> Q: Hand it to me, please.
>
> All right. I see you have signed it and placed your juror number there, and you have placed yourself in Category C; is that correct?[5]

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[5] Jurors were asked to describe themselves, prior to entering the room for individualized *voir dire* as either type A, B, or C jurors. A copy of this form is included in the record. R. 2355. Category C jurors identify with the following statement: There is a type of juror who, although the guilt of the defendant has been determined, would not have his or her mind made up in advance concerning punishment. This juror would need to hear the facts and circumstances in aggravation and mitigation, and would want to listen to and follow the law as the judge charges the jury, before he or she could make the decision regarding punishment, and if the facts presented so warranted, this juror could bring in a

A: Yes.

Q: And as I understand Category C, that is the type of juror that, although the guilt of the defendant had been determined, would not have her mind made up in advance concerning punishment; is that correct?

A: That's correct

Q: That this juror would need to hear the facts and circumstances in aggravation and mitigation and would want to listen and follow the law as the judge charges the jury before she could make her decision regarding punishment; is that correct?

A: Yes, sir.

Q: And if the facts presented so warranted, this juror could bring back a verdict for life without parole, correct?

A: Yes, sir.

Q: Also, if the facts presented so warranted, the juror could bring in a verdict for the death penalty; is that correct?

A: Yes, sir.

Q: And it would depend on the facts and circumstances?

A: Exactly.

Q: And the law as the judge told you the law was?

A: Yes, sir.

Q: And you understand this type of trial potentially is a two-part trial?

A: Yes.

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verdict of life without parole. Also, if the facts presented so warranted it, the juror could bring in a verdict for the death penalty.

> Q: The first part, the jury would be solely focused on whether or not the defendant were guilty or not guilty. You understand that?
>
> A: Yes, I do.
>
> Q: And if the defendant were found not guilty, obviously there'd be no need for the penalty or sentencing phase, correct?
>
> A: Correct.
>
> Q: And this is the only opportunity we get to ask you these questions. That's why we do it at this time. You understand that?
>
> A: Yes, sir.
>
> Q: All right. Do you have an opportunity to review the witness list?
>
> A: Yes, I did.
>
> Q: Did you know anyone on that list?
>
> A: No, sir.
>
> Q: And you know nothing about this case; is that correct?
>
> A: I do not.

R. 182, l. 11- 184, l. 16.

After this initial questioning, which largely just reiterated what was contained on the juror identification sheet, trial counsel was allowed some questioning of the juror. After a couple of very general questions, trial counsel sought to question her about her views of the death penalty. He attempted to ask her:

> Q: Let me ask you this. In terms of life versus death, what are some of the factors that you would consider to be important in making that determination?

The Solicitor objected to this question, which was sustained by the trial court judge. R. 187, ll. 11-17.

Counsel then attempted to ask another question:

> Q: Can I ask you this, then? In your mind, what do you -- what is your understanding of the term "murder"?

The trial court did not allow counsel to ask that question.

> THE COURT: I won't allow that either. That's a charge on the law by the Court and the jurors would be sworn to follow the law.
>
> She may *or may not know*. She may know the law better than I do, but as far as her opinions of what the law of murder is is not appropriate *voir dire*.

R. 187, ll. 19- 188, l. 1. (emphasis added).

Counsel attempted a third question:

> Q: Let me ask you this, Ms. Koenig. What types of evidence that the defense could present to you would be important to you in making your decision in a case like this?

This time the solicitor objected:

> MR. MEYERS: I have to object to that, too, Your Honor. We are getting into hypothetical things of what the juror wants. Jurors have a position and we can't delve into what it may or may not be.
>
> THE COURT: I would agree with that.
>
> You know, you can certainly ask her if she's going to follow the law, there's statutory mitigating, there's non-statutory mitigating without giving examples—

MR. TARR: Yes, sir.

THE COURT: -- is she going to consider everything, but you can't stake them out, Mr. Tarr, so I would sustain the objection.

MR. TARR: And I'm certainly not attempting to---

THE COURT: Yes, sir. And I don't mean that by way of criticism. I didn't mean it like that at all.

MR. TARR: I'm definitely not trying to get her to commit to any specific set of facts.

THE COURT: Yes, sir.

R. 188, l. 3- 189, l. 1.

Trial counsel asked to make an argument on the record outside of the juror's presence. R. 189, ll. 17-19.

After the solicitor completed questioning the juror and the juror exited the room, trial counsel objected to not being allowed to *voir dire* the juror on the definition of murder. R. 192, ll. 20-21.

> And I just think the misconception of what murder means, there's a lot of jurors that -- they think that only certain things are murder and there is to be absolutely an automatic death penalty if that person was found guilty of that. But in their minds, self-defense, accident and things like that are murder. And so not being able to ask them what their understanding is of murder and we're getting jurors who are saying that they can consider both life or death, when in reality they would only consider life for accident or self-defense or manslaughter. They wouldn't consider it for what they have in their minds. So that's the reason why I feel like we need to be able to question them about what their understanding is of the term "murder."

R. 193, ll. 6-19.

The solicitor argued that such questions were improper. R. 193, l. 20- 195, l. 24.

Counsel responded that he was not attempting to find out what they would do in certain circumstances, but only attempting to explore any misconceptions or predispositions to vote a certain way. Counsel argued that his denial of the right to *voir dire* on this issue injects a degree of arbitrariness into the application of the death penalty, and that it violates appellant's rights under the Sixth Amendment, the Eighth Amendment, and the Fourteenth Amendments to the United States Constitution and corresponding State Constitutional provisions. R. 196, l. 2- 197, l. 6. The trial court judge denied the motion. R. 197, ll. 7-8. He concluded that State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010) and State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008), read together, stand for the proposition that counsel cannot question jurors "concerning their conceptions or misconceptions on what the law is." R. 197, l. 7- 198, l. 14. Ms. Koenig was qualified as a juror.

Later, Steven Fraley Jordan, Juror #146 was asked questions during individualized *voir dire*. He was the sixth juror called. He also placed himself in Category C. He revealed that he was close friends with the Sheriff of Richland County, Leon Lott, and friends with the former Solicitor of Richland County, James Anders. His grandfather was the former captain of the Highway Department. He was also a member of the Law Enforcement Officer's Association, and had been a constable for a "number of years." R. 235, l. 17. As a constable, he actually worked with the Edgefield Sheriff's Department, the prosecuting agency in this case. R. 236, ll. 15-19. He knew the Sheriff of Edgefield County "fairly well." R. 237, ll. 4-9.

On questioning from defense counsel, the following occurred:

Q: Now, if you were on the jury and you found that there was a murder that there was absolutely no excuse for, you could give meaningful consideration to a life sentence?

A: Quite honestly, if there was no excuse for it, cold blooded, I couldn't. I've just got to be honest with you. If there are mitigating circumstances or situations, I mean yes, but I'd be lying if I said differently.

R. 237, l. 20- 238, l. 3.

After further colloquy, the juror exited the room and defense counsel challenged his qualification to serve:

MR. TARR: Your Honor, I clearly don't think this juror is qualified. He said flat out if he found somebody committed murder in cold blood with no excuse—

THE COURT: Wait a minute. I never heard the words "cold blood."

MR. TARR: Yeah, he said cold blooded, Your Honor.

THE COURT: I never heard that.

MR. TARR: You can have the court reporter read it back. He said, No excuse in cold blood, I have to be honest, I couldn't vote for a life sentence.

THE COURT: And then went on to say, depending on the mitigation.

R. 240, l. 16 - 241, l. 3.

The juror then returned to the room for further questioning:

Q: If you found beyond a reasonable doubt that there was a murder with no excuse in cold blood, would it matter to you—would anything else matter to you?

THE COURT: No, sir, now that's not an appropriate question.

THE JUROR: Yeah.

THE COURT: Because that's staking him out on a particular hypothetical question. You have to ask him about both aggravation and mitigation, which would be part of his oath in that regard, Mr. Tarr.

MR. TARR: Yes, Your Honor. I believe that's almost the same question I'd asked previously.

THE COURT: No, sir.

R. 242, ll. 10-22.

The judge then had the juror exit the room again so he could address defense counsel. R. 242, l. 24 - 243, l. 2.

> THE COURT: If your question is, and perhaps the Court was not as alert as the Court should have been in that regard, you can't give an individual juror a particular hypothetical or a particular set of facts and say, How would you vote in that circumstance?
>
> And I'm not being critical of you, Mr. Tarr, at all. I'm saying perhaps the Court was not as alert in that particular regard as it should have been. But you can't stake a juror out to one particular hypothetical, or a hypothetical at all, and then say, What would you do in that circumstance, because then they become like a ping pong ball and the Solicitor gets up there and says, Well, let me ask you this: What if you throw this into the hypothetical?
>
> There's a statutory mitigating or non-statutory mitigating or there's evidence of mercy. That's kind of the concern I have with that type of question.
>
> Tell me what you want to ask Mr. Jordan.
>
> MR. TARR: Well, what I'd asked him before was if the jury found beyond a reasonable doubt that there was a murder with no excuse, could you give meaningful

consideration to a life sentence. And he said, No, to be honest with you if they did it no excuse in cold blood, I couldn't do that.

THE COURT: And that's without explaining to him what the law is in South Carolina of whether or not he would consider statutory mitigating or nonstatutory mitigating circumstances.

MR. TARR: It's also *without explaining to him what the definition of murder is, Your Honor. This is exactly—*

THE COURT: I never said that I would not explain the definition of murder. What I had said *was you cannot question these jurors about their conception or misconception about the definition of murder.*

If you want me to tell the jury murder in South Carolina is the unlawful killing of a human being by another with malice aforethought, express or implied, I will be glad to do that. That wasn't what I sustained the objection on.

My sustaining of the objection in that regard was on the fact that it was concerning what the jury thought murder was or what the jurors thought the definition was.

MR. TARR: I'd be happy for Your Honor before they are questioned here today, each one of them, to tell them exactly what you just said.

THE COURT: Well, I'll leave that up to the attorneys to tell them, if they give the proper legal definition. You all give the definition of aggravation and mitigation sometimes, lessen and exacerbate. I mean, I don't object to -- I don't have a problem with a properly framed question of what the law is in that regard. That's just asking if you're going to follow your oath -- if that's the law, are you going to follow your oath in that regard.

What is it you want to ask Mr. Jordan? Let's move on with him. I apologize for bogging this down.

MR. TARR: No. I mean, I think I've already attempted to ask it and you've ruled that I shouldn't ask it.

THE COURT: I don't think I've ruled. That's why I had him step out. I wanted to make sure I understood if I have ruled what I was ruling on. What question do you want to ask Mr. Jordan?

MR. TARR: I wanted to ask him if he could give meaningful consideration to a life sentence if he sits on a jury that finds Mr. Appellant guilty of murder.

THE COURT: All right. Well, let's bring him—yes, sir, Solicitor?

MR. MYERS: That's fine.

THE COURT: If he can give meaningful consideration to a life sentence if he sits on the jury and finds Mr. Appellant guilty of murder, that's what you want to ask him?

MR. TARR: I think anything else I want to ask him I'm not being allowed to.

THE COURT: Well, you've obviously been allowed to because you asked him to start with the one about the no excuse—

MR. TARR: Right. And you said you weren't listening—

THE COURT: So tell me what else you want to ask him, Mr. Tarr. I'm not trying to hamstring your right to voir dire.

MR. TARR: I'm not trying to commit him to any specific scenario or factual scenario or stake him out. I truly believe that if he finds somebody guilty of murder, *this is the type of juror that has a misconception about what murder is, and if it's no justification or excuse, which is what murder is, it's going to be death penalty every time, and I think he said just as much from the stand*, Your Honor, and that's why I don't believe he's qualified.

THE COURT: So you want me to tell him the definition of murder when he first comes back out?

MR. TARR: Yes.

THE COURT: All right.

MR. MYERS: I think the question could be asked under Morgan v. Illinois: Would you vote for the death penalty in every case of murder?

What he's trying to do is he's trying to throw the penalty phase in with the guilt phase, and that's typical. When you say he committed this horrible, violent, intentional premeditated murder, would you give the death penalty, but jurors who've never been through voir dire on a death penalty before without explaining the mitigation and the aggravation, that you can't find the death penalty in the guilt phase. It's the guilt phase, and if they are found guilty, then you go into the good and bad, the aggravation and the mitigation, and then consider the death penalty. And that's confusing. That's confusing.

I was trying to find a case, Patterson, where the Court had ruled on that.

THE COURT: On the hypothetical issue?

MR. MYERS: It was hypothetical, too.

THE COURT: I thought it was State versus Patterson myself.

MR. MYERS: It was. And it's where they asked the juror can they consider both sides after the State had introduced the victim's wife, pictures of the victims and other aggravating circumstances without even talking about the mitigating. The Court said you can't do that. And that's what they're trying to do here. They're trying to get this fellow to say, Well, we don't need the second thing, you can vote guilty on life or death in the same trial, which is not the law.

I think he can ask him, in every case of murder, would you always vote for the death penalty, like Morgan versus Illinois. If he says yes, you disqualify him.

R. 243, l. 3 - 248, l. 5.

When the juror returned to the room, the trial court judge charged the juror with the definition of murder. R. 249, ll. 4-11. Defense counsel then attempted to further question him, and the juror said he was confused. R. 250, ll. 5-11. The juror then asked a question to the court:

> Okay. The question is, a father has a son, okay? Somebody kills his son, he knows he's dead, and then the father goes and kills that person. I think that person deserves life. . . That's the way my thought process is.

R. 250, ll. 15-20.

Instead of exploring with the juror the misconception he had about the definition of murder versus manslaughter, the judge then asked him a number of general and abstract-- and, again, leading-- questions about his ability to impose the death penalty. For example:

> THE COURT: You also have in your mind - - don't tell me what they are, but you also have in your mind examples of murders in which a person may deserve the death penalty?
>
> MR. JORDAN: That's correct. Yes, sir.
>
> THE COURT: So it depends, as you're saying in your mind, on the facts and circumstances of each individual case?
>
> MR. JORDAN: Yeah, that's what I said.
>
> THE COURT: And you're not going to make up your mind just because you've convicted a person of murder?
>
> MR. JORDAN: No, sir.
>
> THE COURT: It's not an automatic decision; you're not one of those jurors that if you find a person guilty of murder, you'd automatically sentence a person to death?

MR. JORDAN: No.

THE COURT: And if you get - - in a death penalty trial an individual's found guilty of murder and you go into that penalty phase, evidence of aggravation, evidence of mitigation, evidence that may show something good or more of the circumstances of the nature of the crime or the particular defendant, or evidence of aggravation that may increase the enormity of the crime, you would consider that - -

MR. JORDAN: Yes, sir.

THE COURT: - - before you made your decision?

MR. JORDAN: Yes, sir. And I apologize. I assumed that's what I said.

THE COURT: And there would be many different factors you would look at - - don't tell me what those factors are - - before you made your decision?

MR. JORDAN: Yes, sir.

THE COURT: And if I told you the law was that the State has the burden of proving at least one statutory aggravating circumstance before the death penalty could be imposed, you would hold them to that burden?

MR. JORDAN: Yes, sir.

THE COURT: And if I told you the law was that we have certain statutory mitigating circumstances passed by our legislature, there's non-statutory mitigating circumstances, you would consider all those before you made your decision as to the appropriate punishment?

MR. JORDAN: Yes, sir.

THE COURT: And you understand there could be cases - - you're never required to impose the death penalty. Never. In other words, even if a person is found guilty of murder and there's an existence of a statutory aggravating circumstance, a jury can sentence a person to a life

sentence even under those circumstances. Do you understand that?

MR. JORDAN: Yes, sir.

THE COURT: For a statutory mitigating circumstance, non statutory, or for what they say no reason at all. In other words, just as an act of mercy.

And there circumstances in your mind in which you could consider and impose each of those sentences depending on the circumstances?

MR. JORDAN: Yes sir.

R. 250, l. 25 – 253, l. 6.

At the conclusion of this exchange, defense counsel again objected to the qualification of this juror. Trial counsel again objected that he was not being allowed to question the jurors about their views of the death penalty. Defense counsel stated he was not trying to get the jurors to commit to any specific factual scenarios. R. 255, ll. 9-15. Over objection, the trial court judge found Mr. Jordan qualified. R. 257, ll. 23-25.

Later, defense counsel attempted to question Kanette Miller about her attitudes towards the death penalty. She was the sixteenth juror to be questioned.

Q: And to just kind of determine what your position is on life versus death, just in general, as far as the death penalty, do you have any religious or moral beliefs that impact your opinion about the death penalty?

A: I feel like sometimes it might be necessary, but I don't—it would have to be like on a case-by-case basis for me to really say okay, well, this is what needs to be done here and this is what needs to be done there. I don't take that lightly.

Q: And do you—what is your thoughts on the axiom from the Bible, an eye for an eye?

MR. MYERS: Objection.

THE COURT: Sustained.

R. 369, ll. 2-14.

Trial counsel also attempted to ask her whether she believed the death penalty helps to protect society. Again the Solicitor objected and the trial court judge sustained the objection. Counsel asked to be allowed to make an objection, and the parties agreed to argue it outside of the juror's presence after additional questioning. R. 369, l. 20- 370, l. 11.

After continuing with the *voir dire*, the juror was excused and the trial judge heard the objection:

> MR. MYERS: Yes, sir. Number one, an eye for an eye in the Bible, religion is not a part of *voir dire*. And so she doesn't have to explain or interpret the Bible in her opinion.
>
> The other one that he said, purpose of the death penalty, the juror doesn't have to explain why they-- what their position is, or they don't have to give an explanation of what the law is, or what morality is or anything for purposes of the death penalty. Hypothetical stuff is just asking them to go into their background and stake them out on State versus Patterson, State versus Smart, a long line of cases that eliminate those kinds of questions.
>
> THE COURT: All right. Mr. Tarr, do you care to be heard?
>
> MR. TARR: I just believe I have the right to delve into whether or not she has religious views that can't be set aside or any other impermissible sentencing consideration that may be underlying her testimony that's under questioning.
>
> THE COURT: I believe you do have—yes, Solicitor.

MR. MYERS: He asked her about her religious views and she said no. She said sometimes the death penalty may be necessary but it would have to be a case-by-case basis. And then he asked her about what religion she was, she said Methodist. Then he started asking about an eye for an eye and the purpose -- what purpose the death penalty serves. That's way out of line.

THE COURT: I agree you have the right to ask a juror if they have any firmly held -- not necessarily firmly held, that maybe my lingo, religious or moral or personal beliefs for or against the death penalty. I agree with that.

I don't think—that's you or the solicitor have that right.

I do not agree that either you or the Solicitor would have the right to ask them, Well, for example, do you believe in the teaching of Jesus that forgiveness is divine? You know, the difference or distinctions in people's philosophies from the Old Testament and the New Testament, I don't think that's appropriate.

I always hold the position that this is not an Ecclesiastical court; that perhaps that would be appropriate in the Ecclesiastical courts that still exist throughout the world, but not in a state constitutional court.

As far as their beliefs in the -- I forget how you formed the question -- is the death penalty, something to the effect, necessary to provide security for society, or words to that effect.

MR. TARR: Yes, sir.

THE COURT: Nor do I think that's appropriate. A, it's kind of a compound question in that regard.

You know, in the past I've observed lawyers ask questions and say, Well, let me ask you this. If you were a member of the legislature at the time they passed the death penalty statute, would you have voted for it, you know, and I just don't think those questions are appropriate.

> Now, I do think it's appropriate for you to question if they have any firmly held beliefs for or against the death penalty.
>
> I would, and perhaps the solicitor just said it different than my interpretation, I interpreted that she does not now go to church but that she was raised Methodist anyway, and I thought her responses were very clear and that she'd be a good juror when she talked about a case-by-case basis. Further, she said it would be a serious decision.
>
> I believe you think she's qualified also you said?
>
> MR. TARR: Yes, Your Honor.
>
> We would for the record object not being able to ask those types of questions of the jurors under the Fifth, Sixth, Eight and Fourteenth Amendments.

R. 375, l. 6 - 378, l. 6.

Seventy-two jurors were questioned during *voir dire*. Defense counsel used peremptory challenges to strike both Ms. Koenig and Mr. Jordan. Ms. Miller was excused due to pregnancy issues and a note from her doctor. R. 1006-1007. Ultimately, defense counsel used nine peremptory strikes.

Discussion

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. Morgan v. Illinois, 504 U.S. 719, 728 (1992); Ross v. Oklahoma, 487 U.S. 81, 85 (1988); Duncan v. Louisiana, 391 U.S. 145, 147-158 (1968); Turner v. Louisiana, 379 U.S. 466, 471-473 (1965); Irwin v. Dowd, 366 U.S. 717, 722-723 (1961). In capital cases, this right embraces the concomitant "right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment . . . ." Uttecht v.

Brown, 551 U.S. 1, 9 ((2007) (citing Witherspoon v. Illinois, 391 U.S. 510, 521 (1968). The "essential demands of fairness" require that criminal defendants be given the opportunity to assure themselves of this right through *voir dire* directed to uncovering bias. Aldridge v. United States, 283 U.S. 308, 310 (1931) (holding that summarily dismissing defense counsel's request for supplemental *voir dire* on an issue of bias, the trial court violated the defendant's right to Due Process). *Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion).

The issue of a fair and impartial jury "becomes most grave when the issue is of life or death." Aldridge, 283 U.S. at 314. Capital defendants have a greater, not a lesser, right than others to ensure themselves of a fair and impartial jury. See, e.g., Turner v. Murray, 476 U.S. 28 (1986) (holding that capital defendants have a constitutional right to explore the issue of racial bias even in the absence of such a right when lesser penalties are at stake).

This Court has repeatedly held that a capital defendant is entitled to a trial before a panel of jurors whose ability to properly interpret and apply the law will not be affected by their personal opinions about the death penalty. See State v. George, 323 S.C. 496, 501, 476 S.E.2d 903, 907 (1996); State v. Davis, 309 S.C. 326, 335, 422 S.E.2d 133, 140 (1990). However, "[t]o be constitutionally compelled . . . the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." Mu'Min v. Virginia, 500 U.S. 415, 425-25 (1991); State v. Stanko, 376 S.C. 571, 658 S.E. 2d 94 (2008).

The trial court judge erred by limiting counsel's ability to explore the potential capital jurors on their attitudes about the death penalty. Without the ability to properly question the jurors about this issue, trial counsel was denied information necessary to decide whether to challenge a juror for cause, or whether to intelligently exercise a peremptory strike. See State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) (purpose of *voir dire* is not only to determine whether a juror is subject to a challenge for cause, but also to allow the parties to elicit information which will allow them to intelligently exercise their peremptory strikes).

From the outset of *voir dire*, the trial court judge stifled counsel's ability to determine juror attitudes towards the death penalty. The judge did not allow questioning about what factors would be important in their decision-making, their understanding of "murder" in South Carolina law, or the kinds of evidence they thought would be important in rendering the death penalty. Counsel was not allowed to fully explore the attitudes of a juror who testified he would likely automatically impose the death penalty if he found the crime committed in "cold blood." Counsel was forbidden from inquiring into the religious views of potential jurors, and thoughts about the deterrent effect of the death penalty. In short, counsel was not allowed an adequate *voir dire* as contemplated by Morgan v. Illinois, 504, 729 (1992): "The Constitution , after all, does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury. Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." (emphasis added). The trial court judge's rulings denied appellant "the right to discern which jurors would in fact be able to follow their

oath and instructions." State v. Bixby, 388 S.C. 528, 563, 698 S.E.2d 572, 590 (2010) (J. Pleicones, dissenting).

These questions that counsel attempted to ask were not "stake out" questions in the sense they were designed to "pre-educate or "indoctrinate" the jury. See State v. Poindexter, 314 S.C. 490, 493, 431 S.E.2d 254, 255, n. 2 (1993) (*voir dire* is not to be used as a means of pre-educating or indoctrinating a jury or as a means of impaneling a jury with particular dispositions) Rather, they were general and relevant questions intended to root out biases, as necessary to seat a jury not "uncommonly willing to condemn a man to die." Witherspoon v. Illinois, 391 U.S. 510, 521 (1968).

Appellant had the right to question jurors about their willingness to impose a life sentence if he were convicted of capital murder, and to explore any bias they may have harbored which would result in an automatic death penalty sentence. The only way to root out these attitudes is by allowing counsel to question the jurors about them.

> "A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empanelled in this case and "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized . . . Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty."

Morgan at 735.

The juror questionnaire in this case is three pages long and only captures general biographical information. R. 2350. Counsel would not have been able to determine jurors' views about the death penalty by merely reviewing their answers to the

questionnaire. *Cf.* Bixby at 541, 579 ("As part of this qualification, each potential juror completed *extensive* juror questionnaires designed to elicit general, personal information, and probe for bias and predisposition. The questionnaires contained *specific questions* concerning each potential juror's view on the death penalty.") (emphasis added). Only questioning could have revealed the meaningful answers that counsel was seeking to uncover. As the Supreme Court recognizes, "general fairness and 'follow the law' questions" do not constitute adequate *voir dire*. Morgan at 734-35.

Additionally, empirical evidence, collected and analyzed by the Capital Juror Project, shows that in South Carolina 14% of jurors who have actually served in capital cases believe that the death penalty is the only acceptable punishment for a defendant who has been convicted of murder. John H. Blume, Sheri Lynn Johnson, and A. Brian Threlkeld, *Probing "Life Qualification" Through Expanded Voir Dire*, 29 Hofstra L.Rev.1209, 1220. Data shows that these jurors exist in our state, and defense counsel must be allowed to ferret them out. The trial court judge's limitation on *voir dire* in this case prevented counsel from being able to uncover those jurors who would have automatically imposed the death penalty upon conviction for a capital offense.

Trial counsel's conduct in attempting to conduct a meaningful *voir dire* is consistent with the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.10.2(B) (1993):

> Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques:

> (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case;
>
> (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and
>
> (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

This Court has cited these Guidelines approvingly in Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008), and Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

The trial court judge, by improperly curtailing counsel's ability to ask relevant questions about the jurors' attitudes about the death penalty, ran afoul of established constitutional principles regarding *voir dire*. Counsel must be allowed to ask probing questions of jurors' beliefs:

> As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, however, the belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's ability to follow the law . . . It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so.

Morgan at 735.

Here, the trial court judge's understanding of the law in South Carolina in apparent reliance upon the holdings in Bixby and Stanko, is, most respectfully, contrary

to the United State's Supreme Court holding in Morgan v. Illinois, and such reliance is also widely divergent from the positions taken by other states' highest courts.

Further, in Bixby, a 3-2 decision holding it was not reversible error to not allow trial counsel to *explore* a potential juror's understanding of the definition of murder on *voir dire*, it was clear in that case on certiorari that defense counsel in Bixby actually *was able* to explore the definition of murder with 10 of the 12 jurors who actually sat on Bixby's jury. It was thus difficult for Bixby to demonstrate prejudice on certiorari to the United States Supreme Court. Moreover, in Stanko, the defendant was requesting *voir dire* on something that was not an undisputed fact -- the defendant's insanity -- and a legal status the jury ultimately rejected.

Here, the judge cut defense counsel off on the definition of murder with the *second juror* during *voir dire*, and prejudice is apparent from having jurors who we know by the experience of *voir dire* did not understand that murder was not the killing of another human being in a heat of passion upon a sufficient legal provocation or by accident.

As for other states that have addressed this issue, the Supreme Court of Ohio for example, in State v. Jackson, 107 Ohio St.3d 53, N.E.2d 1173 (2005), found that the trial court abused its discretion by not allowing counsel to inform potential jurors that one of the murder victims was a three-year-old child. The judge prevented counsel from questioning jurors about the specific facts of the case because he perceived these sorts of questions as an attempt to "predispose jurors to react a certain way to anticipated evidence." In vacating the death sentence, the court held that "[c]ounsel should be

permitted to present uncontested facts to the venire directed at revealing prospective jurors' biases." (*quoting* Turner v. Murray, 476 U.S. 28 (1986).

Here, in appellant' case, the trial court judge limited counsel's ability to question jurors in any probing manner at all, confining counsel to only general and abstract questioning. ("You know, you can certainly ask her if she's going to follow the law, there's statutory mitigating, there's non-statutory mitigating without giving examples." R. 188-189).

The Supreme Court of California also visited this issue in People v. Cash, 28 Cal. 4th 703 (2002). There, counsel was not allowed to question jurors whether they would automatically impose the death penalty for a defendant with two prior murder convictions, an uncontested fact. Additionally, the trial court judge would not allow counsel to ask about any specific acts of mitigation or aggravation because it would have the jurors "prejudge the evidence." Id. at 719. The court held that such restrictions violated federal and state constitutions to an impartial penalty jury:

> "[W]e affirm[] the principle that either party is entitled to ask prospective jurors questions that are *specific enough to determine if those jurors harbor bias*, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence."

Id. at 720-21 (emphasis added).

As to prejudice, the court held that the defendant could not identify a particular biased juror "but that is because he was denied an adequate *voir dire* about prior murder, a possibly determinative factor for a juror. By absolutely barring any *voir dire* beyond facts alleged on the face of the charging document, the trial court created a risk that a

juror would automatically vote to impose the death penalty on a defendant who had previously committed murder was impaneled and acted on those views, thereby violating defendant's Due Process right to an impartial jury." Id. at 723.

The highest criminal court of Oklahoma, the Court of Criminal Appeals, in Jones v. State, 990 P.2d 247 (1999), also found that a capital defendant's right to Due Process was violated when counsel was not allowed to explore whether jurors would automatically impose the death penalty for a conviction for murder in the first degree. The court held that it was clear from the record that the trial court's questions were not sufficient to discover whether jurors would automatically impose the death penalty, and the questions counsel was allowed to ask were not sufficient to determine this important issue. Id. at 250.

In addition, the Supreme Court of Louisiana reversed the conviction and sentence for a capital defendant where the judge curtailed defense counsel's examination in the areas of principles of law and rehabilitation of jurors opposed to capital punishment. State v. Hall, 616 So.2d 664 (1993). The court found that the trial judge "failed to temper the exercise of his discretion by giving the "wide latitude" to counsel for defendant in his examination of prospective jurors, as required by law. Id. at 669. The court found "most objectionable" the restriction on defense counsel's examination on issues of law, such as elements of the offense, reasonable doubt and specific intent. Id. at 669.

> "The trial judge's limitation of the defenses questioning to whether the jurors would accept the law as given is never been favored in our law. Rather, this court has rejected the contention that unjustified restrictions on *voir dire* can be cured by a response on the part of the prospective juror that he will follow the law as given to him by the judge when the juror is

> unaware of the complexity of the law and where that law involved such a basic right of the defendant."

Id. at 669.

In Skipper v. State, 257 Ga. 802, 364 S.E.2d 835 (1988), the Supreme Court of Georgia reversed the death sentence for the defendant when counsel was not allowed to further question prospective jurors about their views of the death penalty after they indicated on a questionnaire that they were not conscientiously opposed to capital punishment. The court held that the trial court judge's limitation on *voir dire* deprived the defendant of an opportunity to determine whether prospective jurors were impartial on the question of sentence, despite their answers on the questionnaire. Id. at 806.

The Supreme Court of New Jersey addressed the scope of capital *voir dire* in State v. Williams, 113 N.J. 393, 550 A.2d 1172 (1988).[6] In this case, defense counsel repeatedly objected to the limited scope of the trial court's questioning, especially with respect to juror's attitudes toward imposition of the death penalty. Counsel objected to the adequacy of the judge's perfunctory questioning regarding attitudes -- both pro and con -- towards the death penalty, their exposure to pretrial publicity, and preconceived opinions concerning the guilt of the defendant. The inadequate questioning left defense counsel insufficiently informed to make an intelligent and effective challenge of potential jurors for cause or peremptorily. The court refused to ask jurors about attitudes of murder committed in conjunction with rape. The court found this a "serious error." Id. 417, 1184.

---

[6] In December, 2007, New Jersey abolished the death penalty.

The court held that counsel must be afforded the opportunity for a thorough *voir dire to* evaluate and assess the juror's attitudes in order to effectively participate in jury selection.

> "Given the important, delicate, and complex nature of the death qualification process, *there can be no substitute for thorough and searching inquiry by the trial court into each individual's attitude concerning the death penalty.* An important ingredient in this inquiry is the use of open-ended questions, which in our opinion are the most likely to provide counsel and the court with insight into jurors' opinions and biases."

Id at 413, 1182 (emphasis added).

The court further found that the trial court judge relied too heavily on close ended questions. Id. 420, 1186. The court noted that "probing inquiries are essential in uncovering hidden biases." Id. 424, 1188. See Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir.1981) ("Questions which merely invite an express admission or denial of prejudice are, of course, a necessary part of voir dire because they may elicit responses which will allow the parties to challenge jurors for cause. However, such general inquiries often fail to reveal relationships or interests . . . which may cause unconscious or unacknowledged bias. For this reason, a more probing inquiry is usually necessary.")

In short, as other state highest courts have acknowledged, a probing *voir dire* is necessary to ferret out those jurors who, perhaps unconsciously, would always vote to impose the death penalty for a conviction of murder, and in violation of Morgan. In this case, the trial court judge erred by because he misunderstood this Court's opinions in Bixby and Stanko to significantly constrain the proper areas of inquiry during this critical

proceeding. Additionally, the trial court judge's rulings constraining *voir dire* as shown above are inconsistent with this Court's other death penalty opinions.

This Court has allowed particularized death-qualifying *voir dire* in other cases. In State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993), the solicitor was allowed to question the jury as to particular mitigation to determine the jurors' ability to impose a death sentence in light of them. The solicitor was allowed to explore whether the jurors could impose a death sentence on a "young person." Id. at 365, 222.

The solicitor was also allowed by the judge to question jurors about their reluctance to impose the death penalty for a "non-triggerman." Id. 366, 222. By asking these case-specific questions, the trial court was able to determine that these jurors "views would substantially impair their performance as jurors." Id. And see State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), where the state was allowed to *voir dire* the jury as to the particular mitigating circumstance of mental retardation. The rulings here, then, are inconsistent with this Court's precedent.

Appellant was denied his right to Due Process when the trial court judge improperly limited counsel's attempt to adequately *voir dire* the jury. Additionally, the trial court judge began stifling appellant's ability to question the jurors at the outset of the process-- during the examination of the second juror. The entire venire, then, is affected by the trial court judge's error. Appellant was denied, wholesale, his right to probe juror's bias. His death sentence must be vacated.

4.

The trial judge erred, in derogation of appellant's rights under the Sixth and Fourteenth Amendments, when he found Karen Padgett unqualified to sit as a juror when she unequivocally stated she would be able to follow the law and render either a life sentence, or impose the death penalty, depending on the circumstances of the case.

The court conducted individualized *voir dire* of Karen Padgett, Juror #203. R. 790-814. Her *voir dire* constitutes one of the lengthier exchanges during the entire *voir dire* process. R. 790-814.

> Ms. Padgett also identified herself as a Category C juror. R. 791, ll. 1-7.
>
> The trial court judge conducted the first part of the questioning:
>
> Q: Now you've placed yourself in Category C. As I understand Category C., that's the type of juror to all that the guilt of the defendant had been determined, that they would not have made up her mind in advance concerning the punishment. Does that describe you?
>
> A: Yes, sir.
>
> Q: That's the type of juror that would need to hear the facts and circumstances in aggravation, which is anything kind of bad, or mitigation, which may be something good that lessens the degree of the severity of the crime, or something about particular offender, background or history, that might lessen the severity of the crime, before that juror would make up her mind as to punishment. Does that describe you?
>
> A: Yes, sir.
>
> Q: That's also the type of juror that would listen to the law as I told them to the law was in follow that law. Does that describe you?

A: Yes, sir.

Q: Before you made any decision as to the appropriate punishment in a case such as this, would you listen to all this facts and circumstances and the law?

A: Yes, sir.

Q: If the facts warranted on the case of a person guilty of murder, could you sentence the person to life without parole?

A: Yes, sir.

Q: If the facts oriented in the persons found guilty of murder, could you sentence a person to the death penalty?

A: Would you repeat that again?

Q: Sure. If the facts warranted, where [a person is found] guilty of murder, could you [sentence] our person to the death penalty?

A: Yes, sir.

Q: Does it depend on the facts and circumstances?

A: Yes, sir.

Q: So you could make a sentencing decision of life without parole or the death penalty depending on the facts and circumstances of the case; is that correct?

A: That's correct.

Q: It's a case-by-case basis?

A: Yes, sir.

R. 792, l. 22 - 794, l. 13.

On examination by defense counsel, the juror revealed that she had a bumper sticker on her car that states: "This is a holy land experience." (This is also indicated on her juror questionnaire). She stated she was "not sure" what part her religion played in her views on the death penalty. R. 795, ll. 13-19.

She testified she could consider life without parole and the death penalty as possible sentences. R. 795, ll. 8-12. She said she was not sure she could impose the death penalty, because she "didn't know anything about this case." R. 798, ll. 1-2.

She testified she was "[n]ot positively sure" she could sentence someone to death. R. 798, ll. 15. She unequivocally answered "yes" when asked if she thought a case was "bad enough" that she could impose the death penalty. R. 800, ll. 1-13. Then, she testified that she could give meaningful consideration to a death sentence as well as a life sentence. R. 800, ll. 14-20. Then the Court questioned her again:

> COURT: We don't want a juror that's committed one way or the other. But a juror has to be able to know that they're the type of juror that could vote to impose a life without parole sentence if the facts warranted it and be able to impose a death penalty if the facts warranted.
>
> So it really comes down to not only is a person able to consider both, but could a person impose both, depending on the facts and circumstances.
>
> Do you have any questions about that process?
>
> Is that a no? I need to get it down for the record.
>
> A *No, sir. Whatever the facts warranted, then—*
>
> Q: And finish that statement for me.
>
> A: Yes, sir.

> Q: When you say "if the facts warranted it," then?
>
> A: Then if I was chose as a juror, then I'd go along with it, the death penalty.
>
> Q: And when you say "you would go along with it," explain what you mean to me by that.
>
> A: As a juror?
>
> Q: It's an individual decision. Each juror has an individual decision to make and a collective decision. It has to be a unanimous decision, but it's personal also.
>
> If you're on a jury on a death penalty case, and the facts warranted it, could you vote to sentence a person to death?
>
> A: *If the facts warranted it, I could.*

R. 802, l. 24 - 803, l. 25. (emphasis added).

Then she testified she *could* sign her name to a document sentencing person to death. R. 804, ll. 9-11. She stated she could be fair and impartial in the trial of the case to both the defendant and the state, during both the trial and penalty phases. R. 804, ll. 15-23. She stated, *again*, she could consider life without parole or the death penalty. R. 804, l. 24 - 805, l. 1. In addition, she stated, *once again*, if the facts warranted she could vote for life without parole or at the death penalty. R. 805, ll 2-6. She testified, *again*, she could sign her name on the verdict. R. 805, ll. 7-9.

The solicitor then asked her one *single*, convoluted question: "Let me ask you this: Would your feelings about signing a death verdict, do you think that would interfere with your ability to sit as a juror in a death penalty case? I know you had a lot of hesitation about whether or not you could sign your name and do that. Do you think

that your feelings on that would interfere with your ability to be an effective juror in a death penalty case?

A: I do.

Q: You think it would? I understand. Like I said, there is nothing right or wrong about this, it's just what you feel. Nobody is trying to make you -- and if you feel that way, it's completely appropriate and honesty view to tell us that.

THE COURT: Any follow-up, Mr. Tarr?

The juror then indicated *two more times* that if she believed it was appropriate, she could sign her name. R. 806, ll. 12-18.

The judge then questioned her once again:

> COURT: In other words, are you opposed to the death penalty, Ms. Padgett?
>
> THE JUROR: I haven't, you know, really thought about it.
>
> The judge then asked her additional, close-ended, and somewhat confusing questions:
>
> THE COURT: Okay. All right. Well, that's a fair statement. But do you think -- you have hesitation. There's no question about that from even my initial questioning to you. And there's nothing wrong with that. That shows that you take it as a very serious, lawful matter.
>
> Do you think because of the nature of this case or the nature, the punishment, that that would interfere with your ability to be a fair and impartial juror, to fulfill your duty and oath as a juror?
>
> THE JUROR: Repeat that again?
>
> THE COURT: I'll try.

> Do you feel like because of your beliefs, because of your feelings, your hesitation given the death penalty, that your beliefs would be such that it would -- your feelings would be such that it would interfere somewhat with your ability to perform your duties as a juror?
>
> THE JUROR: Yes, sir.
>
> THE COURT: And that's because of your beliefs; is that correct?
>
> THE JUROR: Correct.
>
> THE COURT: So you do not feel like you could adequately perform your duties as a juror because you would be hindered somewhat because of your beliefs?
>
> THE JUROR: Yes, sir.
>
> THE COURT: [T]hat's your beliefs that are somewhat exhibited for your hesitancy in your responses to the death penalty questions?
>
> THE JUROR: Yes, sir.
>
> THE COURT: Is that a fair statement?
>
> THE JUROR: Yes, sir.
>
> THE COURT: Don't let me put words in your mouth. You correct me, please. Just because I wear this, that doesn't mean I don't deserve correction if you want to correct me, do you understand?
>
> THE JUROR: Yes, sir.
>
> THE COURT: All right. Thank you very much.

R. 807, l. 1- 808, l. 18.

Despite this juror's repeated statements that she could follow the law and consider both life without parole and the death penalty, the trial court judge excused the juror. He found that "she did equivocate" and that her responses "as a whole would impair her

ability to act as an impartial juror." R. 813, l. 24 - 814, l. 3. Defense counsel argued that she was qualified. R. 809, ll. 4-7.

Discussion

The trial judge erred by excusing Ms. Padgett from the venire because she was a qualified juror.

Witherspoon v. Illinois, 391 U.S. 510 (1968) holds that persons who have qualms about the death penalty in general, and who might be inclined to oppose it as a matter of public policy, but who can put aside those reservations in a particular case, and in compliance with their oaths as jurors consider imposing the death penalty according to the relevant state law, may not be precluded from serving as capital case jurors. Id. at 519-23; see also Morgan v. Illinois, 504 U.S. 719, 731-32 (1992) (characterizing the holding of Witherspoon):

> "[W]e hold that a sentence of death cannot be carried out if the jury that an imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of the tribunal so selected . . . However, this rule is not applicable to prospective jurors to state unequivocally that they could never impose the death penalty regardless of the facts of the particular case."

Id. at 514. See also Morgan v. Illinois, 504 U.S. 719, 734 n. 7 (1992) ("The process of *voir dire* is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case. Clearly, the extremes must be eliminated—i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence.") Opposition to the death

penalty need not be proved with "unmistakable clarity," but a prospective juror may be excused if his views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985)(quoting Adams v. Texas, 448 U.S. 38, 45 (1980).[7] See, also, State v. Mercer, 381 S.C. 149, 156-158, 672 S.E.2d 556, 559-561 (2009); State v. Lindsey, 372 S.C. 185, 192, 642 S.E.2d 557, 561 (2007); State v. Sapp, 366 S.C. 283, 290-291, 621 S.E.2d 883, 886-887 (2005). A juror may not be excluded for his or her attitude against capital punishment unless it would render that juror unable to return a verdict according to law. S.C. Code Ann. §16-3-20(E) (Supp. 1992).

The trial judge erred by excusing this juror because he focused on what he believed her personal beliefs regarding the death penalty were, and not her ability to follow the law. Here, the juror did not express definitive opposition to the death penalty. In fact, she stated on a couple of occasions that she did not know how she felt about it. And then, she **repeatedly** stated that she could follow the law and give fair consideration to both sides. It was only after repeated questioning by the state and the trial judge where complex and confusing, and closed-ended questions were employed -- that this juror expressed any hesitations. About her qualification, the Court stated:

> I find that Ms. Padgett is not qualified. Considering the entire colloquy, even going back to my initial questioning of Ms. Padgett, there was a very, very long pause when I asked her if she could return a sentence of death.
>
> Not only that, her-- my observations of her demeanor, being within two feet, I guess, of her and looking down into her face, it appeared somewhat of concern to her,

[7] Thus, Witherspoon remains viable law, and must be read in conjunction with Adams v. Texas, 448 U.S. 38 (1980) and Wainwright v. Witt, 469 U.S. 412, 424 (1985).

> somewhat of the pain, emotional expression on her face. She stared off momentarily, she hesitated a great deal of the time and then of course responded somewhat quietly, "I think yes."

R. 812, ll. 8-19.

In fact, the initial questioning of this juror is recounted above, and it supports the conclusion that she could follow the law and consider both possible sentences, responding **unequivocally** that she would consider the facts and circumstances of the case, on a case-by-case basis. See, also, State v. Dickerson, 395 S.C. 101, 115-116, 716 S.E.2d 895, 903 (2011):

> After a review of the entire *voir dire* . . . this in-depth examination produced evidence to support the court's ruling that Juror 370 could be fair and impartial juror, acting in accordance with the court's instructions and not merely blindly professing that he would do so. 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.

Id. 115-16, 902 (emphasis added).

On January 9, 2012, the Supreme Court of California decided a case factually similar to the one before this Court, People v. Pearson, 2012 WL 34145 (Cal.). In this case, the prosecutor pressed the potential juror to say whether she was "for or against the death penalty." The potential juror responded, "I think with that, I'd have to be an actual juror to see what's presented for me. I'm not saying that I can't vote for it or that I wouldn't vote for it, but I think that I have to have all the evidence before I can say anything concerning this case itself." Id. 16. The trial court judge granted the

prosecution's challenge for cause, finding that the juror had given equivocal and conflicting responses about capital punishment. The Supreme Court found that the record did not support the trial court's finding that her views regarding the death penalty would prevent or substantially impair the performance of her duties as a juror. Id. at 17.

In reversing the death sentence, the Court held: "To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process. So long as a juror's views on the death penalty do not prevent or substantially impair the juror from "conscientiously consider[ing] all of the sentencing alternatives, including the death penalty where appropriate, the juror is not disqualified by his or her failure to enthusiastically support capital punishment." Id. at 19 (internal citations omitted).

The same is true in this case. This juror testified that she did not have a firm commitment either for or against the death penalty, and unequivocally stated she could follow the law. It was only after repeated and leading questioning, suggesting that she was, in fact, opposed to the death penalty, that the juror hesitated in any respect. But, even so, she consistently maintained she could follow the law. Her removal from the venire was improper, and appellant's death sentence must be vacated. Gray v. Mississippi, 481 U.S. 648 (1987).

5.

<u>The trial court erred by refusing to dismiss the indictments against appellant where the State's failure to comply with the Interstate Agreement on Detainers Act (IAD) rendered the indictments without force or effect</u>

Relevant facts

Before trial began, counsel made a motion to have appellant's indictments dismissed for the state's failure to comply with the Interstate Agreement on Detainers Act (IAD). <u>See</u> Judge Keesley's order. R. 2345. Counsel informed the judge that an offer for custody under the IAD was dated February 12, 2005. R. 161, l. 7.

On May 27, 2005, the Honorable William Keesley ordered an extension of time exceeding the statutory 180 days to try the case. <u>See</u> Order. R. 2345.[8] Defense counsel requested a continuance in March, 2008 due to a counsel's realization that their mitigation specialist was not certified. There was therefore a period of approximately three years between the initial IAD demand and counsel's request for a continuance during which appellant's case was not tried by the state. Counsel argued that the state violated the IAD by not trying him during that three-year period. R. 161, l.2 - 162, l. 9.

The solicitor blamed the prior appointed judge, Judge Maddox, for its inability to call the case. The state argued that since Judge Keesley's order, it had done "everything" to have the case called for trial:

> "Judge Keesley's order specifically addressed the interstate agreement on detainers issue, and he pointed out in the order that it just would not be practical to be able to dispose of this case within 180 days and continued the matter

[8] Appellate counsel made every effort to obtain the transcript of this hearing but due to the passage of time the tape has apparently been destroyed.

> beyond that which effectively tolled this interstate agreement on detainers 180-day clock. Since that time, the State has done everything—the Solicitor's Office, Solicitor Myers has made a repeated request for this case to be tried. Judge Toal appointed Judge Cordell Maddox on October 31st of 2005. Solicitor Myers continually pressed to have a trial date set. It was not done and finally Your Honor was appointed on this case, Your Honor, and we're here this week for trial of this case."

R. 162, l. 20 - 163, l. 8.

The solicitor then argued that appellant would have to make a showing of prejudice to prevail on his motion. R. 163, ll. 9-12. The solicitor also informed the judge that on December 15, 2003, appellant received a life sentence in Georgia for armed robbery and kidnapping. R. 164, ll. 7-13. The trial court judge summarily denied the motion. R. 166, ll. 13-20.

Discussion

Under the Interstate Agreement on Detainers Act (IAD), where a person who has entered upon a term of imprisonment any party state has pending against him or her in any other party state any untried indictment, information, or complaint, the prisoner may cause to be delivered to the prosecutor and the appropriate court of the prosecutor's jurisdiction a written request for final disposition. The other state is then required to try the inmate within 180 days of the request, unless this time limitation is waived by the inmate. On a showing of good cause, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. See 18 U.S.C.A. App. 2 §2 Art. III(a).

With respect to any proceedings made possible by this Article, the trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the state, but for good cause shown in open court, the prisoner or his counsel being present, the court

having jurisdiction of the matter may grant any necessary or reasonable continuance. IV (c). The charges against the defendant must be dismissed with prejudice if he or she is not tried within the specified time or if the defendant is returned to the original jurisdiction without trial. 18 U.S.C.A., App. 2, §2 Art. IV(e), V(c). At the earliest practical time, the prisoner shall be returned to the sending state. Article V(e).

This Court has consistently recognized that failure to comply with the Act mandates dismissal of the charges with prejudice. State v. Patterson, 273 S.C. 361, 256 S.E.2d 417 (1979); State v. Holbrook, 274 S.C. 4, 260 S.E.2d 181 (1979). This Court has also held that actions of defendants in requesting and obtaining a continuance at time the state was prepared to try the case removes his case from the scope of the automatic dismissal provisions of the statute. State v. Allen, 269 S.C. 233, 239, 237 S.E.2d 64, 67 (1977).

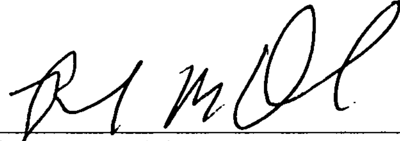
The indictments against appellant should be dismissed and he should be returned to Georgia to serve his life sentence in Georgia because the state failed to comply with the requirements of the IAD. *Appellant* never took any actions which could be construed as a waiver, since he made his demand during the statutory time frame, and until March, 2008, never requested any additional time. As seen supra in issue one, his attorneys made a motion for a continuance then over appellant's express instructions to them that he wanted to enforce the terms of the IAD, and for them not to move for any continuances. *Cf.* New York v. Hill, 528 U.S. 110 (2000) (defendant waived his rights under the IAD when counsel assented to a trial date beyond the statutory term); Reed v. Farley, 512 U.S. 339 (1994) (finding state court's failure to observe the 120-day rule of IAD Article IV(c) is not cognizable under §2254 when defendant did not object to the

trial date at the time it was set, and did not suffer prejudice attributable to three delayed commencement). Here, appellant clearly made the claim under the IAD, and he is entitled to relief.

CONCLUSION

By reason of the foregoing arguments, appellant should be granted a new trial.

Respectfully submitted,



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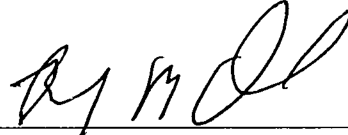
ATTORNEY FOR APPELLANT

This 29th day of November, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 29th, 2012



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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Edgefield County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

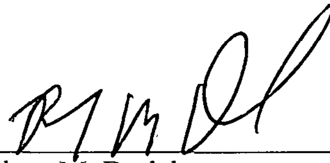
V.

STEVEN BARNES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of November, 2012.



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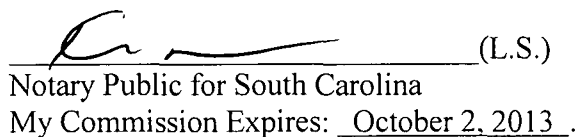
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of November, 2012.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013 .