ORIGINAL

RECEIVED
JAN 04 2018
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2015-000731

STATE OF SOUTH CAROLINA . . . . *Respondent*

v.

LUZENSKI ALLEN COTTRELL . . . . *Appellant*

PETITION FOR REHEARING

Appellant, Luzenski Allen Cottrell, by and through undersigned counsel, and pursuant to Rule 221(a), SCACR, hereby petitions this Court to rehear the issues presented on appeal in this capital case. Rule 221(a) authorizes rehearing where "points ... have been overlooked or misapprehended by the court." As set forth below, several such errors are readily observable in this Court's December 20, 2017 opinion.

I. THIS COURT'S DECISION OVERLOOKED OR MISAPPREHENDED THE CONSTITUTIONAL IMPORT OF THE DISQUALIFYING *VOIR DIRE* RESPONSES GIVEN BY JURORS 450 AND 148.

The facts and legal principles demonstrating that the trial court committed constitutional error by qualifying Jurors 450 and 148 are set forth in detail in Cottrell's Final Brief at 23-38, and his Final Reply Brief at 6-13, and he will not burden the Court by repeating them here. Briefly,

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

In rejecting Cottrell's argument, this Court's brief discussion of the merits emphasizes two central points: *first*, that the jurors' *voir dire* responses are best understood "to signify the jurors' intent to treat all defendants fairly and equally, and base their decision upon the facts of the case," Slip Op. 23 n.9; and *second*, that the jurors' expressed unwillingness to consider a defendant's background as mitigation should be seen as a product of their ignorance of the law at the time of *voir dire*, and would have been corrected when "the trial judge repeatedly instructed jurors that they would be required to consider any mitigating circumstance of any nature whatsoever, and explained what mitigating evidence could entail," Slip Op. 23. Neither of these points – which together supply the only basis for the Court's decision to affirm on this ground – is sustainable on the record and the governing law.

Whether or not it is fair to read the *voir dire* of Jurors 450 and 148 as signaling, above all, their commitment "to treat all defendants fairly and equally," it is beside the point Cottrell has raised on appeal. As *Morgan v. Illinois*, 504 U.S. 719 (1992), made clear, a juror's sincerely held and fully articulated subjective belief in his or her own fairness is no substitute for careful scrutiny

of the juror's *actual* fitness to serve according to the more specific constitutional mandates of capital sentencing. *See Morgan*, 504 U.S. at 735 ("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."). This case illustrates the point. Both of the jurors might well have believed *both* that they would "treat all defendants fairly and equally" *and* that such treatment could rightly include refusal to consider information about any defendant's "background" as mitigation because such information is irrelevant. Even accepting the former – as this Court's opinion appears to do – the latter remains a serious, indeed disqualifying, constitutional problem that this Court simply did not address.

Similarly, whether or not the unwillingness of Jurors 450 and 148 to consider Cottrell's background as mitigation stemmed from their ignorance of the law or some other personal predisposition is likewise irrelevant, at least in this case, because that ignorance was *never corrected* by the trial judge. This Court's opinion declares that, "During the sentencing phase ..., the trial judge repeatedly instructed the jurors that they would be required to consider any mitigating circumstance of any nature whatsoever, and explained what mitigating evidence could entail." Slip Op. 23. That is factually incorrect. As explained in Cottrell's earlier briefing, *see* Final Brief at 31-32 – and never contested by the State – the record makes clear that the trial judge did *not* give *any* instruction that would have informed Jurors 450 and 148 that evidence of a defendant's "background" constitutes relevant mitigating evidence as a matter of law, or that, as capital jurors, they would be constitutionally obligated to consider it.[1] This Court's assertion to

[1] As Cottrell also explained (again without contradiction from the State) in his earlier briefing, *see* Final Brief at 28-31, the reason the instructions lacked that important guidance is clear: The trial judge *himself* labored under – and clung insistently to – the fundamental misconception that only *statutory* mitigating circumstances had to be considered, while *non-statutory* mitigation could be taken or left at an individual juror's unguided discretion. Thus

the contrary constitutes a serious misapprehension of the record. Because that misapprehension necessarily had a significant – and likely dispositive – impact on the outcome of the Court's merits analysis, rehearing is necessary.

II. THIS COURT'S DECISION UPHOLDING THE EXCLUSION OF DEFENSE WITNESS DET. NATHAN JOHNSON IS INCONSISTENT WITH *STATE V. COTTRELL*, 376 S.C. 260, 657 S.E.2D 451 (2008) (*COTTRELL I*).

There has never been any dispute that Cottrell shot Officer McGarry nor any dispute that he did so while McGarry was detaining him. Consequently, the *first* question in determining the degree of Cottrell's criminal responsibility is whether McGarry had adequate legal justification to detain him. Nonetheless, the trial court excluded exculpatory evidence tending to establish that McGarry's actions were unjustified. This Court held both that the trial court did not abuse its discretion in excluding the testimony, and that any error would have been harmless. Slip Op. at 26-27. These findings are not independent of each other; both depend upon this Court's assessment of the probative value of the suppressed evidence. As this Court characterizes it, the purported minimal probative value of Johnson's testimony implies both that the trial judge did not abuse his discretion in determining that the prejudicial potential of the evidence outweighed its probative value, and that, had there been an error in excluding the evidence, it would have been harmless.

Neither of these holding can be squared with Cottrell's right to present a defense or to confront witnesses against him, as set forth in Cottrell's briefs. Cottrell will not repeat those arguments here, but asks that this Court consider how its ruling in *Cottrell II* conflicts with the central thrust of its holding in *Cottrell I.*

---

misinformed, it is not surprising that the trial judge qualified Jurors 450 and 148 despite their unwillingness to consider constitutionally relevant mitigation, and then made no attempt to cure their disqualification with a corrective jury charge.

At Cottrell's first trial, the State maintained that Officer McGarry did not detain Cottrell until he saw a gun concealed under Cottrell's shirt, and obtained a ruling from the trial court that, as a matter of law, what McGarry himself saw constituted probable cause. This Court reversed, correctly holding that whether McGarry "was effectuating a lawful arrest in a lawful manner" was a factual question for the jury. *Cottrell I*, 376 S.C. at 265, 657 S.E.2d at 454.

The State *could* have proceeded under the same theory at the second trial as it did at the first, and attempted to convince *the jury* that McGarry's behavior was reasonable because he had seen the gun. Had it done so, there would have been no constitutional or statutory basis for Cottrell to claim that Officer Johnson's testimony was admissible. In that scenario, this Court's focus on the evidence presented to the jury of McGarry's own observations would have been apt. That is, if the State had pressed the argument that what McGarry himself saw rendered his actions reasonable, then what Det. Johnson saw or thought would have been irrelevant. But of course, if that had been the theory pressed by the State, there would have been no reason for Cottrell to wish to introduce Johnson's testimony in the first place, and there would have been no need for the trial court to determine that it would have been more prejudicial to Cottrell than probative because Cottrell himself would have come to the same conclusion on his own.

That, however, is not what happened at trial. The State's theory in *Cottrell II* was that McGarry had *arrived* at the scene possessing the "articulable suspicion" that would justify Cottrell's detention. Under this revised theory, McGarry acted reasonably because Det. Johnson had reasonable suspicion, upon which McGarry could rely. In that case, however, McGarry's actions were justified only if Johnson actually had reasonable suspicion that Cottrell had committed a crime. Yet the trial court refused to let Johnson testify as to either the facts he knew or the conclusions he drew from those facts. Instead, the jury only heard from Prock, who

recounted what McDaniels conveyed to her, based on what Johnson relayed to McDaniels – along with Prock's opinion that those facts were a sufficient basis upon which to stop Cottrell.

This Court rightly declined to endorse the trial court's reasoning that McGarry's thoughts were all that mattered. But it took a wrong turn in deciding that what McGarry himself knew rendered the probative value of Johnson's testimony slight, and concomitantly, that even if the exclusion of his testimony was error, it was harmless. As this Court held in *Cottrell I*, it was for *the jury* to determine what testimony to believe, and what inferences to draw from that testimony. True, the jury *could* have decided that McGarry's personal knowledge and observations rendered his conduct lawful. But they might also have disbelieved some of the testimony, or drawn different inferences from that testimony.[2]

Ironically, given this Court's holding in *Cottrell I*, the jury was never asked to determine whether McGarry's personal knowledge justified his actions. Certainly, had the State argued that it did, and the jury so found, that verdict would be one supported by the evidence. But that is not what happened. Clearly, the State was not confident that if put to the jury, the jury would conclude that McGarry's own observations justified his conduct; instead, it chose to rely on *a legally incorrect theory* that what McGarry heard from Prock (based on what McDaniels told Prock based on what Johnson told McDaniels) was sufficient, regardless of whether or not it was true.

---

[2] In addition to the mistakes of reasoning discussed below, this Court's statement that "Cottrell must still establish prejudice," indicates a serious misallocation of the burden with respect to harm and harmlessness. Slip Op. at 26; *see also id.* at 25 (quoting *Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)) (requiring that Cottrell demonstrate "'a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof'"). Cottrell's arguments rest on the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, not on South Carolina evidence law. As such, *Chapman v. California*, 386 U.S. 18, 24 (1967), mandates that "the beneficiary of a constitutional error" – in this case, the *State* – "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." The State has made no such showing.

But if the theory the state actually relied upon and pressed to the jury is irrelevant, and the only thing that is relevant is what the McGarry saw himself, then *Cottrell I* was wrongly decided. The error in *Cottrell I*, as this Court held, was that *the jury* was never asked to decide whether the testimony relating to events at the scene was credible, or what inferences should be drawn regarding the events that it determined had occurred; it was wrong for the trial court to usurp that determination. This time, this Court determined that the theory the State propounded regarding Johnson's observations was irrelevant because *this Court* determined that the events as portrayed by the State established that McGarry's behavior was justified by his own observations. Either way, the question of the credibility of witness testimony, and the inferences to be drawn from that testimony, was judicially determined, rather than being reserved – as the Constitution requires -- for the jury.

The State's brief argued that even if McGarry were not justified in stopping Cottrell, it still would have been possible for the jury to find him guilty of murder. Yes, it would have been *possible*, but the point is that without Johnson's testimony, the jury had no facts from which to conclude that McGarry's action was *not* a legal detention, and therefore, absent that testimony it was *impossible* for the jury *not* to find Cottrell guilty of murder. It could not have reached the question of whether Cottrell acted legally in resisting an unjustified detention with proportionate force, and therefore have been not guilty of any crime. Nor could it have reached the question of whether, even if Cottrell's use of force was disproportionate, he acted in the heat of passion and therefore was only guilty of manslaughter.

In contrast, Johnson's testimony would have required the jury to answer these secondary questions, and under the circumstances, the jury certainly *could* have concluded either that Cottrell had a complete defense to the charges, or that his heat of passion mitigated murder to manslaughter.

This Court's decision in *Cottrell I* implicitly acknowledges that the jury could have so concluded; unless it was possible to find that Cottrell acted either with justifiable force in response to an unjustified arrest, or in the heat of passion (either in response to an unjustified arrest or in response to the unjustified use of force in accomplishing the arrest), *the error identified in* Cottrell I *would have been a harmless one*. This Court should therefore grant rehearing and return to the constitutional right to jury trial that it upheld in *Cottrell I*.

WHEREFORE, for the foregoing reasons, Cottrell respectfully requests that this Court vacate its December 20, 2017 decision affirming his conviction and death sentence, rehear this appeal, and enter a new decision reversing the judgment of the trial court and remanding this case for a new trial.

Respectfully submitted,

KEIR M. WEYBLE
SHERI LYNN JOHNSON
Cornell Law School
Hughes Hall
Ithaca, NY 14853
607 255 3805

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

By:
Attorney for Appellant

January 4, 2018.

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JAN 04 2018

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2015-000731

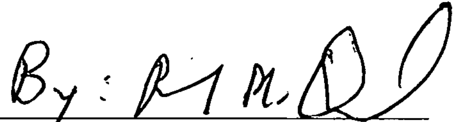
STATE OF SOUTH CAROLINA . . . . *Respondent*

v.

LUZENSKI ALLEN COTTRELL . . . . *Appellant*

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Rehearing in the above referenced case has been served upon Donald J. Zelenka, Esquire and J. Anthony Mabry, Esquire, at the Robert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of January, 2018.



KEIR M. WEYBLE
SHERI LYNN JOHNSON
Cornell Law School
Hughes Hall
Ithaca, NY 14853
607 255 3805

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

Attorneys for Appellant

SUBSCRIBED AND SWORN TO before me
this January 4th, 2018.

______________________________(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.