

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Anderson County
Alexander Macaulay, Circuit Court Judge

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S.C. Supreme Court

THE STATE,

Respondent,

v.

RAYMONDEZE RIVERA,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

Whether Appellant's rights, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, were violated by the trial court's refusal to permit him to testify on his own behalf at the guilt-or-innocence phase of his capital trial?

II.

Whether Appellant's right to self-representation, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. 1, § 14 of the South Carolina Constitution, was violated by the trial court's repeated refusals to permit him to discharge appointed counsel and proceed *Pro Se*?

III.

Whether Appellant's right to a fair trial by an impartial jury, as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3, 14 and 15 of the South Carolina Constitution, was violated as a result of the qualification and seating of three jurors whose views prevented or substantially impaired their ability to impose a sentence less than death, or to consider evidence in mitigation of punishment?

IV.

Whether the Solicitor's peremptory challenge of Juror 64, which he claimed was based on the juror's Catholicism, was pretextual given that the juror declared her religious affiliation would not affect her, and that the Solicitor declined to challenge a white catholic juror?

V.

Whether Appellant's right to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, was violated by the Solicitor's inducement of a confession through promises to seek the death penalty against him, to provide him with a cell to himself, and to permit him to see a chaplain?

VI.

Appellant's right to present evidence in mitigation of punishment, as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, was violated by the trial court's refusal to admit proof that qualified mental health professionals had diagnosed him with a serious mental illness on the ground that they did not hold "medical" degrees?

VII.

Appellant's rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and S.C. Code § 16-3-25(C)(1), were violated when the prosecution was permitted to urge the jury, through argument and evidence, to impose a sentence of death for a homicide as to which he had not and could not have - been found death-eligible?

RESPONDENT'S STATEMENT OF THE CASE

Statement of the Proceedings

The Appellant, Raymondeze Rivera, was indicted at the Court of General Sessions for Anderson County on February 20, 2007 for murder involving the death of Kwana Burns. 2007-GS-04-649.¹ On February 13, 2008 (after the Wiley trial), the State gave formal notice of its intent to seek the death penalty pursuant to S.C. Code Ann., § 16-3-26 (1976). R. 3003. On August 1, 2008, the Honorable J.C. Nicholson appointed John D. Delgado as lead capital counsel and William S. McGuire of the South Carolina Office of Indigent Defense as co-counsel. R. 3001(b), 3002.

On May 7, 2009, the Solicitor's Office pursuant to S.C. Code Ann. § 16-3-20(B) and § 16-3-26 advised the Appellant of the intent to rely upon the statutory aggravating circumstance: "That the defendant, Raymondeze Lamon Rivera, the person who committed the murder, S.C. Code Ann. § 16-3-20(C)(a)(2)." R. ____.

Pretrial hearings were held December 8, 2008, May 27, 2009, June 4, 2009, November 10, 2009 and December 1-2, 2009. Judge Alexander Macaulay replaced Judge Nicholson by Order dated December 21, 2009.

On February 1, 2010, the proceedings began before Judge Macaulay. After jury selection, the defense made a motion pursuant to Batson v. Kentucky, 476 U.S. 79 (1986) challenging the prosecution's peremptory challenge of Juror 64, a Hispanic female. R., Tr. 1859. The trial judge

¹ The Appellant had also been previously tried and convicted of the murder of Asha Wiley. 2007-GS-04-650. On February 13, 2008, Rivera was convicted of Wiley's murder and sentenced by the Honorable J. C. Nicholson to life. His conviction was affirmed on appeal by the Court of Appeals. See State v. Rivera, No. 2011-UP-138 (S.C.Ct.App. April 15, 2011). At the time of briefing, it is presently pending review on a petition for writ of certiorari.

denied the motion concluding the reason given was racially and gender neutral. R., Tr. p. 1865, ll. 14-16.

On February 9, 2010, the trial began before Judge Macaulay. The State was represented by Solicitor Christina Adams, Assistant Solicitor Jennings Byford, and Assistant Solicitor Rame Campbell. The Appellant was present and represented by appointed counsel Delgado and McGuire. Daniel Day was also present as the Guardian Ad Litem. The Appellant, as noted in Question One, did not testify in the guilt phase. Deliberations began at 3:15 p.m. on February 12, 2010. The jury returned a guilty verdict for the murder of Kwana Burns at 3:26 p.m. R., Tr. p. 2232, ll. 3-21.

On February 15, 2010, the penalty phase began. R., Tr. 2240. In the penalty phase, the Appellant made a personal closing statement to the jury requesting that the jury sentence him to death. R., Tr. p. 2767, ll. 1-15.

In his charge to the jury, Judge Macaulay charge the jury to determine the existence of the following statutory aggravating circumstance:

“Murder was committed by a person with a prior
conviction for murder.”

R., Tr. p. 2781, l. 21 - p. 2782, l. 1. Concerning mitigating circumstances, Judge Macaulay charged the jury to consider:

1. murder was committed while the defendant was under the influence of mental or emotional disturbance.
2. age and/or mentality of the defendant;

and the following non-statutory mitigating circumstances, including mercy:

1. the defendant's adaptability to prison life.
2. as well as any other non-statutory mitigating or extenuating circumstances that you find should be considered.

R., Tr. p. 2788, ll. 3-22. Sentencing deliberations began at 4:38 p.m. A series of jury questions were answered by the trial court at 7:13 p.m. R., Tr. p. 2796, l. 2 - p. 2797, l. 23. The jury returned with its verdict at 8:14 p.m. R., Tr. p. 2798, l. 17 p. 2800, l. 22. The jury unanimously found the existence of the statutory aggravating factor beyond a reasonable doubt that the "murder was committed by a person with a prior conviction of murder." R., Tr. p. 2799, ll. 4-8. The jury further recommended that the Appellant be sentenced to death. R., Tr. p. 2799, ll. 13-16.

Judge Macaulay allowed further victim impact information to the court prior to the declaration of the sentence. R., Tr. p. 2805-2811. At that time, Raymondeze Rivera made another statement of allocution to Judge Macaulay prior to the sentence. R., Tr. p. 2811, l. 8 - p. 2812, l. 12. In this statement to the judge, Rivera stated:

THE DEFENDANT: Your Honor, there's nothing I can really do to take the pain from this family of Kwana Burns and Asha Wiley. I know that I destroyed a lot of lives here today. This is been hard for me as I'm pretty sure it's been hard for everybody. All the pain and suffering. I'm sure that everybody has felt it. There's not a single person here that hasn't been touched by what I did and by the victims' family, including me, believe it or not.

I pray for this family, for the kids, for the lives that I destroyed. And I also pray for myself because I know I need help. It takes an evil and cruel person to commit these murders. But I don't make any excuses, Your Honor. I know what I did and I accept

the recommendation of the jury. And I thank them. Because as Mr. Caldwell said, they done justice, Your Honor. And that's all that we asked for. Like I said to the jury, there's nothing I can say to this family or to the jury for mercy. I never gave Asha Wiley or Kwana Burns that benefit. Even when they begged me, I still denied them that. And I don't deserve it. Not one ounce of it.

And I'd like to say to Kameron, I hope you can have closure in your life and I pray that you will never become like me, with bitterness and cold-hearted. But I pray that one day you and your sister will be back together. I never really knew how much I hurt so many people, including my own family and kids. And as you saw my grandmother, my best friend. And Kameron, I want to say forgive me for taking your mama away and for what I did.

That's all, Your Honor.

R., Tr. p. 2811, l. 8 - p. 2812, l. 12. Judge Macaulay then sentenced the Appellant to death. R., Tr. p. 2813, ll. 11-24.

On February 26, 2010, counsel for Rivera made a written motion for a new trial. R. _____. In an order initially dated March 9, 2010, and re-filed May 27, 2010, Judge Macaulay denied the motion. R. _____. A notice of appeal was made June 3, 2010. This appeal follows.

FACTS OF THE CASE

The factual assertions supportive of the crime are set forth in issue one related to the harmless error presentation.

ARGUMENT

- I. The trial judge did not abuse his discretion in failing to call the Appellant as a court witness, after defense counsel, upon Rivera's request refused to call him as a witness. Further, where no objection was made by defense counsel to the failure of the court to call him as a "court witness" the issue is not preserved. Even if it was error due to the failure to call by either defense counsel or the trial judge, the denial of the right to testify is subject to harmless error analysis. Under the unique facts in this case reversal for a new trial is not required where the error was harmless beyond a reasonable doubt. (Brief of Appellant, p. 9-18).[DEFENDANT'S RIGHT TO TESTIFY]**

At first blush, this appears to be a simple case of error of reversal for a new trial. The Appellant wanted to testify in the guilt phase and unequivocally expressed that desire first to defense counsel and then to the trial judge. Both refused to call Rivera for their separate reasons - strategic for counsel and a failure to comply with the disclosure of potential testimony by the court. A survey of any lawyers would easily suggest that there was error here because they are aware that a defendant has a right to testify in his own defense. However, even in what appears to a simple case where the first impression is likely that a new trial would be warranted, the impression may be wrong. This immediate knee jerk reaction for a new trial fails to recognize both that there are appropriate limitations and procedures for a right to testify and that remedies for such denials of the constitutional right under the Fifth and Sixth Amendment, as well as the Due Process Clause of the Fourteenth Amendment are and should be subject to a harmless error analysis.

In his initial question before the Court, Rivera contends that his expressed desire to testify in the guilt phase was improperly prevented by the trial court's failure to call him as a "court

witness.”² However, there has never been a requirement in this State for a court to call a criminal defendant as a court witness. That is not the role of the trial court, but falls within the role of counsel. It was the duty of defense counsel to call Appellant as a witness when they were aware of his desire to do so, even if it was against their advice. It is not the function of trial counsel to refuse a defendant’s request to testify for strategic reasons. Here, there was no suggestion presented that Appellant intended to testify falsely. To the contrary, the only evidence was that the defense counsel expressly abdicated their duty to call Rivera as he desired, instead placing the trial judge in an improper position to resolve whether the court could call him as a “court witness.” Since the court did not abuse its discretion in not calling him as a witness because of Rivera’s failure to adequately follow his procedural requirement to fully reveal the full nature of his testimony as a court witness prior to presenting him to the jury, the trial court did not err. Even if we assume or find constitutional error of the right to testify by the refusal of either defense counsel or the trial judge, since the failure of the defense to call Rivera as a witness upon his request is a “trial error” rather than a “structural error,” the denial is subject to harmless error analysis.

Here, any alleged error is harmless beyond a reasonable doubt for guilt³ based upon a plethora of salient factors including the fact that the defense counsel conceded in its opening statement that evidence would be sufficient to convict and that the case was about punishment

² Prior to the adoption of the South Carolina Rules of Evidence in 1995, S. C. Code Ann. § 19-11-50 read “[I]n the trial of all criminal cases the defendant shall be allowed to testify if he desires to do so, and not otherwise, as to the facts and circumstances of the case. . .” This language was removed from the statute in 1995.

³ The defendant expressly waived his right to testify in the sentencing phase of the trial. R., Tr. 2414-19. This issue only concerns the guilt phase of the trial.

and mercy, the fact that the State's uncontested guilt phase case included Rivera being identified with the victim at her home the evening before her body was discovered, the fact that Rivera was seen in videos during the day in the presence of the victim, the fact that Rivera's DNA was found to be consistent with material found on the victim's ankle, and the fact that the Appellant made an inculpatory statement that he killed the victim consistent with the time and manner of death, including placing the victim's child on her body - which was how the victim was found. Where the only possible issue before the court was the identity of the perpetrator, harmless error beyond a reasonable doubt was shown by the independent evidence supporting identity.⁴ A new trial should not be not required.

Around a quarter of a century ago the Supreme Court observed that "[a]t this point in the development of our adversarial system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and testify in his or her defense." Rock v. Arkansas, 483 U.S. 44, 49 (1987). While "there is no justification today for a rule that denies an accused the opportunity to offer his own testimony", id., 483 U.S. at 52, the accused right to testify is not

⁴ Respondents note that in an earlier trial involving the December 10, 2006 death of Asha Wiley, Appellant testified that he had murdered Kwana Burns after he began stalking her. A petition for writ of certiorari is presently pending before this Court of that conviction from State v. Rivera, 2011- UP-138 (S.C. Ct. App. April 5, 2011) (unpublished) at the time of the preparation of the Initial Brief of Appellant in this matter. The testimony concerning Rivera's admissions that he killed Burns during the Wiley trial can be found at State v. Rivera, 2011- UP-138, (Wiley) ROA 278-279, 288,291, 299. See (Wiley) ROA 416 ("So I ended up choking Mrs. Burns which took two minutes to kill her."). "A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct.App.1984); Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (S.C.App.,2011). However, when the State in the Burns proceedings attempted to present the Wiley trial testimony of Rivera at the trial in the penalty phase, Judge Macaulay denied admission of the video of his testimony, proposed State Exhibit 90 , pursuant to S.C. Code Ann. §19-11-150 and S.C.R.E. Rule 403. R., Tr. p, 2380-2384.

unqualified and “may, in appropriate cases bow to accommodate other legitimate interests in the criminal process...” Rock, 483 U.S. at 55. Among those “(n)umerous state procedural and evidentiary rules [which] control the presentation of evidence and [which] do not offend the defendant’s right to testify”, Rock, 483 U.S. at 55, n. 11, are rules governing the orderly conduct of trial. However, “restrictions of a defendant’s right to testify may not be arbitrary or disproportionate to the purpose they are designed to serve.” Rock, 483 U.S. at 55-56. To the extent an accused’s “right to present his own version of events in his own words” derives from the Due Process Clause of the Fourteenth Amendment, Rock, 483 U.S. at 51, a trial court must exercise this discretion in a manner which accords with “the fundamental standards of due process.” Id., 483 U.S. at 55.

The Circumstances Concerning The Issue.

As set forth below, the defense counsel, aware of the Appellant’s desire and intent to testify, R., Tr. p. 2190, ll. 1-7, expressly refused to call him to the stand. R., Tr. p. 2193, ll. 8-17. Counsel did not state that the basis for refusing to call him was any concern that he would commit perjury or present false testimony. Rather, they indicated “we cannot put him on the stand without harming his case so irreparably as to void any meaningful consideration to guilt or innocence in this matter.” R., Tr. p. 2193, ll. 18-24. This basis was plainly extraordinary since counsel had already virtually conceded guilt in the extensive opening statement. R., Tr. 1891-93, 1900-02. Despite that the defense team stated the jury in his earlier trial involving Asha Wiley’s death was allowed to consider matters it should not have considered based upon his testimony at that trial. The defense restated: “but if that is Mr. Rivera’s wish [to testify] we will respectfully and honorably decline the opportunity to call him.” R., Tr. p. 2194, ll. 6-8.

Rather than comply with the client's request, the defense team suggested that the Court, under S.C. Rule of Evidence 614 had an option to call the Appellant as a "court witness", as an "extraordinary" circumstance. R., Tr. p. 2193, ll. 18-20. The defense then suggested to the trial court to require Rivera to proffer his testimony to make sure it's not going to "erode the integrity of these proceedings." R., Tr. p. 2195, ll. 21-24.

Under the procedure proposed by defense counsel McGuire to the trial judge to consider calling Rivera as a court witness, Judge Macaulay initially declared that he was going to ask the defendant if he wishes to testify and if he says so, he would call him then as a court witness (out of the jury's presence) and place him under oath. Judge Macaulay stated he had no idea what Rivera wants to testify to and it is his absolute right to testify provided that "his testimony is material, relevant, and the probative value outweighs any prejudice to his case." R., Tr. p. 2196, ll. 17-22.

Judge Macaulay then initially inquired of Rivera, who confirmed that he had discussed with the lawyers his right to testify and that they had advised him not to testify. R., Tr. p. 2197, ll. 13-21. He then asked Rivera if he wished to testify and Rivera consistently affirmed that he wished to testify. R., Tr. p. 2197, l. 22. He also confirmed that he understood the information must be relevant to the particular case and that he could be cut off as any witness is if he violates the law. R., Tr. p. 2198, ll. 1-9.

Judge Macaulay next swore in Rivera as a court witness and began procedures under Rule 614 and State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991); Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994). He noted that the requirements for a court witness were that the parties were unwilling to vouch for the veracity or integrity of the witness as their own witness, there

must be a close relationship between the Court witness and defendant, and that evidence from the witness and testimony must be material and without it there would be a miscarriage of justice.

R., Tr. 2199.

Judge Macaulay next questioned Rivera who again confirmed that he wished to testify.

R., Tr. p. 2199, ll. 23-24. Then, the following occurred:

- Q. What's the testimony you wish to give?**
- A. About the murders in Anderson County.**
- Q. Pardon?**
- A. The murders in Anderson County, sir.**
- Q. Murders? Both murders?**
- A. Right.**
- Q. No. What's the testimony you want to give us about the death of Kwana Burns?**
- A. Okay. That will be fine, sir.**
- Q. What do you want to testify to?**
- A. To what happened, sir.**
- Q. Pardon?**
- A. To what happened.**
- Q. And what are you going to testify to?**
- A. About the killing of Kwana Burns.**
- Q. You're what?**
- A. The killing of Kwana Burns.**

Q. What are you going to testify to? What is the testimony you're going to give?

A. I just said it, Judge.

Q. If that's all you say, that's no probative value. I want to hear your testimony. I want to find out if it's relative, material and non-prejudicial.

A. That is my testimony, Your Honor.

Q. Then you don't testify.

A. That's fine with me.

R., Tr. p. 2199, l. 25 - p. 2200, l. 25.

During the proceeding, Judge Macaulay, at various times explained his reasons for not calling Rivera as a "court witness." Initially, he stated:

THE COURT: In light of the Defendant's reluctance to offer anything in a particular way or of a particular nature that would actually be material to the charges in this indictment and any of the issues raised in this matter other than a generalization, and being asked on more than one time to make or to give testimony that would be relevant, material and probative without prejudicial value outweighing that probative value, the Court finds that the Defendant has exercised his right to testify and declined to testify to anything that would be helpful to the jury in reaching the issues in this case.

Having so exercised his rights and declined to give anything of material value to the jury, in determining the issues of the case as required by 401 and 402, the Court finds that whatever probative value the generalization without any specificity substantially outweighs of unfair prejudice - - or is

substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, and also undue delay, waste of time, and needless presentation. Rule 403, South Carolina Rules of Evidence.

R., Tr. p. 2201, ll. 3-23.

A bench conference was then held where the prosecution brought to the court's attention State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985) which held it was reversible error in a capital sentencing proceeding to require a defendant to choose between testifying or making a closing statement. The court distinguished Norris because it was a capital sentencing proceeding issue. Judge Macaulay stated that he had given Rivera every opportunity to testify about "something that is material, relevant and probative not exceeded by the prejudicial value." R., Tr. p. 2203, ll. 4-10. The court stated Rivera had the right to testify under the rules of evidence, but not to use it as a forum to do anything he would like. "I don't know if he wanted to do that or not, but I asked him at least once, maybe twice or three times, what would be his testimony, what would he proffer, what would he offer" and declared he would need to know it before he permits any testimony. R., Tr. p. 2203, ll. 11-19.

At that point, with the help of the guardian ad litem, the Appellant, pro se made an objection to the Court's decision under the Constitution's Sixth and Fourteenth Amendments. R., Tr. p. 2204, ll. 1-2. When asked again by the Court what he would testify about, Rivera stated:

A. About the details of the case.

Q. What are the details?

A. **That's for me to say on the stand, Your Honor.**

Q. Sir?

A. **That's for me to say on the stand.**

R., Tr. p. 2204, ll. 9-16. The court responded that the testimony must be "material, relevant and . . . the probative value [would be] outweighed by the prejudice." R., Tr. p. 2204, ll. 16-21. Rivera responded he never said he was going to testify about anything. R., Tr. p. 2204, ll. 22-23.

Judge Macaulay noted that the prosecution had taken the position before him that the court had erred in denying the testimony of the Appellant. R., Tr. p. 2205, ll. 4-8. Rivera next expressed a desire to make a closing statement (argument). R., Tr. 2205-06. [The record reveals that Rivera waived a personal argument in the guilt phase, after initially indicating a desire to make a statement]. [R., Tr. p. 2211, ll. 3-12].⁵

Prior to the start of the penalty phase, Judge Macaulay returned to re-state and clarify his reasoning concerning his decision about calling Rivera as a court witness in the guilt phase:

The Court has a grave responsibility to assure that justice be done in every case if it can be done according to law. And Friday the Defendant advised the Court that he chose to exercise his right to testify, and the Court permitted him to testify except the Court did what it would do on any case out of the presence of the jury, have an in-camera hearing as to what the testimony might be. The reason for that, of course, is our rules of evidence in South Carolina, and particularly Rules 401, 402 and 403. Because it's not just what somebody wants to say; it's whether what

⁵ After the guilt phase jury instructions, with the assistance of his guardian ad litem, Rivera objected to the "no adverse inference" instruction concerning his failure to testify. R., Tr. p. 2228, l. 20 - p. 2229, l. 7. [R., Tr. p. 2212, l. 8-24 (instruction on right to testify)]. He claimed the instruction was wrong because he did not waive his right so the instruction did not apply. R., Tr. p. 2212, ll. 17-24. The Court disagreed with Rivera's assessment stating that Rivera had waived his right to testify according to the law. Judge Macaulay stated that he had spoken in generalities that he would talk about the death of the victim, but not everything about the death of the victim material or admissible. "Since you declined to help the court decide what would be in the interest of justice . . . You did not want to cooperate . . . and provide the court with information necessary to determine whether or not what you wanted to testify to would be material, relevant, and the probative value would not be outweighed by prejudice to you." R., Tr. p. 2229-2230.

somebody wants to say is material - - or excuse me - - relevant, material, and even if relevant, is there any - - if the prejudicial value outweighs any probative value to be admissible.

So I trust the record will reflect - - and I can't remember how many times I asked the Defendant, once he was on the stand - - to proffer his testimony as to what he wished to testify. And if my recollection is correct, it was to a general matter of, about the death of the victim. **Obviously, he did not give any specifics as to what would be presented, so the Court had no way to rule on the admissibility of such evidence.** And no evidence or no testimony was suggested or was offered that the Court could let it go forward to the jury. The Court made every effort to see if there was something that would be admissible under our rules of evidence, and **the Defendant declined to give the Court any assistance in that matter and, therefore, disallowed his - - just did not permit him to testify to something that the Court could not, in response to its duty to see that justice is done in every case,** could exercise that awesome responsibility.

I do note that - - what is it - - the right to the defendant to testify is well established in *Rock v. Arkansas*, 483 U.S. 44, 107 Supreme Court 2704, a 1987 case. The court there knew or addressed the situation when there was a per se rule against admissibility. In other words, the rule in *Arkansas* at the time was that, I think, it was post-hypnotic testimony would not be admissible per se. In other words, without consideration. There the court said that that was a violation of the Defendant's right to testify. In so doing, the - - not only did the majority, five of the Supreme Court at the time, note - - note that in the exercise of this right, the accused, as is required of the state, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocent. And that was a cite from a prior decision, *Chambers v. Mississippi*, 410 U.S. at 284 and 302 a '93 Supreme Court at 1049. Interesting enough, the four-member dissent cited *Chambers* as well. The Constitution does not in any way relieve a defendant from compliance with, quote, rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilty and innocence.

The Court, in the exercise of its discretion, it's well in light of the grave responsibility to assure that justice is served, complied in its opinion with its duty. **I might note that also, considering the nature of this particular Defendant's propensity to say things that would obviously not be in his best interest, although he would like to do it perhaps or has done it in the past, this Court does not feel that this would be in the Court's - - in the Defendant's best interest and would be prejudicial.** And which is I say, 401 is relevant evidence, 402 is material to the particular issues and 403, Rule 403, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury. And in this case, since nothing was offered that would be any different from what had already been addressed in the - - as far as evidence is concerned, the Court found that even that, if anything, would be cumulative.

So as far as the efforts to have the Defendant exercise his rights were not successful. The Court stands by its ruling. . . .

R., Tr. p. 2250, l. 1 - p. 2253, l. 3.

ANALYSIS

The Decision to Testify

The criminal defendant's constitutional right to testify is unlike other matters of trial strategy which are in the control of defense counsel. A criminal defendant has the right to take the stand even over the objections of his trial counsel. See People v. Robles, 2 Cal.3d 205, 215, 85 Cal.Rptr. 166, 466 P.2d 710 (1970): “[T]he right to testify in one's own behalf is of such fundamental importance that a defendant who timely demands to take the stand contrary to the advice given by his counsel has the right to give an exposition of his defense before a jury. The defendant's insistence upon testifying may in the final analysis be harmful to his case, but the right is of such importance that every defendant should have it in a criminal case.”⁶ See also Wright v. Estelle, 572 F.2d 1071, 1078-79 (5th Cir.1978) (Godbold, J., dissenting) [the defendant's “desire to tell ‘his side’ in a public forum may be of overriding importance to him.... The wisdom or unwisdom of the defendant's choice does not diminish his right to make it.”].)

⁶The right to testify is personal to the defendant and cannot be waived by defense counsel's acting alone. See, Goff v. Bagley, 601 F.3d 445 (6th Cir.2010); U.S. v. Ward, 598 F.3d 1054 (8th Cir.2010); Owens v. U.S., 483 F.3d 48 (1st Cir.2007); U.S. v. Mullins, 315 F.3d 449 (5th Cir.2002); U.S. v. Manjarrez, 258 F.3d 618 (7th Cir.2001); Chang v. U.S., 250 F.3d 79 (2d Cir.2001); Sexton v. French, 163 F.3d 874 (4th Cir.1998); U.S. v. Joelson, 7 F.3d 174 (9th Cir.1993); U.S. v. Teague, 953 F.2d 1525 (11th Cir.1992).

See, e.g., Brown v. Artuz, 124 F.3d 73, 77 (2d Cir. 1997) (citing cases from the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh circuits).

As the Eleventh Circuit stated in a comprehensive in banc opinion, criminal defendants at trial “possess essentially two categories of constitutional rights: those which are waivable by defense counsel on the defendant's behalf, and those which are considered ‘fundamental’ and personal to the defendant, waivable only by the defendant.” United States v. Teague, 953 F.2d 1525, 1531 (11th Cir.1992) (in banc). Included in the former category are matters that “primarily involve trial strategy and tactics,” such as “what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed.” *Id.* Included in the latter category of decisions “personal” to the defendant are, for instance, the decisions whether to enter a guilty plea, see Boykin v. Alabama, 395 U.S. 238, 242-44, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1969), whether to waive a jury trial, see Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942), and whether to pursue an appeal, see Fay v. Noia, 372 U.S. 391, 438-40, 83 S.Ct. 822, 848-49, 9 L.Ed.2d 837 (1963). The question now before us is whether the defendant's right to testify on his own behalf is one of these “personal” rights. If it is, then the defendant must be allowed to testify if he so desires, regardless of strategic considerations that his lawyer concludes weigh against such a decision. If the right is not personal to the defendant, then trial counsel could prevent the defendant from testifying even when the defendant insists on taking the stand.

Arguments are available to support either position. It might be argued, for instance, that once a defendant waives his right to self-representation and retains counsel to represent him during trial, he thereby forfeits his right to determine all tactical aspects of the conduct of trial,

including whether certain objections will be made, how a cross-examination of a prosecution witness will be conducted, and which witnesses, including the defendant himself, will testify for the defense. Because the decision whether the defendant will testify requires weighing the potential benefits against numerous dangers, it might well be left to defense counsel, like other strategic decisions. Defense counsel has superior experience with the criminal process and detailed, objective knowledge of the strengths and weaknesses in the defendant's case. At least one concurring opinion, predating Rock, has accepted this argument, noting that the ultimate decision must reside with trial counsel because “[n]o one could seriously contend that a defendant is in a better position to dictate trial strategy than his attorney,” and because “[n]o attorney could discharge [h]is duty [to provide his client with the best possible defense within the law] if he must yield to the personal demands of his client.” Wright v. Estelle, 572 F.2d 1071, 1073 (5th Cir.1978) (in banc) (Thornberry, Clark, Roney, Gee, and Hill, JJ., specially concurring). Cf. Campos v. United States, 930 F.Supp. 787, 790 (E.D.N.Y.1996) (“[L]ogic suggests that the decision of whether or not a defendant should testify should rest ... [with trial counsel,] who is in a superior position to assess the strength of the case, the plausibility of the defendant's account, and the ability of the defendant to withstand cross-examination.”).⁷

⁷ Recently in State v. Winkler, 388 S.C. 574, 588, 698 S.E.2d 596, 603 (2010), the Court approved of a decision by counsel to present evidence in mitigation in a capital sentencing proceedings over the defendant's objection. In Winkler, the Court stated:

“An attorney undoubtedly has a duty to consult with the client regarding ‘important decisions,’ including questions of overarching defense strategy.” Florida v. Nixon, 543 U.S. 175, 187, 125 S.Ct. 551, 560, 160 L.Ed.2d 565, 578 (2004) (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984)). “That obligation, however, does not require counsel to obtain the defendant's consent to ‘every tactical decision.’ ” Id. (quoting Taylor v. Illinois, 484 U.S. 400, 418, 108 S.Ct. 646, 657, 98 L.Ed.2d

However, every circuit that has considered this question has placed the defendant's right to testify in the "personal rights" category- i.e., waivable only by the defendant himself regardless of tactical considerations. See, e.g., United States v. Pennycooke, 65 F.3d 9, 10-11 (3d Cir.1995); United States v. McMeans, 927 F.2d 162, 163 (4th Cir.1991); Jordan v. Hargett, 34 F.3d 310, 312 (5th Cir.1994), vacated without consideration of this point, 53 F.3d 94 (5th Cir.1995) (in banc); Rogers-Bey v. Lane, 896 F.2d 279, 283 (7th Cir.1990); United States v. Bernloehr, 833 F.2d 749, 751 (8th Cir.1987); United States v. Joelson, 7 F.3d 174, 177 (9th Cir.1993); Teague, 953 F.2d at 1532 (11th Cir.); United States v. Ortiz, 82 F.3d 1066, 1070 (D.C.Cir.1996); see also Lema v. United States, 987 F.2d 48, 52 (1st Cir.1993) (assuming without deciding that right to testify may not be waived by counsel). Although we acknowledge the force of the arguments to the contrary, we consider the arguments set forth in these decisions more compelling and rule that the decision whether to testify belongs to the defendant and may not be made for him by defense counsel.

First, although Rock itself did not settle this issue, that decision compared the defendant's right to testify with the right of self-representation set forth in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and described the accused's right to testify as "[e]ven more fundamental to a personal defense than the right of self-representation." Rock, 483 U.S. at 52, 107 S.Ct. at 2709. Since the decision regarding whether to retain counsel or proceed without representation is personal to the defendant, see Faretta, 422 U.S. at 819-20, 95 S.Ct. at 2532-33,

798, 816 (1988)).

Id.

Rock strongly implies that the decision whether to testify also belongs to the defendant.⁸ Second, as Rock pointed out, the right to testify is a “necessary corollary to the Fifth Amendment's guarantee against compelled testimony.” Rock, 483 U.S. at 52, 107 S.Ct. at 2709. Therefore, the “same logic which dictates that a criminal defendant may not be compelled to testify by defense counsel, also supports the conclusion that a defendant may not be compelled to remain silent by his or her attorney.” Campos, 930 F.Supp. at 791. Third, dictum in one pre- Rock decision by the Supreme Court placed the defendant's right to testify in the category of personal rights. See Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983) (“It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, **testify in his or her own behalf**, or take an appeal.”). See also Wainwright v. Sykes, 433 U.S. 72, 93 n. 1, 97 S.Ct. 2497, 2510 n. 1, 53 L.Ed.2d 594 (1977) (Burger, C.J., concurring) (“Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make.”). Finally, we note that both the American Bar Association's Standards for Criminal Justice and its Model Rules of Professional Conduct place the defendant's right to testify in the personal category. See 1 *ABA Standards for Criminal Justice*, Standard 4-5.2(a)(iii) (2d ed.1980); Model Rules of Professional Conduct, Rule 1.2(a) (1983). Although counsel has the right, and indeed the professional duty, to advise his client of the benefits and pitfalls of a decision to take the stand on his own behalf, see 1 *Standards for Criminal Justice*, Standard 4-5.2(a), the ultimate

⁸ See Holscher, “The Legacy of Rock v. Arkansas: Protecting Criminal Defendants' Right to Testify in Their Own Behalf,” 19 N Eng J Crim & Civ Conf 233 (1993); Caldwell & Spiga, “Crippling the Defense of an Accused: The Constitutionality of the Criminal Defendant's Right to Testify,” 6 Wyo. L. Rev. 87 (2006); Bellin, Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify, 76 U. Cin. L. Rev. 851 (2008).

decision regarding whether to testify belongs to the defendant, not with counsel. Brown v. Artuz, 124 F.3d 73, 77-8 (2nd Cir. 1997).⁹

South Carolina has not expressly addressed the issue concerning a claimed denial of a requested right to testify head on.¹⁰ In State v. Norris, supra., the Court addressed whether a defendant had to choose between his right to testify in the penalty phase and the right to make a closing statement. The Court determined that the law did not forbid a criminal defendant testifying if he desired and the ability to make the closing statement allowed under the death penalty statute. In State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (S.C. 1985), the Court held that before a criminal defendant testifies, trial judge may establish that defendant understands his constitutional right to testify or not to testify. However, the Court stated this inquiry must be limited in scope and judge may not express his opinion, even though based upon judge's experience and best judgment. How jury may or may not view criminal defendant's decision not to testify is not an appropriate subject for comment by trial judge when advising defendant of his right to testify or not to testify. See State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986).

⁹Moreover, “[b]ecause the burden of ensuring that the defendant is informed of the nature and existence of the right to testify rests upon defense counsel, we conclude that this burden is a component of the effective assistance of counsel. As a result, any claim by the defendant that defense counsel has not discharged this responsibility—either by failing to inform the defendant of the right to testify or by overriding the defendant's desire to testify—must satisfy the two prong test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for assessing whether counsel has rendered constitutionally ineffective assistance.... Brown, 124 F.3d at 79.

¹⁰In State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890, 894 (1979), the Court stated: “Each accused, with the assistance of counsel, makes this decision [not to testify] as a part of his trial strategy. Under the first principle of ethics and justice, a defendant who secures a ruling of the court, albeit erroneous, should not be permitted to profit ... from the court's assent to an improper trial strategy.”

In State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991), the Court held that the requirement of knowing and voluntary waiver of right to testify and to personally address jury must be satisfied by full record which may be established by colloquy between court and defendant himself, between court and defendant's counsel, or both.¹¹ In State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993), the Court held that:

In State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985), this Court specifically held that a capital defendant has the right to testify and make a closing statement in the sentencing phase. The denial of the right to testify at either phase of a capital trial, absent a showing on the record of a knowing and voluntary waiver, constitutes reversible error. State v. Orr, *supra*.

State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). However, in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001), the Court overruled its reasoning in State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987), State v. Orr, *supra*., State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993), and State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1996).

It has been stated that if the accused expresses a wish to testify at trial, the court must permit him or her to do so, [People v. Simmons, 140 Mich. App. 681, 364 N.W.2d 783 (1985); Culberson v. State, 412 So. 2d 1184 (Miss. 1982)], even over counsel's objection. [People v. Simmons, *supra*.]. Under some authority, whether the accused will testify is primarily a matter of trial strategy to be decided between the accused and his or her attorney. [U.S. v. Systems Architects, Inc., 757 F.2d 373, 17 Fed. R. Evid. Serv. 705 (1st Cir. 1985)].

The defendant's right to testify may be exercised only within certain bounds, [U.S. v. Panza, 612 F.2d 432 (9th Cir. 1979); Tates v. U.S., 447 U.S. 926, 100 S. Ct. 3020, 65 L. Ed. 2d

¹¹ In State v. Orr, due to the defendant's mental retardation, the Court held that defendant's waivers of his rights to testify and to personally address the jury were insufficient and therefore were not knowing and voluntary.

1118 (1980)] and within the law in a proper and legitimate manner.[Feist v. State, 631 S.W.2d 769 (Tex. App. Beaumont 1982)] Thus, the constitutional right of the accused to testify does not permit him or her to give testimony in disregard of rules of evidence,[State v. George, 194 Conn. 361, 481 A.2d 1068 (1984); Quarels v. Com., 142 S.W.3d 73 (Ky. 2004)] or to testify falsely.[LaChance v. Erickson, 522 U.S. 262, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998); In re G.E., 879 A.2d 672 (D.C. 2005); State v. Daniels, 182 N.J. 80, 861 A.2d 808 (2004); People v. DePallo, 96 N.Y.2d 437, 729 N.Y.S.2d 649, 754 N.E.2d 751 (2001); State v. Conway, 108 Ohio St. 3d 214, 842 N.E.2d 996 (2006)].

1. Counsel - Not the Defendant - Made the Decision Not To Call Rivera as a Witness.

In his argument, he ignores one simple fact - despite knowing the desire of the Appellant to testify, defense counsel knowingly preventing his client's testimony for strategic reasons by expressly failing to call Rivera as a witness. It is not the court's responsibility to call a defendant as a witness, but it is the lawyer's responsibility. Defense counsel, aware of the Appellant's desire and intent to testify, expressly refused to call him to the stand. Tr. p. 2193, ll. 8-17. Counsel did not state that the basis for refusing to call him was any concern that he would commit perjury or present false testimony. Rather, they indicated "we cannot put him on the stand without harming his case so irreparably as to void any meaningful consideration to guilt or innocence in this matter." R., Tr. p. 2193, ll. 18-24.

Counsel asserted that when Rivera testified in the Asha Wiley murder trial, Rivera presented testimony concerning inadmissible matters that the jury was allowed to consider. Rather than seeking to present and guide his desired testimony with the guiding hand of counsel,

counsel simply refused to do so, The defense restated: “but if that is Mr. Rivera’s wish [to testify] we will respectfully and honorably decline the opportunity to call him.” R., Tr. p. 2194, ll. 6-8.

Whether counsel was correct in their strategic decision to preclude Rivera’s testimony may see another day where the strategic decision is assessed under the standards of Strickland v. Washington, 466 U.S. 668(1984). See Cannon v. Mullin, 383 F.3d 1152, 1171 (10th Cir.2004) (allegations that defense counsel prevented defendant from testifying in his own defense satisfy first prong of Strickland); Brown v. Artuz, 124 F.3d 73, 78–79 (2d Cir.1997) (defendant claiming ineffective assistance due to counsel's failure to advise about personal right to testify which denied right to testify must still establish prejudice under second prong of Strickland); Palmer v. Hendricks, 592 F.3d 386, 394 (3d Cir. 2010) (rejecting Palmer's claim that his attorney was ineffective for interfering with his right to testify where Palmer did not inform the court of any of the facts to which he would have testified, but merely stated “that he would have taken the stand to testify on [his] own behalf to explain [his] side of what really happened if [he had been] allowed to do so”) Oisorio v. State, 676 So.2d 1363, 1364–65 (Fla.1996) (rejecting an argument that a defendant alleging that counsel interfered with his or her right to testify must prove only deficient performance and holding that "to obtain post conviction relief, a defendant claiming his or her right to testify was violated must show that counsel's performance was deficient and that the deficient performance prejudiced the defense"); Baker v. Greene, No. 03–CV6368P, 2010 WL 3504783, at * 11 (W.D.N.Y. Sept.2, 2010) (“even if Petitioner had not been advised that it was his decision whether to testify, or trial counsel had prevented him in some way from doing so, Petitioner has offered no evidence demonstrating that his failure to testify prejudiced his

defense.”).¹²

The Court has addressed situations where the attorney was faced with a situation of a client who intended to commit perjury. In Matter of Goodwin, 279 S.C. 274, 277, 305 S.E.2d 578, 580 (1983), this Court established as the acceptable procedure the narrative approach represents the best accommodation of the competing interests of the defendant's right to testify and the attorney's ethical obligation not to participate in the presentation of perjured testimony since it allows the defendant to tell the jury, in his own words, his version of what occurred, a right which has been described as fundamental, and allows the attorney to play a passive role. However, there is no indication in this matter that it was other than a strategic decision. To the contrary, there is no evidence that this was the dilemma that trial counsel was faced with in this setting. Only that there was a strategic disagreement with the client's decision to testify.

Rather than seeking to follow their clients advice, the defense team sought refuge in placing the burden upon the Court to their role and call Appellant as a Court witness where the Court admittedly had no knowledge about the specifics of the testimony. The defense team put

¹² A claim that counsel was ineffective because counsel prevented the defendant from testifying is judged under the Strickland standard, Matylinsky v. Budge, 577 F.3d 1083, 1097 (9th Cir. 2009), citing Medley v. Runnels, 506 F.3d 857, 861 (9th Cir. 2007)(en banc). Matylinsky found no ineffectiveness where counsel was concerned about petitioner's impeachment, about petitioner's flat affect, and about petitioner's desire to say how the victim of the brutal wife-murder instigated his attack, contrary to the defense. Id. at 1097-98. Alleged attorney coercion in preventing defendant from testifying failed in U.S. v. Brown, 217 F.3d 247, 259 (5th Cir. 2000) where the failure to testify was the product not of coercion but of persuasion. In U.S. v. Aldea, 2011 Westlaw 5433720, 2 -3 (C.A.3 (C.A.3 (Pa.),2011)(the court used the Strickland prejudice standard in rejecting a similar claim where the Petitioner failed to show how his testimony would have changed the result of the proceeding. While it is true the ability of a defendant to testify at his own trial is “inherently significant,” Nichols v. Butler, 953 F.2d 1550, 1553 (11 th Cir.1992), the court implicitly found Aldea's testimony would not have undermined the verdict, even though he claimed it would have contradicted the testimony of the government's witnesses,

the trial court in the impossible situation to act as a mediator over a situation that rested solely between counsel and the defendant. This abdication of the defense function was wrong. Though not raised in this proceeding, the actual error - if any - was that defense counsel failed to call Rivera to testify upon his request. To suggest otherwise would set a precedent that anytime a defendant disagrees with the lawyers advice that the defendant should not testify, to have them called as a court witness. Upon a reasonable reading of the precedent of this Court and others, this has not been the rule of procedure. This Court should not take this step now.

2. Under Rule 614 and the procedures set up in State v. Anderson, the trial judge did not abuse his discretion in deciding not to call Rivera as a Court Witness Where the Record Supports That Rivera Failed to Sufficiently Comply With The Court's Request For Information About Possible Testimony So It Could Decide Admissibility Under The Rule.

In State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991), the Supreme Court established the following prerequisites for a court's witness: 1) the prosecution is unwilling to vouch for the veracity or integrity of the witness, 2) there is a close relationship between the accused and the prospective Court's witness, 3) there is evidence that the proposed witness was an eyewitness to the act giving rise to the prosecution, 4) the witness gave a sworn statement concerning the relevant facts which have been or will probably be contradicted, and 5) the absence of the witness's testimony would likely result in a miscarriage of justice. See also Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994); State v. Evans, 316 S.C. 303, 312, 450 S.E.2d 47, 53 (1994). However, since the adoption of the South Carolina Rules of Evidence, the "voucher" rule of the common law has been abandoned under Rule 607 so the need for the court to call a witness has been lessened. Rule 614 now addresses the ability to call court witnesses and states:

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT

- (a) Calling by Court. **In extraordinary circumstances**, the court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. Before calling a court's witness, the court shall afford the parties a hearing on the matter outside the presence of the jury.
- (b) Interrogation by Court. **When required by the interests of justice only**, the court may interrogate witnesses.

Rule 614, S.C.R.E. (emphasis added). The comments to the Rule address the situation of when

Subsection (b) is the federal rule modified by adding the phrase “[w]hen required by the interests of justice only.” **This language was added to emphasize that this power, like the power to call a court's witness, should be used sparingly.** If the court does interrogate a witness, the court must be careful not to intimate any opinion as to the force and effect of the testimony by its questions. Fowler v. Laney Tank Lines, Inc., 263 S.C. 422, 211 S.E.2d 231 (1975).

Here, the trial judge reasonably stated that he was seeking information to understand whether the defendant intention to testify concerned presenting relevant material or incompetent material. Although the defendant stated that it was his intent to testify “about the murders in Anderson County” and “to what happened” about the killing of Kwana Burns,” Rivera refused to tell the judge the specific testimony he was going to give upon the trial judge’s expressed elicitation for that testimony. R., Tr.p. 2199-2200. Rivera’s uncooperativeness concerning his intent to follow the instructions and procedure of the Court was evident when Rivera later responded:

When asked again by the Court what he would testify about, Rivera stated:

A. About the details of the case.

Q. What are the details?

A. **That’s for me to say on the stand, Your Honor.**

Q. Sir?

A. That's for me to say on the stand.

R., Tr. p. 2204, ll. 9-16.

The trial judge did not abuse his discretion in concluding that extraordinary circumstances had not been met because Rivera had refused the court's simple and straight forward demand to reveal under oath the testimony he intended to present because the Court had to assess whether the proposed testimony would be "material, relevant and . . . the probative value [would be] outweighed by the prejudice." R., Tr. p. 2204, ll. 16-21. See also S.C.R.E., Rule 401, 403. In Judge Macaulay's assessment, Rivera had "declined to testify to anything that would be helpful to the jury in reaching the issues in this case" [R., Tr.p. 2201, ll. 12-13], "not give[n] any specifics as to what would be presented, so the Court had no way to rule on the admissibility of such evidence" [R., Tr.p. 2250, ll. 20-21] and concluded that "[Y]ou did not want to cooperate . . . and provide the court with information necessary to determine whether or not what you wanted to testify to would be material, relevant, and the probative value would not be outweighed by prejudice to you." [R., Tr.p. 2229-2230].¹³

In reaching its conclusion about the right to testify, the Supreme Court explicitly held that "the right to present relevant testimony is not without limitation." Rock, supra., at 55, 107 S.Ct. 2704 (emphasis added). It emphasized that while exercising the right to testify, "the accused, as is required of the State, must comply with established rules of procedure and evidence designed

¹³ In addition, the Court addressed his limited knowledge about the Appellant's prior testimony in the Asha Wiley murder case noting his added concern that "considering the nature of this particular Defendant's propensity to say things that would obviously not be in his best interest, although he would like to do it perhaps or has done it in the past, this Court does not feel that this would be in . . . in the Defendant's best interest and would be prejudicial." R., Tr.p. 2252, l. 11-14.

to assure both fairness and reliability in the ascertainment of guilt and innocence.” Id. at 56, 107 S.Ct. 2704. See Lohmiller v. State, 884 N.E.2d 903, 910 (Ind.App. 2008). “While the constitutional right to testify permits a defendant to choose whether or not to take the witness stand, it does not authorize a defendant to present irrelevant testimony.” U.S. v. Vasquez-Landaver, 527 F.3d 798, 802 (9th Cir. 2008).

One area in which the right to testify may be circumscribed is where a defendant chooses to disregard the rules of evidence. See Rock, 483 U.S. at 56 n. 11, 107 S.Ct. 2704; Booker v. State, 397 So.2d 910, 914 (Fla.1981) (“A defendant who takes the stand as a witness in his own behalf occupies the same status as any other witness, and all the rules applicable to other witnesses are likewise applicable to him.”); United States v. Dunnigan, 507 U.S. 87, 96, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993) (“[A] defendant's right to testify does not include a right to commit perjury.”) see also Wilson v. State, 12 So.3d 292, 297 (Fla. 4th DCA 2009) (“The right to testify includes the right to testify fully, without perjury, to matters not precluded by a rule of evidence.”). Nevertheless, a procedural or evidentiary rule may not be applied in a manner so as to arbitrarily exclude material portions of a defendant's testimony. Bowden, 588 So.2d at 230–31 (citing Rock, 483 U.S. at 55, 107 S.Ct. 2704).

Simply stated, a criminal defendant does not have an absolute, unrestrainable right to spew irrelevant - and thus inadmissible testimony from the witness stand. See U.S. v. Lea, 249 F.3d 632 (7th Cir 2001) (“the accused does not have an unfettered right to offer testimony that is incompetent, privileged or otherwise inadmissible under the standard rules of evidence,” quoting Taylor v. Illinois, 484 U.S. 400, 410 (1988)), S.C.R.E. Rule 402 (“evidence which is not relevant is not admissible”). See also U.S. v. Moreno, 102 F.3d 994, 999 (9th Cir. 1996). cf. U.S. v. Pless,

982 F.2d 1118, 1123 (7th Cir. 1992) (testimony may be in narrative form as long as it stays within the bounds of pertinency and materiality). Further a court has the inherent authority to take appropriate measures to control a stubbornly defiant defendant. Illinois v. Allen, 397 U.S. 337, 343 (1970).

The trial judge was unable to determine the relevance of any potential testimony because the Appellant was intentionally unwilling to provide it to him. The trial judge pleaded with Rivera to provide him the information so he could determine as a court witness whether the evidence was relevant or was it evidence that should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

The Appellant contends that Rivera's brief comments that he would testify about the killing of Kwana Burns, without more, was sufficient to meet the standards of Rule 614 and Anderson. However, in the interest of justice and seeking a determination of extraordinary circumstances, it was not up to the judge to replace the role of defense counsel and automatically place the defendant on the witness stand because of the defendant's dispute over strategy with counsel - not as a defense witness, but as a court witness. The trial judge had a right to determine the relevance and potential prejudice of evidence he was being asked to present. The defendant's blatant unwillingness to present it and cooperate, revealed an intent to not follow state procedure and potentially present inadmissible and prejudicial matter.

In summary, the Appellant has failed to present extraordinary circumstances requiring the trial court under Rule 614 to automatically call a defendant as a court witness. There are a plethora of cases where defendant has testified against their lawyers advice without being called

as court witnesses. There was nothing extraordinary about this situation - only the refusal of the defense to comply with the defendant's wishes. What was extraordinary was when the defense abdicated its role to present evidence - even if through a narrative acceptable under Goodwin, to the trial judge. However, it is not the role of the trial judge to be an advocate for the defendant. Under those discrete circumstances, Judge Macaulay did not abuse his discretion in failing to independently call Rivera as a court witness - not knowing what information Rivera intended to reveal and its relevance to the jury.

However, if the Court is of the opinion that in this setting where a defendant disagrees with his lawyers advice not to testify that the trial judge must always blindly call a defendant as a witness without knowing the parameters of his intended testimony rather than continuing that responsibility on counsel, as shown below, a new trial is not always required for the failure to do so because harmless error in this particular case has been convincingly shown. If it is sufficient for a court witness to establish relevance and materiality and probative value over prejudice by merely stating an intent to talk about the murder (or in other settings to talk about a crime without more), then that showing was not met here. However, Respondent respectfully submits that in the discrete setting presented here, Judge Macaulay was placed in a situation he should never have been placed in by the defense team initially, and then by Appellant ultimately through his obstinance. As the Supreme Court stated: "The Constitution does not in any way relieve a defendant from compliance with "rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, supra, 410 U.S., at 302, 93 S.Ct., at 1049. It was defense counsel who refused to call the defendant as a witness.

3. Any Error In Failing To Allow The Defendant To Testify Does Not Require Automatic Reversal And Is Harmless Error In This Case.

Assuming the failure to call Appellant as a Court Witness under Rule 614 was error, Respondent submits that the error was harmless beyond a reasonable doubt. Respondent submits that a harmless error analysis is appropriate in matters of constitutional error. See e.g. Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (holding that harmless error analysis applies to erroneous jury instructions which direct the jury to presume an ultimate element of the offense based upon proof of certain predicate facts); Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (holding that harmless error analysis applies to erroneous admission of involuntary confessions); Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (holding that harmless error analysis applies to unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (holding that harmless error analysis applies to a jury instruction containing an erroneous conclusive presumption).

This Court has not specifically addressed whether a denial of the right to testify is always automatic reversible error. While in pre-Torrence cases, such as Orr, the Court found the denial of the right to testify at either phase of a capital trial, absent a showing on the record of a knowing and voluntary waiver, constitutes reversible error. However, in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001), the Court overruled State v. Reed, 293 S.C. 515, 362 S.E.2d 13, State v. Orr, 304 S.C. 185, 403 S.E.2d 623, State v. Charping, 313 S.C. 147, 437 S.E.2d 88, and State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 and concluded that a defendant was required to show prejudice in support of his claim that counsel were ineffective for failing to advise him of

his right to make personal closing statement during guilt phase and the defendant failed to show prejudice. The waiver issue presented in Franklin concerning the statutory right to make a personal closing statement, but the analysis was combined in each of the cases that also concerned a waiver of the right to testify.

Despite the strong interests that support application of the harmless error doctrine, the United States Supreme Court and this Court have consistently held that some errors defy harmless error analysis and require reversal. See e.g. Arizona v. Fulminante, 499 U.S. at 309, 111 S.Ct. at 1265. The cases in which the United States Supreme Court and this Court have refused to apply the harmless error doctrine involve errors that are “structural defects in the constitution of the trial mechanism.” Fulminante, 499 U.S. at 310, 111 S.Ct. at 1265. These errors have an impact upon “[t]he entire conduct of the trial from beginning to end.” *Id.* Stated another way, “these errors deprive defendants of ‘basic protections’ without which ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.’ ” Neder, 527 U.S. at , 119 S.Ct. at 1833. Only a very limited class of errors have been found to be “structural,” and subject to automatic reversal. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (adjudication by a biased judge); Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable doubt

instruction); Crane v. Kentucky, 476 U.S. 683, 691 (1986)[harmless error test applied to erroneous exclusion of defense evidence].

Unlike such defects as a complete deprivation of counsel or trial before a biased judge, denial of the defendant's right to testify does not in all cases render a criminal trial fundamentally unfair or call into question the reliability of the trial as a vehicle for determining guilt or innocence. Such an error involves the exclusion of testimony which is evidence that can be “quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” Fulminante, 499 U.S. at 307, 111 S.Ct. at 1264. In some cases, “the defendant's testimony would have no impact, or even a negative impact, on the result of trial.” United States v. Tavares, 100 F.3d 995, 999 (D.C.Cir.1996), cert. denied 520 U.S. 1160, 117 S.Ct. 1344, 137 L.Ed.2d 502 (1997); see also State v. Robinson, 138 Wash.2d 753, 982 P.2d 590, 599 (1999). Likewise, in some cases, denial of a defendant's right to testify may be devastating to the defense. However, under such circumstances, a reviewing court will simply conclude that the error was not harmless beyond a reasonable doubt. The fact that reversal may be required in some cases is no reason to eschew the harmless error doctrine entirely when the error involved is clearly of a trial, rather than a structural nature. Cf. Fulminante, 499 U.S. at 312, 111 S.Ct. at 1266.

As such, denial of the right to testify has been appropriately characterized as a “trial error” which is subject to the harmless error doctrine. Indeed, the vast majority of jurisdictions which have considered this issue have held either that the harmless error doctrine applies when a defendant establishes a denial of the right to testify under the Fifth Amendment or that the prejudice prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984) must be established if the defendant is to prove ineffective assistance of counsel as a result of counsel's unilateral waiver of the right to testify. See e.g. Tavares, 100 F.3d at 999 (citing other federal cases)[no reasonable probability testimony would have changed the verdict, standard for ineffective assistance of counsel claim]; Momon v. State, 18 S.W.3d 152, 165 (Tenn.,1999) [Chapman standard in denial of right to counsel cases]. United States v. Taylor, 128 F.3d 1105, 1109 (7th Cir.1997); Ortega v. O'Leary, 843 F.2d 258, 262–263 (7th Cir.1988) [denial of right to testify tested under Chapman]; Commissioner of Correction v. Rodriguez, 222 Conn. 469, 610 A.2d 631, 636 n. 9 (1992); People v. Johnson, 62 Cal.App.4th 608, 72 Cal.Rptr.2d 805, 820 (4 Dist.1998); State v. Silva, 78 Hawai'I 115, 890 P.2d 702, 712 (1995) (overruled on other grounds in Tachibana v. State, 79 Hawai'I 226, 900 P.2d 1293, 1302–03 (1995); People v. Solomon, 220 Mich.App. 527, 560 N.W.2d 651, 654–56 (1996); State v. Paulsen, 726 A.2d 902, 907 (N.H.1999); State v. Arguelles, 921 P.2d 439, 441 (Utah 1996); Robinson, 982 P.2d at 598; State v. Flynn, 190 Wis.2d 31, 527 N.W.2d 343 (App.1994); Alicea v. Gagnon, 675 F.2d 913, 925-926 (7th Cir.1982) [error in preventing defendant from testifying based on noncompliance with 'alibi-notice' statute tested under Chapman]. Application of the harmless error doctrine to the denial of a criminal defendant's right to testify strikes the appropriate balance between the judicial system's interest in obtaining reliable results and the system's competing interest in having litigation end at some point. Van Arsdaal, 475 U.S. at 681, 106 S.Ct. at 1436; Chapman, 386 U.S. at 22, 87 S.Ct. at 827.

The Supreme Court has tested analogous claims under a harmless error standard. (See)” Additional cases which have applied the Chapman harmless error analysis to a denial of the defendant's right to testify. (See; _but see State v. Rosillo, 281 N.W.2d 877, 879 (Minn. 1979);

Hernandez v. Dugger (M.D.Fla.1992) 829 F.Supp., 372, 376–377 [finding defect “structural”].)

The Supreme Court has explained “the harmless-error doctrine is essential to preserve the ‘principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.’ ” (Arizona v. Fulminante (1991) 499 U.S. 279, 308, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302.) The Supreme Court has further stated, constitutional violations which are subject to harmless-error analysis are errors that “occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” (Id. at pp. 307–308, 111 S.Ct. at p. 1264.) Under the Chapman harmless error test, a violation of a defendant's constitutional right does not require reversal when it can be shown beyond a reasonable doubt that a “trial error” (as opposed to “structural defects in the constitution of the trial mechanism”) did not contribute to the guilty verdict. (Id. at p. 309, 111 S.Ct. at p. 1265; Chapman v. California, supra, 386 U.S. 18, 24, 87 S.Ct. 824, 828.)

Respondents agree with those cases which have held the denial of the defendant's right to testify is a “trial error.” Such an error, resulting in exclusion of evidence, is not reversible per se but subject to the Chapman harmless error analysis. Accordingly, a review the record to determine if the error in not permitting Rivera to testify was harmless beyond a reasonable doubt.

4. Why Any Error Was Harmless Error.

There can be only one conclusion based upon the unique factors presented in this case. Any alleged error in the failure of Rivera testifying is harmless beyond a reasonable doubt. This

case was not tried by the defense as an issue of guilt, lack of identity or alibi. From the moment of the defense's opening statement it was only about punishment and mitigation.

A. Defense Opening Statement Concessions.

In his opening statement, defense counsel John Delgado plainly focused his case beyond the guilt phase in the penalty phase by this immediate concession : "it is very likely that the state will be able to prove beyond every reasonable doubt that any of you might have, his guilt." R., Tr.p. 1891, l. 22- p. 1892, l. 1. Later, counsel Delgado announced : "[S]o the next question is why? They will show you what happened, **and we basically will agree absolutely with that.**" R., Tr.p. 1893, l. 9-10. (emphasis added). Defense counsel further described evidence in his opening - including the defendant's statement about the murder of Kwana Burns (R., Tr. p. 1895, l. 1-12)("Mr. Rivera makes a very detailed statement about what happened to Ms. Burns"), evidence that was not introduced in the guilt phase ("said he has killed six other woman in other states (Tr.p. 1895, l. 14-15), suffered from bi-polar disorder and mental illness (R., Tr.p. ll. 22-24), **"this is not the first time he has killed someone,"** (R., Tr.p. 1897, l. 9-12), and killed an "unconnected , but very related innocent young woman Asha Wiley on December 10, 2006 (R., Tr.p. 1897, l. 11-17). In addition counsel Delgado stated that "on that witness stand in February 2008 Rivera talked about his assignment to not only kill Kwana Burns, but Asha Wiley as well (R., Tr.p. 1898, ll. 6-11). Then counsel Delgado refers to letters that Rivera had written, over objection, to family members of the victims and reads them into the record, which included further descriptions of the killings and his continuing expressions of malice toward the victim. R., Tr.p. 1898-1902. Counsel Delgado stated that the letter were written not to the victim's survivors, but to the jurors because "he's always wanted the death penalty. R., Tr. p. 1902. He

concluded with a statement that “at the conclusion of all of this case, it may well be that mercy kneels humbly beside you and whispers the decision and the choice that only you can give: mercy”. R., Tr. p. 1902, ll. 13-19.

So firm was the defense representations, that the jury twice sent notes concerned about the effect of the representations after the opening argument. See R., Tr.p. 1916, ll. 5-10 (“please clarify if defendant said he committed crime and asked for death sentence why are we having the trial”); R., Tr. p. 1990, ll. 14-21 (“in the defense’s opening statement everything he said seemed to me to say that the defendant was guilty, yet he is pleading not guilty. Are they heading towards an insanity type of plea or are they trying to prove that the defendant did not kill or murder the victim at all.”).

At shown from a review of the guilt phase evidence , the state did not introduce evidence of the Asha Wiley murder or the letters or any testimony that Rivera made in 2008 in the Wiley trial.¹⁴

B. The Defense Counsel’s Closing Concessions.

The guilt of Rivera for the death of Kwana Burns remained the theme in the guilt phase closing presented by defense counsel McGuire. He opened and declared: “as Mr. Delgado told you in opening, we don’t expect you to pause long in deciding guilt in this case. And as you’ve noticed, we’ve not put up any evidence to fight guilt. And really this case is going to be about punishment. . .” R., Tr. p. 2208, ll. 16-20. The remainder of his argument was a prelude to the

¹⁴ In fact, when the State attempted to introduce a video of the 2008 testimony in the penalty, Judge Macaulay excluded it, even though the defense had referred to it specifically in the guilt phase opening reversing an earlier ruling, based upon S.C. Code Ann. § 19-50-20 and S.C.R.E. Rule 403. R., Tr. p, 2380-2384 (ruling denying admission and revising earlier holding). See R., Tr.p. 2245- 2249; R., Tr.p. 2340, l. 12- p. 2341, l. 15.

penalty phase by asking for “death in prison” and foreshadowing the state’s penalty phase presentation of letters written to the victim’s by Rivera. And “that’s what we’re going to show you in the next phase of the trial.” R., Tr. p. 2209, ll. 15-23.

C. Uncontested Evidence of Guilt and Rivera’s Identity As the Perpetrator.

The theme throughout the state’s guilt phase case that Rivera, passing through Anderson, went to the Anderson Mall on December 10, 2006 and began stalking and developing a relationship with Kwana Burns, a Belk employee leading up to her vicious death on by strangulation, hogtying her hands and feet, and then placing her child over her body.

The evidence to support this uncontested theory of guilt began with the testimony of Kiki Hatten, Kwana Burns’s cousin, who identified Rivera as being in the presence of Kwana Burns eating at her home on December 13, 2006 and going by the name “Raymond.” R., Tr. p. 1922-1928, l. 21. Hatten described that after no one answered the telephone the next day, she went over to the home, found the Red Buick of the visitor missing, the door unlocked and a light on. R., Tr.p. 1932-33. She found the victim lying with her hands and feet tied together and her young child on top of her. R., Tr. p. 1933-1935.

Crime scene investigation described arriving and finding the victim in the back bedroom with her hands tied behind her back and feet tied up and in a hog-tie. R., Tr. p. 1948, 1972-78. The investigator learned from the victim’s son that his mother had met the day before with the “suspect” at a Shell Station the night before. Upon reviewing a video from the station, it revealed the Appellant and the victim’s vehicle at the station at 6:37 P.M. R., Tr. p. 1952. Information gathered was that the victim went to the Shell Station because Appellant was unable to locate her

house from the directions Kwana Burns had given him. R., Tr. p. 1952. The video showed the victim's car leaving the station and the Appellant's car following it. R., Tr. p. 1954, l. 20. The investigation lead to Rivera.

Further connections with Rivera and the victim were developed. The victim's business card from Belk as a Lancome Beauty Advisor was in the Appellant's wallet. R., Tr. p. 1982-83. Raymondeze Rivera's fingerprint was identified on a plate recovered from the victim's home. R., Tr.p. 1996-1998. A series of text messages from the victim's telephone were consistent with the number associated with Raymond. R., Tr. p. 1999-2002. Particularly, around 2:20 PM on December 13 and another text to "please answer phone. You are on my mind" on December 12, 2006 at 10:20 p.m. from Burns telephone. R., Tr. p. 2002 -2005, l. 21. Lt. Zamberlin located and seized the Red Buick of Appellant which was located with an improper tag that was registered to a BMW. Tr.p. 2027. The certificate of title was to Raymondeze Rivera. R., Tr. p. 2026-27, 2032.

Additionally, evidence connecting (and corroborating the Appellant's statement) was a video from the Belk store showing the Appellant coming into the store at various times throughout the day on December 10, 2006. R., Tr. p. 2015, ll. 4-11. Lt. Zamberlin identifies Rivera on the video at the Belk's Anderson Mall store at various times on December 10 including 3:00, 3:15, 3:35, and 3:36 p.m. R., Tr. p. 2041-2043.

Further evidence connecting Rivera to the victim and the crime concerned material recovered from the victim's ankle at the crime scene which matched the Appellant's DNA profile. The material was from a swab taken of the victim's ankle by Anderson Police Department. R., Tr. p. 2010- 2012. The DNA testing by the South Carolina Law Enforcement Division revealed the swab from the victim's inner ankle and the victim's sock matched Rivera's

profile and the probability of randomly selecting an unrelated individual who would have the profile the same as Mr. Rivera's is one in three hundred and ninety quadrillion. R., Tr. p. 2182, l. 1-p. 2183, l. 12. The cutting from the victim's shorts also revealed urine (consistent with the Appellant's statement). R., Tr. p. 2181-82.

D. The Appellant's Inculpatory Statement Related To Kwana Burns.

As shown within the brief on Issue 5, Appellant gave a confession to Lt. John Zamberlin of the Anderson Police Department on December 21, 2006. R., Tr. p. 2059-2071. As presented in the guilt phase of the Burns trial, the statement read as follows:

Sergeant John Zamberlin has written his statement for me at my request. I was traveling from Washington, D.C. and I was coming by Anderson, South Carolina. I needed gas, so I stopped at a gas station across from a Wendy's. This was on Sunday December 10th, 2006. I asked somebody for directions to the mall. It was still daylight, I want to say about two to three p.m. Then I went to the mall.

I walked around a little bit, then I went into the store that has the men and women's store. I met Kwana Burns working at the cosmetic counter. She gave me a business card with her cell number on it. She said she was single. Kwana said she got off work at 3:30 p.m. She had to pick up her kids.

I noticed that my cell phone didn't work in Anderson, so I used a phone in the store Kwana works at to call Kwana. Kwana had left work. I told Kwana I would call her in about one hours, so I walked around some more. I drove back to Atlanta. Along the way I stopped at a rest stop and called Kwana Burns on the phones. We was talking. I asked her what had happened to her, then I drove to a friend's house in Douglas, Georgia. My friend wasn't home, so I went to a motel. Next day I went to the friend's house and stayed. Then I talked to Kwana again by phone. We set it up where I would meet Kwana in Anderson Wednesday.

On Wednesday I drive back to Anderson. It was about seven p.m. I had looked up the address on Mapquest for Tribble Street, but I got lost. I stopped at a Shell Station on Mall Street in Anderson. I used the pay phone to call Kwana. Kwana told me that she lived just down the street. Kwana came to the store and met me. She had her kids with her. I followed her back to her house on Tribble Street. Kwana didn't have any water, so she took her son to her aunt's house to take a shower. I stayed at Kwana's house. Kwana came back. She had her

cousin and her daughter with her. Kwana had a plate of food. It was mashed potatoes, beans and pork chops. Kwana got a Pepsi out of her van and brought it in.

Kwana started cleaning up. Kwana asked me if I wanted to see a movie and she put Poseidon movie in with Kurt Russell. Some guy came by and asked Kwana when did she want him to clean the oven. Kwana told him about five thirty or six a.m. The guy left. Before Kwana went to her aunt's house, she asked me if I wanted anything to eat. I asked what did she have, and Kwana said pork chops and mashed potatoes.

We were sitting on the couch watching a movie and talking. We starting kissing. Kwana asked me if that's all I came over for. Kwana had moved away from me, and she asked me what time I was leaving. Kwana was worried her son would see me at the house. I told her I was going to leave at about three thirty a.m. to four a.m. I asked Kwana if I could lay down on her bed. She told me it was not a good idea because she was still moving and the bed wasn't made up. She told me I could lay on the sofa. Kwana was talking loud. I didn't want to wake up her daughter, so I asked her if we could talk in the hallway.

In the hallway I kissed her, and she pulled away. I pushed her in the bedroom. Kwana fell down. Kwana tried to hit me with some kind of a pole. I think it was laying on a box. I grabbed her arm and throat. I told her we didn't want to wake her daughter up because I would kill her daughter. Kwana was trying to talk to me. I was trying to get Kwana's shorts and underwear off. Kwana started hollering for her daughter Kamille. I grabbed Kwana by the throat. Her daughter came in and was crying for her mom. I was going to kill her daughter, but I couldn't, so I strangled Kwana. She said she had asthma. Kwana started peeing on herself. Kwana stopped breathing.

I went to the dining room and got some Clorox wipes, and I wiped down the bathroom. I went back to the room where Kwana was at and I wiped down Kwana. Then I wiped the fork down I was eating with. I wiped down the two-liter Pepsi. I got Kwana's cell phone. I deleted my number out of it and wiped the phone down. There was a tablet with my name and number on it, so I tore the paper off and took it with me.

After I had wiped down everything, I found a jump rope in a box and I hogtied Kwana with it. I put Kwana's hands behind her back first and tied them, then tied her legs. I placed her daughter on Kwana. I put wipes in the toilet, then I left.

I went back to my friend's house in Douglasville, Georgia. End of

statement. This is a true and voluntary statement, and I have receive a copy of it.

R., Tr. p. 2067, l. 2 - p. 2071, l. 9.

Additionally corroborating evidence about the statement was presented was the Poseidan Adventure movie located at the home (Exhibit 21) and the victim's business card in Rivera's wallet. R., Tr. p. 2071-72. Additionally, the pole he described that Kwana tried to hit him with (R., Tr. p. 2069, l. 25- p. 2070, l. 2) was located at the victim's home. R., Tr. p. 2072, ll. 8-11.

The pathologist testimony further corroborates the Appellant's statement concerning the manner and cause of Kwana Burns death. Dr. Woodard testified the cause of death was strangulation through asphyxia including extensive bruising on her neck area. R., Tr. p. 2151, ll. 14. He determined that the death occurred between six and twelve areas when he saw her in the morning hours on December 14. R., Tr. p. 2151. Dr. Woodard testified that the results of his autopsy were consistent with the Appellant's statement. R., Tr. p. 2146, ll. 1-24, p. 2152, ll. 3-16.

E. The Error Was Harmless Beyond A Reasonable Doubt.

In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict. State v. Mizzell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Thus, an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its

relationship to the entire case. Error is harmless when it “could not reasonably have affected the result of the trial.” State v. Northcutt , 372 S.C. 207, 217, 641 S.E.2d 873, 878 (S.C. 2007).

As thoroughly set forth above, harmless error beyond a reasonable doubt has been shown where the alleged denial of the right to testify can be uniquely said on the basis of the record to not have contributed to the guilty verdict in this case. Defense counsel plainly was not contesting guilt of the identity of the Appellant as the perpetrator. The Appellant had entered a confession to the crime and his involvement was conclusively shown by multiple sources - eyewitnesses seeing the Appellant present with the victim at her home the day before the incident, the Appellant’s DNA profile on the victim’s body, and evidence through videos of the gas station and the victim’s workplace tying the two together. Although relief may be available for a denial of the right to testify under some circumstances, it is not required here. The initial issue must be denied for this reason.

- II. Where there is evidence that the Appellant suffered a mental disease such that he was mentally incompetent to represent himself at trial, a new trial is not warranted by the failure of the trial court to allow the defendant upon request prior to and during the trial to represent himself after he claimed a conflict with his appointed counsel where the Appellant evidenced deliberate and obstructive behavior in refusing to answer the court’s inquiries when he tried to determine the knowing and voluntary nature of the claimed waiver. Alternately, where there was evidence of the mental illness and the record reveals that the Appellant had outburst during the trial and did not act in his best interest, an alternate remand may be appropriate for a further order to determine if he was competent to represent himself under Indiana v. Edwards. when his counsel were also of the same opinion. [Initial Brief of Appellant, p. 18-24] [RIGHT OF SELF-REPRESENTATION ISSUE]**

Prior to trial, Dr. Donna Schwartz-Watts expressed an opinion to Judge Nicholson as a special court-appointed expert witness that Raymondeze Rivera was not competent to represent

himself due to a combination of mental illnesses that he suffered, although he was competent to stand trial. R. 2958, 12/1/2009 Tr. p. 6, ll. 6-19. See also, Feb. 1, 2010 R., Tr. p. 1914, ll. 6-11 (counsel McGuire in opening statement refers to fact that Dr. Schwartz-Watts has testified that his mental illness is so significant that he is not able to represent himself); R., 2830, 12/8/2008 Tr. p. 15, l. 8-14.(counsel Delgado stated not competent under Edwards due to mental illness “paranoid and delusional). She had opined that he suffered from post-traumatic stress disorder - an anxiety disorder - and had a history of being diagnosed with bi-polar disorder. R. 2955-2957, 12/1/2009 Tr.p. 3-5. See also R. 2853-2854, May 27, 2009 Tr. p. 10-11. At various times, set forth in detail below, due to his perceived communication conflicts with counsel concerning the filing of certain motions, Appellant continued to make pro se requests to either have new counsel appointed or that he be allowed to represent himself after the November 2009 denial. At each attempt, the particular trial judge - either Judge Nicholson or Judge Macaulay denied the Appellant’s demand to be allowed to represent himself. As predicted by counsel at the first hearing, the record appears to reflect, the Appellant’s ability to recognize the reality of his situation in basing his demands or illogical readings of the law and facts as a possible result of his mental illness. However, the court’s rejection was ultimately correct, the evidence in the record supports an additional basis for the denial due to his mental illness. Although not specifically addressed by either Judge Nicholson or Judge Macaulay, the record supports the basis. This Court may, at most, request a remand to include a consideration and finding and determination under Indiana v. Edwards, 554 U.S. 164 (2008). See e.g. People v. Davis, __ P.3d __, 2012 Westlaw 19373 (Colo.App. Jan. 5, 2012) (remand to evaluate competency to represent himself was appropriate where trial judge used wrong test in determining issue).

In his brief before this Court, Rivera asserts that a new trial is required because he made a request to represent himself in November 2009 before Judge Nicholson after a request to have new counsel was denied and then renewed that request at trial before Judge Macaulay, albeit for different reasons. Although never referring to the mental health testimony that disputes Rivera's mental competency to represent himself, Rivera asserts that "rather than seeing to it that Rivera was informed of the advantages and disadvantages of self-representation," the trial judge denied the requests, by reacting in a way he asserts was forbidden by Faretta, by only evaluating the benefit of counsel and ignoring his right to represent himself. However, by the concession that he was not informed by counsel of the dangers, he essentially admits that the attempted waiver was not intelligently made. *Initial Brief of Appellant*, p. 23. The Appellant admits that during the pretrial hearings Judge Nicholson made a determination on November 10, 2009, that Rivera was not competent to represent himself" R. 2950, Nov. 10, 2009 Tr. p. 28, ll. 24-25, but claims it was not related to his mental or psychiatric fitness. This assertion ignores that later hearing in December where Dr. Schwartz-Watts testified about his lack of competency to represent himself and the fact that Judge Nicholson stated that was a continuation of the competency issue.

Respondent submits that the pretrial denials of Rivera's request to represent himself before Judge Nicholson were supported by the evidence of mental illness and his deliberate and obstructive failure to respond to the inquiries of Judge Nicholson as he was seeking information to make his decision revealing an individual who would fail to follow the instructions of the court, as evidenced by the judge's prior experience with him in the Wiley trial. As to the repetitive requests at trial before Judge Macaulay, the judge did not abuse his discretion in continuing to denying the relief where the evidence shows that even while being represented he lacked

comportment to comply with court procedures and evidenced an attempt to manipulate the proceedings, possibly because of his mental illness. A new trial under these circumstances is not warranted.

STANDARDS FOR PRO SE REPRESENTATION

The South Carolina Constitution provides that every criminal defendant has the right to represent himself and makes no distinction between capital and non-capital defendants. See S.C. Const. art. 1, § 14. Additionally, the United States Supreme Court has interpreted the United States Constitution as providing a right to self-representation. See Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (“The Sixth Amendment, when naturally read, thus implies a right of self-representation.”). The right to self-representation, however, is not absolute. The Constitution allows states to prohibit defendants from waiving their right to counsel if they are not competent to conduct trial proceedings by themselves. See Indiana v. Edwards, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008) (holding a defendant may be competent enough to stand trial but not competent enough to waive his Sixth Amendment right to counsel and represent himself). In State v. Starnes, 388 S.C. 590, 600, 698 S.E.2d 604, 610 (S.C. 2010), the South Carolina Supreme Court held that a per se ruling forbidding capital defendants from representing themselves would violate both the South Carolina and United States Constitutions, rejecting a request by to adopt such a rule in South Carolina.

As the Court stated in State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (S.C.,1997):

The right to proceed pro se must be clearly asserted by the defendant prior to trial. State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991); United States v. Lorick, 753 F.2d 1295 (4th Cir.1985). 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. Faretta v.

California, supra; State v. Dixon, supra. The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding. Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992). A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel. Faretta v. California, supra; United States v. Bennett, 539 F.2d 45 (10th Cir.1976).

State v. Brewer, supra.¹⁵ See also State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998).

¹⁵ In the **absence of a specific inquiry** by the trial judge addressing the disadvantages of a pro se defense as required by the second Faretta prong, [the appellate court] will **look to the record** to determine whether petitioner had sufficient background or was apprised of his rights by some other source." Id. (citation omitted). To determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of factors including:

- (1) the accused's age, educational **background**, and physical and mental health;
- (2) whether the accused was **previously involved** in criminal trials;
- (3) whether the accused knew the **nature of the charge(s)** and of the possible penalties;
- (4) whether the accused was represented by counsel before trial and whether that **attorney explained to him** the dangers of self-representation;
- (5) whether the accused was attempting to **delay or manipulate** the proceedings;
- (6) whether the court appointed **stand-by counsel**;
- (7) whether the accused knew he would be required to comply with the **rules of procedure** at trial;
- (8) whether the accused knew of the **legal challenges** he could raise in defense to the charge(s) against him;
- (9) whether the **exchange between the accused and the court** consisted merely of pro forma answers to pro forma questions; and

If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge.” State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (S.C. 2010). “Once trial commences, that right [to proceed *pro se*] is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress.” Id. see also U.S. v. Stevens, 83 F.3d 60, 66–67 (2d Cir.1996) (“[O]nce a trial has begun, a defendant's right to represent himself ‘is sharply curtailed,’ and the judge considering the motion must weigh ‘the prejudice to the legitimate interests of the defendant’ against the ‘potential disruption of proceedings already in progress.’ ”).

While the Faretta factors remained in tact, courts have considered Indiana v. Edwards for creating another factor for disallowing *pro se* representation in a particular case. Courts agree that Edwards did not announce a rule mandating that they deny the requests of mentally ill defendants to represent themselves at trial. See, e.g., United States v. DeShazer, 554 F.3d 1281, 1290 (10th Cir.2009) (Edwards “reaffirmed that a court may constitutionally permit a defendant to represent himself so long as he is competent to stand trial”); People v. Taylor, 47 Cal.4th 850, 102 Cal.Rptr.3d 852, 220 P.3d 872, 890–91 (Cal.2009) (“Edwards did not alter the principle that the federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent.”

(10) whether the accused's waiver resulted from either **coercion or mistreatment**.

Gardner v. State, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002).

(quoting State v. Connor, 292 Conn. 483, 973 A.2d 627, 650 (Conn.2009)); In re Rhome, 172 Wash.2d 654, 260 P.3d 874, 881 (Wash.2011)(“ Edwards does not require trial courts to evaluate mental health status in order to secure a valid waiver of counsel.” (emphasis in original)).¹⁶

Other courts have concluded that they will apply the standard expressed in Edwards. For example, in Connor, the Connecticut Supreme Court exercised its supervisory authority. It held that “upon a finding that a mentally ill or mentally incapacitated defendant is competent to stand trial and to waive his right to counsel at that trial, the trial court must make another determination, that is, whether the defendant also is competent to conduct the trial proceedings without counsel.” Connor, 973 A.2d at 650–51; see also In re Amendments to Florida Rule of Criminal Procedure 3.111, 17 So.3d 272, 275 (Fla.2009)(Florida Supreme Court amended the rules of criminal procedure to require courts, when ruling on defendants' requests to represent themselves, to consider whether they “suffer from severe mental illness to the point where [they are] not competent to conduct trial proceedings by [themselves]”); Major v. Commonwealth, 275 S.W.3d 706, 722 (Ky.2009) (although defendant was competent under Dusky to assert his right to self-representation and to waive his right to counsel, the trial court could deny his request “because of his borderline competency”); State v. Baumruk, 280 S.W.3d 600, 610–11 (Mo.2009) (Edwards held that the standard for determining whether defendants are competent to stand trial is “lower” than the one for determining whether they are competent to represent themselves); State v. Lewis, 280 Neb. 246, 785 N.W.2d 834, 840 (Neb.2010)(“[W]e now hold that ... a

¹⁶Some states have left open whether they will answer the question that Edwards expressly avoided: should a standard more specific than the one set forth in Edwards be adopted for determining whether competent, but mentally ill defendants should be allowed to represent themselves at trial? See Taylor, 102 Cal.Rptr.3d 852, 220 P.3d at 883.

criminal defendant's right to conduct his or her own defense is not violated when the court determines that a defendant competent to stand trial nevertheless suffers from severe mental illness to the point where he or she is not competent to conduct trial proceedings without counsel.”).

Commentators have declared that, by allowing courts to deny certain competent but mentally ill defendants the right to represent themselves at trial in some circumstances, Edwards has “paved the way” to “improvements in fairness for the mentally ill criminal defendant.” Jason R. Marks, State Competence Standards for Self-Representation in a Criminal Trial: Opportunity and Danger for State Courts after Indiana v. Edwards, 44 U.S.F. L.Rev. 825, 835 (2010); see Alan R. Felthous & Laura E. Flynn, From Competence to Waive Counsel to Competence to Represent Oneself: the Supreme Court Advances Fairness in Edwards, 33 Mental & Physical L. Rep. 14, 16 (2009).

How the Pro Se Representation Issue Was Raised And Decided Below.

Pretrial Matters

On August 1, 2008, Judge J.C. Nicholson appointed two counsel with extraordinary capital litigation experience - John Delgado and William “Bill” McGuire - to represent the Appellant in his pending death penalty case involving the killing of Kwana Burns. On October 13, 2008, Rivera, *pro se*, filed an October 8, 2008 letter requesting that his counsel be relieved. ROA ___. (October 8, 2008 Letter). On October 30, 2008, Rivera made a motion to have counsel relieved. ROA ___. (October 30, 2008 Motion).

A hearing was convened before Judge Nicholson on December 8, 2008. R. 2816, 12/8/2008 Tr. p. 2-27. The Appellant was present with his guardian, Daniel Day, and his counsel.

When the judge asked why he wanted counsel removed and replaced, Rivera stated that he had asked counsel to file certain motions for discovery, change of venue and Batson and that they had refused to file them. Id. R. 2820, Tr. p. 5, ll. 21-25. Also, Rivera contended that he had been harassed by officers at the Anderson jail and he claimed that they had been reading his motions. He stated that he brought his concern up with counsel Delgado, but nothing happened. Id. R. 2821, Tr.p. 6, ll. 1-25.

Rivera complained that counsel had not complied with SCACR Rule 407, Rule 1 concerning counsel's duty to reasonably consult, keep the client reasonably informed of the status, promptly comply with his request for information and explain matters for him to make reasonable decisions. Id. R. 2822, Tr.p. 7. Rivera admitted McGuire had seen him four times, but complained that McGuire fell asleep on one occasion and at another only wanted to talk about football rather than his case strategy. R. 2823, Tr. p. 8, ll. 1-7.

Rivera stated that he had tried to make amends with counsel Delgado, yet in a telephone call on December 3, 2008, counsel cussed at him and told him "that I can die," before Delgado hung up on him. R. 2823, Tr. p. 8, ll. 13-15.

Rivera stated that he wanted a common ground with counsel to not discuss other activities or sports, but to discuss trial preparation. R. 2823, Tr.p. 8, ll. 22-25. Rivera stated that he was upset with counsel Delgado, claiming that he had lied to him, because Rivera "wanted them to leave his family alone," yet he had learned that counsel was going to visit Appellant's mother. R. 2824, Tr. p. 9. Judge Nicholson apprised Rivera that as part of trial preparation, counsel does not have to consult with a client on how to prepare for trial and that "talking to your family would be important in preparing for trial." R. 2824, Tr. p. 9, ll. 11-14.

Rivera returned to his other complaints about counsel's alleged omissions after stating he might as well proceed *pro se*. He stated that counsel told him concerning his request that they file a motion to compel discovery that counsel told him that they would get it from (former counsel) Gamble. R. 2824, Tr. p. 9-10, l. 11. His second specific complaint was that they failed to file a motion for a change of venue or a Batson motion. R. 2825, Tr. p. 10.

Judge Nicholson explained to him that Batson had nothing to do with trial preparation. The judge admonished the Appellant that a problem in proceeding *pro se* is the mistake that he just made and that a "little bit of information can be dangerous." When Judge Nicholson asked Rivera what a Batson motion was, Rivera responded erroneously that he did not have that information but then asserted that it was asking the jury "about their ethics, education and stuff like that." R. 2826, Tr. p. 11, ll. 10-12.

As to his remaining complaints, Rivera pointed out that the telephone call with Delgado "broke the camel's back when he told me I could die." R. 2826, Tr. p. 11, ll. 20-23. Even though this call occurred after he had filed the motion, Rivera stated that when asking Delgado to come by the prison and he responded with profanity "and then said he don't give a damn, I could die," it resolved that he could not work with Delgado in that environment. R. 2827, Tr. p. 12, ll. 1-10.

Rivera argued that under the 6th and 14th Amendments that he had a right to dispose of counsel, that counsel is not the master of him and that he had a right to proceed *pro se*. R. 2827, Tr. p. 12, ll. 21-25. He stated that he was seeking to proceed *pro se* with full knowledge of what he was doing. R. 2828, Tr. p. 13, ll. 2-4. In response, counsel Delgado said that Rivera was "delusional and paranoid" and suffers from a mental illness. He stated that Rivera hears and believes things that in truth are not accurate and is paranoid about every aspect of the defense

teams relationship with him. Due to Rivera's mental illness, Delgado stated that he looks for ways to be able to manipulate and control the situation. R. 2832-36, Tr. p. 17-21.

Concerning the alleged omissions, Delgado refuted the comments and stated that defense had received all the discovery over a month earlier with over 1300 pages with CD's and photographs. R. 2828, Tr. p. 13, ll. 17-21. He explained that Rivera had cut off communication with the defense in September and had refused his visit. He stated that he had seen him, however, since he had moved to Broad River Correctional Institution, which the Appellant then denied. R. 2828-29, Tr. p. 13-14.

Delgado described that when he tried to see Rivera, there was a plethora of profanity directed at Delgado, Delgado's family the legal system, and what he could do as a result of that. R. 2829, Tr. p. 14, ll. 18-20. Rivera had been taking, unknown to the defense team, an anti-psychotic drug - Seroquel, that treats schizophrenia and bipolar disease. R. 2829, Tr. p. 14, ll. 18-20. Rivera had accused counsel for having moved him to Anderson to get information about his claimed murders and rapes in three other states, as opposed to having him moved to Broad River Correctional Institution so he could be closer to the electric chair. R. 2829-2830, Tr. p. 14, l. 21-p, 15, l. 2. Delgado stated this was part of Rivera's delusion. Delgado responded that, of course, any change of venue or Batson motion was premature at this time. R. 2830, Tr. p. 15, ll. 1-7.

Counsel Delgado argued that at this time Rivera was not competent to either stand trial or represent himself under Indiana v. Edwards, 554 U.S. 164 (2008). R. 2830, Tr. p. 15, ll. 8-14. Delgado stated that the material Rivera stated was from the Faretta decision was from material that counsel McGuire had sent him. R. 2830, Tr. p. 15, l. 13. Counsel Delgado stated that Rivera, if allowed to represent himself, will engage in , not just undignified, but some reprehensible

conduct. R. 2831, Tr. p. 16, ll. 4-11. He asked the Court to deny the motion and him to allow them to continue to represent Rivera. R. 2831, Tr. p. 16, ll. 8-11.

Delgado also requested the Court to direct Rivera to cooperate with counsel. He stated that Rivera is very remorseful for the things that he has done, but that he cannot control his anger which is a part of his (mental illness) profile. R. 2831, Tr. p. 16, ll. 19-20.

Counsel McGuire confirmed that with their strong background in mental health issues, they had already consulted with experts in the field who agree that Rivera has mental health issues as shown in this hearing. R. 2832, Tr. p. 17, ll. 12-15. Counsel stated that the defense wants to be on the case and will do everything to protect Rivera, despite his mental illness. R. 2832, Tr. p. 17, ll. 16-21.

The Solicitor stated that Rivera had earlier been evaluated by the Department of Mental Health before the first trial. She stated that since Judge Nicholson heard the first trial that he was familiar with how Rivera handled himself against the wishes of counsel. She stated that was why [Public Defender] Gamble was not on the case. R. 2833, Tr. p. 18.

Upon inquiry by Judge Nicholson, Rivera stated that he had been taking Seroquel 300 mg. For one month to help him sleep and that it had been prescribed by a prison doctor at his request. He agreed to have the dosage look at by an evaluator. Rivera stated that he asked to be put on the medicine after his transfer to Broad River when he had problems sleeping after he learned the execution area was down his hall and that in fact there was an execution on Friday [December 5, 2008]. R. 2835-36, Tr. p. 20-21.

Judge Nicholson ordered Rivera to be evaluated by a private physician for determining competence to stand trial and to represent himself. At that point, Rivera stated that he had no

problem reconciling with counsel, but stated his problem was with the control issue with Delgado. Rivera then asked to be transferred to Kirkland from Broad River “so I could be statewide,” which makes it easier for him to make contact with his social worker, mitigation specialist, and attorneys. R. 2838, Tr. p. 23. When Judge Nicholson stated the Kirkland was just across the street from Broad River, Rivera stated that he knew it. R. 2838, Tr. p. 23. He then requested that River cooperate with counsel and the doctor. R. 2839-2841, Tr. p. 24-26.

May 27, 2009 Hearing On Competency after Withdrawal of the Motion To Represent Himself and Mental Illness Testimony.

On May 27, 2009, a hearing was held concerning the competency to stand trial and competency to represent himself before Judge Nicholson. R. 2844-2863, 5/27/2009 Tr. p. 1-20. At the outset of the hearing, counsel Delgado reported that Rivera advised him that he was now satisfied with their services and wished to withdraw to motion to remove counsel and wanted to proceed to trial with them as his counsel. R. 2846, 5/27/2009 Tr. p. 3, ll. 10-15. Rivera agreed with counsel’s statement. R. 2846-47, 5/27/2009 Tr. p. 3-4. The court next addressed the issue of Rivera’s competency to stand trial. Dr. Donna Schwartz-Watts was called as the court’s expert witness. Id. R. 2847-2860, Tr. p. 4-17. She stated that in the interim, Rivera had his medications increased which has helped Rivera be “less impulsive” “helped him calm down” and “helped him be more rational.” R. 2852, Tr. p. 9, ll. 8-11. She testified that she had provisionally diagnosed Rivera with post-traumatic stress disorder, an anxiety disorder, but needed more evidence to support it from family members. She opined that Rivera understood the relative functions of the prosecution, defense, court and jury. She also opined that he did not at this time have any manifestation of any impairment to be (un)able to understand what his role was and what will

transpire at the trial and capital proceeding. R. 2852, Tr. p. 9. *No questions were asked specifically on whether he possessed competence to represent himself in the proceedings, apparently since that motion was withdrawn.*

She noted that by history, he had received a diagnosis of “impulse control disorder (Dr. Dalal), “malingering”(Dr. Cross), and “bipolar disorder” (Dr. Poiletman). R. 2852-2853, Tr. p. 10, l. 20- p. 11, l. 7. She also diagnosed him with alcohol abuse from his self-report. She stated it would be useful to have a guardian appointed. Also ROA 3231-3236. The court then re-appointed Daniel Day as his guardian. R. 2860-61, Tr. p. 17-18.

Judge Nicholson found that Appellant was competent to assist counsel and stand trial based upon Dr. Schwartz-Watts testimony. R. 2863, Tr. p. 20, ll. 6-7. He found that the issue concerning his motion for self-representation had been withdrawn. R. 2863, Tr. p. 20, ll. 8-10.

November 10, 2009 Hearing Before Judge Nicholson Where Judge Nicholson Denies the Request To Self-Representation.

On November 10, 2009, about three months before the trial, another motion hearing was held before Judge Nicholson. Judge Nicholson stated that while another motion hearing would be held before the trial in February, he was going to address Rivera’s motion to relieve counsel and appoint different counsel or let him proceed pro se, which arose from a September 21, 2009 letter from him to the Anderson Clerk of Court. R. 2927, 11/10/2009 Tr. p. 5. See ROA _ (September 21, 2008 letter). The Appellant asserted that he had a conflict of interest with counsel initially based upon the earlier telephone call he had with counsel that was discussed at the first hearing and that he had asked Mr. Delgado not to file matters but he still did. Id. R. 2928, Tr. p. 6, ll. 4-12. When asked what matters had he filed, Rivera began to ramble about when he was there in

July 2009, he thought they were going to pick a jury but then learned that the trial had been continued, then they had explained after a meeting that it had been set for October which Rivera agreed with. He stated that in August, he had a visit from counsel, who advised him that they had filed a motion for a continuance because Mr. McGuire was in another trial. Rivera stated that he disagreed with this request because he felt McGuire had enough time to prepare for his trial after the other trial. Rivera complained that he asked the defense counsel to not file anything without having it set with Rivera, but they did anyway.

At that meeting, Rivera stated that he learned the court date would be in February, and Rivera asked them to have it set in December. But counsel told him that they do not want to try cases in December. He stated that counsel advised him that they had three months to prepare for the trial in February, but Rivera stated that was a lie. R. 2929, Tr. p. 7, ll. 14-23. When Rivera asked if they had received any written notice about the February trial, Delgado told him they had not. R. 2929, Tr. p. 7, ll. 22-23. This was the facts that prompted the motion to remove counsel. R. 2930, Tr. p. 8, ll. 1-8.

Judge Nicholson then informed Rivera that the change in trial dates was due to Dr. Schwartz-Watts becoming ill weeks before the July trial, which the court then continued. R. 2930, Tr. p. 8, ll. 9-16. The judge declared the trial was tentatively set for November, then arbitrarily set by the judge for October without being aware that counsel McGuire had Berkeley trial set for September. Id. Since the court felt that there was not enough time between the Berkeley case and this trial, he got counsel together and they agreed on the February 1, 2010

date.¹⁷ Id. R. 2930-31, Tr. p. 8-9.

Rivera then complained that he had not received notice about the February trial, which Judge Nicholson then declared that he was notifying him then and asked his clerk for a copy of the order which had just been drafted. R. 2931, Tr. p. 9, ll. 8-10. Judge Nicholson stated that he would sign the order that date setting case for February and that it was the Court's doings - not counsel, based upon the circumstances of the other trial. R. 2931-32, Tr. p. 9-10.

Rivera then announced that he had a right to appear *pro se*. The Court stated that in his September 21, 2009 letter, he wanted to be either *pro se* or have two competent attorneys. R. 2932, Tr. p. 10, ll. 12-22. Judge Nicholson declared that he had two competent lawyers representing him and that he was not going to appoint any more lawyers. He stated that they were probably as competent as anyone in the state. R. 2933, Tr. p. 11, ll. 1-4.

At that point Rivera stated that "I'll proceed *pro se*." R. 2933, Tr. p. 11, ll. 7-11. He stated: Rivera continued:

Your Honor, it says right here under the Sixth Amendment that this Court cannot thrust counsel upon me. It violates the logic of the amendment. It also says that under appropriate circumstances, the Constitution requires that counsel be tendered. It does not require that in all circumstances counsel be forced upon a defendant. That's [Faretta] v. California, Your Honor. It says when the administration of a criminal law-

Id., R. 2933, Tr. p. 11, ll. 14-22.

Judge Nicholson acknowledged that the law does say you can proceed *pro se*. the judge then ask whether Rivera was aware of "the qualifications or the criteria" for the court to allow

¹⁷S.C. Code Ann. § 16-3-26 (A) provides that at counsel's request, the defense lawyer shall be excluded from all other trial duties ten days prior to the term of court in which the trial is to be held.

him to proceed pro se. R. 2933-34, Tr. p. 11, l. 25 - p. 12, l.1. Rivera responded by acknowledging the requirement that he “knowingly, intelligently and voluntarily waive [his] rights,” and asserting that he had “done that.” R. 2934, Tr. p. 12, ll. 14-17. The court then stated that he was going to “ask [Rivera] some questions,” and proceeded to quiz him on his knowledge of the rules of evidence. Rivera responded that he did not have a copy of the rules of court, but thought a copy was in the library, and that he had briefly read the rules of court, that he had heard of the word “hearsay” which meant “anything that said through somebody else is hearsay” and that he was “briefly familiar with [exceptions to the hearsay rule]”. As to the “relevance, Rivera stated he had never heard of that word. R. 2936, Tr. p. 14. He also declared that he had read something about the law of prior bad acts but could not answer what he knew because it was not with him. As to the difference between direct and cross-examination, Rivera stated that they (state) can asked anything to lead into the question, “you can ask “leading questions.” R. 2937, Tr. p. 15, ll. 1-20. He stated that it was his understanding of direct examination that he cannot ask leading questions. R. 2937, Tr. p. 15, ll. 21-24.

The Appellant declared that there was nothing further that he wanted to tell him concerning his request to appear pro se, but said:” this Court cannot force me against my will to proceed with these two attorneys. Judge Nicholson responded that he could if he finds that he did not voluntarily and intelligently waive his right to counsel. Rivera responded: “I have already voluntarily and intelligently waived my rights,” “because I just told you why.” R. 2938, Tr.p. 16, ll. 11-16.

Judge Nicholson inquired of his education and learned that Rivera had gone in the 11th grade, but did not complete his GED and was in Job Corps school for 7 months. He stated that he

had worked in merchandising Coca Cola products which involved setting up the shelves and stuff in stores and maintenance for Ernst and Young. R. 2939-2940, Tr. p. 17-18. After stating that he was not married but had three children, Rivera refused to answer their names, but eventually gave their ages. R. 2940, Tr. p. 18, ll. 7-25. He further refused to answer the length of time he had lived with the children's mother and stated "I'm not going to discuss my personal life with you." R. 2941, Tr. p. 19, ll. 13-18. Rivera stated that the questions do not have anything to do with proceeding *pro se*. The Appellant's guardian stated that he was not going to argue with Mr. Rivera. R. 2942, Tr. p. 20, ll. 3-6.

Judge Nicholson then denied Rivera's motion: "I don't think you voluntarily, intelligently, willingly made a decision to proceed *pro se*, and that motion is denied." R. 2942, Tr. p. 20, ll. 13-15.

At that point, Rivera demanded a copy of the notice of intent to seek the death penalty, claiming that he had not received it. R. 2942-43, Tr. p. 20-21. The State, through Assistant Solicitor Campbell stated that Rivera was served and given a copy on February 13, 2008, which another copy was provided to him at the hearing. R. 2943, Tr. p. 21.

Rivera next stated that he had a pending motion to dismiss. When the court reviewed the copy he said the motion stated that he did not want the jury sequestered. Rivera responded that "I do not want to unsequester the jury." The court then stated that he understood the motion to be that "you don't want them sequestered, right?" But Rivera responded that "I want them sequestered." The Court stated that was not what his motion said. Rivera stated that "the motion says to not sequester them. I mean to un-sequester them," which meant his attorneys filed a motion so they wouldn't be segregated, but Rivera wanted the jurors segregated. He clarified that

the defense wants the jurors to go home, but Rivera did not want that. He clarified that he wanted he jurors sequestered. Judge Nicholson stated that he thought he had already ruled on that .

Counsel McGuire confirmed that the court had already ruled that the jury would be sequestered and motel rooms had already been done before the July trial. R. 2946, Tr. p. 24. Judge Nicholson stated that “part of your problem is that you don’t listen.” He further concluded :

Now, you motion to un-sequester the jury is denied because that’s what the motion says. And this is also the reason for the Court refusing to let you proceed pro se because you’re not knowingly doing it. You’re sitting there serving a motion to un-sequester and sitting there arguing to sequester which has already been done.”

R. 2946-47, Tr. p. 24, l. 25-p. 25, l. 6.

Later in the same hearing, the court attempted to revisit the motion to proceed pro se stating that he had acted prematurely. R. 2948, Tr. p. 26, ll. 20-24. The Court stated that he wished to ask him some further questions, but refused to answer. R. 2948, Tr. p. 26, l. 25. Rivera then refused to answer and of the following question from the judge:

COURT : You do not want to answer any more questions?

DEFENDANT: (shook head from side to side)

COURT: Well, I’m going to ask them anyhow, okay? I’m going to ask them anyhow. Do you understand what your charged with? Mr. Rivera, do you understand what you’re charged with? Are you just going to refuse to answer?

DEFENDANT: I’m not going to answer any more questions , Your Honor.

COURT: All right. You’re not going to answer any more questions. Well, I’m going to propose the questions to you, and if you refuse to answer that’s fine. Do you understand the charge against you?

DEFENDANT: (No verbal response).

COURT: Do you understand the penalty against you?

DEFENDANT: (No verbal response).

COURT: Now, you were previously involved in a criminal trial that we tried, what , about a year ago, is that correct?

DEFENDANT: **I don't know. You tell me.**

COURT: Okay, Has anybody coerced you or mistreated you, making you ask to terminate your attorneys and proceed pro se?

DEFENDANT: (No verbal response).

R. 2949-50, 11/10/2009 Tr. p. 27, l. 1- p. 28, l. 1.

At that point, Judge Nicholson stated that he was incorporating the medical testimony from Dr. Schwartz-Watts from the earlier hearing and made the following findings and conclusions:

This Court tried the first murder case with Mr. Rivera. And from those observations and Mr. Rivera's conduct during the trial towards his attorneys and his conduct during the trial, actually confessing to the murder he was on trial for and confessing to the murder which he is now charged with in this particular case plus an attempt to talk about some other killings and his overall demeanor in court in this Court observed plus his demeanor here today in refusing to answer questions earlier because he thought they were personal - - obviously he does not want to answer questions. **And I believe it's an attempt to basically make a mockery out of the whole justice system. And based on those observations previously at trial, I find that he is not competent to represent himself.** And the motion to proceed pro se is denied.

R. 2950, Tr. p. 28, ll. 3-25.

***The December 1, 2009 Hearing Before Judge Nicholson and Dr. Schwartz-Watts
Opinion the Rivera Was Not Competent To Represent Himself Due To His Mental
Illness.***

On December 1, 2009, at the motion hearing, Judge Nicholson addressed the continuation of the competency issue. Dr. Donna Schwartz-Watts was called to address Rivera's continuing competency. R. 2955-2960, December 1, 2009 Tr. p. 3-8. Dr. Watts stated that she had continued to see Appellant a number of times and had interviewed him on that date. She stated that Rivera clearly had a rational and factual understanding of the proceedings and remains able to assist in his defense, although he has symptoms of a mental illness. She stated that she had diagnosed him with post-traumatic stress disorder and he had a history of bipolar disorder and been prescribed two drugs Neurotin and Seroquel for the management of psychosis. R. 2957, Tr. p. 5, ll. 2-24. She stated that at the time, Rivera wanted to continue to be represented by counsel.

Concerning his present competency to represent himself, counsel asked the following question:

- Q. . . while he is competent to stand trial there may be a different issue as to whether or not he is competent to represent himself in this capital proceeding? Do you have an opinion as to that matter?
- A. Yes, and we've discussed that briefly. Of course, that's not Mr. Rivera's opinion at this point. He has shown that he's able to work with you and chooses to do that, but **in my opinion that it is not a good idea for him to represent himself. These are serious proceedings, He does have a mental illness and has symptoms at times, and in my opinion it's not a good idea and I would have concerns about him being competent to do so.**

R. 2958, 12/1/2009 Tr. p. 6, ll. 6-19. ¹⁸

¹⁸In the Initial Brief of Appellant, no reference is made to the December 1, 2009 proceedings, the testimony of Dr. Schwartz-Watts at the hearing or her opinion that he was not competent to represent himself.

The February 2010 Trial Proceedings before Judge Macaulay.

On February 1, 2010, at the outset of the trial proceedings, now before Judge Macaulay, prior to the Jackson v. Denno hearing, Rivera renewed his denied motion to relieve counsel. He stated that “to thrust counsel upon me against my specific wish violates the logic of government.” He stated that he had a right to a freedom of choice to force counsel upon him is to suggest that the law is against him. He stated that he “must knowingly and intelligently relieve those benefits with an open eye.” R., Feb. 1, 2010 Tr. p. 68, ll. 7-18. He then stated “I’m the Defendant and not my lawyers appointed to me nor the State prepared the consequences with my permission.” R., Tr. p. 69, ll. 8-10. He stated that his choice “must be honored out of respect for the individual whose life was lost.”

Judge Macaulay explained that the attorneys appointed to represent him were exceptionally qualified, dedicated . When asked by the court why he wanted to pursue the motion, Rivera stated that he had previously asked his lawyers to file certain motions and get him a copy of the newly discovered evidence that the State intended to present and the jury package. R., Tr. p. 70, ll. 16-25. He also wanted to “see the eyewitness for the defense, ” but they refused. Rivera stated that he had filed motions on his own behalf, including to change venue, to dismiss charges under a violation of the Sixth Amendment for a speedy trial, yet counsel refused to file them. R., Tr. p. 70-71. Rivera stated that this had been a conflict of interest from the start.

When Rivera stated that his conflict with counsel was them refusing to file the motions, Judge Macaulay responded that he was just asking his lawyers to do something that would be a waste of time or interfere with the proper disposition of the case. R., Tr. p. 71, ll. 19-22. Rivera retorted that he did not think it would be a waste of time. The court questioned how he had been

prejudiced by the refusal to file the motions, and Appellant stated because they had not been ruled upon. Rivera stated that he made the motion for a change of venue because he felt he would not get a fair trial because of the last trial. He stated that his motion to dismiss was filed his grounds for dismissed was a violation of the Sixth Amendment. When asked the ground, the Appellant initially just stated "Sixth Amendment" and unable to provide specifics, then stated the Fourteenth Amendment and when asked what part, he eventually stated speedy trial. After some prodding, Rivera stated that he had asked his lawyers not to file continuance motions because he had filed a speedy trial motion in 2008. Judge Macaulay responded that he was only on the case briefly, but was aware of the diligence counsel had been involved in protecting his interests , including evaluations and all that had happened within the last few days. He stated that if he had a speedy trial, he would not have had the benefit of the matters. R., Tr. p. 75, ll. 1-8.

Rivera : I mean, that's about it , Your Honor. As long as I knowingly and intelligently waive my rights under the Constitution, that's it.

Court: Well, I'm afraid not because the Constitution does provide for representation.

Rivera : Right. And it also provides for me to go pro se.

Court: *Only if it doesn't prejudice.* And I think that in your particular case, since you don't recognize the advantages you've been afforded, that perhaps it would be an ill considered exercise of what you consider your rights. I would - I don't find that - what is it - you're qualified to represent yourself.

Rivera : That's fine.

Court : All right. Anything else?

R., Tr. 75, ll. 10-23 (emphasis added).

Rivera then continued to complain that his change of venue motion had not been ruled

upon. R., Tr. p. 76, ll. 2-7. Rivera complained that due to publicity that he could not get a fair trial in Anderson County. Though the motion for a change of venue had been made December 21, it had not been because Judge Nicholson had concluded that it was premature until a jury is tried to be selected. Judge Macaulay concurred and stated that in light of the initial voir dire he had not seen any prejudice. R., Tr. p. 76, l.- p. 77, l. 9. McGuire further stated the motion was not filed earlier because there had not been an overwhelming amount of publicity saturation and he weighed the choice of selecting an out of county jury that would have to be transported in and guaranteed to be sequestered. This was something defense counsel did not want. Judge Macaulay responded he had denied the motion to not sequester because of the danger .

When Rivera stated he still had a motion to dismiss, the court responded that he was wanting to make sure he was on solid ground concerning whether his motion should be granted to discharge counsel is based upon whether he could adequately represent himself, but more importantly, if counsel that had been appointed are equipped to represent him. R., Tr. p. 78, ll. 13-18. Judge Macaulay stated that they were adept at what they were doing and knowledgeable, if not the preeminent counsel on cases like this. Judge Macaulay stated he was denying the motion to dismiss. R., Tr. p. 78, ll. 23-24.

Rivera then respond "you already did that" and wanted a response to his motion to dismiss. The court held that he did not find a violation of his right to a speedy trial. R., Tr. p. 79-80. The trial then proceeded to a Jackson v. Denno hearing and then proceeded to voir dire.

Rivera's Outburst of Profanity During Voir Dire.

During the voir dire of juror 364, there was an outburst from Rivera. R., Tr. p. 954-955. After the juror questioning was completed, the following happened:

Rivera : That was him telling me to shut the fuck up.

Court: Have a seat.

Rivera: You need to tell him to shut the fuck —

Mr. McGuire: Your honor, if we could have a moment with the Court?

Court: Yes, if you would, please go with the bailiff.

Rivera: He don't need to tell me to shut the fuck up again.

R., Tr. p. 956, ll. 1-15. After juror 364 exited the courtroom, counsel McGuire renewed his earlier motion regarding Defendant's presence in court. R., Tr. p. 956, ll. 19-21. See Also ROA, p. __. He also moved to "excuse this juror because of the unfortunate outburst." R., Tr. p. 956, ll. 19-23.

At that point, Rivera renewed his motion to relieve counsel. R., Tr. p. 956, ll. 23-24.

Court: . . .you have the constitutional right to be present in the courtroom at all critical stages of the proceeding. However, you can waive that right to be present. Do you understand that?

Rivera : Yes, sir.

Court: And you waive it when you start showing contempt for this Court. And I can remove you and put you in a place that—I think we have a place where you can watch it on a screen. If you insist on disrupting this Court, you will waive your right to be present, physically present, in the court room do you understand that?

Rivera: Yes, sir.

Court: Am I going to have any more problems with you?

Rivera: No, sir.

R., Tr. p. 957, l. 25- p. 958, l. 16.

The inquiry then proceeded whether juror 364 was qualified to be seated and affected the

Appellant's outburst. R., Tr. p. 958-964.

Rivera then again responded:

Rivera: Your honor, I'd like to note on the record that Mr. McGuire came over to me and told me to shut the fuck up. That's why you had the outburst.. I'm sorry. I apologize.

R., Tr. p. 964, ll. 13-16.

Shortly thereafter, Rivera stated that he like to again apologize for the outburst and stated:

that there was clearly a conflict with counsel and that "it was inappropriate for my attorney to tell me to shut the fuck up. And that 's why the outburst happened. I'd just like to put on the record that it's clearly a conflict of interest between me and my attorneys, and its obvious.

R., Tr. p. 969, ll. 16-22.

Judge Macaulay stated that he noted his observations and the renewal of his motion to relieve counsel and it was denied. R., Tr. p. 969, l. 24 - p. 970, l. 1.

A short time later, Rivera again spoke up. R., Tr. p. 1000, l. 1- p. 1001, l. 12. In particular, he restated that he felt the evidence of a conflict of interest with his counsel was once again revealed when counsel McGuire told him to "shut the fuck up" which he claims that the juror heard and was upset by it. He further stated that he had pleaded with the court on several occasions and asked that counsel be relieved and under Faretta v. California and State v. Brewer it was his constitutional right not to have lawyers forced upon him. R., Tr. p. 1000, ll. 12-19. Rivera stated that he did not want to go through the same thing as his first trial when he had to act through his guardian ad litem. He stated that it was affecting his fate because a potential juror had heard this and would be deciding his fate. R., Tr. p. 1000, ll. 23-25.

Rivera also expressed displeasure in the fact that the court admonished him, but not his

attorneys. R., Tr. p. 1001, ll. 2-4. He said that they should know how to act in court because they had been doing it longer. He concluded by again asking for counsel to be relieved under Faretta and Brewer.

Judge Macaulay stated that he had heard the motion and renewed motion to be relieved. The court assured the Appellant that his counsel was persistent, very dedicated and very competent. "So rather than finding you prejudiced in any way" by their actions in his case, Judge Macaulay found that Rivera had benefitted from the experience and ability that had been afforded as far as their representation. R., Tr. p. 1001, ll. 17-21. He stated that he was basing it on what he had seen in the courtroom and his experience in trying cases, including capital cases. R., Tr. p. 1001-1002. However, Rivera asserted that the issue was counsel McGuire approaching the bench to tell me to "shut the fuck up." R., Tr. p. 1002, ll. 4-7. Judge Macaulay stated that for the record that he did not hear he did not hear that and "it seems the only one that was heard using that expression was yourself." R., Tr. p. 1002, ll. 10-14. Rivera responded that it was not him, but also juror number 364. R., Tr. p. 1002, ll. 15-16. The court responded: "but she heard it from you!" R., Tr. p. 1002, l. 17. Rivera denied that saying she didn't say she heard it from him. The court stated the record would speak for itself on that matter. R., Tr. p. 1002, ll. 15-21. [A review of juror 364 voir dire reveals that she stated that she heard the defendant say shut the F up. R., Tr. p. 960, ll. 5-11. She stated that she thought he was upset about something and found his behavior disrespectful. R., Tr. p. 14-17.].

ANALYSIS.

Respondent submits that the analysis is different for the pre-trial requests before Judge Nicholson and the in-trial requests before Judge Macaulay which are subject to an abuse of

discretion finding. However, both test should be assessed in light of Dr. Schwartz-Watts opinion the Rivera due to his mental illness lacked competence to represent himself in a trial. At the time of the December testimony, Judge Nicholson had already denied Appellant a right to represent himself at the November 2009 hearing when Rivera had refused to cooperate with the judge's inquiry, consistent with Gardner, concerning waiver and specifically had incorporated Dr. Schwartz-Watts earlier testimony about Rivera's mental illness from the May 2009 hearing after he had appointed her as a special court examiner. However, the evidence, noted by Judge Nicholson to be a continuation of the competency issue further supports his rejection.

The Appellant fails to recognize that two separate judge's addressed the Appellant's request to represent himself. Respondent admits that prior to trial in a September 2009 letter and at the November 10, 2009, the Appellant expressed a desire to have counsel replaced with two competent attorneys or appear pro se. R. 2932, 11/10/2009 Tr. p. 10, ll. 12-22. When Judge Nicholson denied the request because they were competent counsel, Rivera clearly restructured his request to proceed pro se. However, once the defendant "corrected" the record to indicate that he wanted to remove counsel so he could represent himself, the situation changed significantly. See State v. Flanagan, 293 Conn. 406, 978 A.2d 64, 80 (Conn.2009) ("[D]efendant's right to self-representation raises distinctly different, and more compelling, concerns than does his right to replace competent counsel...."). This results from the fact that, under Faretta v. California, a defendant need not have a good reason for desiring to represent himself. See Faretta, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) ("[A]lthough [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." (quotation omitted)); *id.* at 836 ("We need make

no assessment of how well or poorly Faretta had mastered the intricacies [of the law] ... [f]or his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.”); Buhl v. Cooksey, 233 F.3d 783, 794 (3d Cir.2000) (“[Defendant's] motivation for waiving counsel was not the issue.... Once [the defendant] properly asserted his right to proceed pro se the trial court was obligated to undertake an appropriate inquiry under Faretta even though [the defendant's] request apparently rested upon nothing other than dissatisfaction with defense counsel.”); Commonwealth v. Spatz, 18 A.3d 244, 265 n. 12 (Pa.2011) (“[A] court's disagreement with a defendant's reason for proceeding pro se does not constitute grounds for denial of this constitutional right.”). Hence, once the equation changed from “Delgado and McGuire versus new counsel” to “Delgado and McGuire versus self-representation,” it was the defendant's determination as to whether the defense team had a conflict of interest or was unprepared - not the trial court's - that should have been controlling.¹⁹ Cf. McKaskle v. Wiggins, 465 U.S. 168, 178, 185, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (emphasizing that the “core” of the Faretta right is a defendant's entitlement to maintain actual control over his defense).

¹⁹ Although a trial court has no authority to substitute its judgment for that of the defendant regarding the merits of the reasons upon which the decision to proceed pro se is based, this is not to say that the court is prohibited from inquiring into those reasons insofar as they may have a bearing on whether the defendant's waiver of his right to counsel is made knowingly, intelligently and voluntarily. See Buhl v. Cooksey, 233 F.3d 783, 798 (3d Cir.2000). (“[Defendant's] motivation for waiving counsel was not the issue.... Once [the defendant] properly asserted his right to proceed pro se the trial court was obligated to undertake an appropriate inquiry under Faretta even though [the defendant's] request apparently rested upon nothing other than dissatisfaction with defense counsel.”). The fact that Rivera now takes issue with the inquiry by Judge Nicholson is in error because the judge was correctly trying to assess the Appellant's factors to determine if the decision was both knowing and voluntary.

Where, as here, timing was not an issue, unlike Faretta and Brewer there were questions before Judge Nicholson from current counsel and the judge's own experience with Rivera in the Wiley trial, as to the defendant's competency for self-representation, see Indiana v. Edwards, 554 U.S. 164, 177–78, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008), if he was prepared to make a knowing, intelligent and voluntary decision to proceed pro se and thereby to waive his right to counsel, Faretta, 422 U.S. at 835, and whether he was not making that decision for a prohibited reason, such as delay or disruption of the proceedings, see id. at 834 n. 46. If there was no question as to each of these, as Appellant suggests, the defendant was entitled to discharge Delgado and McGuire at the pre-trial hearings for any reason or no reason at all. See Flanagan, 978 A.2d at 81 (stating that Faretta recognizes three reasons for denying a defendant his right to self-representation: (1) the request is untimely; (2) the defendant engages in serious obstructionist misconduct; (3) the defendant has not knowingly and intelligently waived his right to counsel).

Judge Nicholson questioning Rivera about his knowledge of the rules of evidence and court procedures was reasonably based under Gardner to determine if Rivera was aware of the advantages and disadvantages of counsel. R.2933-2946, November 10, 2009 Tr. p. 11-24. Further, once Rivera became mute to the Judge Nicholson's reasonable questioning under the Gardner criteria, (R. 2948-49, November 10, 2009 Tr. p. 26-27), Rivera's responses (and lack of them) bordered on contemptuous and obstructionist behavior. Judge Nicholson reasonably concluded that Rivera's actions were intended to make a mockery out of the whole justice system. R. 2950, November 10, 2009 Tr. p. 28, ll. 3-25. Simply put, Judge Nicholson concluded that the Court not grant the request to appear pro se to an obstructionist defendant.

In Faretta, the Court held that the second Faretta criteria was that "a trial judge may

terminate self-representation by a defendant who engages in serious and obstructionist misconduct.” Faretta v. California, 422 U.S. 806, 834, n.46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).²⁰ This “serious and obstructionist misconduct” factor ordinarily would be exercised only after the defendant had begun to represent himself.²¹ However, in exceptional circumstances, the defendant’s behavior in the course of seeking self-representation may in itself be disruptive and therefore justifies denying his pro se requests. See e.g., Africa v. Anderson, 542 F.Supp. 224 (E.D.Pa.1982); People v. Carson, 35 Cal.4th 1, 23 Cal.Rptr.3d 482, 104 P.3d 837 (2005) (misconduct must threaten to obstruct the proceedings; that could include certain out-of-court misconduct, such as witness intimidation, but not unrelated misconduct, such as damaging a jail telephone or using his legal runner to pass illegal gambling proceeds).

A court has found the refusal to answer questions during a Faretta inquiry sufficient to justify denial under this factor. See United States v. Long, 597 F.3d 720 (5th Cir. 2010) (defendant refused to answer questions during several attempted Faretta hearings, continuously

²⁰In United States v. Flewitt, 874 F.2d 669 (9th Cir.1989), the court held that this language allows termination of pro se representation based only upon “uncontrollable and disruptive behavior in the court room.” The trial court therefore violated Faretta in terminating defendants’ self-representation because they had refused to prepare their defense, except on their own terms, and had ceased communications with advisory counsel. See United States v. West, 877 F.2d 281 (4th Cir.1989) (court need not have concluded that defendant sought deliberately to disrupt the trial in order to terminate his pro se status following an opening statement in which he attacked the court’s integrity); State v. Ploof, 162 Vt. 560, 649 A.2d 774 (Vt.1994) (court could discontinue pro se representation where defendant threatened to commit suicide, and since court concluded that threats were exercise in gamesmanship, no need to conduct competency hearing).

²¹ See State v. Chamley, 1997 S.D. 107, 568 N.W.2d 607 (1997) (court could not deny request to proceed pro se because defendant was “difficult to deal with”; trial courts have broad discretion to deal with disruptive behavior should they occur at trial). But see People v. Anderson, 398 Mich. 361, 247 N.W.2d 857 (1976) (before allowing defendant to proceed pro se, trial judge shall “determine that defendant’s acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court’s business”).

quoting a nonsensical statement); Hummel v. Commonwealth, 306 S.W.3d 48 (Ky. 2010) (defendant in pretrial proceedings had shown that “he could not control himself”). In ferreting out that the defendant’s real intent was to exploit the right of self-representation to manipulative or disruptive means, denial of the right was appropriate. See Blankenship v. State, 673 S.W.2d 578 (Tex.Crim.App.1984) (concurring opinion).

In McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), the Supreme Court spoke of denying self-representation where the individual is unable or unwilling “to abide by rules of procedure and courtroom protocol.” 465 U.S. at 173. The general rule is that a request for self-representation may be properly denied if the defendant is unable or unwilling to act with decorum in court as he conducts his own defense and instead seeks only to disrupt or delay proceedings. E.g., United States v. Dujanovic, 486 F.2d 182, 187 (9th Cir.1973); State v. Plunkett, 261 Kan. 1024, 934 P.2d 113, 116–17 (1997); Leonard v. State, 302 Md. 111, 486 A.2d 163, 170–71 (1985); People v. Dennany, 445 Mich. 412, 519 N.W.2d 128, 136 (1994); Vanisi v. State, 117 Nev. 330, 22 P.3d 1164, 1171 (2001); 21A Am. Jur. 2d, *Criminal Law* § 1156 (2011); 22 C.J.S. *Criminal Law* § 374 (2011). In these jurisdictions, a trial court's determination to this effect is reviewed for an abuse of discretion. E.g., Vanisi, 22 P.3d at 1171.

Based upon the circumstances that Judge Nicholson was presented he did not err in denying the request based upon his understanding the mental illness of the Rivera and his obstructionist attitude before the Court.

The critical denial by Judge Nicholson in refusing the right to self-representation was not merely based upon the fact that he had competent lawyers to represent him and that it would be a bad choice for Rivera to represent himself as in Brewer, which was improper. Instead it was a

combination of factors including knowledge of the defendant's mental illness and the belief, supported by his attorneys and Dr. Schwartz-Watts that his mental illness made him mentally incompetent to represent himself, that the judge had seen in the first trial the behavior of Rivera, that blatant refusal to respond to the trial court's reasonable inquiries by standing mute was obstructionist behavior that would likely be repeated at trial. See R. 2950, 2949, 11/10/2009 Tr. p. 28, ll. 3-25; 11/10/2009 Tr. p. 27, l. 1- p. 28, l. 1 (refusal to respond to questions to Judge Nicholson); R. 2958, 12/1/2009 Tr. p. 6, ll. 6-19 (mental illness opinion by Dr. Schwartz-Watts). The motion was properly denied.

Judge Macaulay's denial of the later requests are in a different situation. It is unclear at the time that Judge Macaulay, when Rivera initially renewed his request before him was aware of the earlier basis of the denial by Judge Nicholson, including the mental illness evidence from the December 1, 2009 hearing. However, the simple fact is that Judge Nicholson had already denied the request for self-representation and that it was not a change in Rivera's position from wanting counsel to wanted to have self-representation. Since Judge Nicholson had already established the basis for denial, Judge Macaulay's continuing denial of the requests and his reasons could be seen as an attempts to persuade a mentally ill Appellant that the lawyers were competent and acting in his best interests. As far as this record shows, from the November hearing forward, Rivera was making expressions for self-representation²².

The complaint about Judge Macaulay's conclusion that Rivera would have to show prejudice was more related to the Appellant's complaint about counsel not filing the motions and

²² However, at the December 2009 hearing Dr. Schwartz-Watt's stated that Rivera wanted to be represented by counsel at that time, although he wants to have a different attorneys represent him. R. 2959, 12/1/2009 Tr. p. 7, ll. 1-14.

getting a decision by the court on them and his assertion that it was a conflict of interest because they failed to do it rather than a condition precedent to being allowed to be self-representation. R., Tr. p. 71-75. As the court stated, his inquiry was to try to determine if Rivera was aware of the advantages the right to counsel affords. Though the trial court spoke of “only if it doesn’t prejudice” and that he was not qualified to represent himself, it was in response to Rivera’s comment that the Constitution “provides for me to go pro se” R., Tr. p. 75, ll. 12-21. The trial judge at the initial motion plainly was considering the Appellant’s motion to self-representation to be based upon whether he could adequately represent himself and whether counsel currently representing him was equipped to go forward. These are factors that court can and should make inquiry of the defendant under the Gardner factors.

However, Respondent agrees that if this Court limited its review to Judge Macaulay’s stated reason that the only right he had to self-representation was “only if it did not prejudice” and because it was a burden that the Appellant could not show, it would be an improper basis for the denial. See Brewer. However, since Judge Nicholson had already denied this, the further denials were not an abuse of discretion. The setting would be different had Judge Nicholson actually granted Appellant the right to appear pro se and Judge Macaulay then denied it only because his lawyers could better serve him. That was not the situation. His request had already been denied.

Judge Macaulay denied the request primarily based upon his inquiry and concluded that the waiver was not valid because he did not recognize the advantages of counsel that he would be waiving. R., Tr. p. 75, ll. 10-23. This is different than the conclusion in Brewer where the trial judge denied the motion erroneously because the judge did not believe that the defendant’s

decision was a good one in a death penalty case, but that he would have allowed it if it was not a death penalty. Of course, it the judge's decision was based not on the understanding of the advantages and disadvantages of the right to counsel, but just that the court disagreed with the choice of the Appellant to represent himself over experience counsel - that would be an error under Brewer. It was not wrong for the court to recognize that Appellant was represented by very competent counsel and inform Appellant of that fact. However, if that fact alone was the basis for denial, it would be wrong.

Further, the trial court did not abuse his discretion in denying the right to represent himself after the in-court profanity outburst by Appellant in the midst of voir dire. Though Appellant tried to blame the outburst incident on counsel, it evidenced his refusal to believe the true nature of what happened, asserting that the juror heard the profanity from counsel, when in fact it was heard from Appellant's statements. R., Tr. p. 956-958, p. 960, ll. 5-11, (juror testimony); p. 969-970, p. 1000-1002. This behavior dramatically showed the Appellant's inability to conform himself to the rules and procedures, the precise behavior that counsel Delgado predicted at the initial hearing in December 12, 2008. R. 2830, 12/8/2008 Tr. p. 15, ll. 8-14. Again, the in-court disagreement rest in the abuse of discretion standard. See State v. Martin, 102 Ariz. 142, 146, 150, 427 P.2d 639, 643, 647 (1967) (denial of self-representation was justified on basis of defendant's repeated verbal outbursts, "wild antics" and "utter and complete disrespect for the court"); State v. Whalen, 192 Ariz. 103, 108, 961 P.2d 1051, 1056 (App.1997) (court did not abuse its discretion in revoking defendant's right to self-representation after he disregarded warnings that he must obey court rules to defend himself at trial from the front of the courtroom).

See United States v. Brock, 159 F.3d 1077, 1079–81 (7th Cir.1998) (concluding that “when a defendant's obstreperous behavior is so disruptive that the trial cannot move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel”). Although Rivera agreed that he would not continue his outburst to prevent removal from the courtroom, as requested by his counsel, it does not cause the fact of the outburst and continual return to it to disappear as reflected above. To suggest that this outburst supports a decision to represent himself would have been an abuse of discretion.

The Arizona v. Edwards Remand Issue.

Respondents recognize that the use of a different standard to evaluate decisions made by competent, but mentally ill, defendants to represent themselves is not constitutionally required. See Edwards, 554 U.S. at 177–78; Godinez v. Moran, 509 U.S. 389, at 399-400 (1993). However, recently in State v. Starnes, the Court recognized the Edwards decision as allowing states to prohibit defendants from waiving their right to counsel if they are not competent to conduct proceedings by themselves. Respondents contend that evidence in the record supports such a conclusion in this case.

Therefore, even if the other reasons for the denial of the right to counsel are found to be deficient or in violation of the mandates of Brewer and Faretta, a new trial may not be warranted. We nonetheless conclude that the additional standard described in Edwards should be applied in this case. This means that the original trial court must determine on remand whether defendant was so mentally ill when he requested to represent himself that he was incompetent to conduct his trial without the assistance of counsel. This analysis must take into consideration whether he was unable to carry out the basic tasks needed to present his defense in counsel's absence.

Respondent emphasize, as did Edwards, and Godinez, that this standard addresses defendant's mental capacity, not his technical trial skills or legal knowledge.

However, even if this Court were to find either judge's decision insufficient, this error does not mean that defendant's conviction after the jury trial must automatically be reversed. Rather, Respondent assert that the case must be remanded for the trial court to apply the additional Edwards standard, which we have identified above as the proper standard to be applied in this case. See State v. Jason, 779 N.W.2d 66, 74 (Iowa Ct.App.2009)("In reaching [the conclusion that Edwards applies a different standard], other courts have remanded the proceedings to the trial court to conduct a hearing to determine the defendant's competency to represent himself or herself post-trial."); People v. Davis, 2012 WL 19373, 12 (Colo.App.) (Colo.App.,2012).

Respondent submit that the Court may remand to the trial court judge who previously presided over this case (Judge Macaulay) to analyze the existing pretrial record, including the mental health testimony, and to enter findings under the additional Edwards standard that we have concluded applies. Respondent submits to do so because that judge, having observed defendant's conduct and demeanor, is in the best position to make those findings.

If the court, taking into consideration whether defendant was unable to carry out the basic tasks needed to present his defense in counsel's absence, finds that defendant was so mentally ill that he was incompetent to conduct his trial without the assistance of counsel, then the court shall leave the judgment of conviction undisturbed. If the court finds that defendant was competent to conduct his trial under this standard, the court shall vacate the judgment of conviction and proceed accordingly to a new trial.

- III. The trial judge did not abuse his discretion in qualifying three jurors who expressed the ability to consider the evidence and follow the law in rendering a verdict, even though they had earlier expressed a speculative conclusion that if there was a prior murder the death penalty would be appropriate. The record shows that each juror was not a juror who would automatically vote for the death penalty in every case and fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions requires the juror to do. [Initial Brief of Appellant, p. 24-39]. [JUROR QUALIFICATION].**

INTRODUCTION

The Appellant contends that three venirepersons, Jurors 29, 222, and 247 were improperly qualified to serve as jurors in his trial. The record of the voir dire reveals that while Appellant used 10 strikes in his jury selection, he had strikes remaining when jurors 222 [R., Tr. p. 1846, l. 23-1847, l. 2] and 247 [R., Tr. p. 1850, l. 18-22] were selected, but had used the strikes when Juror 29 [R., Tr. p. 1853, ll. 8-14]²³ was selected. R., Tr. p. 6 -7, 1845-1856. The Appellant contends that isolated responses made during the defense questions which attempted to stake out the juror as to the aggravating factor of a “prior conviction of murder” or whether isolated mitigating evidence was relevant to the potential juror - without the full context of the requirement to consider such evidence from jury instructions. As shown below, once the prosecution inquiry and the trial judge’s own questioning resolved that the juror would listen to everything, not just the aggravating factor, including mitigation evidence and was not automatic death penalty, the trial judge properly qualified the jurors.

²³When Juror 29 was presented, defense counsel Delgado stated “ I believe that we have no challenges for cause” when asked by the Clerk for their position. R., Tr. p. 1853, ll. 11-13. Respondent assumes that this was a misstatement by counsel Delgado meaning that they had no peremptory challenges remaining. However, if intended to stated that, in fact, the he had no challenges for cause to any of the jurors selected, this would be a complete waiver of his right to challenge their qualification and selection on appeal.

STANDARD OF REVIEW

The determination whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. State v. Woods, 382 S.C. 153, 159, 676 S.E.2d 128, 131 - 132 (2009). A juror's disqualification will not be disturbed on appeal if there is a reasonable basis from which the trial court could have concluded the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied 498 U.S. 881, 111 S.Ct. 229, 112 L.Ed.2d 183 (1990).

The Court recently addressed the standard of review in State v. Dickerson, __ S.C. __ 716 S.E.2d 895, 902-903 (2011). The Court stated that a juror must be excused from service if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)); see also State v. Green, 301 S.C. 347, 354, 392 S.E.2d 157, 160 (1990).

A juror who will automatically vote for the death penalty **in every case** will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.... If even one such juror is empaneled and the death sentence is imposed, the state is disentitled to execute the sentence.

Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (emphasis added).²⁴ General protestations that the juror will follow the law, without the opportunity for

²⁴ In Morgan, all of the jurors were asked, "Would you automatically vote against the death penalty no matter what the facts of the case were." 504 U.S. at 723, 112 S.Ct. 2222. However, the trial court refused to permit defense counsel to ask jurors, "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" The trial court's refusal was based on the belief that the substance of the question had already been asked. *Id.* Later, the jurors were asked whether they could be fair and impartial and

further inquiry by the defendant, are not sufficient for “[i]t 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.” *Id.* at 734–36, 112 S.Ct. 2222; see also State v. Bennett, 328 S.C. 251, 257–58, 493 S.E.2d 845, 848 (1997) (holding that a juror's general statements he could be fair and impartial and follow the law were not sufficient in light of his later, unequivocal statement that he would just “go with the majority”).²⁵

This inquiry, however, “cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.” Wainwright, 469 U.S. at 424, 105 S.Ct. 844. In State v.

whether they could follow the court's instructions.

The Supreme Court held that it was error not to permit the questioning sought by the defendant, holding that its prior cases established “that a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause.” *Id.* at 728, 112 S.Ct. 2222. Conversely, “[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.” *Id.* Such a juror is likewise not fair and impartial and should be removed. The fact that the jurors had responded affirmatively to questions about their fairness made no difference. *Id.* at 730–35, 112 S.Ct. 2222. The Court went on to note, “Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.” *Id.* at 739, 112 S.Ct. 2222.

²⁵ And, in a capital sentencing proceeding, a juror's duties include giving meaningful consideration to any mitigating evidence that the defendant can produce. See Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (observing that sentencer may not refuse to consider any mitigating factor). Thus, where voir dire examination reveals that a juror “will fail in good faith to consider the evidence of ... mitigating circumstances as the instructions require him to do,” he is excludable for cause. Morgan, 504 U.S. at 729, 112 S.Ct. 2222; see also Boyde v. California, 494 U.S. 370, 377–78, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (observing that jury must “be able to consider and give effect to” mitigating evidence); U.S. v. Tipton, 90 F.3d 861, at 878 (4th Cir. 1996) (noting that Morgan requires the exclusion of jurors who “would uniformly reject any and all evidence of mitigating factors, no matter how instructed on the law”). And “[i]f even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.” Morgan, 504 U.S. at 729, 112 S.Ct. 2222. See U.S. v. Fulks, 454 F.3d 410, 427–428 (4th Cir. 2006).

Powers, 331 S.C. 37, 48-49, 501 S.E.2d 116, 121 - 122 (1998), the Court held that Morgan v. Illinois does not require the questioning concerning specific mitigating factors. The Court held that Morgan merely recognized that a capital defendant may challenge for cause any prospective juror who indicates he or she will automatically vote for death in every case. Importantly, unlike this case and the allowance by the trial judge, Morgan does not, however, stand for the proposition that a defendant is entitled to open-ended inquiry regarding a prospective juror's sentiments on each and every possible aggravating and mitigating circumstance. Powers, *supra*. Other courts have specifically rejected an identical contention. See State v. Skipper, 337 N.C. 1, 446 S.E.2d 252, cert. denied 513 U.S. 1134, 115 S.Ct. 953, 130 L.Ed.2d 895 (N.C.1995) (holding that Morgan does not require a defendant to be permitted to voir dire jurors regarding how they would be affected by evidence of mental impairment, age, and other mitigating circumstances, since such questions would "stake out" juror and pledge him to a future course of action; general questions as to whether juror would consider mitigating circumstances as charged by the judge are sufficient); State v. Wilson, 74 Ohio St.3d 381, 659 N.E.2d 292 (1996) (Morgan does not require individual voir dire on separate mitigating factors); State v. Kreutzer, 928 S.W.2d 854 (Mo.1996).²⁶

²⁶ In State v. Hill, 331 S.C. 94, 103, 501 S.E.2d 122, 127 (1998) the Court rejected an appeal on a claim that the capital defendant wanted to ask jurors whether they would consider that appellant did not have a significant prior criminal history of violence. The Court has consistently held that 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 predispositions. See State v. Stanko 376 S.C. 571, 576, 658 S.E.2d 94, 96 - 97 (2008); State v. Poindexter, 314 S.C. 490, 493, 431 S.E.2d 254, 255 n. 2 (1993) (same). See, e.g., State v. Ross, 849 A.2d 648, 683 (Conn. 2004) (holding that a trial court could prohibit a defendant from questioning jurors in voir dire about whether they would consider the defendant's "conduct in prison to be mitigating"); State v. Wilson, 659 N.E.2d 292, 300-01 (Ohio 1996) (holding that a defendant does not have a constitutional right to question prospective jurors about statutory mitigating factors).

Thus, the record may not be entirely clear to the point of “unmistakable clarity” as to the juror's views, and situations will arise where a circuit court simply is left with a “definite impression” of a juror's qualifications following voir dire. Id. at 425–26, 105 S.Ct. 844. “[T]his is why deference must be paid to the trial judge who sees and hears the juror.” Id. at 426, 105 S.Ct. 844; State v. Mercer, 381 S.C. 149, 156, 672 S.E.2d 556, 559 - 560 (2009). Therefore, determinations of whether a juror is qualified to serve on a panel are left to the sole discretion of the circuit court. Green, 301 S.C. at 354, 392 S.E.2d at 160. In reviewing the circuit court's decision, we must examine the juror's responses in light of the entire voir dire and will not reverse the court's decision unless it is wholly unsupported by the evidence. Id. at 354, 392 S.E.2d at 160–61.

HOW THE ISSUES WERE RAISED BELOW

1. Preliminary Matters.

During the first voir dire of juror #3, defense counsel McGuire questioned the juror concerning whether the death penalty was an appropriate penalty “if someone murdered and then murdered again.” R., Tr. p. 151, ll. 2-3. The prosecutor objected and the court declared “let’s not get fact specific.” R., Tr. p. 151, ll. 4-5.²⁷ Subsequently juror #3, in response to a question whether there were situations that an automatic death penalty was deserved, described “serial type situations” as something that could and that the juror did not think there was a grey line,

²⁷ The Arizona, North Carolina, and Mississippi Supreme Courts have all upheld a trial court's denial of voir dire questioning regarding aggravating factors on the grounds that such questioning impermissibly seeks to have jurors precommit to a sentencing decision before they have heard all the evidence (i.e., “stake out” questions). See State v. Smith, 159 P.3d 531, 541 (Ariz. 2007); Evans v. State, 725 So. 2d 613, 651 (Miss. 1997); State v. Robinson, 451 S.E.2d 196, 202 (N.C. 1994).

“but I would have to think very hard at somebody who had killed more than once...” R., Tr. 155-57.

Defense counsel then asserted that he would like the Court’s permission to be able to voir dire the potential jurors on the issue of multiple prior murders regarding the defendant. R., Tr. p. 164, ll. 12-23. He claimed the Supreme Court had allowed the State to use specific mitigating factors, such as mild retardation, youth, and non-triggerman to disqualify jurors.²⁸ He claimed that it was not staking out jurors, but seeking to determine a significant fact and if that fact would “prevent them from properly considering aggravating and mitigating factors and fairly considering both punishments. R., Tr. 165. McGuire stated that they had “huge” aggravation that they had to defend against this case concerning eight murders total (six by the Appellant’s statement, two at issue in Anderson County) a separate rape with a rape survivor and multiple victims of criminal domestic violence. R., Tr. p. 166, ll. 1-15. Relying upon Davis and Longworth, he asked to be able to focus on something significant to determine if it would interfere with the jurors’ ability to fairly consider all factors in aggravation and mitigation and interfere with the ability to consider both punishments. He declared that he did not think anyone wants the case reversed, but thought if he could not voir dire on a fact that significant, he would have to go to the Supreme Court on it. R., Tr. 166-67.

Solicitor Adams asserted the defense was trying to stake out the jurors and pledge them to a course of action. She stated that “prior murder” is the specific aggravating factor in this case. Relying upon State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998) and State v. Powers, 331 S.C. 37,

²⁸ Counsel made reference to State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) and State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993).

501 S.E.2d 116 (1998), she concluded that they cannot get into specific facts of a case as a means of compromising a juror. R., Tr. p. 168, ll. 2-15.

Defense counsel McGuire followed by citing a pre-Morgan New Jersey case, State v. Biegenwald, 126 N.J. 1, 594 A.2d. 172 (N.J. 1991)²⁹ which he claimed was support which reversed a murder conviction based upon the failure to allow defense counsel to voir dire about a prior murder and a similar California result in People v. Cash, 50 P.3d. 332 (Calif. 2003)(California defendant was entitled to inquire during voir dire whether prospective jurors in prosecution for first degree murder would automatically vote for the death penalty if the defendant had previously committed another murder, even though allegation of prior murder was not expressly pleaded in the information charging defendant; defendant's guilt of a prior murder was a general fact or circumstance present in the case that was likely to be of great significance to prospective jurors, causing some to invariably vote for the death penalty). R., Tr. p. 169, ll. 1-22.

Subsequently, the trial court relied upon State v. Powers to restrict counsel's ability to stake out a juror, noting that under Longworth the question was whether disqualification was proper after they got into specifics. R., Tr. 175.

Judge Macaulay then concluded that he would permit some latitude on the questioning. R., Tr. p. 176, ll. 6-10.

Subsequent questioning of potential jurors revealed the defense would routinely present

²⁹ State v. Biegenwald, 126 N.J. 1, 594 A.2d 172 (1991) (New Jersey capital defendant must be allowed to voir dire jurors concerning aggravating circumstances applicable to his particular case). Also, John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 Hofstra L. Rev. 1209, 1258 (2001).

questions about multiple murders and “if somebody kills and then kills again” as a category of a crime that is so bad where the death penalty is really the only appropriate penalty. R., Tr. 231-32. See also, R., Tr. p. 258, ll. 1-5.

Further discussion led to Judge Macaulay allowing questioning that suggested a consideration of the particular aggravating factor of a “prior conviction of murder.” R., Tr. 275-280. Judge Macaulay stated the question would have to be balanced as to any mitigating circumstances charged to allow the juror to know they were going to have to consider more than just aggravation. R., Tr. p. 281, ll. 7-15. He clarified that the defense can mention a prior conviction as an aggravating circumstance, but at the same time taken in the context of any mitigation that might be charged. R., Tr. p. 282, ll. 21-23.

As to the next juror, juror #19, defense counsel McGuire asked: “What’s your opinion about the death penalty for a defendant, any defendant, who not only committed a deliberate, intentional killing, but did it twice? Could a life sentence ever be appropriate in that case?” R., Tr. p. 291, ll. 10-16.

The next day (February 2, 2010), the defense filed a motion to expand their right to voir dire from beyond the aggravating factor of “prior conviction of murder” to include questioning about the State’s proffered additional six claimed murders from his statement. R., Tr. 302. The trial judge denied the request to voir dire as to six other murder claims. R., Tr. 303-313, 317-18, l. 18.

2. Juror 29

The next juror voir dired was juror 29. R., Tr. 319-350. During the trial judge’s initial inquiry, juror 29 stated:

A. Yes.

Q. Could you, as a juror in the sentencing phase, depending upon the facts including relevant aggravating and mitigating circumstances and the law as instructed to you, render a sentence of life imprisonment which is life without parole until death - - do you understand that?

A. Yes.

Q. Could you under the - - as a juror in the sentencing phase, depending upon the facts including relevant aggravating and mitigating circumstances and the law as I instruct it to you, render a sentence of life imprisonment without parole?

A. Yes.

Q. Second, on the other hand, as a juror in the sentencing phase, depending upon the facts including relevant aggravating and mitigating circumstances and the law as instructed to you, could you render a sentence of death?

A. Yes.

R., Tr. p. 324, ll. 1-19.

Defense counsel McGuire made inquiry of juror 29 in the following manner:

Q. So to get started, the definition of murder in South Carolina is that a person kills another unlawfully with malice aforethought. And the way the law explains it, and the Court will charge you on it, is that the killer was operating with black and malignant heart, fatally bent on evil and intentionally, willfully, deliberately took another person's life. In that situation, what's your feeling about the death penalty as the appropriate penalty?

A. I believe in it in that situation.

Q. Okay. On your questionnaire you indicated that you thought the death penalty was appropriate if the person

basically meant to take an innocent life?

A. Right.

Q. And you still feel that way?

A. Planned ahead.

Q. Okay. ... [W]hat we're talking about is an intentional, deliberate choice to take a life. Is that still consistent with your definition, that if a person meant to do it, took an -- [p. 327]

A. Yes.

Q. -- innocent life, they should receive the death penalty?

A. Yes.

Q. And that's still your view?

A. Yes.

Q. And you -- I assume you took great care in putting your answers down on the questionnaire?

A. Right.

Q. They weren't frivolously given?

A. No.

Q. You really thought about it?

A. Yes.

R., Tr. p. 326, l. 2 - p. 327, l. 13. Defense counsel McGuire asked:

Q. ... So I'm going to put you in a situation where not only do we have that deliberate, intentional, malice aforethought taking of a life, but that the person had already murdered before. And you would be in judgment of somebody whose committed two murders.

Could a life sentence ever be severe enough to punish
that kind of case?

R., Tr. p. 327, l. 23 - p. 328, l. 4. The prosecution objected to the question as not in compliance with the "balancing" and staking out of the juror. R., Tr. p. 328, ll. 5-6. Judge Macaulay concurred and directed the question be restated with the balancing. R., Tr. p. 328, ll. 11-12. After a question was asked, juror 29 sought clarification and was advised that it was a prior conviction for murder. Judge Macaulay intervened that the juror would not only consider the prior conviction, but any established basis for mitigation. R., Tr. 330.

The juror initially declared that she did not think the prior conviction would have any effect on the next one. R., Tr. p. 331, ll. 9-10.

Q. Okay. Now, the Judge would instruct you that you specifically have to consider all of the aggravating circumstances brought forward by the State. And in this sort of situation I'm talking about, that would be a prior conviction for murder. Now, the Judge would also instruct you that you had to consider anything that might be called mitigation which could be something in the defendant's background, something you see in the facts of the case, that sort of thing. Now, knowing all of that, sitting on a murder case where ... you're satisfied and the eleven other jurors are satisfied beyond a reasonable doubt a defendant deliberately, intentionally took the life of another and had murdered before. In that situation is the life penalty severe enough to punish that kind of case? [p. 332]

A. No.

Q. Okay. Because we would be talking about two deliberate murders?

A. Two separate, deliberate murders. ...

Q. And in fixing punishment for a defendant - - I'm not

talking about this case, just any case - - who had deliberately taken a life and then deliberately taken another life, would things like the defendant's background, if he grew up poor, would these things be relevant to you in making your decision?

A. No.

R., Tr. p. 331, l. 11 - p. 332, l. 18.

The prosecution voir dire of Juror #29 was begun with a development of procedures and a recognition that not every murder qualifies for a death penalty and that a determination of a aggravating factor and that the judge would instruct that once you find an aggravating circumstance that you must consider mitigating circumstances as well no matter what they are.

R., Tr. p. 336, ll. 23-25. Juror 29 declared "Yes" in response to whether she could follow those instructions. R., Tr. p. 337, l. 1. Further, she stated:

Q. Okay. Once you have heard all the evidence in aggravation and all the evidence in mitigation, do you feel that you would wait until you hear all of it before making a decision of whether life without parole is appropriate or if the death penalty is appropriate?

A. Yes.

Q. So under the circumstances, do you think that you could vote for life without parole if the evidence warranted life without parole?

A. Yes.

Q. And actually even for no reason at all, you could give life without parole.

A. Yes.

Q. Okay. But if the evidence warranted the death penalty, could you also give the death penalty as well?

A. Yes.

Q. Okay. But you would like to consider and hear all of it and follow the Judge's instructions before making that decision?

A. Yes, definitely.

R., Tr. p. 338, l. 12 - p. 329, l. 6. Importantly, Juror 29 declared it did not make a difference what aggravating factor was found:

Q. So again, no matter what the aggravating circumstances that you find, you would follow the Judge's instruction and listen to the mitigation before making a decision?

A. Yes.

MS. ADAMS: One moment, Your Honor.

Q. I know sometimes we feel like we're using semantics and words. But not only would you listen to the evidence in aggravation or mitigation, you would consider both the aggravation and consider both mitigation?

A. Yes.

Q. And you would be able to actually vote for life if that was appropriate and vote for death if you felt that was appropriate after you considered all the evidence?

A. Yes.

R., Tr. p. 339, l. 15 - p. 340, l. 4.

Judge Macaulay then briefly voir dired:

Q. If you were instructed that the law in South Carolina is that a person who is convicted of murder - - could you, depending upon the circumstances, impose a sentence of either life imprisonment or death?

A. Yes.

R., Tr. p. 340, ll. 10-15.

At that point, defense counsel McGuire challenged juror 29 for cause asserting that her responses were “automatic death penalty.” R., Tr. p. 341, l. 3. He stated that when she understood the principle that when she had to take aggravation with mitigation when a prior murder conviction was aggravation, in response to his question could a life sentence ever be severe enough to punish that kind of defendant, she said no very candidly. R., Tr. p. 341, ll. 1-10. He suggested that she also said things about the defendant and his background and mitigation would not affect her decision regarding a desire to vote for death in a murder case. He opined that she opined herself to be automatic death penalty several times. R., Tr. p. 342, ll. 3-5. Counsel McGuire asked the court to not give much weight to her responses that she would “consider” this because the value of the question was “almost nil.” R., Tr. p. 342, ll. 7-8. He cited Morgan v. Illinois, 504 U.S. 719 (1992), for the suggesting that the venire would respond to questions in a manner to please the court. R., Tr. p. 342, ll. 20-25. He asserted that the State’s attempted rehabilitation of the juror that if the judge said you had to do this could you do it had little weight compared to her “candid responses to me where she was automatic death penalty several times.” R., Tr. p. 343, ll. 8-17. He summarized that she was substantially impaired based on her death views based upon the aggravator and mitigation impaired. R., Tr. p. 343, ll. 17-23.

The prosecution asserted that juror 29 was qualified under the proper standard of Wainwright v. Witt, 469 U.S. 412 (1985). R., Tr. 344-45. (“The proper standard is whether the juror’s views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath”). Solicitor Adams complained

that the defense's attempt to stake out juror as to what sentence they would give if someone had committed a prior murder is not the proper standard. She stated the question is whether they can consider life and consider death after hearing all the evidence. Solicitor Adams contended that juror 29 clearly stated she would follow the court's instructions and could vote for life for no reason at all or she could vote for death - but she's not going to know until she hears the evidence. R., Tr. 344-45.

Counsel McGuire responded that under this specific aggravator, there was impairment and automatic death. R., Tr. p. 345, ll. 14-17. Further, he again complained that the balancing question was not required under Morgan. R., Tr. 345-46.

Judge Macaulay responded that he had reviewed State v. Powers and its analysis of Morgan v. Illinois, and decided to inquire of the juror one more time. Further, he had analyzed her questionnaire and determined that it includes information that her religious, moral and philosophical principles did not affect her ability to vote for the death penalty and stated: "I would be able to vote for it if I felt it was necessary and fair, depending on all information available." R., Tr. p. 347, l. 24 - p. 348, l. 6. He stated he would resolve the qualification based upon the answer to a question.

Judge Macaulay then asked Juror 29, the following final question:

BY THE COURT:

- Q. Juror 29, I have one more question, and it will be the final question. In a death penalty case, would you always or automatically vote for the death penalty, even though the law provides that you may impose a sentence of life without parole depending upon the circumstances of a particular case and the characteristics of an individual defendant or for no reason at all?

A. Would I always vote - - -

Q. Would you always or automatically vote for the death penalty even though the law provides that you may impose a sentence of life without parole depending upon the circumstances of a particular case and the characteristics of an individual defendant?

A. No.

R., Tr. p. 348, l. 14 - p. 349, l. 2.

Judge Macaulay then qualified Juror 29 with the following findings:

“Considering the entire voir dire, I find that Juror 29 will be fair, unbiased, impartial and able to carry out the law as explained to her. Furthermore, I find that the juror’s beliefs or attitudes toward the death penalty would not prevent or substantially impair the performance of her duties as a juror in accordance with the law, the Court’s instructions and the juror’s oath.”

R., Tr. p. 349, ll. 5-12.

3. Juror 247

Subsequently juror 247, a sixty-seven (67) year old white male was voir dired. Like juror 29 (and juror 222), the initial inquiry with the judge, juror 247 responded “Yes” that he could render a life sentence, depending upon the facts including the relevant aggravating and mitigating circumstances and the law as instructed. R., Tr. p. 1110, ll. 17-22. similarly, he responded: “Yes”, that he could render a death sentence under similar circumstances. R., Tr. p. 1110, l. 23 - p. 1111, l. 2.

Upon the defense inquiry, juror 247's opinions concerning the death penalty were discussed:

Q. What are your views about the death penalty for just that

kind of killing?

A. Well, this is the way I look at it. If a person kills somebody just out of just care - - not carelessness, but he just wants to kill somebody, if he does it just out of pleasure, I would say, then I have no problem with sending him to it. I think that's where he needs to go.
R., Tr. p. 1111, l. 24 - p. 1112, l. 5.

Q. . . . The case that you're talking about, could a life in prison penalty ever be severe enough to punish that kind of case, the one that you just told me about?

A. The - - -

Q. The person who killed to kill.

A. I tell you what. If somebody goes out and kills somebody just for the fun of it, I don't have a whole lot of mercy for them. I'm being honest with you.

Q. Sure.

A. I think that's an eye-for-an-eye. I'm a Christian. An eye-for-an-eye, a tooth-for-a-tooth is what I look at.

R., Tr. p. 1112, l. 15 - p. 1113, l. 3. The following then occurred after further discussion:

THE COURT: Again, that's not the law. The law is that not only do you consider the aggravation, but you also consider anything that might mitigate the aggravated circumstance. And that could be any reason, no reason - - or any reason or no reason at all or even mercy.

Q. Keeping in mind everything the Judge just said, could a life in prison sentence be appropriate for a defendant who's murdered then murdered again?

A. All right. Now, on this are you talking about somebody that just murdered for the fun of it? He didn't have to kill them. But he just killed them just to be killing them. Are you talking about that?

Q. Well - - -

THE COURT: It depends on the facts of the case.

THE POTENTIAL JUROR: Yeah, that's - - -

THE COURT: But you'll hear - - you haven't heard the facts as yet. What he wants to now, would you absolutely impose the death sentence on any murder case that he's described?

MR. McGUIRE: The double case murder.

THE POTENTIAL JUROR: Not necessarily. Like I say, it would have to be according to what I found out about it on the jury.

Q. Okay. It sounds like motive, kind of the why of the killing, seems to be important to you?

A. It is. It is.

Q. Okay. Now, we're not talking about like - - we're not talking about any kind of defense that would rise to a legal defense, meaning didn't have to kill somebody to save your own life or protect anybody else. That would be self-defense.

A. Un-huh (affirmative).

Q. It's not an accident. It's not being so mad because somebody did you wrong that you can't control yourself. This is the deliberate, intentional choice to take an innocent life.

A. Then I would think he would get the death penalty. Or she, whichever.

Q. Okay.

A. I mean, that's the way I feel.

Q. Okay. What I want to do is - - if I could have just one second.

THE COURT: Here you go.

Q. Would - - in that situation we just discussed where you said it seems like he or she would get the death penalty from you, would background factors of a defendant be relevant in fixing punishment for somebody who murdered twice?

A. What do you mean background? Like what?

Q. Like their walk in life, their childhood, how they grew up?

A. Talking about they had it really rough, was in a bad environment?

Q. Sure, something like that. Could that be relevant in punishing somebody?

A. Well, I still say if you kill somebody, and you just - - and you didn't have to, you just do it for the fun of it - - I mean, that's what it looks like - - I wouldn't have - - no, I wouldn't consider that.

R., Tr. p. 1116, l. 4 - p. 1118, l. 13.

During the prosecution questioning, juror 247 declared that after he heard everything, he could vote for life without parole or death. R., Tr. p. 1123, l. 17 - p. 1124, l. 1.

Judge Macaulay followed up with the following question:

In a death penalty case, would you always or automatically vote for the death penalty even though the law provides that you may impose a sentence of life without parole depending upon the circumstances of a particular case and the characteristics of an individual defendant?

A. I would listen to everything, and then I would go - - if I thought he got life in prison or if it's the death penalty, like I said, you know, I would have to listen to the case before I could really tell you how, you know, what I would do. But I would be open to listening to it. And, I

mean, I haven't got my mind made up that this guy's going to do this or this guy's going to do that or the ladies or whatever.

R., Tr. p. 1124, l. 20 - p. 1125, l. 8.

Defense counsel McGuire moved to strike juror 247 for cause. He asserted that the juror was an "eye for an eye" and was consistent that it was his consistent position. He further asserted that background characteristics would not be relevant to him in fixing punishment, such as a really rough childhood. R., Tr. p. 1126, ll. 14-18.

Judge Macaulay denied the motion finding juror 247 qualified. He stated he considered not only the testimony, but the questionnaire.

Inasmuch as it doesn't appear that he would automatically or always give the death sentence, that he would listen to all of the evidence - - and that seemed to be his final analysis - - that is what the law is, and that is what he'd be instructed. So I find that he would be qualified.

R., Tr. p. 1127, ll. 9-14.³⁰

4. Juror 222

After juror 247 was qualified, the next juror was juror 222, a 26 year old white female. Like 29 and 247, she confirmed that depending upon the facts including the relevant aggravating and mitigating circumstances and law as instructed, she could render a sentence of life or a sentence of death. R., Tr. p. 1134, l. 20 - p. 1135, l. 4.

³⁰ In Juror 247's Questionnaire, he stated that he was a #2 juror that it was appropriate in some murder cases, "depending on the evidence, the law and what I learned about the defendant." Questionnaire of #247, p. 16. ROA 3129. He stated: "if the crime fits, so be it" and regarding life without parole "if the case warrants it I would be for it." ROA 3129.

Upon the defense's inquiry about the death penalty, juror 222 initially declared: "I don't think it's used enough." R., Tr. p. 1136, ll. 11-13.³¹

Q. Would a life in prison sentence be severe enough for that intentional killing?

A. To me, it would depend on the evidence, or would depend on the case.

R., Tr. p. 1136, ll. 19-22.

The defense followed with this inquiry:

Q. ... And I'm going to ask you - - I'm going to give you some examples of aggravation evidence and then ask your opinion about the death penalty. And as an example, I'm going to give you the situation of the person that you just judged, sat through on the first part, you found him guilty of murder. And then what makes this case worse is that it was actually the second murder that person committed. Could a life in prison sentence ever be appropriate for a double-murder case?

MS. ADAMS: Your Honor, that's not the law. He's misstating it.

THE COURT: Are you going to tell her that she doesn't have to? That there are other things she's supposed to consider.

Q. Well, there would be other evidence, of course. There would be evidence in mitigation. For instance, like background factors of a defendant like his childhood, stuff like that. You'd be able to consider all of that. Knowing that, could a life sentence punishment be appropriate or severe enough for somebody who, for

³¹ In Juror 222's Questionnaire, she circled that the death penalty was used "too seldom." Questionnaire 222, p. 17. ROA 3112. She also stated therein "I am not a very opinionated person, but I do believe that death is an appropriate form of punishment", that she was a type 2, and that life without possibility of parole "could be an appropriate form of punishment in a particular case." 222 Questionnaire, p. 16. ROA 3111.

example, murdered twice?

R., Tr. p. 1137, l. 12 - p. 1138, l. 8. The prosecutor later asked the following:

Q. The Judge is also going to instruct you that you have to consider not only the aggravating circumstances, but the mitigating circumstances, if any, that the Defense will present. Will you be able to remain open-minded throughout the whole process and consider everything before you decide if life or death is appropriate?

A. Yes, ma'am.

Q. Okay. So once you've heard all the aggravation and all the mitigation, if you thought that life was appropriate, would you vote for life?

A. Yes, ma'am.

Q. Okay. And if - - on the other side, if you thought death was appropriate, would you vote for death?

A. Yes, ma'am.

Q. Okay. So a death verdict would not be automatic for you; basically you would have to wait and hear all the facts and circumstances?

A. Yes, ma'am.

Q. Okay. And in this case, you haven't heard the facts and circumstances, have you?

A. No.

Q. So is it fair to say that even if the Defendant is found guilty of murder, that you don't know right now whether the defendant should receive life or death?

A. Uh-un (negative).

Q. You don't know?

A. No, ma'am.

Q. Because you'd want to wait and hear everything?

A. Yes, ma'am.

R., Tr. p. 1142, l. 25 - p. 1144, l. 4.

The defense moved to strike juror 222 claiming her answers indicated that she was "pretty much automatic death penalty just on murder. And then in the case of aggravation, double murder, even knowing the kinds of mitigation in the question, she also indicated life would never be appropriate or severe enough for that kind of case." R., Tr. p. 1145, ll. 7-8. he claimed mitigation evidence was not relevant to her and that she was substantially impaired. R., Tr. p. 1145, ll. 7-13.

The prosecutor countered that juror 222 was qualified. Particularly, the State asserted the juror confirmed that she wants to hear the whole story before she makes a decision. R., Tr. p. 1145, ll. 16-21. The Solicitor complained that the manner of questioning by the defense was improper. R., Tr. p. 1145, ll. 21-23.

Judge Macaulay qualified the juror:

THE COURT: . . . I must take the totality of the voir dire. And in this case, when she was advised that she could consider other matters other than just the fact of a double murder or two murders, that she said that, yes, life without parole could be appropriate as well for murder. The fact does remain that we're looking to eliminate anyone who would ipso facto, absolutely without any question, either vote for death or could never vote for death. And so with that, I find that she is qualified because she does meet that definition.

R., Tr. p. 1145, l. 24 - p. 1146, l. 9. He concluded that "this juror's beliefs or attitudes toward the death penalty would not prevent or substantially impair the performance of her duties as a juror

in accordance with the law and the Court's instructions and the jurors oath." R., Tr. p. 1146, ll. 14-21.

ANALYSIS

Respondent submits the trial court acted well within its broad discretion in finding Jurors 222, 247 and 29's views would not substantially impair their ability to follow his oath and the court's instructions on the law. See Uttecht v. Brown, 551 U.S. 1, 9, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007) ("Deference to the trial court is appropriate [which necessarily involves granting the trial court broad discretion] because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.")³²; State v. Mercer, 381 S.C. 149, 158, 672 S.E.2d 556, 560 - 561 (2009) (adhering to the rule that a "trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis ... [to] conclude[] that the juror would not have been able to faithfully discharge his responsibilities as a juror"); State v. Wood, 362 S.C. 135, 141, 607 S.E.2d 57, 60 (2004)(same); State v. Council, 335 S.C. 1, 10, 515 S.E.2d 508, 512 (1999) (following the rule that unless unsupported by the evidence, "determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge"). Even the cold record before us reflects Juror Doe's hesitancy and profound unease with the prospect of performing his duties as a juror in accordance with his oath and the court's

³² The Court specified, in Uttecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014 (2007), that a trial court removing a potential juror "makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts." Further, "when there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve [the question] in favor of the State.' " Id. at 2223 (quoting Witt, 469 U.S. at 434, 105 S.Ct. 844).

instructions. State v. George, 323 S.C. 496, 503, 476 S.E.2d 903, 908 (1996) (finding that the trial court acted correctly by disqualifying a juror that “declared that she did not think she could sign a form recommending the death penalty”); State v. Longworth, 313 S.C. 360, 366, 438 S.E.2d 219, 222 (1993) (disqualifying a juror who initially stated “he ‘probably could’ consider” the death penalty but later stated he did not “think so”).

Appellant’s argument rests on parsed statements taken out of context which is contrary to settled law and unsupportive of error. The instant passage from *State v. Gilbert* is instructive:

This Court will not consider only isolated statements made during voir dire but will examine the entire colloquy with the venireman in order to review his qualifications. Having done this, it is clear that the challenged juror was properly qualified. When questioned by the trial judge subsequent to confusing inquiries made by appellants’ trial counsel, the juror stated that she would give due consideration to any mitigating factor that the court instructed her to consider.

277 S.C. 53, 56-57, 283 S.E.2d 179, 108-81 (1981).

In viewing the evidence concerning the qualification of a juror, the issue is not necessarily based upon a single response, but upon whether there is record support for a judge’s decision. Simply put, the mere fact that the juror make a statement that standing alone may suggest disqualification does not require it if the judge determines that other responses rehabilitate the juror based upon the tonality of the information before the court. See *Comment note.-beliefs regarding capital punishment as disqualifying juror in capital case -post-Witherspoon cases*, 39 A.L.R.3d 550 (1971)(as supplemented 2012). For example, a prospective capital juror was not required to be excused for cause pursuant to defendant’s challenge based on juror’s voir dire statement that he would automatically vote for death penalty for the **first-degree murder of a police officer**, where, at conclusion of additional questioning and upon being provided the

appropriate criteria, juror affirmed that he could follow the law and would not automatically vote for death simply upon the existence of a verdict of guilt. Pietri v. State, 885 So. 2d 245 (Fla. 2004), reh'g denied, (Oct. 18, 2004). Similarly, the record supported a finding that prospective juror would not automatically vote for death penalty, where juror stated that he fell in middle between automatic death sentence and automatic rejection of death and that he could sign a life verdict if life were appropriate sentence, although juror indicated that he would be predisposed to death penalty if he found that defendant **purposely killed two people**, as was alleged, juror added that he would try his best to accept all evidence and factors that were presented and to be open-minded about process. State v. Bethel, 2006-Ohio-4853, 854 N.E.2d 150 (Ohio 2006). (Venireman Ford said on voir dire: "I believe in capital punishment, I definitely believe that there are circumstances and factors that must be weighed out and I definitely fall in the middle" between an automatic death sentence and an automatic rejection of death. He said that if life were the appropriate sentence, he could sign a life verdict. When asked whether he would be "predisposed to the death penalty if he found that the defendant did purposely kill two people," he said, "Yes." However, he added, "I [would] totally try to do my best to clearly accept all the evidence and factors that are presented," and "I would definitely try my very best to be open-minded about the process"). State v. Bethel, 110 Ohio St.3d 416, 436, 854 N.E.2d 150, 177 (2006). A challenge was also rejected although during voir dire the juror expressed **unwillingness to consider specific items of mitigation** evidence; while juror stated initially that the gravity of the offenses might prevent her from considering life sentences, when she specifically agreed to follow the court's instructions even if they involved evidence she hypothetically might be skeptical of considering. State v. Skatzes, 104 Ohio St. 3d 195,

2004-Ohio-6391, 819 N.E.2d 215 (2004). In addition, the trial court did not abuse its discretion in denying a challenge to veniremember who indicated on juror questionnaire his disagreement with statement that "some people's circumstances, birth, upbringing, and environment should be considered to determine punishment," where the veniremember stated during questioning by attorneys that he could consider such evidence in assessing punishment even though he did not personally find it relevant. Gardner v. State, 306 S.W.3d 274 (Tex. Crim. App. 2009).³³

Furthermore, "eye for an eye" comments do not automatically require the exclusion of a potential juror for cause. See Jenkins v. State, 269 Ga. 282, 498 S.E.2d 502 (1998) (record did not support capital murder defendant's claim that prospective juror was predisposed to death penalty and could not consider mitigating evidence; although juror stated that he believed in "an

³³ But see People v. Boyette, 29 Cal. 4th 381, 127 Cal. Rptr. 2d 544, 58 P.3d 391 (2002) (Denial of defendant's for-cause challenge to prospective juror was error in capital prosecution arising from double murder, where prospective juror stated he was strongly in favor of death penalty, indicated that he would apply a higher standard to a life sentence than to one of death, and that an offender who killed more than one victim should automatically receive the death penalty, and *admitted he would not follow an instruction to assume that a sentence of life in prison with no possibility of parole meant the prisoner would never be released.*); Busby v. State, 894 So. 2d 88 (Fla. 2004), as revised on denial of reh'g, (Feb. 3, 2005) (prospective juror's responses during voir dire to questions regarding his ability to be impartial raised reasonable doubt as to his fitness to serve as juror, a former death row corrections officer, indicated that fact that accused had been convicted of prior crimes might cause him to automatically vote for death penalty, that life imprisonment was not severe enough punishment for premeditated murder, and that his ability to serve as impartial juror might be compromised because homicide occurred in prison); State v. Tate, 851 So. 2d 921 (La. 2003) (juror may be excluded for cause because of his view on capital punishment if prospective juror will not consider a life sentence and will automatically vote for the death penalty under the factual circumstances of the case before him. State v. Robinson, 874 So. 2d 66 (La. 2004). The basis of the exclusion for prospective juror by the defense for the juror's views on capital punishment is that the juror will not consider a life sentence and will automatically vote for the death penalty under the factual circumstances of the case before him; it is irrelevant that the potential juror can conceive of different factual situations where he might consider voting for a life sentence where his unwillingness to consider such a sentence in the case before him is clear).

eye for an eye, a tooth for a tooth," and that he was in favor of death penalty, he also stated that no situation is automatic because "you have to look at the whole picture," that he could fairly consider both life and death sentence, and that he would follow court's instructions); Jones v. State, 273 Ga. 231, 539 S.E.2d 154 (2000) (defendant was not entitled to have excused for cause a prospective juror who said that he believed in an eye for an eye and that he was leaning to a death sentence, as juror also stated that he could fairly consider both life and death as possible sentences, that his mind was not made up with regard to punishment, and that he would have to hear the evidence before deciding the sentence); Stopher v. Com., 57 S.W.3d 787 (Ky. 2001), as amended, (Aug. 15, 2001)(excusal for cause was not required for juror who believed in an "eye for an eye" philosophy and death as the only appropriate sentence for an intentional killing; the juror stated that he would follow the law and that death would not be his automatic vote without hearing the evidence at the guilt phase). But see Green v. Com., 546 S.E.2d 446 (Va. 2001)(prospective juror who possessed firm belief in the adage, "an eye for an eye, tooth for a tooth," and who stated during voir dire that if Commonwealth proved beyond a reasonable doubt that defendant had committed a capital offense, he would vote to fix defendant's penalty at death and he would not give any consideration to a lesser penalty because defendant "didn't give his victim consideration when he took [her] life," was not impartial and should have been removed for cause in capital murder trial).

There is no question that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury. Ross v. Oklahoma, 487 U.S. 81, 85 (1985). However, the Appellant's reliance upon Morgan v. Illinois, *supra* is misplaced wherein he suggests that the disqualification was required by a response by each juror during the defense

questioning about their feelings on sentencing where a prior conviction for murder is an aggravating factor. Morgan is clear that: “a juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.” Morgan, supra at 2229. Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of the law. Morgan, id. at 735, at 2333, citing Turner v. Murray, 476 U.S. at 34-35. Under Morgan, “any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider mitigating evidence and decide if it is sufficient to preclude imposition of the death penalty.” Morgan, id. at 738, at 2234.

In State v. Powers, 331 S.C. 37, 48-49, 501 S.E.2d 116, 121-122 (1998), this Court held that “Morgan does not, however, stand for the proposition that the defendant is entitled to open-ended inquiry regarding a prospective juror’s sentiments on each and every possible aggravating and mitigating circumstance. Importantly, in Powers, the Court held that where the defendant was permitted to ask the jurors if they would consider aggravating and mitigating circumstances as charged by the court and whether they would consider age as mitigating if so charged by the judge. In State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998), the Court found that the trial court’s limitation on voir dire which precluded the defense from questioning jurors on whether they would consider a mitigating the fact the defendant did not have a significant prior criminal history did not violate his rights. The Court, citing Morgan, U.S. v. Tipton, 90 F.3d. 861 (4th Cir. 1996) and Mu’Min v. Virginia, 500 U.S. 415 (1991), concluded that because the trial court allowed Hill to ask a general question whether a juror would consider mitigating circumstances

as instructed by the court covered the issue of whether a juror would refuse to consider mitigating circumstances.

In a pre Morgan case, in State v. Davis (Thomas Lee), 309 S.C. 326, 422 S.E.2d 133 (1991), the Court addressed the exclusion of a juror based upon her unequivocal statement that “she would never impose the death penalty on a mentally retarded defendant, no matter how egregious the crime and how slight the mental retardation.” The Davis trial court excluded the juror on the grounds that she would be unable to fulfill her duties to consider the aggravating and mitigating circumstances which may be supported by the evidence. This Court found “the record overwhelmingly support the conclusion that the potential juror was so irrevocably committed to her position regarding mentally retarded persons that she would have refused to consider any statutory aggravating factors supported by the evidence.”

Respondent submits that there is record support for Judge Macaulay’s conclusion in qualifying each of the challenged jurors. Like the jurors who may initially state that they would give a death penalty (or life imprisonment) for every murder conviction, the totality of the information presented to the judge, including the voir dire and the questionnaires.

Concerning each of the jurors, the sole focus of the Appellant is upon a response by each juror to a question posed by defense as to whether a life sentence was severe enough for a defendant who intentionally murdered and had murdered before. (R., Tr. 330-31)(Juror 29); (R., Tr. 1116-17)(Juror 247); (R., Tr. 1137-38)(Juror 222). However, this Court, like the trial court is not limited to that response to determine if the jurors are “life-qualified.” The subsequent inquiries, placed in their proper perspective reveals support for the trial court’s qualification.

1. Juror 29.

Although during the defense inquiry Juror 29 declared that he felt a life sentence was not severe enough for a defendant who had intentionally killed and had murdered before, he also denied that things like the defendant's background or if he grew up poor would be relevant to him. R., Tr. 332. However, the inquiry and review does not stop with those parsed statements of juror 29. Subsequently, upon the prosecution questioning, Juror 29 confirmed that he could impose a sentence of life or death after she considered all the evidence. R., Tr. 340. Leading up to that response, Juror 29 had confirmed "no matter what the aggravating circumstance you find" that she would follow the judge's instruction and listen to the mitigation before making a decision (of life or death). R., Tr. 339. Similarly, she declared that she would wait to hear all the evidence before making the decision. R., Tr. 338.

The deference given to the trial judge in making the assessment of the juror's qualification is particularly informant in this case. Judge Macaulay, after weighing the arguments by the defense and prosecution rested his decision upon his final question which resolved that juror 29 was qualified to sit under Wainwright v. Witt and Morgan:

Q. Would you always or automatically vote for the death penalty even though the law provides that you may impose a sentence of life without parole depending upon the circumstances of a particular case and the characteristics of the defendant.

A. No.

R., Tr. p. 348, l. 22 - p. 349, l. 1.

The Appellant's apparent suggestion that Juror 29's responses are somehow different from a juror who initially responds that he would always/never give a sentence of death, but later

vacillates and is qualified. However, Juror 29 was no different than those jurors who are qualified. Judge Macaulay's assessment was that Juror 29's attitudes toward the death penalty would not prevent or substantially impair the performance of her duties. His assessment is supported by the entire voir dire.

2. Juror 222.

Judge Macaulay also concluded that juror 222 was qualified based upon the entirety of the voir dire. R., Tr. 1146. He opined that when advised that she could consider other matters, a sentence of life without parole could be appropriate. Again, Appellant focuses solely upon Juror 222 parsed responses to a question "could a life sentence punishment be appropriate or severe enough for somebody, who, for example, murdered twice?" [No]. R., Tr. p. 1137, l. 14 - p. 1138, l. 8. However, unlike the trial judge, the Appellant wholly fails to note the effect of Juror 222's rehabilitation and similar responses about her willingness to consider mitigating evidence before deciding the sentence. Subsequent to the "murdered again" question of the defense, Juror 222 confirmed that where the judge instructed to consider not only the aggravating, but the mitigating that she would remain open-minded and consider everything before she decided the sentence, that she could vote for life (or death), and importantly that "a death verdict would not be automatic" [R., Tr. p. 1143, ll. 12-13] and that she would have to wait and hear all the facts and circumstances. R., Tr. 1142-44.

Like the juror in State v. Dickenson, 716 S.E.2d 895, the trial court was persuaded by the juror's consistent affirmation that she would follow the law and wait and hear the evidence, rather than by the defense confusing stake out question concerning whether a life sentence would be severe enough for a double murder. This is why deference is given to the trial judge in light of

the entire voir dire. Since juror 222 would not automatically vote for the death penalty in every case and would consider both aggravating and mitigating evidence as the instructions required her to do, there was no error in the qualification.

3. Juror 247.

Judge Macaulay concluded that juror 247 would not automatically or always give a death sentence, that he would listen to all the evidence “and that seemed to be his final analysis.” He based his findings, not only on the voir dire, but also on the questionnaire. ROA 1127, ll. 1-14, 3114-31. The judge rejected the Appellant’s claim that juror 247 would not consider mitigation, such as a rough childhood, concluding his decision was based on the totality of the evidence.

Examining the juror’s responses, in light of the entire voir dire and questionnaire responses, there is evidence to support the judge’s decision to qualify the juror. Juror 247 during the judge’s initial voir dire indicated he could sentence to life or death “depending on the facts including the relevant aggravating and mitigating circumstances and the law as instructed.” R., Tr. 110. Although he admitted he did not have a lot of mercy for “persons who killed to kill” and believed in an eye for an eye (R., Tr. 1112-13), he stated that he would not necessarily impose a death sentence on a “double case murder” and it would depend “to what I found out about it on the jury.” R., Tr. p. 1116, l. 4 - p. 1117, l. 2. Asked to speculate on whether background factors would be relevant in fixing punishment (which the defense identified as “walk in life, their [really rough, bad environment] childhood, he declared if you kill somebody ‘for the fun of it’ he would not consider that.” R., Tr. p. 1118, ll. 1-13.

However, the prosecution rehabilitated the juror, who declared that he could follow the instructions that he “must consider aggravation and you must consider the mitigation before

rendering a decision.” R., Tr. p. 1123, ll. 1-16. He summarized that “I would have to hear the case before I could tell you anything [about whether life without parole is appropriate or death is appropriate]”. R., Tr. p. 1123, ll. 12-19.

Particularly telling to the trial court was juror 247's response to the court's final question as to whether he would always automatically vote for a death penalty even though the law provided that he may impose a sentence of life without parole depending on the circumstances of a particular case and the characteristics of an individual defendant. R., Tr. p. 1124, ll. 20-25. Juror 247 concluded that he would “listen to everything” and would be “open to listening to it.” R., Tr. p. 1125, ll. 1-18.

There was a basis in the record which showed Juror 247 was not “a juror who will automatically vote for the death penalty in every case” and agreed to consider the evidence in mitigating as well as evidence in aggravation as instructed by the judge. Although he initially questioned whether a poor family background was relevant to be considered on a murderer, he subsequently and consistently agreed to consider mitigation before deciding a sentence and revealed he was not predisposed to a death sentence – he would listen to everything. the judge's acceptance of the juror's responses are entitled to deference because they are supported by the record.

Conclusion

Evidence supports that jurors 29, 222, and 247 could be fair and impartial jurors, were not predisposed to a death sentence in every case, would follow the law and wait to hear all the evidence, including a consideration of the mitigating evidence as well as the aggravating evidence, before deciding the sentence. His claim must be denied.

IV. Where the trial judge and prosecution erroneously thought juror #64 was a female Caucasian at the time of the peremptory challenge and the State's stated reason for the strike was based upon her unique combination of factors - her hesitation on voir dire answers about the death penalty and her Catholicism and that her son had been in a pre-trial intervention program for shoplifting, the trial court found it was a racially neutral reason, although another white juror was not struck who was Catholic and other potential jurors may have also hesitated, those jurors were not similarly situated to #64 and not a violation of the mandated of Batson v. Kentucky. [BATSON CLAIM].

The State struck potential juror #64 based upon a unique combination of factors when they erroneously assumed, like the trial judge, that she was a Caucasian female juror. R., Tr. p. 1859, ll. 2-6. These factors were reported as hesitation and demeanor on some of her answers concerning her Catholicism and the death penalty and the fact that her son had been arrested for shoplifting and was in the pre-trial intervention program. After an attempt to compare #64, who is Hispanic, with a juror who reported to be Catholic that the State did not strike - but the defense attempted to have removed "for cause" [Juror #104], and the hesitancy in questions about the death penalty with #33 and #248, the trial judge concluded that "as far as the strike of juror #64, the reason given was racially and gender neutral." R., Tr. p. 1865, ll. 14-16. There is a factual basis in the record to support the trial court's rejection of the Batson claim where the other compared jurors were clearly not similarly situated to #64.

In his argument, Rivera contends the prosecution violated the mandates of Batson v. Kentucky, 476 U.S. 79, 89 (1986) in its use of a peremptory challenge on potential juror #64 who

he identified as an Hispanic.³⁴ He contends that the stated reasons to support the discretionary strike of jury 64 - hesitation in some of the answers, her hesitation in answering the questions related to Catholicism and the death penalty, and the fact her son had been in a pre-trial intervention program - were pretextual because he asserts other white veniremen were not struck who either hesitated in responses or were Catholic. The Appellant attacks challenge of the individual reasons for the strike of #64 as standing in isolation as opposed to the combination of factors that led to the strike. The trial judge found that the basis for the challenge was not stated as a pretext against an Hispanic juror, but a racially neutral basis.³⁵ As seen from a review of the totality of the circumstances, the potential jurors that were compared to #64 were not similarly situated to #64.

#64 Voir Dire and Questionnaire

A review of the record of the voir dire of juror #64 reveals that she placed herself under the Court's questioning as a #2 juror, "as a juror in the sentencing phase, depending on the facts including the relevant circumstances and the law" render a sentence of life or death. R., Tr. 649-650.

Upon defense questioning, defense counsel pointed out that #64 had stated that "life imprisonment is cheaper than a death penalty." R., Tr. p. 655, ll. 22-24. The juror when asked

³⁴ As set forth within, the prosecution had identified the particular venireperson as a white female as she was discussing its strikes. R., Tr. p. 1859, ll. 2-16. Subsequently, the defense pointed out that the juror had reported she was Hispanic on her juror questionnaire. R., Tr. p. 1859, ll. 20-25. #64 Questionnaire, p. 1. ROA 3042.

³⁵ This is even more telling of its neutrality because the trial judge and proponent of the strike announced that #64 - who did not have an Hispanic name - was a "white female." R., Tr. p. 1859, ll. 2-5. Thus, in erroneously assuming the venireperson was a white female at the time of the strike, the strike could not have been based to exclude a minority.

how she knew that, responded: "I know the law ..." R., Tr. p. 656, ll. 2-3.

On examination by Assistant Solicitor Byford, it was pointed out that in her questionnaire that she had stated that she thought "the death penalty was used too often." R., Tr. p. 656, ll. 15-19. In response to explain, #64 gave a response which evidenced hesitation (R., Tr. p. 656, l. 20) and then an unresponsive answer about fair trials not happening and everyone has to know the law inside and out. R., Tr. p. 656, ll. 20-24. The prosecutor then attempted to restate her earlier written response to suggest that she meant that it needs to be used in the right situation - [whereas the juror never defense her written responses and it could be read to suggest that she felt the death penalty in being used too often was being used in the wrong situations]. The prosecutor also questioned #64 about the Catholic Church's position against the death penalty and the juror declared it would not affect her. R., Tr. 657-58. She was also asked about her questionnaire information that her son was in the pre-trial intervention program due to a shoplifting charge in Anderson County. R., Tr. p. 658, 660.

A review of #64's questionnaire revealed a 54 year old married woman with a non-Hispanic name, but declared her racial or ethnic group as "Hispanic." #64 Questionnaire, p. 1. ROA 3042. Her programs she watches are on PBS and NPR and that she spend 1-2 hours per night on the internet. Id. p. 5-6. ROA 3046-47. She stated her parents were Catholic and that she had changed from Catholic to Lutheran. #64 Questionnaire, p. 9. ROA 3050. She revealed her son was arrested for shoplifting and went to P.T.I. Id. p. 12. ROA 3053. There were a number of firearms owned by her family. Id. p. 15 and believed that counselors, therapists, psychologists, and psychiatrists "serve the community well." Id. p. 15. ROA 3056. Concerning the death penalty, she wrote "It doesn't prevent crime but is politically necessary" and her opinion about

life without possibility of parole is that it “is cheaper than death penalty and it can be commuted if overturned.” She circled that the death penalty used “too often” and LWOP is “less severe” than the death penalty. ROA 3058.

Batson Hearing

At the conclusion of the selection of the jury, the defense made an objection pursuant to Batson v. Kentucky, 476 U.S. 79 (1986). R., Tr. p. 1857, l. 9. In response to the trial court’s inquiry, Assistant Solicitor Byford initially responded that the basis striking white female juror 64 was:

1. her hesitation on some of her answers.
2. the fact that she was Catholic concerned us.
3. her overall demeanor in answering her questions.
4. she had a son who had been to P.T.I. (Pre-trial intervention).

R., Tr. p. 1859, ll. 2-16. Judge Macaulay found that the response was facially race and gender neutral.

Defense counsel McGuire asserted that there were only three minority jurors called in the strike of the first twelve. Unlike the State, he contended that Juror #64 was described as Hispanic (contrary to the State’s assertion that she was a white female).³⁶ R., Tr. p. 1859, ll. 20-25. McGuire asserted that the other minority jurors called were #278, a black female and “283, a black male. McGuire stated the State used its two strikes against two of the three. McGuire also

³⁶ The court reporters voir summary has the race of juror 64 as “H.” R., Tr. 6. The juror’s questionnaire identifies her racial or ethnic group as “Hispanic.” #64 Juror Questionnaire, § 7. ROA 3042.

contended that as to the Catholic basis, juror #104 was also a Catholic and was seated so that basis is pretextual. R., Tr. p. 1860, ll. 8-12.

Assistant Byford responded that the reason attached to her Catholicism was her hesitation in answering questions regarding her Catholicism. She confirmed that they had sat juror #278 (BF) and did not strike #386 (BF)(who was struck by the defense). R., Tr. p. 1860, ll. 14-21.

Assistant Solicitor Byford further explained that #86 was an African American female juror that they struck and #383 (BM) was another strike. As to #86, the prosecutor declared in her questionnaire and during individual questioning that she did not want to sit in judgment of another human being. R., Tr. p. 1861, ll. 2-6. Accord, R., Tr. p. 575, ll. 15-19, also R., Tr. 573-74. ["I don't believe in it (death penalty)"], R., Tr. p. 578, ll. 7-10 [State motion to strike for cause juror 86]. ROA 3076.

Assistant Solicitor Byford further stated that the basis for striking #383 was because on his questionnaire he refused to answer any questions about the death penalty and wrote across the top of the sheet "I do not believe in the death penalty." R., Tr. p. 1861, ll. 7-11. See also ROA 3201 (Questionnaire for #833). However, she noted that when he came to Court during his voir dire he expressed a different attitude and in her impression could not explain the change from the written questionnaire. R., Tr. p. 1765, l. 14 - p. 1766, l. 15.

Counsel McGuire sought to compare the hesitation of juror 64 with the hesitation of juror 248 (WF), who had initially declared she was leaning toward life. R., Tr. p. 1861, ll. 21-24. McGuire opined that 248's answers were more extreme and hesitant than juror 64. R., Tr. p. 1862, ll. 1-11.

Counsel McGuire claimed that challenge to the strike of juror 64 was not based upon her

gender but that she was an Hispanic and that the State struck 2 of their strikes to strike 2 of the 3 minority jurors presented. In response to the Catholic basis, McGuire restated that #104 was a Catholic also.³⁷ R., Tr. p. 1862, ll. 14-24. He restated his claim that juror 248 gave answers that indicated great hesitation in a vote for death. He asserted the answer that it was “hesitation” is a pretextual as the Catholic reason because they sat two jurors with those issues.

Assistant Solicitor Byford responded that her notes reflected that defense counsel’s questions to #248 were confusing and that her answers were not as concerning to the prosecution because he became boxed in with misleading questions about the law.

Counsel McGuire stated Juror 33 also gave answers with reservations about the death penalty and that only in extreme circumstances could he vote for it. McGuire opined that this revealed pretext in the hesitancy response.

Assistant Solicitor Byford responded to the comments about #33 that he had declared initially that he had never thought about it and addressed the concerns with appropriate open-ended questions, that he could consider everything, including life and death. R., Tr. p. 1864, ll. 15-24. As to #64, Assistant Solicitor Byford confirmed that it was #33's hesitancy in responding to questions about being Catholic, not the fact that she was Catholic was one of the basis, as well as her son having gone through P.T.I. R., Tr. p. 1865, ll. 7-13.

Judge Macaulay determined that the reason given for the strike of number 64 was racially and gender neutral. R., Tr. p. 1865, ll. 14-19.

³⁷ The defense, in fact, attempted to strike juror 104 for cause after her responses, claiming that her responses were such that she would automatically vote for the death penalty. R., Tr. p. 599, ll. 7-13.

The trial court next addressed the State's strike of #352. R., Tr. 1865. Assistant Solicitor Byford stated that when the Solicitor asked her if she could vote for the death penalty - there was a very long pause and she stated that she would have to think about it, R., Tr. 1866, see R., Tr. p. 1642, l. 7 - p. 1643, l. 2, which caused Byford to write in her notes that "I am not sure she could do it." R., Tr. 1866. Judge Macaulay determined that reason was racially and gender neutral.

Judge Macaulay also confirmed that #383 had stated in his questionnaire that he was against the death penalty and that another black, #278, was seated before this strike.

The State's next strike was #307. Assistant Solicitor Byford stated that #307 was a member of the A.C.L.U. and Unitarian Universalist Church who had indicated a recent change in her opinion on the death penalty. She had claimed that she had been opposed to it before and had concerns based upon the Innocence Project and had researched it and had grave concerns. R., Tr. p. 1866, ll. 14-23. See R., Tr. p. 1418, ll. 13-16, p. 1426, ll. 17-25, p. 1428, ll. 15-21. See, ROA 3176-3185.

Counsel McGuire stated that he did not have a challenge to the strike of #307. R., Tr. 1867.

Counsel McGuire asserted that he had Batson objection to the strike of #86. Assistant Solicitor Byford stated that #86 is an African American female. R., Tr. 1867. She reminded the court that the State had not struck #278 or #386. #86 had stated that she did not want to sit in judgment of another human being and stated at least five times that she was opposed to the death penalty and had stated opposition in the questionnaire. R., Tr. p. 1867, ll. 15-20. See R., Tr. p.

573, l. 9 - p. 574, l. 10, p. 575, ll. 15-19.³⁸

Counsel McGuire requested the trial court to compare her with juror #248, a white female, who gave answers leaning toward life, yet was not struck. R., Tr. 1868. McGuire contended that in the alternate pool, since only two minorities were called - #386 and #86, the State used 50% of its strikes. R., Tr. 1868.

Judge Macaulay concluded the strike on #86 was racially and gender neutral and did not constitute “mere pretext.” R., Tr. p. 1868, ll. 11-19. The Batson motion was denied.

Comparison Jurors

#104 - White Female Catholic

Rivera seeks to isolate the criteria of “Catholic” to assert that the failure to strike #104 supports a claim that the Catholic basis was a pretext. At the outset this claim comparison must be undermined by the fact that Rivera sought to strike juror #104 for cause - plainly reflecting #104 possessed strong characteristics in opposition to a defense position, claiming that her responses on voir dire suggested that she was “automatic for the death penalty.” R., Tr. p. 599, ll. 7-13. The defense sought as a basis for the strike for cause was an indication that in an intentional deliberate murder, a life penalty would never be severe enough. R., Tr. p. 599, ll. 7-13. See, R., Tr. 588-589 (#104 voir dire). Judge Macaulay concluded that her overall responses, when it was clarified that not all murders were eligible for the death penalty, were qualified. R., Tr. 600-01.

During #104's voir dire, the prosecution questioned #104 concerning her Catholicism, in

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The State sought to disqualify #86 for cause. R., Tr. 577-580.

which she responded:

Q. Would that in any way - - I know that Catholics - it's kind of a hard conversation - but do not believe in the death penalty. Would that affect your ability in any way?

A. No, ma'am.

Q. Okay. As part of - the law requires, if a death verdict is handed down, that you actually sign your name along with the other eleven jurors to a sentence sheet which would allow the State to carry out the execution of a defendant or actually to kill a defendant. And that is public record. Could you sign your name to that sentence sheet?

A. Yes. Would that - - the religion side, would that ban me - - exile me from the church?

Q. No, no, no. The fact that you're Catholic doesn't matter at all. No ma'am.

A. Okay.

Q. I just want to make sure that your beliefs would not prevent you from giving life or death.

A. No.

R., Tr. 598, ll. 1-21. At that point, the defense immediately moved to strike juror #104 which was denied. [Although he attempted to have her struck for cause, #104 was the second juror presented and not struck by the defense].

On #104's questionnaire, in response to questions about death penalty attitudes, she declared: "no opinion - if the information is proven - so be it." #104 Questionnaire, p. 16. ROA 3093. During her voir dire, she stated that the death penalty was an appropriate punishment "if they did it with a black heart" and then confirmed that a life sentence as not too severe to punish that kind of intentional, deliberate murder. R., Tr. p. 589, ll. 2-5.

Juror 248 - "Hesitation"

The Appellant contended #248, a white female showed greater hesitation in her responses to suggest the "hesitation" factor was a pretext. However, a review of #248 questionnaire revealed immediate differences with #64. Rather than Catholic, she stated her religious affiliation was Baptist and in regular attendance. #248 Questionnaire, p. 9, [ROA 3140] she had no family member ever arrested or accused of a crime [Id. p. 12]. ROA 3143. She declared: "I am completely supportive of the death penalty", that "I believe the sentence of life without the possibility of parole could be deemed appropriate depending on the nature of the crime, criminal record of the individual on trial, and the age of the individual on trial." Id. p. 16. ROA 3147. Unlike #64 who declared the death penalty was used "too often," juror #248 circled it was used "**too seldom.**" Id. p. 17. ROA 3148. Importantly, she also responded that life was less severe than death and the defendant "gets another chance at life to some degree. That point is unfair to the victim and his/her family." #248 Questionnaire, p. 17 (emphasis added). ROA 3148

The voir dire of #248.

During the voir dire of #248, she placed herself as a #2 type juror who could consider the evidence and render either a life or death sentence. R., Tr. 1179-1180.

In response to a defense question concerning someone who had killed before, the juror opined that she would be responsible for the case she was on, not the other case. R., Tr. p. 1185, ll. 2-7. However, the juror also stated: "I believe the death penalty would not be sufficient for that... not to go back just to stay in jail for that."

Q. You would want them to stay in jail forever?

A. I believe so. I believe that would be the proper remedy.

given unless my jurors that I'm on - if I'm the only one left to decide death forever or death by lethal injection, I have to decide based upon what the jury discusses.

R., Tr. p. 1186, ll. 5-14.³⁹ In addressing the concept of mercy, #248 responded:

Q. The last question I have for you is mercy - the concept of mercy freely given or is it earned?

A. It's earned.

R., Tr. p. 1190, ll. 17-20.

The claimed preference for a life sentence dissipated during the prosecution questioning which attempted to resolve #248's admitted confusion from the defense questioning. The prosecution inquired of #248 about a prior murder and evidence in aggravation and mitigation and declared she could consider it all [R., Tr. p. 1192, l. 20] and declared "oh no, no, no" in response to a question whether life without parole is worse than the death penalty. R., Tr. p. 1193, ll. 10-12. She clarified that: **"I would not automatically do one or the other."** R., Tr. p. 1194, l. 9. Her remaining responses were consistent with that position. R., Tr. 1194-95.

Juror #33 - Hesitation Claim.

During the Batson hearing, the defense asserted that #33's answers revealed similar hesitations on voir dire. According to the questionnaire of #33, a 53 year old Caucasian male, revealed he was not affiliated with any church, but believed in God. #33 Questionnaire, p. 1, 9. ROA 3024,3032. No family members had been charged or convicted of a crime (unlike #64). ROA 3035. Concerning the death penalty, he stated that he "never really thought about it, if it is

³⁹In the appeal, the Appellant suggests that this response suggested that she would always vote for a life sentence. Initial Brief of Appellant, p. 42.

meant to be then so be it, depending on the circumstances of the crime.” Id. p. 16, ROA 3039.

#33 further circled:

3. “Although I do not believe that the death penalty ever ought to be imposed, as long as the law provided for it, I could vote to impose it if I believed it was warranted in a particular case, depending on the evidence, the law, and what I learned about the defendant.”

Id. p. 16. ROA 3039. He wrote “death is the most severe punishment.” Id. p. 17. ROA 3040.

In #33 voir dire, in response to an inquiry about the comment that he had not thought about the death penalty before: “pretty much so. I do drag racing. That’s my deal.” R., Tr. p. 384, ll. 11-13. In inquiry about his reference to “3”, that he did not believe in the death penalty, #33 stated “under certain circumstances. It all depends on the circumstances.” R., Tr. p. 385, ll. 9-12. He stated that the circumstances to change it from life to death is “the action that was taken to take someone’s life.” R., Tr. p. 385, l. 17. The remainder of his responses were consistent that if the facts warranted it, he could give a death sentence. R., Tr. 386-88.

Standards under Batson v. Kentucky.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender. State v. Shuler, 344 S.C. 604, 615-617, 545 S.E.2d 805, 810 - 811 (S.C. 2001); State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998). When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one. See generally State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999). The proponent of the strike must offer a race or gender neutral explanation. Id. The opponent must show the race or gender neutral

explanation was mere pretext, which is generally established by showing the party did not strike a **similarly situated member of another race** or gender. Under some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge may determine the explanation was mere pretext, even without a showing of disparate treatment. *Id.*; see State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007)

Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record. Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994). The opponent of the strike carries the ultimate burden of persuading the trial court the challenged party exercised strikes in a discriminatory manner. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). Appellate courts give the trial judge's finding great deference on appeal, and review the trial judge's ruling with a clearly erroneous standard. State v. Dyar, 317 S.C. 77, 452 S.E.2d 603 (1994).

The trial judge's findings of purposeful discrimination rest largely on his evaluation of demeanor and credibility. Sumpter v. State, 312 S.C. 221, 439 S.E.2d 842 (1994). Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and "evaluation of the prosecutor's mind lies peculiarly within a trial judge's province." Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

Furthermore, a strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891 (1989). However, a solicitor can strike a potential juror based on his or her demeanor and disposition. State v. Wilder, 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991). Vacillating responses to voir dire questions regarding the death penalty will

support the use of a peremptory strike against a Batson challenge. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990); State v. Elmore, 300 S.C. 130, 386 S.E.2d 769 (1989). Where the Solicitor perceives a person will have difficulty imposing the death penalty, he may exercise a peremptory challenge against that juror upon this ground as a racially neutral reason. Bell, 305 S.C. at 15, 406 S.E.2d at 168.⁴⁰

"The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike." *Id.* The trial court's findings regarding purposeful discrimination are given great deference and will not be set aside by this court unless clearly erroneous. *Id.* at 416, 645 S.E.2d at 909–10. "It is within the discretion of the trial judge to determine purposeful discrimination based on the 'totality of relevant facts,' including the credibility of the solicitor." Wilder, 306 S.C. at 538, 413 S.E.2d at 325. A defendant has no right to trial by a particular jury, and the right to serve on a jury and not be discriminated against because of race or gender belongs to the potential juror, not a litigant. Evins, 373 S.C. at 416, 645 S.E.2d at 910.

The State's reasons for striking jurors do not have to be reasonably specific or legitimate.

⁴⁰ There is a difference between giving sufficient answers for qualification under Wainwright v. Witt, 469 U.S. 412 (1985), and giving those answers in a manner which would justify skepticism as to the conviction or strength of those beliefs. *See, e.g.* Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994) (although a juror's vacillation was insufficient to justify challenge for cause, the vacillation did justify exercise of a peremptory strike); Bell, 305 S.C. 11, 406 S.E.2d 165 (use of peremptory challenge is proper where juror merely expresses scruples against the death penalty that would not be sufficient to excuse for cause); Matthews v. Evatt, 105 F.3d 907, 918 (4th Cir. 1997) (solicitor entitled to judge credibility of responses). This Court has held that a "solicitor may view the entirety of the juror's voir dire responses to determine whether to accept or reject the juror, and where responses are subject to more than one conclusion, a reviewing court will not substitute its own opinion for that of the solicitor". Riddle, 314 S.C. 1, 443 S.E.2d 557, 565.

State v. Easler, 322 S.C. 333, 350, 471 S.E.2d 745, 755 (Ct.App.1996). The reason need only be race neutral. Id.

In many circumstances, attorneys attempt to "save" an unconstitutional preemptory strike by offering another non-discriminatory reason for the strike. However, the Supreme Court in Payton, supra held a racially discriminatory preemptory challenge in violation of Batson cannot be saved because the proponent of the strike puts forth a non-discriminatory reason. According to the Court in Payton, if this "dual motivation doctrine" were adopted,

[T]his Court would be approving a party's consideration of discriminatory factors so long as the sufficient non-discriminatory factors were also part of the decision to strike a juror and the discriminatory factor was not the substantial or motivating factor. However, any consideration of discriminatory factors in this decision is in direct contravention of the purposes of Batson, which was to ensure preemptory challenges are executed in a non-discriminatory manner.

Id. at 59-60, 495 S.E.2d at 210. The Court concluded that, "[o]nce a discriminatory reason has been uncovered-either inherent or pretextual-this reason taints the entire jury selection procedure." Id. Wainwright v. Witt, 469 U.S. 412 (1985).

The Court reiterated its rejection of the dual motivation doctrine in Haigler and Shuler . supra. In Haigler, the Court applied Payton to the defendant's claim one of the prosecutor's two reasons for striking a black female juror was pretextual. According to the prosecutor, the main reason he struck the juror was because she was opinionated and polarizing. His secondary reason was because of her prior jury service on an acquitting jury. The Court found the defendant did not prove a Batson violation because the struck juror and a seated juror were not similarly situated because their prior jury service was sufficiently different. Furthermore, the prosecutor's seating of other black jurors in Haigler weighed against a discriminatory intent, and the

prosecutor's reasons for striking other black females did not indicate discrimination.

In Shuler, the court found that the trial judge had made a factual mistake and that the State had legitimate, non-discriminatory reasons for striking both potential jurors, concluding that the trial judge's finding the Solicitor's reason was a subterfuge was not supported by the record, and was clearly erroneous. See State v. Shuler, 344 S.C. 604, 615-617, 545 S.E.2d 805, 810 - 811 (S.C. 2001).

ANALYSIS

The State's strike of Juror #64 revealed the prosecution's reasons were not the product of pretext, but the unique characteristics that #64 possessed unlike the potential jurors that the State did not strike. When presented with the comparison jurors at the trial, Judge Macaulay concluded that the prosecution's reasons were race and gender neutral.

A review of the stated reasons for the peremptory challenge of #64 reveals a basis why the prosecution would strike a juror with those characteristics. The Appellant attempts to focus on "Catholic" and "hesitation", but ignores the combination of factors that motivated the strike. #64 uniquely had a son who had been arrested and completed a pre-trial intervention program. #64 uniquely opined in her questionnaire that the death penalty was used "too often", #64 uniquely declared that the death penalty "does not prevent crime", #64 also uniquely expressed that her basis for believing the death penalty was used "too often" was because there were problems with people receiving fair trials and everyone has to know the law inside and out. #64 also uniquely suggested that life imprisonment is cheaper than the death penalty, unlike any other juror. The State also expressed as a basis that she had been a Catholic and the State suggested she hesitated in her responses concerning it - a hesitation that was not challenged by the court or

the defense. R., Tr. 657-58.

The Appellant's attempt to equate #64 to #104 as similarly situated must fail. As noted, it is evident that #64 and #104 were not similarly situated merely because they had each suggested they were or had been in the Catholic Church. Juror #104's responses on voir dire lead the defense to move to have the juror #104 removed for cause.⁴¹ R., Tr. 599-600. *Unlike* #64, #104 did not think the death penalty was used too often. *Unlike* #64, #104 expressed that the death penalty would be appropriate if they did it with a black heart. *Unlike* #64, #104 had no family members who had been arrested and placed in a P.T.I. program. *Unlike* #64, #104 analyzed the next step in sentencing a person to death, wondering if the Catholic Church would ban or exile her (implicitly if she sentenced the Appellant to death). This combination of factors caused the defense to seek to disqualify for cause juror #104 and the defense asserted that her responses suggested a person who was "**automatic for the death penalty.**" R., Tr. p. 599, ll. 7-10.

As Assistant Solicitor Byford acknowledged, it was not the mere fact that #64 was [or had been] a Catholic, but her responses with respect to the death penalty and Catholic Church. Contrasting #64, #104's responses on voir dire gave the defense the impression that #104 was automatically for the death penalty - in great contrast to #64 who had opined the death penalty was used too often. There is an evident and sound basis for why #64 was struck by the State and #104 was not. They are not similarly situated.

⁴¹ The attempt by defense to have juror #104 stricken for cause would have lead most prosecutors to not use a strike on the same juror with a reasonable expectation that the defense would use one of its strikes on the same juror. However, the defense did not use a discretionary strike on #104 for reasons known only to the defense.

Similarly, the comparison with venireperson #248 concerned her claimed hesitation with her responses. A review of #248 questionnaire and voir dire reveals the virtual opposite of #64. ROA 3147-3148. Unlike #64, Juror #248 declared in her questionnaire that she was completely supportive of the death penalty, along with her husband and opined it was used “too seldom.” #248 responses were in stark contrast to #64 comment that it was used “too often” and does not prevent crime. Unlike #64, #248 was Baptist and no family members had been arrested (or placed in the PTI program. Two important comments that show the stark differences between #64 and #248 were her comment that a life sentence was unfair to the victims and their family and that mercy was earned, not freely given. This is the polar opposite of the impression announced by juror #64 that the death penalty was used too often. They were not similarly situated and why the prosecution treated them different undermines any claim of pretext.

The final juror that Rivera attempts to contrast #64 with is #33, a white male without church affiliation who declared he had not thought much about the death penalty because drag racing is his deal. *Unlike #64*, who opined the death penalty was used “too often”, #33 was consistent in his written and oral responses that the death penalty depends on the circumstances of the crime. #248 Questionnaire, p. 16-17. He had no opinion on whether it was used too often or too seldom. In further contrast with #64, his responses reflected no hesitation and consistency with his position that he was qualified and the decision of death would depend on the circumstances and would be changed from life to death based upon “the action that was taken to take someone’s life.” R., Tr. 385. Contrary to the characterization by the defense at trial, the responses of #33 never expressed that it would only be in “extreme circumstances”. [R., Tr. p. 1864, ll. 1-4]. Rather, #33 consistently opined that it depended on the circumstances - the

hallmark of a qualified juror. The prosecutor noted these same characteristics of #33 when stating why he was not struck. R., Tr. p. 1864, ll. 15-24.

It is evident that “104, #248 and #33 do not support the Appellant’s claim that the reasons given by the State for striking #64. None of the venirepersons were similarly situated to juror #64. While at the time of the strike, the prosecution may not have been cognizant that #64 was Hispanic, when announcing that the potential juror was a “white female,” her written and oral responses reflected a concern about the use of the death penalty and the prosecution had a reasonable additional concern about the fact that her son had been arrested and had been in a P.T.I. program. Her responses were reflected and supported by the record. The trial court properly credited the validity of the State’s reasons as being racially neutral and not in violation of Batson. The claim must be denied where the Appellant failed in his burden of proof in the trial court as well as in the appeal.

V. **The trial judge did not abuse his discretion in concluding that the statements were voluntary and not the product of Rivera's will being overborne during the interrogation. The fact that Rivera initiated a request for the State to assure an intention to seek the death penalty, to have him housed in a private cell in Anderson County, and have an opportunity to speak with a chaplain prior to a statement and where the state made a response that it had arranged to have him meet with a chaplain and be held in a private cell in Anderson and to seek the death penalty if its investigation and evidence supported it was not under the totality of the circumstances sufficient compelling to undermine the suspect's will and clearly did not have the likelihood of stripping Rivera's capacity for self-determination.**

Further, the Petitioner cannot be heard to complain about its admission when he conceded in the opening statement the evidence would be presented concerning the statement, thereby opening the door to its admission. [Voluntariness of Statement Issue]

This is not a case about a promise of leniency. It is also not a case about police trickery or false statements. Rather it is a case where a defendant attempts to secure information from the State about his future detention, his ability to seek a chaplain and an assurance not that the state would not seek the death penalty, but rather that the state will seek the death penalty. In his fifth issue, Rivera asserts that December 21, 2006 statement was involuntary because he had confessed after he personally sought and received a promise from the Solicitor that the state would seek the death penalty if he did so. He claims that Rivera's request that the prosecution seek the death penalty suggested that his mental state was suicidal and that they were dealing with a mentally ill person. The defense misreads this record as well as the standard for determining voluntariness of statements. As will be shown below, Rivera's will was not overborne when the State merely responded to his requests about what their position would be concerning seeking the death penalty, allowing him to see a chaplain and housing him in a private cell. First, in its letter of December 20, 2006, the State clearly stated that it had already

arranged for him to have a private cell and for him to see a chaplain - *it was not conditioned upon him giving a statement in any manner*. Further, the State plainly stated that it would seek the death penalty intended to seek the death penalty as long as the investigation and evidence supported the penalty - *it was not conditioned on him giving a statement*. R., Tr. p. 99-100. Further, the request to seek the death penalty and the response by the state was plainly not a promise of leniency - to the contrary - *it was an expression to seek the penalty to the fullest extent allowable by the law*.

These are not the type of coercive promises or threats that lead to *per se* involuntary confessions. Contrary to the argument, Rivera obviously had already decided to speak with the police and give a statement and then initiated the contact with law enforcement with his proposed conditions that he receive information in writing and requested their position before the statement was actually given. The conditions set forth by the Appellant were set by him - not the state.⁴² The conditions were not a “but for” scenario made by the State. The State’s response to Rivera’s initiated request cannot be seen to be a coercive promise or threat that had a likelihood of stripping the defendant of his capacity for self-determination. Under the totality of the circumstances, the trial judge reasonably found the statements were voluntarily given. In denying the motion after a Jackson v. Denno hearing, Judge Macaulay concluded the state had satisfied the burden of showing voluntariness by a preponderance of the evidence. R., Tr. p. 137-138. The issue for relief must be denied.

⁴² Contrary to the characterization by the Appellant, the State did not agree to seek the death penalty in return for a confession. In fact, they denied his request, stating that they intended to seek the death penalty if the evidence and law allowed. This distinction was recognized by the trial judge in his decision. R., Tr. p. 138, ll. 5-10.

PROCEDURALLY BARRED DUE TO WAIVER IN OPENING.

Any alleged error in the admission of the statement in the guilt phase of the trial is barred from appellate consideration based upon the guilt phase opening statement of defense counsel Delgado. In his opening statement, counsel Delgado referenced the fact that he gave a statement to Lt. John Zamberlin after Rivera requested three things, that the Solicitor wrote back guaranteeing the things and as a result gave a statement. R., Tr. p. 1894, l. 18- p. 1896, l. 21. In the opening, Delgado stated Rivera “made a very detailed statement about what happened to Ms. Burns,” admitted putting the child on her body after she died, and admitted in the statement killing other woman in other states, although there was no evidence to support that. R. Tr. p. 1895, ll. 1-18. After the statement, Judge Macaulay declared that it seemed that Rivera through his agents had waived any right to object to the statements.

South Carolina precedent has firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel “opens the door” to that evidence. State v. Dunlap, 353 S.C. 539, 541, 579 S.E.2d 318, 319 (2003) (holding defense counsel's opening statement “opened the door to the introduction of evidence rebutting the contention that [defendant] was merely an addict”); State v. Curtis, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) (“Given that [defendants] maintained that PPS did not allow pornographic materials or links on the website, it is patent that they opened the door to this line of inquiry.”); State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) (ruling expert could testify that she believed the victim in this case because defendant opened the door by cross-examining expert about other cases in which she did not believe victim); State v. Taylor, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) (“[B]ecause appellant ‘opened the door’ about his relationship with his

wife, the solicitor was entitled to cross-examine him about the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction.”).

Furthermore, an appellant cannot complain of prejudice resulting from admission of evidence to which she opened the door. See State v. Foster, 354 S.C. 614, 623, 582 S.E.2d 426, 431 (2003) (noting one who opens the door to evidence cannot complain of its admission); State v. Robinson, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991) (“Since appellant opened the door to this evidence, he cannot complain of prejudice from its admission.”); State v. Beam, 336 S.C. 45, 53, 518 S.E.2d 297, 301 (Ct.App.1999) (“Beam cannot complain about the admission of evidence where he opened the door to the evidence.”). For this threshold reason, he cannot be heard to complain on appeal about the admission of the statement.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. *Id.*; State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct.App.2005). The appellate courts are “bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.” Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct.App.1999) (citing State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)).

The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988); State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977). The jury must determine whether the statement was freely and voluntarily given beyond a reasonable doubt. Washington,

296 S.C. at 55-56, 370 S.E.2d at 612. On appeal, the conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so erroneous as to show an abuse of discretion. State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996). When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). The trial judge must determine if under the totality of the circumstances a statement was knowingly, intelligibly, and voluntarily made. *Id.*

If a suspect was advised of his Miranda rights but made a statement, the “burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived.” Saltz, 346 at 135, 551 S.E.2d at 252. A statement is not admissible unless it was voluntarily made. State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996). Under Jackson v. Denno, a defendant is entitled to a “reliable determination as to the voluntariness of his [statement] by a tribunal other than the jury charged with deciding his guilt or innocence.” State v. Fortner, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976).

The test of voluntariness is “ ‘whether a defendant's will was overborne’ by the circumstances surrounding the given [statement]. The due process test takes into consideration ‘the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation.’ ” Dickerson v. United States, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000); State v. Aleksey, 343 S.C. 20, 30, 538 S.E.2d 248, 253 (2000). When considering the voluntariness of a statement, the court and jury should consider “not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the

defendant's maturity; education; physical condition; and mental health.” Withrow v. Williams, 507 U.S. 680, 693, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993). A promise of leniency may not, in itself, invalidate a confession; other surrounding circumstances must be considered. Brady v. U.S., 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). But see Shirley v. State, 306 S.C. 241, 244, 411 S.E.2d 215 (1991) (“Statements are inadmissible at trial when they are made involuntarily. A statement is made involuntarily when it is induced by a promise of leniency.”). Misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible. Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). “Coercion is determined from the perspective of the suspect.” Miller, 375 S.C. at 386, 652 S.E.2d at 452. The Supreme Court, in Withrow v. Williams, 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993), set forth a non-exclusive list of factors which may be considered in the totality-of-the-circumstances analysis:

Under the due process approach ... courts look to the totality of circumstances to determine whether a statement was voluntary. Those potential circumstances include not only **the crucial element of police coercion**, Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473(1986); **the length of the interrogation**, Ashcraft v. Tennessee, 322 U.S. 143, 153-154, 64 S.Ct. 921, 88 L.Ed. 1192(1944); **its location**, see Reck v. Pate, 367 U.S. 433, 441, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); **its continuity**, Leyra v. Denno, 347 U.S. 556, 561, 74 S.Ct. 716, 98 L.Ed. 948 (1954); **the defendant's maturity**, Haley v. Ohio, 332 U.S. 596, 599-601, 68 S.Ct. 302, 92 L.Ed. 224 (1948) (opinion of Douglas, J.); **education**, Clewis v. Texas, 386 U.S. 707, 712, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); **physical condition**, Greenwald v. Wisconsin, 390 U.S. 519, 520-521, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968) (per curiam); and **mental health**, Fikes v. Alabama, 352 U.S. 191, 196, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957). They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation. Haynes v. Washington, 373 U.S. 503, 516-517, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963)[.]

507 U.S. at 693-94, 113 S.Ct. 1745.

South Carolina has recognized that appropriate factors to consider in the totality-of-circumstances analysis include: background, experience, and conduct of the accused; age; length of custody; police misrepresentations; isolation of a minor from his or her parent; threats of violence; and promises of leniency. See State v. Childs, 299 S.C. at 475, 385 S.E.2d at 842 (background, experience, and conduct of the accused); In re Williams, 265 S.C. 295, 217 S.E.2d 719 (1975) (age); State v. Jennings, 280 S.C. 62, 309 S.E.2d 759 (1983) (length of custody); State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980) (police misrepresentations); State v. Smith, 268 S.C. 349, 355, 234 S.E.2d 19, 21 (1977) (isolation of minor); State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (threats of violence and promises of leniency).

Coercive police activity is a necessary predicate to finding a statement is not voluntary. Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); State v Linnen, 278 S.C. 175, 293 S.E.2d 851. Coercion is determined from the perspective of the suspect. Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990).

The Court has generally stated that a statement may not be “extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence.” State v. Rochester, 301 S.C. at 200, 391 S.E.2d at 247 (citing Hutto v. Ross, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976)). A statement “induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise.” State v. Compton, 366 S.C. 671 at 680, 623 S.E.2d 661 at 666 (S.C. App. 2005); State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001); State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987).

In Compton, the court found that nothing indicated that Compton made the statements involuntarily or based upon a promise of leniency. Rather, the evidence indicated he sought out the sheriff in order to make a deal to reduce his burglary sentence in exchange for information about a separate matter.

In Peake, the court held a defendant's statements made to an investigating officer were induced by a promise of leniency because the officer told the defendant the State would not seek the death penalty if he made a statement. 291 S.C. at 139, 352 S.E.2d at 488. However, in State v. Rochester, the supreme court found a statement made by a polygraph examiner to tell the truth was in his interest was not an inducement by a promise of leniency. The examiner's statement simply conveyed that it would be in the defendant's best interest to tell the truth. 301 S.C. at 201, 391 S.E.2d at 247. The Rochester court further noted, "[S]tanding alone, the polygraph examiner's comment did not constitute the kind of hope or reward or benefit condemned by this Court in Peake." Id.

In State v. Goodwin, 384 S.C. 588, 601-603, 683 S.E.2d 500, 507 - 508 (S.C.App. 2009), the Court of Appeals found Goodwin's statement to be voluntary. A factor in deciding it was voluntary was that Goodwin, like Rivera, initiated the discussion about sentencing and the death penalty. The court reasonably concluded that the police (or state) did not create an environment that caused Goodwin's will to be overborne under the totality of the circumstances. Accord, State v. Dye, 384 S.C. 42, 47-49, 681 S.E.2d 23, 26-28 (S.C.App. 2009) (statement to Dye that he could get help for his problems if he admitted to the charge was not tantamount to coercion). See State v. Von Dohlen, 322 S.C. 234, 245, 471 S.E.2d 689, 695 (1996) (finding fact that interrogating officer knew and was empathetic to defendant was insufficient to render statement

involuntary) (citing to Miller v. Fenton, 796 F.2d 598, 607–11 (3rd Cir.), which upheld the admissibility of a defendant's statement notwithstanding police's friendly approach, lies concerning evidence, and promises to help the defendant get psychiatric care); see also State v. Linnen, 278 S.C. 175, 179, 293 S.E.2d 851, 854 (1982) (holding that even though interrogating officers encouraged defendant to make a statement, their actions were not coercive or threatening).

The Appellant cites Bram v. United States, 168 U.S. 532 (1897) for the proposition that a confession is *per se* inadmissible “if it is obtained through promises” and “obtained by any direct or indirect promises, however slight ...” *Initial Brief of Appellant*, p. 48, 49. See also, State v. Rochester, *supra*. Although, read literally, this passage suggests a standard holding automatically involuntary any confession that was a “but for” product of a promise that might benefit the defendant. That position has long been challenged,⁴³ however, and in Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), the Supreme Court noted that such a reading of the Bram passage “under current precedent does not state the standard for determining the voluntariness of a confession.” Fulminante, 499 U.S. at 285, 111 S.Ct. 1246. The role of the promise must be evaluated in light of the totality of the circumstances and the promise must have been “sufficiently compelling to overbear the suspect's will in light of ... [those] circumstances.”

⁴³ See United States v. Rutledge, 900 F.2d 1127 (7th Cir.1990); United States v. Long, 852 F.2d 975 (7th Cir.1988); United States v. Leon Guerrero, 847 F.2d 1363 (9th Cir.1988), all discussing case law developments prior to Fulminante, which rejected such a broad reading of Bram. Consider also the discussion in Cole v. Lane, 830 F.2d 104 (7th Cir.1987), and People v. Conte, 421 Mich. 704, 365 N.W.2d 648 (1984), of the standard appropriate for promises of leniency. See generally, the pre-Fulminante cases cited and discussed in D. Nissman, E. Hagen, & P. Brooks, *Law of Confessions* § 1.12 (1985).

Id. United States v. Braxton, 112 F.3d 777, 780 (4th Cir.1997) (en banc) (“The mere existence of threats, violence, implied promises, improper influence, or other coercive police activity ... does not automatically render a confession involuntary.”); Fulminante, 499 U.S. at 288, 111 S.Ct. 1246 (holding that a confession was unconstitutionally coerced based upon the totality of the circumstances and placing special emphasis on the fact that the interrogating agent promised to protect the suspect from physical violence from other inmates in exchange for his confession); see also Payne v. Arkansas, 356 U.S. 560, 564–67, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) (holding that a confession was unconstitutionally coerced because the interrogating police officer had promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jail-house door). See also United States v. Baldwin, 60 F.3d 363 (7th Cir.1995) (at least after Fulminante, key is whether promise “made it impossible for the defendant to make a rational choice as to whether to confess”); State v. Rezk, 150 N.H. 483, 840 A.2d 758 (2004) (post-Fulminante, it important that “the nature of the police promises ... ‘clearly had the likelihood of stripping [the] defendant of his capacity for self-determination’”).

It may more generally be said that a mere threat to take action which would be lawful and necessary absent cooperation is not objectionable or an indicia of coercion and involuntariness. See, e.g., United States v. Crespo de Llano, 838 F.2d 1006 (9th Cir.1987) (defendant told if she did not reveal location of cocaine police with search warrant would have to search all areas of house); United States v. Pelton, 835 F.2d 1067 (4th Cir.1987) (threat that otherwise there would be a full-scale investigation did not make defendant's confession involuntary, as “the agents were telling him the truth about the future course that an investigation could legally and properly take”); State v. Davison, 280 Ga. 84, 623 S.E.2d 500 (2005) (defendant told if she did not

cooperate she would be arrested for her offense of giving false name to police); Henson v. Commonwealth, 20 S.W.3d 466 (Ky.1999) (telling defendant that if he did not cooperate “they would arrest Ms. Snyder for receiving stolen property and she could lose custody of her daughter,” a “true statement of fact,” not “oppressive conduct” making confession involuntary); State v. McCurry, 228 Neb. 841, 424 N.W.2d 364 (1988) (defendant told of police intent to get court order for blood and saliva samples, “a course of conduct permissible under the law”). Quite obviously, a threat that failure to talk will result in prosecution for withholding evidence is different. State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990) (confession involuntary). Compare Armstead v. State, 978 So.2d 642 (Miss.2008) (“Threats to arrest a defendant's family member(s) do not render a confession involuntary so long as probable cause exists to arrest such persons”); State v. Perez, 124 Ohio St.3d 122, 920 N.E.2d 104 (2009) (defendant's confession voluntary notwithstanding police threat to arrest his wife, as there probable cause to arrest her, and thus threatening arrest “was not a coercive tactic”). Cf. State v. Tuttle, 650 N.W.2d 20 (S.D.2002) (the “line between making threats and simply informing suspects what the natural consequences of their acts are likely to be can sometimes be narrow, but that line must remain distinct,” and was crossed here, as police improperly told defendant that if he “refused to confess, then the report to the authorities would be written to discourage any leniency”); United States v. Mendoza-Cecelia, 963 F.2d 1467 (11th Cir.1992) (officer “who informs the defendant of realistically expected penalties for cooperation and/or non-cooperation does not offer an illegal inducement”).

Initiation of Conditions by Defendant

There are a series of cases that hold that a strong factor that a statement is voluntary is

found in some cases hold that promises of leniency are not objectionable “when made in response to a solicitation by the accused.” See State v. Richardson, 316 N.C. 594, 342 S.E.2d 823 (1986)⁴⁴. See also State v. Goodwin, supra.; Ex parte Siebert, 555 So. 2d 780 (Ala. 1989); Bisbee v. State, 341 Ark. 508, 17 S.W.3d 477 (2000); People v. Mounts, 784 P.2d 792 (Colo.1990); Morgan v. State, 587 N.E.2d 680 (Ind.1992); Jacobs v. State, 787 S.W.2d 397 (Tex.Cr.App. App. 1990) (“Because appellant acted in the role of dealmaker our analysis is cast in a different light”); Drew v. State, 503 N.E.2d 613, 617 (Ind.1987) (noting “the defendant had already manifested the propensity and willingness to make a voluntary statement before the occurrence of any action on the part of the State” because the promise of immunity was in “response to a specific request by the defendant, who solicited the promises as a precondition for making a full statement”); State v. Hutson, 537 S.W.2d 809, 813–14 (Mo.Ct.App.1976) (concluding that the confession was voluntary under the totality of the circumstances, including the fact that the defendant initiated the plea negotiations); Jones v. State, 43 So.3d 1258 (Ala.Crim.App. 2007)(test of involuntariness of a confession, or other inculpatory statement, is not whether the defendant bargained with police officers but whether in his discussions with the officers, which may have included bargaining, the defendant's will was overborne by apprehension of harm or hope of favor).

In State v. Smith, 328 N.C. 99, 118, 400 S.E.2d 712, 722 (N.C.,1991), the North Carolina

⁴⁴ In Richardson defendant's confession came as a result of bargaining with police officers. Thus, the promises made did not render his confession involuntary because “[p]romises or other statements indicating to an accused that he will receive some benefit if he confesses do not render his confession involuntary when made in response to a solicitation by the accused.” Id. at 604, 342 S.E.2d at 831.

Court addressed a similar situation of initiated contact. There, the defendant testified that the sheriff asked where the “gun and stuff was at.” Defendant asked why he should tell, and the sheriff responded that defendant could get the electric chair. The court found that, according to defendant's own testimony, any benefits that the sheriff mentioned were in response to defendant's own inquiry and did not render the statement involuntary.

Other states have ruled that confessions are voluntary, despite promises made by the government where the defendant initiates or solicits the deal. In State v. Williams, 664 P.2d 202 (Ariz. 1983), the Arizona Supreme Court held that where the defendant solicited the deal, the defendant is precluded from now claiming that he was the victim of the prosecutor's compelling influences. See also Taylor v. Commonwealth, 461 S.W.2d 920, 922 (Ky. App. 1970), cert denied sub nom. Brown v. Kentucky, 404 U.S. 837 (1971) (“a confession is not rendered involuntary by a promise of a benefit that was solicited freely and voluntarily by the accused”, “here, the promise was solicited by the accused, freely and voluntarily, so they cannot be heard to say that in accepting the promise they were the victims of compelling influences.”); Eakes v. State 387 So. 2d 855 (Ala. 1978) (same); State v. Harwick, (552 P.2d 987, 990 (Kan. 1976) (“When the promises are solicited by the accused, freely and voluntarily, the accused cannot be heard to say that in accepting the promise he was the victim of a compelling influence.”); People v. Wright, 469 N.E.2d 351 (Ill. 1984) (Confession given pursuant to plea agreement negotiations initiated by the defendant held voluntary). Bivins v. State, 642 N.E.2d 928, 941 (Ind. 1994) (same).

In their brief, the Appellant cites additional cases that have held similarly - Bible v. State,

162 S.W. 3d 234 (Tx. Ct. Crim. App. 2005)⁴⁵; Ex Parte Siebert, 555 So. 2d 780 (Ala. 1989)⁴⁶, and State v. Torres, 588 P.2d 852 (Ariz. Ct. App. 1978)⁴⁷. See *Initial Brief of Appellant*, p. 51. He claims that these cases are inapposite because he oddly characterizes that Rivera's negotiations did not secure for him anything resembling a bargain. Although he suggested that obtaining a private cell and seeing the chaplain may be benefits, he suggest that requesting th solicitor to seek death cannot be seen as anything other than an act of self-harm or "suicide by cop." His rhetoric undermines his argument that the statement was involuntary. To the contrary, it suggests that the Solicitor's letter in response to his request - including a rejection that the State had agreed to seek the death penalty - cannot be seen to be a coercive promise or threat that had a likelihood of stripping the defendant of his capacity for self-determination.

How the Issue was Raised and Decided at Trial

Prior to the beginning of the trial, on February 1, 2010, a Jackson v. Denno hearing was

⁴⁵ In Bible, the court found that the defendant had acted as an entrepreneur in attempting to secure a deal for a life sentence. He was advised by the detective that because of his age, any prison sentence would result in incarceration for the rest of his life. Finding no promise that he would receive a life sentence rather than the death penalty and that the detective told defendant that he had no authority to make the a deal, the claim of involuntariness was rejected. As a matter of state law, the Texas court noted that a promise can render a statement involuntary, if it is "positive, made or sanctioned by one in authority, and of such an influential nature that it would cause a defendant to speak untruthfully.

⁴⁶ In Siebert, the court found that a its precedent that a confession is not rendered involuntary if it was made in response to a promise of a benefit that was solicited by the accused. It noted that Siebert had imposed a condition that he not be questioned about the details of a particular crime in Alabama, noting that the limitation did not originate with the officer in Tennessee. Even if viewed as a promise, the court found it did not affect the admissibility of the statement.

held concerning the admissibility of Raymondeze Rivera's statement made to Anderson Police Lt. John Zamberlin. The Appellant, through counsel, had made a "Brief in Support of Motion to Suppress Defendant's Statements Due to a Statement Being Procured by a Promise from the Prosecutor and Therefore Involuntary." ROA 3006. The State had prepared a counter brief styled "Memorandum in Support of Admissibility of Defendant's Confession June 3, 2009" ROA 2995-98.⁴⁸ During the February 1, 2010 hearing before Judge Macaulay, testimony was received from Lt. John Zamberlin of the Anderson Police Department and the Appellant. ROA 81-140. Judge Macaulay concluded that the statement was freely and voluntarily given. ROA 136-38.

The In-Camera Testimony of Lt. Zamberlin

Lt. Zamberlin testified that he was involved in the investigation of the murders of Asha Wiley and Kwana Burns, which occurred about four days apart. ROA 82. The Appellant was tracked to Douglasville, Georgia by cell phone after his number was located in Kwana Burns cell phone to someone identified as "Raymond" with a Florida area code. *Id.* The Appellant was arrested on Friday, December 15, 2006 at 7:30 p.m. ROA 82, l. 22 - p. 83, l. 1. After the arrest, Lt. Zamberlin went to Douglasville with Lt. Mike Walters and arrived around 2:45 a.m. on December 16. He attempted to speak with Rivera in an interview room at the Douglas County Detention Center. ROA 83-84. He met with the Appellant at that time from 2:44 until 2:53 p.m. ROA 84-85. After Miranda warnings were read to Appellant, Rivera asked Lt. Zamberlin why

⁴⁸ When the case was previously assigned to Judge Nicholson, a Jackson v. Denno hearing was also held on June 4, 2009. See R. 2867-2920, 6/4/2009 Tr. p. 3-56. However, no ruling was held as a result of that hearing.

he wanted to speak with him. Lt. Zamberlin told him that he was from Anderson and was investigating two homicides. ROA 86, ll. 10-13. At that point, Rivera looked downward, smiled and stated he thought he needed a lawyer. ROA 86, ll. 15-18. Lt. Zamberlin noted on his Miranda form that he had asked for a lawyer and told Rivera that he would be in Douglasville for a short time and gave him paper with his phone number on it and then left. ROA 87, ll. 6-11.

Subsequently, Lt. Zamberlin and Lt. Walters returned to Anderson and began the process of charging Appellant with murder and preparing extradition matters. ROA 88. In need of four latent fingerprint cards for extradition paperwork, Lt. Zamberlin contacted an Anderson narcotics officer to go to Douglasville to pick up print cards in Douglasville. Lt. Zamberlin stated that someone at the Detention Center had taken the prints, but when he viewed the cards he received there were omissions on the cards, and determined that they were unsuitable to submit for extradition. ROA 90-92.

Lt. Zamberlin then contacted Mike Baskins, Anderson Police Department, who agreed to travel with him to Georgia for the purpose of rolling a set of ten print cards of the Appellant and recover the red automobile that Rivera was arrested in. R., Tr. 92-93. They went to the Douglasville jail on December 20, 2006, without an intent to speak to Rivera (because he had asked for counsel). R., Tr. 92-93. When they arrived, Lt. Zamberlin stood outside the room, while Baskins was in the room taking the fingerprints. R., Tr. 94. While Lt. Zamberlin was in the hallway, he heard his name called and turned and saw Rivera. Lt. Zamberlin walked over to Rivera and Rivera told him that "he would cooperate fully, but had some requests to make." R., Tr. p. 94, ll. 19-22. Zamberlin stated he searched, but did not have a Miranda form with him, and retrieved a similar form used by Douglasville. Alone with Appellant in the room, he read Rivera

his Miranda rights off the Georgia form and it was signed by Rivera on December 20, 2006 at 11:44 a.m. R., Tr. p. 96, l. 1 - p. 97, l. 1.

Appearing to Zamberlin to have understood his rights, Rivera next told Zamberlin he was willing to cooperate fully, but had three requests that he wanted to make to the district attorneys office. Lt. Zamberlin turned over the Miranda warning paper and wrote down Rivera's three requests:

Three requests from Raymondeze Rivera to prosecutors. Number one, asking for prosecutors to seek the death penalty. Number two, in jail alone by self . . . Number three, see chaplain when he gets to jail. He's asking these things in writing to be signed by the D.A., then he will cooperate fully.

R., Tr. p. 97, ll. 15-20. After he read them back to Rivera, Rivera put an X by each and signed his name. R., Tr. p. 98, ll. 2-7. Lt. Zamberlin then told Rivera that he would check on the matter and get back to him. R., Tr. 98. Lt. Zamberlin estimated that he spent less than five minutes with him. R., Tr. p. 98, ll. 21-24. Specifically, Lt. Zamberlin denied that he promised Rivera anything that date or asked questions of Rivera about his requests. R., Tr. p. 98, l. 24 - p. 99, l. 5.

On that date, Lt. Zamberlin returned to Anderson and contacted Solicitor Adams about the requests. R., Tr. p. 99, l. 15. Solicitor Adams on December 20, 2006 provided Lt. Zamberlin with a letter to Rivera concerning his requests:

Dear Mr. Raymondeze Lamon Rivera:

It is my understanding per your request that you wish to speak to Investigator John Zamberlin regarding the deaths of Kwana Burns and Asha Wiley as long as the following three conditions are met. Number one, the opportunity to speak with the chaplain. Number two, if and when you are transported to the Anderson County,

you have requested a private cell. And number three, assurances from this office that we intend to seek the death penalty against you.

Myself along with Anderson City Police Department have made arrangements for you to meet with a chaplain upon your return for you to be held in a private cell pending trial. furthermore, this office intends to seek the death penalty against you as long as the investigation and evidence supports such a penalty under . . .the laws of the State of South Carolina.

. . .signed Sincerely, Tenth Circuit Solicitor, Chrissy Adams.

R., Tr. p. 99, l. 19 - p. 100, l. 15. (Court Exhibit 5). Zamberlin stated that he returned to Douglasville on December 21, 2006 and arrived at 10:45 a.m. approximately 24 hours after he had left.

Lt. Zamberlin stated he met in Douglasville with Lt. Layton Creamer in the same interview room as before. When Appellant entered, Lt. Zamberlin found Rivera's demeanor to be the same as before - - likeable, personable, and polite. R., Tr. p. 101, ll. 11-15. He began by reading his Miranda rights, line by line, at 10:47 a.m. Seeming to understand his rights, Zamberlin gave Rivera the Solicitor's letter and read it to him. R., Tr. p. 102, ll. 12-17. After reading the letter, Rivera responded: "are you ready to write?" R., Tr. p. 102, ll. 12-18.

Lt. Zamberlin stated that for the next four hours, Rivera gave details of the circumstances of the deaths of Kwana Burns and Asha Wiley. R., Tr. 102-103. Other than the letter, Zamberlin denied giving any promises. Further, Appellant never asked for a lawyer during this period. Although Zamberlin asked Rivera if he wanted breaks, food, or drink and the Appellant did not. Lt. Zamberlin stated that he wrote the statement because Rivera ask him to writ it. The statement

was ten pages long. R., Tr. 104.

After the statement was written, he went back over it with Rivera. Changes were made on the statement both while it was being written and after it was done and reviewed again by Rivera. R., Tr. p. 104, l. 18 - p. 105, l. 9. Lt. Zamberlin opined that Rivera was "very specific" about word choice. R., Tr. p. 105, ll. 16-21. After the written statement was completed, Lt. Zamberlin felt that he had failed to ask why he committed the crimes and Rivera explained he had been "court-ordered out of the State of Georgia and that his family was there" and the system made him do it and quoted a Bible verse about Job's suffering at the hands of Satan and being stripped of his possessions. R., Tr. p. 107, ll. 7-19.

Zamberlin asked Rivera if there was anything he wanted to relate to the victim's family. Rivera related that if he had killed Lt. Zamberlin's daughter whether there was anything he could say to make him feel better, but Zamberlin noted there wouldn't be and that was all he had to say. However, he asked Lt. Zamberlin on leaving, for copies of the obituaries from the victims. R., Tr. 108.

On cross-examination, Lt. Zamberlin confirmed that in his initial meeting with Rivera at 2:45 a.m. on December 16, 2006 that Rivera seemed to understand everything, was not under the influence of drugs, and seemed to control his mental faculties. R., Tr. 112. Lt. Zamberlin stated that he discussed with Appellant his request for counsel because at first it was unclear, but then it was very clear he asked for a lawyer. R., Tr. p. 112, ll. 5-21. Zamberlin confirmed that Rivera initiated the later conversation on December 21 and made the three requests which he then signed. R., Tr. p. 113, ll. 1-24.

Zamberlin admitted the request for the State to seek the death penalty was not one he had

encountered before. However, he did not request to have him evaluated by a psychiatrist at that time. R., Tr. p. 115-16. Lt. Zamberlin confirmed he did not discuss the reasons or importance of each of his requests or whether he had been threatened in jail previously. Lt. Zamberlin interpreted the Solicitor's letter response:

I think that my interpretation of that letter was that she promised that two of the requests could be met. The third would depend upon, I guess the facts of the case regarding the death penalty.

R., Tr. p. 118, ll. 15-18. He acknowledged that she had declared if the death penalty was possible she would seek it. R., Tr. p. 119, ll. 1-14. He confirmed that once Rivera reviewed the letter, he asked Zamberlin to begin to write. R., Tr. 120.

The In-Camera Testimony of Rivera

Rivera testified that when he was initially interviewed on December 16, 2006, he invoked his right to counsel. R., Tr. p. 123, ll. 6-8. On December 20, 2006, Rivera stated to Lt. Zamberlin when he saw him that he did not mind making a statement unless I get three things. R., Tr. p. 123, ll. 16-17. He stated he asked Zamberlin to write them down and that he wanted it from the D.A., confirming the items as written. R., Tr. p. 124, ll. 2-12.

Rivera stated that it was his position on whether he would give a statement that he wanted assurance that the prosecutor would cooperate with him and give him the three things and not on the word of Zamberlin. R., Tr. 124-25.

Rivera stated when he received the Solicitor's letter it changed his position. He stated that he was not ready to give a statement the day before (December 20) because the three things weren't promise him the day before. R., Tr. p. 126, ll. 21-24.

Rivera explained that he had served time in jail in Georgia before and considered it imperative that his safety be insured by a single cell guarantee as a ten based upon the violence he had seen in jails and prisons and known of prison killings and sexual and physical assaults. R., Tr. p. 127, ll. 5-24. He stated while at Alto Correctional Institution, he had asked to go on protective custody for his safety because he had received "rape threats." R., Tr. 128. He stated he was concerned about his own safety. R., Tr. 128.

On cross-examination, Rivera confirmed that he initiated the contact with Lt. Zamberlin. R., Tr. p. 129, ll. 15-17. He stated that Lt. Zamberlin did not attempt to talk with him nor try to get a statement from him then. Rivera confirmed that he initiated the conversation with Zamberlin and that Rivera solicited and made the three requests in writing. R., Tr. p. 130, ll. 5-8.

Defense Argument on Voluntariness.

Defense counsel McGuire argued that case law he had found concerning promises that involve physical safety support that statements are involuntary. He contended that Rivera's prior incarceration experience suggests a fear to ensure his safety which makes the statement not voluntary. R., Tr. p. 133, ll. 6-23.

The Solicitor argued that the totality of the circumstances supports admission. She relied upon case law which supports if the defendant initiates the contact, he cannot argue that he was the victim of a compelling influence. She contrasted the defense's citations where the State states if you do this, we'll promise this. R., Tr. 134.

The Trial Judge's Denial of Suppression

After argument, Judge Macaulay denied the motion to suppress. Initially, he concluded that Rivera had been advised and waived his rights under Miranda. R., Tr. p. 135, l. 8 - p. 136, l.

5. In addressing the voluntariness of the statement, Judge Macaulay declared:

- - so it all comes down to whether or not there was undue influence of reward or promise or a hope of reward. There was no promise of leniency or threat - - or maybe the threat of injury or caution or inducement of some kind. But it's hard for the Court to say that when a request is initiated by a Defendant, that somehow creates a block of any communication in response to that request. Unless the State knows of some reason that the - - and implies and instills in the Defendant's mind as to something that if you'll do this, I'll do that, it's completely initiated by the Defendant. And there's no way to know what might be in the mind of any person and why they might request it.

I don't know if they've got chaplains in Georgia correction facilities or - - certainly, if you request the death penalty, it doesn't matter what else is going to be done to you. And in fact, I would imagine in the Georgia facility, since those are the ones that he was relying on, they probably segregate the death inmates.

So I can't see how a response to a request, particularly that request that is initiated and created by the Defendant, somehow moves the element of compulsion and threat to the State. If anything, you would want the State to cooperate with the Defendant. And if he has something that he would request I think it's only right and correct to accede to those requests, particularly as I understand that the Solicitor said, particularly as to the request for the death penalty, she couldn't do that unless it was justified under the law and the facts of the particular case.

I therefore find that the statement obtained from the Defendant was freely and voluntarily given without duress, without coercion, without undue influence, promise of leniency or without threat of injury and without compulsion or inducement of any kind, and considering the totality of the facts of the statement or confession the voluntary product, free and unconstrained will of the Defendant. And although I find all these, I'm only required to find that by a preponderance of the

evidence, I do find the foregoing to be beyond a reasonable doubt. And so they will be admitted. And that will be - - and of course upon the proper proffer at the time they are offered. But they will be admitted, and that will be the ruling of the Court unless changed.

R., Tr. p. 137, l. 5 - p. 138, l. 24.

The Trial Evidence.

During the trial, Lt. Zamberlin testified similarly concerning the statement. Testimony was presented through Lt. Zamberlin that when Rivera was first arrested, he had invoked his right to counsel and the investigator stopped questioning him. R., Tr. 2039, l. 7-13. A week later, during a second fingerprinting, Rivera asked to speak with Lt. Zamberlin. R., Tr. p. 2049, ll. 9-14. Rivera told Zamberlin that he would "cooperate," and "he wanted if granted three requests by the "D.A.'s". R. Tr. p. 2053, ll. 10-11. He asked that the Solicitor promise in writing "to seek the death penalty;" that he would be housed "in jail alone by self;" and that he would be permitted to "see chaplain when he gets to jail." R., Tr. p. 2055, ll. 7-9. Zamberlin did not attempt to speak to Rivera further, but immediately called Solicitor Adams. R., Tr. p. 2056, ll. 5-16. The next day, Adams wrote a letter to Rivera stating:

Myself, along with the Anderson City Police Department, have made arrangements for you to meet with a chaplain upon your return, for you to be held in a private cell pending trial. And furthermore, this Office intends to seek the death penalty against you as long as the investigation and evidence supports such a penalty under the laws of the State of South Carolina.

R., Tr. p. 2058, ll. 12-19.

The next day, Zamberlin went to Georgia. Zamberlin stated he initially read Appellant his rights. R., Tr. p. 2059, ll. 23-25. He then gave that letter to Rivera and went over it with him.

Rivera then asked Zamberlin if he was ready to write. R., Tr. p. 2059, l. 23- p. 2060, l. 2.

At that point in the testimony defense counsel McGuire renewed his objection pursuant to the earlier Jackson v. Denno hearing. Tr. p. 2060, ll. 8-13. Judge Macaulay denied the motion. See also, R., Tr. p. 2064, ll. 3-10. The confession, State Exhibit 42 was introduced. R., Tr. p. 2064.

The statement, as introduced in the guilt phase with redactions. R., Tr. p. 2067-2071.

ANALYSIS

The trial judge's decision that the confession was freely and voluntarily entered is supported by the evidence under the "totality of the circumstances test. Since it has not been shown that the judge abused his discretion in the admission of the statement, this issue for relief must be denied.

The Appellant focuses upon limited factors in the appeal. He suggests that because he sought the unusual promise that the State seek the death penalty, that they should have felt it revealed a suicidal nature and should have stopped further inquiry. However, as revealed in the Appellant's own testimony at the hearing, Rivera's prior incarceration experience revealed his belief that life in prison was unacceptable because it was a place of sexual and physical assaults upon prisoners and that he had previously sought protective custody for his safety. Contrary to the claim that it was "suicide by cop" scenario, it was more a preference and decision by Rivera for the type of punishment he sought to receive for his crimes. This was not a situation of taking advantage of a mentally ill person as Appellant suggests. Zamberlin testified that Appellant's demeanor during both his three meetings were similar - likeable , personable and polite. R., Tr. p. 95, ll. 9-11, p. 101, ll. 11-15. See also R., Tr. p. 86, ll. 18-20 ("likeable personality"). R., Tr.

2038, 2051-52, 2060. Zamberlin testified that during the taking of the confession, Rivera did not appear to be under the influence of alcohol or drugs, did most of the talking, and did not get upset. R., Tr. p. 103, ll. 5-16. On cross-examination, Zamberlin testified that Rivera appeared to have control of his mental faculties. R., Tr. p. 112, ll. 1-2. He stated the fact that Rivera made the request to have the State seek the death penalty did not cause him to seek to have Rivera evaluated before proceeding. R., Tr. 115-16. See also R., Tr. 2134-35. Lt. Zamberlin testified that he had previously stopped an interview to determine an interviewee's well being when it was "something blatantly obvious." R., Tr. p. 2135, l. 21 - p. 2136. He described Rivera to "seem competent ... very absorbed into our conversations ... very attentive, polite, engaged." R., Tr. p. 2136, ll. 3-15. Contrary to the characterization of Appellant in his Initial Brief of Appellant, p. 50, this was not an "obviously suicidal man" because he did not try to bargain for his life or other favors.

In addition, the trial court properly relied upon the factor that Rivera initiated the contact and initiated the conditions to support a showing of voluntariness. Under the totality of the circumstances, the fact that it was Rivera who made the decision to contact the police and offer to give a statement reflects that the later statement was not the product of any coercive actions on the part of the State that caused his "will to be overborne." Similarly, the fact that Rivera initiated the three requests for information similarly supports a showing of voluntariness because it was Rivera, not the State, who produced the proposed conditions. However, it is ignored by the Appellant that the Solicitor's response was not an agreement to seek death if a statement was given, but instead a statement of her intent to seek death if the investigation and law allowed it. Importantly, none of Solicitor Adams responses were conditional upon Rivera giving a statement

or more specifically an inculpatory statement.

Viewing the totality of the circumstances, the statement was voluntarily entered. The Appellant, initially invoked his Miranda right to counsel which was scrupulously honored upon the initial attempted interrogation. Over a week later, Rivera initiates contact, waives his Miranda right to silence and counsel, and states he will give a statement if he received assurances from the Solicitor as to his requests. A day later, he receives the response from the Solicitor after he again waives his Miranda rights. Although the Solicitor failed to commit that the death penalty will be sought, Rivera tells the officer to get ready to write.

The record supports that at the time of the statement, Rivera was competent, polite, and conversational with the officers. The environment was non-coercive in an interview room where breaks and food were offered to Appellant, although rejected. Further, Rivera made corrections to the statements as it was being written and after. At no time, under the totality of the circumstances, did the methods of police and prosecutor create an environment which had a likelihood of stripping Rivera's capacity for self-determination. Nor is there any indication that the letter from the Solicitor "critically impaired" Rivera's "capacity for self-determination," Braxton, 112 F.3d at 780 (internal quotation marks omitted), or that Rivera's will "was overborne in such a way as to render his confession the product of coercion," Fulminante, 499 U.S. at 288, 111 S.Ct. 1246; cf. Braxton, 112 F.3d at 782 (noting that "[a]dmonishing a suspect to tell the truth during an investigatory interview" by advising him of potential consequences of failing to tell the truth "does not constitute coercive police conduct rendering a statement involuntary."). To the contrary, Rivera's actions reflect that at all times he was in control of his destiny on whether he gave a statement or not. The argument otherwise is without merit.

VI. The trial judge did not abuse his discretion in excluding the introduction of evidence of a notation in S.C.D.C. records of bipolar disorder where he found the introduction misleading and where no expert was offered to testify who had evaluated Appellant and had an opinion that Rivera suffered from bipolar disorder. Although he also found that an appropriate expert would be someone with a medical degree to give such an opinion, any error, if any, was harmless because none of the proffered witnesses reported that they had diagnosed Rivera with that particular mental disease and the witnesses were not otherwise from presenting other mitigating evidence of the defendants concerning his mental and emotional deficits. [Bipolar Disorder Notation]

This issue is not as a cursory reading of the Appellant's brief would suggest. It is not about a refusal by the trial judge to admit actual opinions from either Dr. Loring or Dr. Cooper-Lewter that Raymondeze Rivera suffered from the mental condition of bipolar disorder. Rather, in fact, it is only a refusal of the trial court to admit, through either Dr. Cooper-Lewter and Dr. Loring, a notation in the records of the S.C.D.C. of bipolar disorder by a Masters in Education and likely bachelor in social work. There was never a proffer by either Dr. Cooper-Lewter or Dr. Loring that they would testify to a reasonable degree of certainty in their field that Rivera had "bipolar disorder." To the contrary, at the sentencing proceeding and during the proffer, defense counsel Delgado expressly stated that he had not asked Dr. Cooper-Lewter to diagnose Rivera or present an opinion that Rivera actually suffered under bipolar disorder. See R., Tr. p. 2593, l. 24 - p. 2594, l. 4; R., Tr. p. 2594, ll. 15-16; R., Tr. p. 2597, ll. 15-16; R., Tr. p. 2609, ll. 6-12. As counsel Delgado tried to make clear, it was his intent only to have Dr. Cooper-Lewter state that he saw the notations in the S.C.D.C. prison records. As to Dr. Loring, the proffer was similar. R., Tr. p. 2627, ll. 6-14.

In his sixth argument, the Appellant asserts error in the refusal of the trial judge in the penalty phase to "admit proof that qualified mental health professionals had diagnosed Rivera

with serious mental illnesses on the basis that the witnesses did not hold medical degrees.” He contends that this precluded an intended presentation, supportive of admitted evidence of a troubled and abusive upbringing, that he had a diagnosed mental illness – bipolar disorder, which they contend that they intend to show to explain his commission of the crime and “his self-destructive conduct at trial.” Initial Brief of Appellant, p. 52. The problem with this assertion is that it is not what they intended to present. There is no proffer in this record that either Dr. Cooper-Lewter or Dr. Loring had an opinion that he had bipolar disorder. As shown below, Dr. Cooper-Lewter was not restricted concerning his testimony about his observation of the existence of an emotional or mental disturbance and mood swings, depression, and elation. R., Tr. 2612. For the reasons set forth below, the exclusion of testimony concerning the S.C.D.C. notation of “bipolar” does not require a new sentencing hearing.

In the proffer of Dr. Cooper-Lewter, the defense presented him with a document from the S.C. Department of Corrections that reflected Ms. Pamela Whitney, a master in education and Pete Carter, a social worker, references Axis I “bipolar disorder” and similar reference by S.C.D.C. doctor, Dr. Politeman, a psychiatrist. R., Tr. p. 2606, l. 3 - p. 2619. Court Exhibit 15. As Dr. Cooper-Lewter stated: “I was not asked to give a diagnosis in this case, but I was asked to make use of my training to better understand the client.” R., Tr. p. 2603, ll. 11-15. Respondent submits that a new sentencing hearing is not required by its exclusion.

STANDARD OF REVIEW

The admission of evidence is left to the sound discretion of the trial judge whose decision will not be reversed on appeal absent an abuse of discretion. State v. Northcutt , 372 S.C. 207, 219, 641 S.E.2d 873, 879 (2007). “Although relevant, evidence may be excluded if its probative

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE. The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (S.C.,2011).

During the sentencing phase of a capital trial, the defense must be able to present mitigating evidence on “any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality)); State v Northcutt, 372 S.C. at 221, 641 S.E.2d at 880. The jury is entitled to hear this evidence so that it may “give a ‘reasoned moral response to the defendant's background, character, and crime’ ” and prevent it from reacting out of an “unguided emotional response.” Penry v. Lynaugh, 492 U.S. 302, 328, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (quoting Franklin v. Lynaugh, 487 U.S. 164, 184, 108 S.Ct. 2320, 101 L.Ed.2d 155 (O'Connor, J., concurring)), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). However, Eddings does not limit a court's ability to exclude evidence not bearing on the defendant's character, his prior record, or the circumstances of the crime as being irrelevant. 438 U.S. at 604 n. 12, 98 S.Ct. 2954; State v. Dickerson , 395 S.C. 101, 121-122, 716 S.E.2d 895, 906 (2011).

In State v. Mercer, 381 S.C. 149, 161, n. 7, 672 S.E.2d 556, 562, n.7 (2009), this Court reminded the bench and bar of the importance of a meaningful mitigation defense and,

concomitantly, the ability of a capital defendant to fully present mitigation evidence, citing Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) (relying in large part upon Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), this Court determined that counsel's failure to adequately investigate and present mitigating evidence resulted in the ineffective assistance of counsel requiring a new sentencing hearing). The Court stated "[T]he trial courts, vested with considerable discretion in evidentiary matters, must not neglect the due process implications involved in a capital defendant's right to present mitigation evidence. State v. Mercer, supra.

How the Issue was raised at trial.

In his brief, the Appellant refers to the fact that in his opening statement in the guilt phase where defense counsel previewed the evidence for penalty phase with this comment:

MCGUIRE: . . . can we make any sense of that? No you can't. And no you won't. And the reason for that is that he is mentally ill. He suffers from bipolar disorder. While you were here in the jury room . . . he was taking medicine that law enforcement was giving him. It's called Seraquel. He takes it twice a day. He has a major mental illness, and he takes an anti-psychotic medicine twice a day for that illness.

Tr. p. 1893, ll. 11-25. He referred to this diagnosis a second time during his argument:

If a woman turns her back on him, he takes that, because of his mental illness, his bipolar disease, to such a level, he thinks that it is a complete refutation of who he is. And he becomes another person. And that's what we intend to show you happened on December 13th and the morning of the 14th of December.

R., Tr. p. 1893, l. 22 - p. 1896, l. 3.

During the guilt phase, the defense did not put up any evidence in defense. Particularly,

no mental health professionals testified. At no time was any showing made or attempted to satisfy the “guilty but mentally ill standard.”

A. Dr. Arlene Andrews - Expert in Family History Assessment.

Dr. Arlene Andrews, a social worker and psychologist, testified concerning her assessment of Rivera’s social history. She was qualified as an expert in family history assessments. R., Tr. p. 2491, ll. 6-17. She opined that she found evidence that Rivera “suffered from a very serious emotional and behavioral disturbance, and that was evident even when he was a tiny child. It evolved into a mental disorder that’s been exacerbated, or increased by the fact that he experienced extreme physical abuse and very persistent psychological abuse throughout his developmental years. R., Tr. p. 2494, l. 23 - p. 2949, l. 4. She stated that he comes from a family that had a pattern of serious mental illness problems, particularly with handling stress and anxiety. R., Tr. p. 2496, ll. 23-25. She described in detail the history of the family illnesses and anecdotal information concerning the physical abuse that the Appellant received throughout childhood, with the use of a family tree. She stated this gave him a high risk of developing a mental illness. R., Tr. p. 2497. Her themes were a life of broken attachments, yearning for affection, a life of fear and pain, trying and failing developing shame, and chaos and order that becomes disorder. R., Tr. p. 2514-2515. She described the hyper-vigilance evidenced by a school teacher that is prevalent in physically abused children. R., Tr. p. 2522, ll. 10-14. Her testimony presented his history of severe beatings as a child. R., Tr. p. 2516-2521. During her testimony, Dr. Andrews was describing his series of bouts of domestic violence that he had with Renee. She described his discussions with Renee about his temper and attempt at anger management. She also testified about evidence of “repressed emotions” present in his history and

the support of it for abuse. R., Tr. p. 2528-29.

Dr. Andrews stated “anger management is for people who have a simple anger problem or need to learn some communication skills. He had a profound disability.” R., Tr. p. 2543, ll. 19-23. At that point, the prosecutor objected stating: “I’m okay with her testifying as to themes and social history, but she has not been qualified as an expert in what might be wrong with him. And I’m going to object to any testimony about any disability or diagnosis—.” R., Tr. p. 2544, ll. 1-6. Defense counsel moved on.

B. Dr. Nicholas Cooper-Lewter - Expert in Trauma in African American Males.

1. The Objection to the “Bipolar” Reference in the S.C.D.C. records.

Dr. Cooper-Lewter, a psychologist and social work lecturer testified. During his testimony, Dr. Cooper-Lewter was asked by the court to stay within the expertise of the witness, after an objection when he was describing Rivera’s prescriptions at the prison. R., Tr. p. 2591-91. When he stated that Rivera had told him that he had been diagnosed with bipolar disorder, the prosecution objected. R., Tr. p. 2592, ll. 13-15. The prosecution argued that Dr. Cooper-Lewter was not qualified to diagnose Rivera with any mental illness. R., Tr. p. 2592, ll. 16-18. Judge Macaulay responded that it was a medical condition that requires expert testimony. R., Tr. p. 2592, ll. 23-25. When counsel asked Dr. Cooper-Lewter if he had seen “diagnosable conditions” in his interviews with Rivera, another objection was made. R., Tr. p. 2593, l. 6.

The solicitor asserted that the witness was not qualified to diagnose Rivera as bipolar. She stated that he was qualified as an expert in trauma in African-American males. R., Tr. p. 2593, ll. 17-23. Accord, R., Tr. p. 2584, ll. 4-6. She stated that expertise did not qualify him to diagnose Rivera as “bipolar”. R., Tr. p. 2593, ll. 22-23.

Counsel Delgado urged that Dr. Cooper-Lewter was not being asked by him to diagnose Rivera, but only refer to records that he had seen in the prison that showed that he was diagnosed as bipolar and given medicine for it. R., Tr. p. 2593-94. Judge Macaulay stated that he was concerned that the witness could state what effect trauma had on the individual, but to say River is bipolar would be misleading (when based upon the notation). The trial court stated Dr. Cooper-Lewter was not offered as a psychiatrist or someone in the medical field who would be able to diagnose a medical condition. R., Tr. p. 2594, ll. 21-25.

After a break, counsel made a proffer concerning his question of Dr. Cooper-Lewter concerning the bipolar diagnosis that had been given Rivera by the Department of Corrections. R., Tr. p. 2596, ll. 5-22. He stated the information from S.C.D.C. was admissible under Mills v. Maryland, 486 U.S. 367 (1988) because the sentence not be precluded from considering as a mitigating fact or any aspect of the defendant's character or record. *Id.*

The Court discussed that bipolar disorder is not related to trauma, the witness' expertise. R., Tr. p. 2598. He stated that many groups of professionals suffer from bipolar that is unrelated to any trauma. He declared that was why you need an expert to diagnose it. R., Tr. p. 2598, ll. 6-7.

However, counsel Delgado attempted to clarify that he was not trying to have Dr. Cooper-Lewter diagnose River with bipolar disorder, but only to have him describe mood swings, depression, then elation experience by Appellant. R., Tr. p. 2597, ll. 15-18.

Judge Macaulay stated that the fact that bipolar was mentioned in a prison record does not affect the ability of the witness to establish it as causation. R., Tr. p. 2698, ll. 11-14. The court stated that the fact it is mentioned in a record does not affect the witness's his ability to establish

the cause of the condition. Judge Macauley stated that he had no problem with Dr. Cooper-Lewter testifying that he is mentally or emotionally disturbed as to the age and mentality at time of the crime. In particular, Dr. Cooper-Lewter had a Ph.D. in psychology and Masters in Social work. R., Tr. p. 2602, ll. 6-7. He stated he was licensed in South Carolina to give diagnosis in the area of social work. R., Tr. p. 2601. He said that he was **not** allowed to diagnose psychiatric or medical conditions. R., Tr. p. 2602, ll. 17-20. He stated that he is limited to diagnosing emotional disorders. R., Tr. p. 2602, ll. 14-16. When asked if bipolar or manic depression is a diagnosable medical condition, Dr. Cooper-Lewter stated:

It is a diagnosable medical condition if a medical practitioner so diagnoses it. It is also a statement of mental health. And therefore, as a social worker, licensed, one can – I teach psycho pathology. My students have to know what different diagnoses mean and different - - and how to recognize things so that they can better talk to and work with clients. We do not – we’re not doctors in the sense of the medical. And you’re correct. But we do have the right to, for instance, an adjustment disorder, 309.28, very common.

I’ve been in private practice almost thirty years and insurance companies require that I provide a diagnosis for those who I treat. I was not asked to give a diagnosis in this case, but I was asked to make use of my training to better understand the client.

R., Tr. p. 2600, l. 25 - p. 2601, l. 15.

Dr. Cooper-Lewter then testified in camera, that he had **never** diagnosed **any** client with bipolar disorder. R., Tr. p. 2604, l. 1.⁴⁹ He stated that he was allowed to see the symptoms of bipolar, but would refer them to a physician. R., Tr. p. 2604, ll. 12-16. In camera, he stated that he saw in the S.C.D.C. records diagnosis for bipolar disorder from a masters in education and a

⁴⁹Obviously, this answer speaks for itself that Dr. Cooper-Lewter did not diagnose Raymondez Rivera with “bipolar disorder” whether or not he was qualified to do so.

social worker. R., Tr. p. 2606, ll. 7-17.

After the completion of the in camera proceeding, counsel Delgado inquired of the parameters of the court's ruling. Counsel stated that he did not ask for a diagnosis of bipolar disorder, but only ask whether or not he had ever seen mood swings with the defendant. Judge Macaulay stated that those were matters that could be asked of the witness because it fell within his area of expertise. R., Tr. p. 2609, ll. 13-14. As the court stated: "I'm not limiting the testimony in any way to those things that are relevant and that would be as to matters of mitigation under § 16-3-20(d)(2) and (7)." R., Tr. p. 2609-10.

Judge Macaulay then directed to the jury the following after instructing that the witness was qualified as an expert in trauma in African American males and is therefore not qualified to testify as to any alleged physiological or medical condition:

...disregard the witness' last statement regarding any alleged bipolar disorder. Such testimony regarding any alleged physiological or medical condition requires an expert witness qualified in that particular field. The witness...is not qualified to testify as to any alleged physiological or medical condition. Therefore, the last statement by the expert witness...should not be considered for any purpose during your deliberations.

R., Tr. p. 2611, ll. 6-19.

2. *Dr. Cooper-Lewter's Sentencing Testimony.*

At that point, Dr. Cooper Lewter testified in detail about his personal observations of Rivera's mood swings, describing Appellant in his sessions with him as "very manic, very agitated, had racing thoughts, not able to take his mind off certain things," with difficulty to focus and yet on other occasions was "deeply depressed, suicidal and wanting to die" all within the space of a week. R., Tr. p. 2611, l. 24 - p. 2612, l. 14. He described the events as he was

growing up with sexual abuse and beatings, fearing that he would be killed by his father. R., Tr. p. 2612-13. He described the lack of a positive male role model in his life and his image of the world as a threatening and dangerous. R., Tr. p. 2614.

He described how Rivera's present demeanor is a reflection of his problems in appearing to have a tough exterior, described in the African American community as a "cool pose." Dr. Cooper-Lewter stated that this experience of appearing to act as if nothing bothers you was to counteract the fact that it was not really the case. R., Tr. p. 2616, ll. 18-24. He stated that Rivera had fear for his own safety and has shame.

He described his visits with Rivera in prison and learned from him about his experience in another prison when a young man was raped and killed which led Rivera to ask for protection. R., Tr. p. 2618, ll. 14-18. He stated that Rivera would always ask him to check the hallway to be sure no one was there and he would walk on the wall side to protect himself. R., Tr. p. 2618, ll. 20-25.

Dr. Cooper Lewter also described meeting with Sheena Scott, the Appellant's mother who described an event when she attempted to kick him out of the house when he was 29 and she was screaming at him and she physically reached up to grab him in his throat, and Rivera merely stood there and cried and never touched her. R., Tr. p. 2620, ll. 15-22. Dr. Cooper-Lewter described this removal event as profound in that he just stood there and cried, suggesting to him that he wanted his mother's love, but also felt betrayed. R., Tr. p. 2621, ll. 5-10. She described to him that her son was just a boy who lives in a man's body and he cannot get out of his childhood. R., Tr. p. 2621, ll. 16-18. He stated that on August 14, Rivera had an event that he "flashed on his mother" and could not get her out of his head by envisioning her. R., Tr. p. 2622, ll. 3-23. Dr.

Cooper-Lewter described the flash about his mother as someone who abandoned Rivera and continues to abandon him. R., Tr. p. 2622, ll. 21-25.

C. Dr. Marti Loring - Expert in Trauma and Development.

1. The Issue of Her Expertise To Diagnose.

Counsel Delgado stated that they would be calling Dr. Marti Loring who will also qualify as a trauma and developmental expert. R., Tr. p. 2627, ll. 6-14. He stated that he raises the same question relating to bipolar disorder and the Court's reluctance and ruling not to allow that with Dr. Cooper-Lewter. He stated that Dr. Loring had a degree of Doctor of Sociology. R., Tr. p. 2627. Judge Macaulay stated that the S.C.D.C. notations were made by a masters in education and maybe a bachelor in social work. R., Tr. p. 2628, ll. 1-13. Judge Macaulay stated that Dr. Loring can talk about what the manifestation of bipolar means in her field. R., Tr. p. 2628, ll. 10-16. But he stated that unless she is competent to diagnose bipolar and treat it, I am not sure it's not anything else but what the notation might be. R., Tr. p. 2629.

Dr. Loring was called in camera. She stated that she had a B.A. with a major in psychology, a masters in Social Work and Social research and a Ph.D. in Sociology with a major in social psychology. R., Tr. p. 2630, ll. 6-13. She stated that she did evaluations of individuals, some who suffer from trauma or abuse or developmental issues. She also stated that she had written in trauma journals. R., Tr. p. 2630-31. Counsel Delgado then stated his intent was to determine whether or not she was qualified to discuss the diagnosis of bipolar disorder. R., Tr. p. 2631, ll. 4-8. At that point, Judge Macaulay inquired whether her Georgia license allowed her to include a diagnosis of physiological and psychiatric conditions, and Dr. Loring responded that she was qualified to do psycho-social evaluations, through the use of the diagnostic manual,

DSM IV-TR. R., Tr. p. 2631, ll. 19-20. She clarified that she diagnoses bipolar conditions, but does not prescribe medications. R., Tr. p. 2631-32. She stated that she could do emergency admissions for a bipolar person who threatening themselves, but admitted that it was done not because they were bipolar, but because of the threat. R., Tr. p. 2632, ll. 20-25.

Judge Macaulay stated that if they wanted to get bipolar in to put up a physician or psychiatrist to do it because it is a medical diagnosis. R., Tr. p. 2632, ll. 22-25. Dr. Loring then stated that she was qualified if a psychiatrist or doctor had already prescribe the bipolar diagnosis to take that into account in describing other things in the person's life related to their social history. R., Tr. p. 2633, ll. 7-13. Counsel Delgado stated his objection to the ruling would be the same as it was for Dr. Cooper-Lewter. R., Tr. p. 2633, ll. 17-23.

Judge Macaulay then entered into a discussion with Dr. Loring about the fact that bipolar disorder is a medical condition. Dr. Loring stated it was a mental disorder as part of the D.S.M. IV-R. She stated that there were so many mental conditions and bipolar is a mental condition, but having it would not necessarily qualify the person as mentally ill. R., Tr. p. 2635-36.

Judge Macaulay concluded that the bipolar diagnosis that was made in the S.C.D.C. records was not made by a person trained in medicine, so therefore the reference to bipolar will be excluded. R., Tr. p. 2636, ll. 16-21. Judge Macaulay stated that if the defense wanted to broach the conditions that affect what bipolar or manic depression is, then they have to do it with someone who is qualified. However, that leaves everything else open, that Dr. Loring can testify about those mitigating elements that the statute provides. R., Tr. p. 2636-37. He clarified that the witness would not be limited to testifying as to whether or not there was influence of mental or emotional disturbance or age and mentality. R., Tr. p. 2637, ll. 12-16.

2. *Dr. Loring's Presentation before the jury.*

Before the jury Dr. Loring testified as an expert in the area of trauma and development. R., Tr. p. 2655. She stated that she was asked to evaluate Rivera and described her review of historical data from school records, prison records, police records and hospital records, Job Corps, Salvation Army records and her interviews with collateral witnesses, including family. R., Tr. p. 2657-58.

Dr. Loring used various charts before the jury. First, she presented a "Trauma Family Genogram" to show the strong relationship to Rivera. R., Tr. 2660. This chart was used to show the very severe physical abuse perpetrated upon Rivera by his father Stanley. R., Tr. p. 2662, ll. 4-8. It also showed the abandonment by his mother, Sheena Scott. R., Tr. p. 2662, ll. 9-14. Further, it showed the physical abuse perpetrated upon Rivera by his grandmother, Elizabeth Rivera. R., Tr. p. 2662, ll. 15-20. Concerning his step-sister Teresa and stepmother Elaine, it showed the emotional abuse towards Rivera where they would advise Rivera that his father would be coming home and would beat him, in addition to Elaine beating him. R., Tr. 2662-63. Dr. Loring described Rivera having welts from the beating which would be scrubbed to try to stop the bleeding. R., Tr. p. 2663, ll. 13-18. In addition, it showed that Rivera was also beaten by Sheena's husband, including slinging him against a car or wall. R., Tr. p. 2663, l. 20 - p. 2664, l. 5. The chart, Exhibit 11 [Trauma Family Genogram], was admitted without objection.⁵⁰

Dr. Loring next used a "Trauma Chart." R., Tr. p. 2664, ll. 22-23. She stated this chart attempted to use a time-line. she stated that Rivera had "a huge amount of traumas." R., Tr. p.

⁵⁰ Grandma Cousins was not on the chart because she was sweet and kind to the Appellant and not able to see him when he was beaten. R., Tr. p. 2664, ll. 6-13.

2665, ll. 5-6.

She first described “the profound neglect.” She described information she had that he had gotten food poisoning from eating out of garbage can, that he was left at a hospital by his mother, a crack addict, when he was two. R., Tr. 2665. After age two when living with family, the Appellant would wait for his mother on visitation days, but she would rarely show up. R., Tr. 2666. Further, at age three, beatings from his grandmother Rivera began who was “a very angry person.” R., Tr. p. 2666, ll. 14-15.

Dr. Loring reported on the ritualistic emotional abuse that Appellant received after age three when he was reported, sometimes falsely to have done something, and the father would be advised and to expect a beating when he came home. R., Tr. 2667-68. Dr. Loring stated that this developmentally created a difficulty for Rivera to wait for outcomes. R., Tr. 2668. She reported on the circumstances of Rivera laying in wait in his room to be beaten. R., Tr. p. 2668, ll. 1-24. Rivera was described by his brother, who suffered less severe beatings, that Rivera would not cry. R., Tr. 2668-69.

Dr. Loring emphasized these beatings were severe and included “weight belts”, being stripped, and also striking the genitals. R., Tr. 2670. She described the bleeding required him to stuff Kleenex in his pants before he went to school. R., Tr. 2671.

This extraordinary physical abuse affected his behavior at school, including an inability to focus, sit still, or concentrate. R., Tr. p. 2671, ll. 9-16.

When Rivera was locked up, his hands were oftentimes tied up with a rope by his father. R., Tr. 2671-72. Sometimes he was left in the basement for days at a time. R., Tr. p. 2672, ll. 1-9. She opined this lead to a life pattern of “anger explosions.” R., Tr. p. 2672, ll. 9-19.

She described Rivera running from home after his father threatened to kill him. R., Tr. p. 2672, ll. 20-25. Upon return to school, he began "giving up" and getting bad grades. There was evidence that he would be bullied at school and being chased by others with nails sticking on the ends of boards. R., Tr. p. 2673, ll. 3-10.

Family members reported Rivera having flashbacks as he slept where he stated for his father not to beat him and saw evidence of the beatings. R., Tr. 2673-74.

The beatings were not limited to home. She described the effect school reports of lack of concentration resulted in the father coming to school and beating Rivera in the classroom with fists. R., Tr. p. 2674, l. 19 - p. 2675, l. 10. The school considered Rivera to have attention deficit disorder and hyperactivity. R., Tr. p. 2675, ll. 1-13.

She stated at age 14, he moved to Florida to be with his mother, after his father had threatened to kill him. R., Tr. p. 2675, ll. 14-20. However, he in another environment of violence where his mother was being beaten and then Rivera would be beaten. He eventually returned home.

Dr. Loring stated that Rivera was sexually abused by his pastor. R., Tr. 2676. In addition, when he was in prison in Georgia, a prisoner was raped and killed and Rivera was threatened with sexual assault and placed in isolation to protect him. R., Tr. p. 2676, ll. 8-20. Rivera also had fear of prison from his uncle Arnaldo who had been raped several times and then threatened to kill his grandmother after he was released. R., Tr. 2677.

Dr. Loring stated she learned from family that Rivera would try to do well and then snap and become angry, especially if abandoned or rejected. R., Tr. 2677.

Dr. Loring used another chart, styled "Trauma Life Cycle" which starts with being

abandoned at hospital and then repeats itself. R., Tr. 2677-78. She stated it showed repeating patterns of abandonment (R., Tr. p. 2678, ll. 1-5), being beaten by father and locked up (R., Tr. p. 2678, ll. 5-12), ritualistic abuse (R., Tr. p. 2678, ll. 12-14),⁵¹ attention deficit disorder, exposure to pornography showing rapes and women being tied up (R., Tr. p. 2678, l. 20 - p. 2679, l. 10), lack of protection (except for Grandma Cousins) and lack of support (R., Tr. p. 2680, ll. 1-16), sexual abuse (R., Tr. 7-16), hyper-vigilance (R., Tr. p. 2680, ll. 17-24), rejection (R., Tr. 2680-81), and struggle for self-control. R., Tr. 2681-82.

In response to the lack of supportive evidence that school teachers reported the abuse, Dr. Loring based upon her information found that it was amazing that the beatings were not reported in either school or police records. R., Tr. p. 2683, l. 4 - p. 2684, l. 4.

In her seven hours of meeting with Appellant, Dr. Loring confirmed that she saw alternating moods within periods of time. R., Tr. 2683-86. She described him as being more anxious as he described his father's beatings, then would stare off into space. Sometimes, his mood would change and he would be depressed, and stare down at the floor. Other times, he would appear frightened, with shaking hands. R., Tr. p. 2685, l. 7 - p. 2686, l. 9.

Dr. Loring stated Rivera had revealed to her his fear of his personal safety and protection. R., Tr. p. 2686, ll. 12-20. she said he feared being in prison based upon what happened to his uncle and had problems with trust to the day. R., Tr. p. 2686, l. 18 - p. 2687, l. 9.

On cross-examination, Dr. Loring confirmed that there were no police reports, no DSS reports, and no school records that showed any abuse. R., Tr. 2696-97.

⁵¹ Dr. Loring had on her chart "bipolar disorder", which she left out and was removed. R., Tr. p. 2678, l. 15. See also, R., Tr. p. 2698, l. 20 - p. 2699, l. 2.

D. Jury Instructions

In his jury instructions, Judge Macaulay instructed:

murder was committed while the defendant was under the influence of mental or emotional disturbance, the age or mentality at the time of the crime. ... any other non-statutory circumstances to include mercy. . . the Defendant's adaptability to prison life as well as any other non-statutory mitigating or extenuating circumstances.

R., Tr. p. 2788, ll. 1-13.

ANALYSIS

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that the Eighth and Fourteenth Amendments require that the sentencer in a capital case “not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” Id. at 604, 98 S.Ct. 2954. The Court later explained “the corollary rule that the sentencer may not refuse to consider or be precluded from considering ‘any relevant mitigating evidence.’ ” Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (quoting Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)). The Court has used broad language to describe the relevance standard, observing that the meaning of relevance in the mitigation context is not unlike the meaning of relevance in other contexts; it is “evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” Tennard v. Dretke, 542 U.S. 274, 284, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) (quoting McKoy v. North Carolina, 494 U.S. 433, 440, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)). The precise application of that broad

language, however, is not always clear, and courts have acknowledged that there is “little guidance on what constitutes relevance for Lockett purposes.” Sweet v. Delo, 125 F.3d 1144, 1158 (8th Cir.1997). The Lockett line of cases has focused on the categorical exclusion of certain types of mitigating evidence. See Sweet, 125 F.3d at 1158 (collecting cases).

Respondent agrees that a diagnosis of a mental condition may be mitigating evidence in a capital case. This does not relieve the obligation to present competent evidence and evidence that satisfied Rule 403 as not being misleading, conflicting or confusing. The trial court was correct in requiring evidence of a defined mental condition to be presented by a qualified examiner whose opinion and the reliability of the opinion could be tested. Instead, the Appellant opted to present the matter as either a self-report by the defendant to a witness that he had been told he was “bipolar” or by stating that a third party saw in the prison records a reference to “bipolar disorder.”

The jury was presented with three expert witnesses in social work who specialized in “family tree assessments,” “trauma among African America males,” and “trauma and development.” Each were not restricted in any manner in their presentation about their findings and conclusions of the existence of mental and emotional conditions on the part the Rivera that found, including identifiable symptoms of mood swings, “very manic, very agitated, had racing thoughts, not able to take his mind off certain things,” and difficulty to focus and yet on other occasions was “deeply depressed, suicidal and wanting to die.” None of the witnesses were presented with an intent to offer their own opinion about bipolar disorder - just that they had seen it in the records. The trial judge also allowed the jury’s consideration of these factors which were emphasized in the statutory mitigating instructions of mental and emotional disturbance and age

and mentality instructions.

A. Evidence of the S.C.D.C. “Bipolar Disorder” Notation Was Properly Excluded Under Rule 403 As Misleading.

This case, however, involves a somewhat different issue that Appellant’s brief suggests: namely, the extent to which a trial judge may, when there are no categorical limitations on mitigation evidence, exclude testimony because of its apparent lack of probative value and hearsay concerning the existence in a prison record of a reported diagnosis of bipolar disorder where there is no expert witness presented to testify that upon his own evaluation the defendant suffers from the mental disease styled as bipolar disorder. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues....” Rule 403, SCRE. “Unfair prejudice means an undue tendency to suggest decision on an improper basis.... [T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case.” State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). “A trial court’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” State v. Caldwell, 378 S.C. 268, 287, 662 S.E.2d 474, 484 (Ct.App.2008): State v. Bixby, 2011 Westlaw 3568541, 4 (S.C.App. 2011).

What the Appellant apparently sought to do is to treat the mere “notation” in the record as the conclusive opinion without calling the actual mental health professional who created the information, such as the masters in education, social worker or Dr. Poiletman.⁵² or present any

⁵²During the pretrial hearings, Dr. Schwartz-Watts testified that her provisional opinion was that he suffered from post-traumatic stress disorder, but noted in the medical history that it had been reported that had received a diagnosis of “impulse control disorder” (Dr. Dalal),

qualified expert who had the same opinion. Judge Macaulay concerning that attempted presentation as “misleading” and refused its admission. Instead, he required that for a diagnosis of bipolar disorder to be presented, it would have to be presented by a qualified expert who necessarily held that opinion.

The Supreme Court has addressed this issue only indirectly. In Skipper, the Court held that evidence of a defendant's positive adjustment to pre-trial incarceration could not be categorically excluded from the sentencing decision, but it also stated that not “all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating.” 476 U.S. at 7 n. 2, 106 S.Ct. 1669. As one example, the Court suggested that the frequency of the defendant's showers would be irrelevant. *Id.* Similarly, in Tennard the Court stated that it had “never denied that gravity has a place in the relevance analysis, insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability.” 542 U.S. at 286, 124 S.Ct. 2562.

The trial court's conclusion that the prison record “bipolar” notation was inadmissible as misleading was not an abuse of discretion. The Appellant was not seeking to present it as merely something reported in the prison records, but as evidence in the brief, it was their intent to suggest the notation was conclusive proof that Rivera suffered from bipolar disorder. Contrary to the claims of Appellant, the trial court, in its discretion was not excluding an opinion from a testifying expert that Rivera suffered from bipolar disorder. He was merely stating that the mere notation was insufficient and expert testimony on the issue was required. As stated above, Dr.

“malinger” (Dr. Cross), and “bipolar disorder” (Dr. Poiletman). 5/27/2009 Tr.p. 10, l. 20- p. 21, l. 7.

Cooper-Lewter expressly stated that he did not have an opinion that Appellant suffered from bipolar disorder and counsel Delgado actually conceded that he did not intend to produce that information from him. Similarly, counsel asserted the same basis to attempt to present the SCDC materials through Dr. Loring, but the Court again found that insufficient. Simply put, there was no offer of proof by either Dr. Cooper-Lewter or Dr. Loring that they had a professional opinion in their field that Rivera had bipolar disorder - just that they had viewed the notations in the prison records. His claim otherwise must be rejected.

B. The Physician Diagnosis Controversy.

During the proceeding, the trial judge and defense got into a debate on whether a mental health professional who is not an expert can diagnose a person with “bipolar disorder” who is not a physician or psychiatrist. Judge Macaulay was firmly of the opinion that a medical degree was required, essentially discounting as possibly misleading the prison notation by the master in education or a bachelor in social work who he considered unqualified due to an apparent lack of adequate training, knowledge and experience, such that their opinions would have otherwise been admissible under SCRE Rule 702 or 703. Nevertheless, neither the master in education, the social worker nor Dr. Poiletman were presented or offered as witnesses in this matter.

Rule 702, SCRE, provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Likewise, an expert's testimony may not exceed the scope of his expertise. State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) (finding police officer, who was qualified as an expert in crime

scene processing and fingerprint identification, exceeded the scope of his expertise when he was permitted to testify to conclusions drawn from the location and position of the victim's body at the time of the shooting); State v. Commander, 2011 WL 5137834, 4 (S.C.S. Ct. 2011). A person may be qualified as an expert in a particular area based upon knowledge, skill, experience, training or education. Rule 702, SCRE. In determining a witness's qualifications as an expert, the trial court should not have a solitary focus, but rather, should make an inquiry broad in scope. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008). The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. Wilson v. Rivers, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004). The qualification of a witness as an expert is within the trial court's discretion, and this Court will not reverse that decision absent an abuse of discretion. Fields, 376 at 555, 658 S.E.2d at 85; Watson v. Ford Motor Co., 389 S.C. 434, 447, 699 S.E.2d 169, 176 (2010).

Here, Dr. Cooper-Lewter confirmed that he was not qualified to issue an opinion of bipolar and in thirty years, had never done so. Concerning the other social worker, Dr. Loring, while she stated that she had opined in the past that individuals were “bipolar,” she admitted that it was discovery of the symptoms of bipolar, and would reveal them to the doctor.

In Honea v. Prior, 295 S.C. 526, 531, 369 S.E.2d 846, 849 (Ct.App.1988), the court found that a social worker was qualified to give an opinion as to the defendant's mental state despite not being a psychiatrist because she had adequate opportunities to observe and interview the defendant. In State v. Henry, 329 S.C. 266, 275, 495 S.E.2d 463, 467 (S.C.App. 1997), the court found that qualification of a social worker to give a direct opinion as to diagnosis of Post Traumatic Stress Disorder (PTSD) has been addressed with certitude in the civil law setting, in

Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct.App.1988).

A review of other states precedents such a split concerning the acceptance of social workers ability to give such testimony. In Georgia, the Georgia court held that courts have also admitted the testimony of psychiatric social workers when that testimony remained within the experts' areas of specialization. Adams v. State, 275 Ga. 867, 870, 572 S.E.2d 545, 548 - 549 (2002), citing State v. Zola, 112 N.J. 384, 548 A.2d 1022, 1041(III)(E) (1988). See also In the Interest of S.T., 201 Ga.App. 37(1), 410 S.E.2d 312 (1991). “However, because psychiatric diagnoses are generally outside the competence of psychiatric social workers, appellate courts have sustained the discretion of trial courts that excluded such testimony, citing State v. Zola, supra at 1041(III)(E). The Adams court held that “[S]ince paranoia and schizophrenia are medical terms relating to mental disorders, “only a qualified expert such as a psychiatrist, psychologist or medical doctor would be competent to diagnose and define such a mental disorder.” Ellis v. State, 168 Ga.App. 757, 759(3), 309 S.E.2d 924 (1983). See also Morris v. Chandler Exterminators, 200 Ga.App. 816, 818(1), 409 S.E.2d 677 (1991), rev'd on other grounds, Chandler Exterminators v. Morris, 262 Ga. 257, 416 S.E.2d 277 (1992). Nothing in the social worker's testimony here indicates that she was such an expert or even that her diagnosis was made under the supervision of a qualified expert. Adams, supra.

Virginia may take a different approach. See Fitzgerald v. Commonwealth, 273 Va. 596, 603, 643 S.E.2d 162, 165 (2007) (finding a licensed professional counselor qualified to diagnose recognized mental disorders); Conley v. Commonwealth, 273 Va. 554, 562, 643 S.E.2d 131, 135 (2007) (agreeing that a licensed clinical social worker could testify as an expert on mental disorders). In New York, in People v. R.R., 12 Misc.3d 161, 807 N.Y.S.2d 516 (N.Y.Sup. 2005)

the court concluded that diagnosis and treatment of mental disorders that are organic or result from physical ailment is within scope of social work and psychology professions.

Concerning psychologists, South Carolina, in Howle v. PYA/Monarch, Inc., 288 S.C. 586, 594, 344 S.E.2d 157, 161 (1986), the court held that a psychologist was able to give an opinion concerning a mental condition:

The question of a nonmedical psychologist's qualification to give expert testimony on the issue of mental and emotional condition has not been addressed in South Carolina. Courts in other jurisdictions have not treated the issue uniformly but the majority, more liberal approach appears to be in favor of allowing a psychologist to give expert testimony. As the Fourth Circuit Court of Appeals has stated:

[T]he determination of a psychologist's competence to render an expert opinion based on his findings as to the presence or absence of mental disease or defect must depend upon the nature and extent of his knowledge; it does not depend upon his claim to the title of psychologist or psychiatrist.

United States v. Riggleman, 411 F.2d 1190, 1191 (4th Cir.1969).

Psychologists have been allowed to give expert opinions as to mental and emotional condition, and often causation, in many different types of cases. See Kravinsky v. Glover, 263 Pa.Super. 8, 396 A.2d 1349 (1979) (psychologist's expert testimony admissible in automobile accident case as to diagnosis of plaintiff's "driving phobia" and its cause); Reese v. Naylor, 222 So.2d 487 (Fla.App.1969) (automobile accident case where court allowed psychologist to testify as to plaintiff's mental condition; court recognized but did not decide the issue of whether the psychologist could testify as to causation); Landreth v. Reed, 570 S.W.2d 486 (Tex.Civ.App.1978) (in an action involving wrongful death and infliction of emotional distress, clinical psychologist allowed to testify as to physical manifestations of emotional trauma); In Interest of O'Neal, 303 N.W.2d 414 (Iowa 1981) (in proceedings for termination of parental rights, psychologist qualified to express opinion based on interviews with the natural parents and results of tests administered to them as to their mental conditions); People v. Noble, 42 Ill.2d 425, 248 N.E.2d 96 (1969) (court held exclusion of testimony of psychologist who examined defendant and administered psychological tests to him was error in criminal case where defendant was pleading insanity); In re Marriage of Auer, 86 Ill.App.3d 84, 41 Ill.Dec. 536, 407 N.E.2d 1034 (1980)

(psychologist's testimony admissible as to mother's mental condition in child custody case). But see Spann v. Bees, 23 Md.App. 313, 327 A.2d 801 (1974) (psychologist barred as a matter of law from giving expert testimony as to the presence or absence of mental disease or defect but may testify as to his judgment and interpretation of tests administered to a subject).

Section 40-47-40, which defines the term "practice of medicine," neither expressly nor implicitly bars a psychologist from testifying as to diagnosis, prognosis, and causation. A psychologist is not incompetent to give his opinion simply because he is not a licensed medical doctor. See Daniels v. Bernard, 270 S.C. 51, 240 S.E.2d 518 (1978); Botelho v. Bycura, supra. At most, a psychologist's lack of a medical license affects his credibility and is a proper subject for cross-examination and for comment during jury argument. Executive Car & Truck Leasing, Inc. v. DeSerio, 468 So.2d 1027 (Fla. 4th Dist.Ct.App.1985), review denied 480 So.2d 1293 (Fla.1985).

Section 40-55-50, which defines the practice of psychology, likewise neither expressly nor implicitly bars a psychologist from giving testimony as to diagnosis, prognosis, and causation. Indeed, Section 40-55-60, another statute included among those that regulate the practice of psychology, contemplates that a psychologist may "diagnose, prescribe for, treat or advise a client with reference to complaints" embraced by psychological practice "as determined by the Board [of Examiners in Psychology]." Here, PYA and Gregory do not contend that Howle's complaint is one which the Board has determined is "outside the limits of psychological practice." Code of Laws of South Carolina § 40-55-60 (1976).

We therefore hold that a psychologist, once qualified as an expert witness by reason of education, training, and experience, is competent to testify as to diagnosis, prognosis, and causation of mental and emotional disturbance. Simmons v. Mullen, 231 Pa.Super. 199, 331 A.2d 892 (1974).

Howle v. PYA/Monarch, Inc. 288 S.C. 586, 593-594, 344 S.E.2d 157, 160 - 161

(S.C.App.1986). See also Annotation, *Qualification of nonmedical psychologist to testify as to mental condition or competency*, 72 A.L.R.5th 529 (1999).

Therefore, it would appear that Judge Macaulay was in error in his conclusion that only a medical doctor or psychiatrist could testify about the existence of a defined mental condition. However, even if this was error, it was not error that requires reversal because neither witness

was proffered to give an personal expert opinion that Rivera suffered from bipolar disorder.

C. The Notation of “Bipolar Disorder” in SCDC Records Was Inadmissible Hearsay.

As a sustaining ground, the Appellant has failed to show how the admission of the notation was not hearsay because he was seeking to introduce it for the truth of the matter asserted - that the Appellant had bipolar disorder, not merely that a notation was made by possibly non-expert personnel of the Department of Corrections. Rule 802, SCRE. A witness may not testify as to the contents of a document if the document is not admitted into evidence or if the witness knows the facts only from reading the document. State v. James, 255 S.C. 365, 179 S.E.2d 41 (1971). Similarly, if a document has no relevance other than its truth, it is properly excluded as hearsay. See State v. Caulder, 287 S.C. 504, 339 S.E.2d 876(Ct. App. 1986). Although it is unclear that Appellant ever attempted to get the document with the notation into evidence, under either theory, it is inadmissible.⁵³ However, the medical diagnosis and treatment exception to hearsay does not apply to statements by a physician, including those to the patient. Wilson v. Childs, 315 S.C. 431, 434 S.E.2d 286 (Ct. App. 1993).

He may claim that the SCDC notation's exclusion violates the principle announced in Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), concerning guilt, and extended to capital sentencing in Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d

⁵³Medical and prison grievance records, although hearsay, may be admissible under the business records exception to the hearsay rule. That exception renders admissible records of “acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge” but only if such records are “kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation.”

738 (1979) (per curiam), that “the hearsay rule may not be applied mechanistically to defeat the ends of justice.” Chambers, 410 U.S. at 302, 93 S.Ct. 1038. Specifically, he argues that like the evidence in Green, the excluded videotape was “highly relevant to a critical issue in the punishment phase of the trial,” and “substantial reasons existed to assume its reliability.” Green, 442 U.S. at 97, 99 S.Ct. 2150.

In Chambers, the Supreme Court considered the petition of a man sentenced to life in prison for the murder of a police officer. 410 U.S. at 285, 93 S.Ct. 1038. Prior to the petitioner's trial, another man, McDonald, gave a sworn confession that he had committed the murder and had already confessed this to another friend, before later retracting his confession. *Id.* at 287–88, 93 S.Ct. 1038. At the petitioner's trial, the trial court denied his request to call McDonald as an adverse witness as well as three witnesses to whom McDonald had confessed, finding that the testimony of the other three would constitute hearsay. *Id.* at 291–92, 93 S.Ct. 1038. The Supreme Court reversed the petitioner's conviction, holding that “the exclusion of this critical evidence, coupled with the State's refusal to permit [the petitioner] to cross-examine McDonald, denied him a trial in accord with ... due process.” *Id.* at 302, 93 S.Ct. 1038. The Court noted that “where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.” *Id.* Despite this broad language, the Court noted that its holding did not establish new constitutional principles, but instead that “under the facts and circumstances of this case,” the petitioner was denied a fair trial. *Id.* at 302–03, 93 S.Ct. 1038. The Court also noted that the hearsay statements it ruled should have been admitted “were originally made ... under circumstances that provided considerable assurance of their reliability.” *Id.* at 300, 93 S.Ct. 1038.

The Supreme Court applied a similar principle in the context of capital sentencing several years later. In *Green*, the Supreme Court reversed the death sentence of the petitioner after the trial court excluded from the sentencing as hearsay the testimony of a man, Moore, who claimed that another man had confessed to committing the murder. 442 U.S. at 96, 99 S.Ct. 2150. The Supreme Court held that regardless of Georgia's hearsay rule, "under the facts of this case," the testimony's exclusion was a due process violation. *Id.* at 97, 99 S.Ct. 2150. The Court noted that the testimony was "highly relevant to a critical issue in the punishment phase of the trial," and "substantial reasons existed to assume its reliability." *Id.* These "substantial reasons" to find the testimony reliable were: (1) Moore's confession was made spontaneously to a close friend; (2) the confession was corroborated by ample evidence; (3) the statement was against interest and nothing suggested an ulterior motive; and (4) "[p]erhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a death sentence upon it." *Id.* Therefore, the Supreme Court held that "[i]n these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'" *Id.* (quoting *Chambers*, 410 U.S. at 302, 93 S.Ct. 1038).

Courts have held that the application of these cases is quite limited. "*Green* is limited to its facts, and certainly did not federalize the law of evidence. It does, however, indicate that certain egregious evidentiary errors may be redressed by the due process clause." *Barefoot v. Estelle*, 697 F.2d 593, 597 (5th Cir.), *aff'd*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). In *Edwards v. Scroggy*, the 5th Circuit considered the trial court's exclusion of testimony by the petitioner's mother and priest that the petitioner was sorry for his participation in the murder and, if his life were spared, that he would "serve God" and "do something with his life in

the future in a very constructive way.” 849 F.2d 204, 211–12 (5th Cir.1988). It found that the exclusion was not unconstitutional under Green and Eddings, holding that Mississippi's exclusion of hearsay evidence “was not unnecessarily limiting, nor did it operate to render [the petitioner's] trial fundamentally unfair.” Id. at 212. See Simmons v. Epps , 654 F.3d 526, 542 -543 (5th Cir. 2011).

HARMLESS ERROR

Here, any error was harmless because the trial judge allowed each witness to testify about their interaction and knowledge of the mood swings, depression and elation of the witness and their extensive description of the emotional and mental condition. Considering the record as a whole, Respondent submits that any error in the exclusion of the SCDC “bipolar disorder” notation in his prison medical records was harmless beyond a reasonable doubt. See Jones, 527 U.S. at 402-405; Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987); Chapman v. California, *supra.*; State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009). We are confident the jury would have reached the death sentence even if the judge had admitted this evidence. See Jones, 527 U.S. at 402. Cf; Sweet v. Delo, *supra.* The jury redeived significant testimony concerning Rivera’s emotional and mental trauma’s throughout life and the manner that those traumas affected his ability to function. The only item missing was that he was labeled “bipolar disorder” while in the prison. The jury was therefore not precluded from considering his mental and emotional impairments, it was merely precluded from considering the label for one of his impairments.

Considering the minimal probative value that the SCDC record had where no mental health expert was proffered to render an opinion that he suffered from “bipolar disorder,” in light

of the overwhelming evidence of guilt, multiple killings in his violent history, and the horrific circumstances of this crime, its exclusion was harmless. Furthermore, it cannot be ignored that the Appellant made a personal closing statement in which he asked for the death penalty. As he declared to the sentencing jury:

I don't want to live no more. I don't want them to suffer. This is what they want, the death penalty. This is what I asked for. And again, it may not be enough for them because they will never be able to get Kwana Burns and Asha Wiley back, I will never be able to heal their pain. And so I hope I was honest with you as I could be. And I pray that you do the right thing.

Tr.p. 2766, l. 25- p. 2767, l. 7.

VII. The Prosecution Properly Presented Testimony and Argument concerning the evidence concerning the statutory aggravating factor about the conviction for the murder of Asha Wiley where the crimes involved the consistent course of conduct by Appellant. Further, this issue is not preserved because there was no objection to any evidence concerning the impact of the crime or argument of the State on this issue. [Argument on Statutory Aggravating Factor]

How the Evidence was Presented at Court

In the penalty phase opening statement, the prosecution stated the case would be focused upon the circumstances surrounding the death of Kwana Burns, how it impacted her family, her friends, her loved ones. R., Tr. p. 2259, ll. 21-23. The State explained that the jury would be shown proof that Rivera had already killed another person before he killed Kwana Burns and that he had been convicted of killing Asha Wiley. R., Tr. 2260. As to the aggravating evidence, the State asserted it would show the circumstances of Ms. Wiley's murder, how the cases are similar, and that Rivera had already planned to return to Anderson to kill Kwana Burns, before Ms. Wiley's body was found. R., Tr. 2261.

The statutory aggravating factor in this case was solely that the defendant: "the murder was committed by a person with a prior conviction of murder." S.C. Code § 16-3-20(c)(a)(3). The State presented significant evidence in aggravation, including witnesses who developed evidence concerning the death of Asha Wiley. Without objection from the defense, witnesses testified concerning her death. R., Tr. p. 2284-2290 (Joya Joseph's testimony concerning seeing victim Asha Wiley on December 10, 2006 and what she learned about her interaction with Rivera on that date); R., Tr. p. 2290-2294 (Capt. Mike Walters testimony about his investigation into the death of Wiley); R., Tr .p. 2295-2296 (Detective Partain's testimony concerning evidence

collected at the Wiley crime scene and photographs of the scene and the rape kit collection); R., Tr. p. 2297- 2302 (Dr. Woodard testimony concerning the cause of death of Wiley); R., Tr. p. 2301-2302 (chain of custody testimony concerning the rape kit of Wiley); R., Tr. p. 2303-2306 (serological testing of urine found on Wiley's bedspread/comforter); R., Tr. p. 2307-2309 (DNA testing results that had DNA match with Rivera on items in victim Wiley's rape kit). Included was the defendant's full statement, explaining his involvement in her killing. R., Tr. 2362-2372.⁵⁴

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Rivera's Statement to Police Concerning the Wiley Murder.

Zamberlin testified that he wrote the written statement for Appellant. R. 206, Tr. 324. Appellant declared he traveled from Washington, D.C. to Anderson. He stated he met Wiley there near the bungee jump. He said she told him she did not give out her number to strangers, but he gave her his cell phone number.

Rivera stated he did not have his keys. He asked her to go get food and then followed her to McDonalds. After they ate inside, Rivera asked Wiley to the movies. He followed her back to her apartment and went inside her apartment.

He stated the victim asked him if he wanted some Grey Goose which she got him. They then played two hand spades as a drinking game.

Rivera described watching a DVD and then began having sex on the floor. Rivera refused to let her go to the bathroom after and described her peeing on the floor. They went back to the couch and they fell asleep. Rivera described her waking up and shaking claiming she needed sugar and a banana. She said he was trying to kill her because he would not let her get sugar.

He described wanting to go upstairs and they went up into her bedroom, had sex again on the bed and fell asleep. When she woke up, she wanted to go to the bathroom and he followed her there and then they returned to the bed. Rivera described trying to have sex again, but she refused.

Rivera described next going down to the kitchen and getting a steak knife to put against her throat. She woke up and Rivera told her they were going to have sex again and they did. He then cut some cords from the printer and tied her hands behind her back and her legs. Rivera next put a sheet over her head. The victim asked him not to kill her and said she was all her daughter had. Rivera next turned up the TV and choked her with a cord and she peed on the bed again. They fell off the bed and the cords on her legs broke. He next took the pillowcase off her head.

After she said she was the only thing her daughter had, she asked him if he had a daughter. When Rivera said he did, the victim told him he did not have to kill her, that it's her

In his closing argument, again without objection, the Solicitor stated the following:

Ladies and gentlemen, the circumstances of *these crimes* are none other than horrific. You heard the descriptions and you have seen the pictures. A stranger came to Anderson Mall. He preyed on *two women* and he *planned to kill Asha and Kwana* as soon as he met them.

R., Tr. p. 2716, ll. 15-19 (emphasis added). As her argument went on, the Solicitor also noted a consistency in the manner of the Appellant's selection of victims and manner of killing between Wiley and Burns:

He preyed upon *these women*, ladies and gentleman. He's a man I would marry next week if he asked me. Little did Asha know as she was planning the rest of her life, he was planning the end of hers. Call me. You're on my mind. Little did Kwana know that her first night in her new home would be her last. ... There was only death for *Asha and Kwana*. And the manner in which he killed *them* was so personal. ... [H]e watched *them* die. He felt *them* die.

fault and she wouldn't say anything .

Rivera next told Lt. Zamberlin that he went back downstairs and put on his clothes and came up and put the pillowcase back on Wiley's face. She was crying and told him about a friend Joya who she had told about the type of car he had and that he was from Atlanta. Rivera stated at that point he put the cord around her mouth, started strangling her again, and she peed on the floor again.

Rivera told Zamberlin that he checked to see if she was dead and she was. He but the cords off her wrists and mouth. He began wiping everything down using a rag and cleaning supplies. He washed the knife, the shot glasses, and wiped the Grey Goose and refrigerator door.

Rivera also got Wiley's cell phone and erased his name. He got a trash bag and put the banana, bra, panties, cords and cards in it. He got a douche bottle, cleaned the victim and wiped her down "from head to toe." He then got some clothes and re-dressed her. He cleaned up blood beside her

Rivera said he next went and found Wiley's car keys and moved her car. He then threw away the keys into a dumpster. He then moved his own car and then returned through the back door and got the bag. He left out the back after he heard someone pull up in the front in a car. He threw the bag into the dumpster and left. he said he drove to Atlanta.

R., Tr. p. 2717, l. 16 - p. 2718, l. 1 (emphasis added).

He methodically and meticulously cleaned and [sic] *Asha and Kwana's bodies* to destroy all evidence. He went through *each apartment and each home*, and he wiped down everything that he thought he had touched in an attempt to erase all evidence of his existence in Anderson, South Carolina. He erased his number from Asha's cell phone before he killed her because he planned to kill her.

R., Tr. p. 2718, l. 22 - p. 2719, l. 3 (emphasis added).

He wants you to know every horrible, graphic detail of what he did to these *two innocent women*. And then he calls *them*. ... He calls *them* after they're dead to hear their voices.

R., Tr. p. 2719, l. 24 - p. 2720, l. 4 (emphasis added).

He planned to kill [Phoebe Kenney] just like he planned to kill *Asha and Kwana*. ... He cleans her. Just like he cleaned *Asha and Kwana*

R., Tr. p. 2722, ll. 14-18 (emphasis added).

[H]e continued his life of terror right here in Anderson, South Carolina when he strangled *two innocent women* to death in a matter of three days.

R., Tr. p. 2723, l. 23 - p. 2724, l. 1 (emphasis added).

There should have been tomorrow for Asha. There should have been tomorrow for Kwana.

R., Tr. p. 2726, ll. 3-4.

ANALYSIS

In his argument, Rivera contends that the State use of the evidence of the Asha Wiley murder and conviction was error because it injected an arbitrary factor - doing justice for both victims in this case. He suggests that it was error to use the statutory aggravating factor of murder

was committed by a person with a prior conviction of murder, to refocus sentencing upon the Asha Wiley murder as well. The Appellant complains that by the prosecutor's closing argument that the jury should chose a sentence that Asha Wiley and Kwana Burns deserve," (R., Tr. p. 2263, l. 4), a sentence appropriate for someone who strangled two innocent woman" (R., Tr. p. 2729, ll. 12-13) was improper because he contends it was a naked ploy to circumvent the state and federal law that prevented the state from seeking the death penalty in the Wiley case itself (apparently because he claims there was a lack of a statutory aggravating factor at the Wiley trial). He suggests that this combination was a both a constitutional and state law error. He points out that in State v. Bennett, the Court acknowledged "the need to protect a capital defendant from unfair prejudice and prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant's prior crimes."

1. This issue is procedurally barred.

As the Appellant acknowledges, there was no objection to either the evidence or argument at trial. At no time before Judge Macaulay was a suggestion made about the evidence concerning the death of Asha Wiley or the particular argument that he now focuses upon. Because he failed to timely object or present the same claim, Respondents respectfully submit that this is procedurally barred from consideration. State v. Stone, 376 S.C. 32, 35-36, 655 S.E.2d 487, 488 - 489 (2007) (Because appellant did not argue these grounds in support of his objection at trial, Appellant's argument is not preserved for review); State v. Simmons, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (to be preserved for appellate review, issue must be raised and ruled upon in the trial court). The Appellant admits that the issue was not preserved at the trial court.

2. Consideration of the Evidence of the Wiley Murder Was Appropriate.

South Carolina has long recognized that information about prior convictions of a defendant is admissible in a capital sentencing proceeding. See State v. Gaskins, 284 S.C. 105, 124, 326 S.E.2d 132, 143 (1985); and State v. Plath, 281 S.C. at 9, 313 S.E.2d at 623 (stating that this rule is so fundamental that it requires no citation of authority). As this Court has stated in State v. Bennett 369 S.C. 219, 228-230, 632 S.E.2d 281, 286 - 287 (S.C.,2006), “[T]his rule is derived from the principle that receiving evidence of prior crimes is probative of the character of the defendant and consistent with the sentencing authority's duty to “conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.” Dawson v. Delaware, 503 U.S. 159, 164, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992); see also State v. Skipper, 285 S.C. 42, 47, 328 S.E.2d 58, 61 (1985) (overruled on other grounds 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)).

This information was no different than the situation in Bennett, where the court found that the testimony of the ABHAN victims family and photographs were not improper penalty phase evidence. Here, the probative value was enhanced because of the connection between the killings by Rivera.

3. The Fact that The Was A Statutory Aggravating Factor Was A Proper Consideration for the Jury As To Sentencing .

The Appellant additionally fails to recognize that the jury was required under South Carolina law to consider the existence of the statutory aggravating in making its assessment of the proper sentence for Rivera. Here that factor was the prior murder conviction for the death of Asha Wiley. Like any other statutory aggravating factor, the jury was required under South

Carolina law to consider this factor. As the Court stated in Sumner v. Shuman, 483 U.S. 66(1987), “past conviction of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder ...” In addition, the use of this factor was held by the Court to not violate the double jeopardy clause in State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985).

Importantly, as a matter of state law, the jury was required to be instructed in capital sentencing proceedings “to consider mitigating circumstances otherwise authorized or allowed by law and . . . aggravating and mitigating circumstances which may be supported by the evidence.” S.C.Code Ann. § 16–3–20(B) & (C). See State v. Allen, 386 S.C. 93, 102, 687 S.E.2d 21, 25 - 26 (2009). Here, the jury was properly instructed that “in reaching your decision as to which sentence to recommend, you will consider the aggravating and mitigating circumstances.” R., Tr. p. 2788, ll. 23-25.

4. The State’s Closing Argument Was Not Improper.

A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. Id. Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998) (citations omitted). The relevant question is whether the solicitor's comments so

infected the trial with unfairness as to make the resulting conviction a denial of due process. Id.⁵⁵

The Solicitor's argument focused upon the evidence presented, including the evidence to support the statutory aggravating factor. Under the Appellant's theory, the state would be restricted from discussing any evidence in aggravation in its closing argument concerning past crimes and whether the evidence of his past acts, reflective of his character should ever be considered. Here, the Solicitor's focused statement were supported by the evidence and the Appellant's own confessions to each crime. The manner of presentation reflected upon the fact that Rivera had killed two woman. The conviction for the Burns killing and the statutory aggravating factor of a prior conviction of murder evidence that Rivera had killed two woman. There is no error and certainly no "arbitrary factor" in the evident fact to all. A new sentencing hearing is not required.

⁵⁵It has been determined that the prosecutor's remarks concerning prior victims during closing argument of a capital sentencing proceeding were permissible.

In State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), stay denied, 339 N.C. 619, 457 S.E.2d 303 (1995), the court found that the prosecutor's remarks concerning a victim of the defendant's prior offenses, made during a capital sentencing hearing, were permissible. The prosecutor introduced evidence of a prior murder in which a child witnessed her mother's murder by the defendant. The prosecutor commented, "There are children in this world today that are without mothers because of the [defendant]." The court ruled that the prosecutor's comments readily applied to the evidence of the prior murder and that such victim impact evidence was admissible in a capital sentencing proceeding.

In Middleton v. State, 103 S.W.3d 726 (Mo. 2003), a prosecutor's closing argument at penalty phase of capital murder trial, that victim of another murder had been "moaning in agony before she [was] finally finished off" by defendant's girlfriend, was not an improper suggestion of personal danger to the jurors or their families. In State v. Christeson, 50 S.W.3d 251 (Mo. 2001), the court held that a comment by prosecutor during closing argument in penalty phase of capital murder trial that defendant's conduct toward inmate he sodomized while they shared a jail cell after defendant's arrest revealed a "predatory pattern," because defendant led his accomplice to commit murder and also coerced inmate, was a reasonable inference drawn from the evidence, and was not improper.

CONCLUSION

For all the foregoing reasons, the appeal and judgment must be affirmed.

Respectfully Submitted,

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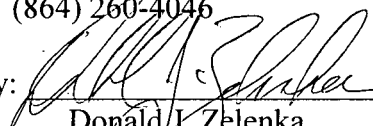
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April 23, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Anderson County
Alexander Macaulay, Circuit Court Judge

THE STATE,

Respondent,

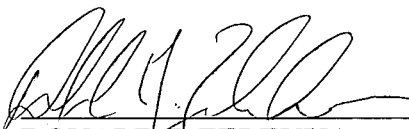
v.

RAYMONDEZE RIVERA,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled “Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.”



DONALD J. ZELENKA

Senior Assistant Deputy Attorney General

April 23, 2012

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the *Final Brief of Respondent* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

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and a copy in South Carolina Inter agency mail to

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This 23rd day of April, 2012.



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