

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 29 2018

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

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

Respondent,

v.

LUZINSKI ALLEN COTTRELL,

Appellant

Appellate Case No. 2015-000731

RETURN TO PETITION FOR REHEARING

Petitioner, Luzenski Allen Cottrell (hereinafter "Cottrell"), specifically asks this Court to rehear 2 appellate issues (issues 2 and 3) of the 5 appellate issues this Court decided in its published Opinion in this case. State v. Cottrell, Shearhouse Advance Sheets, Opinion No. 27754 (Filed December 20, 2017).¹ These 2 appellate issues were decided unanimously by this Court against Cottrell.¹ There is no merit to Cottrell's petition for rehearing for the reasons more fully stated in this Court's Opinion in this case and in Respondent's brief, and as stated herein. This Court did not misapprehend points or overlook them or misapprehend the record or the law. Rule 221(a), SCACR.

¹ Justice Few concurred in result only as to 2 different issues: (1) disqualification of original appointed counsel and (2) whether the trial court erred in failing to disclose the contents of a juror note. Id.

I. Appellate Issue Two

Cottrell argues this Court misapprehended or overlooked points in finding Judge Hyman did not abuse his discretion in qualifying 2 prospective jurors after individual *voir dire* because Cottrell alleges the jurors were “mitigation impaired.” There is no merit to Cottrell’s argument.

First, this issue related to both jurors was not preserved for review or was waived and abandoned.² While case law requires all strikes be exhausted before an argument may be made against a seated juror, *see State v. Tucker*, 324 S.C. 155, 162, 478 S.E.2d 260, 264 (1996), these 2 jurors were not seated because they were mistakenly qualified and Cottrell exhausted all of his strikes. *See Green v. Maynard*, 349 S.C. 535, 564 S.E.2d 83 (2002); *State v. Green*, 301 S.C. 347, 352, 392 S.E.2d 157, 159-60 (1990) *cert. denied*, 498 U.S. 881 (1990). After individual *voir dire* of all jurors, the jury was struck in order of qualification. When the 2 challenged jurors were presented for the jury strike, they were the 2nd and 3rd jurors presented. Cottrell had only exercised 1 jury strike. Cottrell had 9 available peremptory strikes he did not use to remove the jurors he *alleges* were mitigation impaired. Rather than striking these 2 jurors, Cottrell seated them. They were the 1st and 2nd jurors seated on Cottrell’s jury. (R. 3227-28). If not unpreserved for appellate review, the issue should be deemed **waived** in these circumstances where counsel exercised well trained professional judgment in not striking the jurors at issue but seated them. *Cf. State v. Torrence*, 305 S.C. 45, 65, 406 S.E.2d 315, 326 (1991)(discouraging structure that allows counsel to hold back an issue for appeal). At bottom, the fault if any lies in Cottrell’s decision not to strike the jurors, not with qualification.

² While this Court did not address the failure to preserve or waiver of this issue in its Opinion, should this Court grant rehearing on this issue, this Court should hold this issue is either not preserved for appellate review or was waived by Cottrell for the reasons stated herein. Respondent raised the rule preservation and waiver of this issue in its Brief. (FBOR).

Second, upon consideration of the record of the entire *voir dire* of these 2 jurors, each juror conclusively revealed they would give meaningful consideration to all mitigating circumstances and evidence, including statutory and non-statutory, and follow the instructions by the court as to what they should consider after the evidence and instructions were presented to them. Respondent invites or asks this Court to re-review the entire *voir dire* of each juror which reveals the jurors were not mitigation impaired. **(R. 1462-1512)**. Given the entire *voir dire* of the 2 jurors, the record supports this Court's Opinion and Judge Hyman's exercise of discretion. Further, as this Court correctly found, the trial court specifically instructed the jurors before deliberating on the appropriate sentence that they must consider all mitigation evidence introduced, including that related to the defendant himself, in determining the appropriate sentence. **(R. 4346-68)**. As to this issue, the petition for rehearing must be denied.

What Occurred Below

Cottrell was represented at trial by Bill McGuire and Teresa Norris, Esquires. As this Court is aware, both are extremely well experienced in capital litigation and well versed in capital jury selection jurisprudence. Both are aware of what questions are proper and what questions are not proper to ask a juror during individual *voir dire* and what questions and answers would ultimately disqualify a juror from capital jury service. Not only did counsel ask improper questions of these 2 jurors, but counsel also intentionally refrained from asking the jurors the critical question to which a negative response would have disqualified the jurors.

During the individual death penalty *voir dire* of the very 1st juror called, counsel for Cottrell [Mr. McGuire] sought to use this juror's *voir dire* to see how far he could go in

questioning individual jurors. (R. 1375-1425).³ Among other things, counsel sought to ask this Juror about **specific aggravating circumstances**, and other improper individual *voir dire* questions. (R. 1375-1425).⁴ The State objected to the improper question about specific aggravating circumstances, and Judge Hyman agreed sustaining the objection defense counsel was seeking to “stake out” the juror or the questions were improper. Following the U.S. Supreme Court’s and this Court’s prior opinions, Judge Hyman properly ruled counsel could question the juror about general aggravating and general mitigating circumstances to determine if the juror was qualified to serve in a death penalty case; however, counsel could not ask about *specific aggravating* and *specific mitigating circumstances* because that would be improper. Morgan v. Illinois, 504 U.S. 719 (1992), State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998); State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998).⁵

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

³ The individual *voir dire* of the 1st juror called, including argument on objections and Judge Hyman’s ruling, takes up 50 pages of transcript.

⁴ For example, defense counsel sought to educate the juror on what would happen if the jury was unable to reach a verdict, i.e. the judge would sentence the defendant, and as a result, stake the juror out to reach a hung jury and a resulting life sentence. Judge Hyman appropriately found this line of inquiry was improper. (R. 1404-13).

⁵ In Mu’Min v. Virginia, 500 U.S. 415 (1991), the Court held a defendant is entitled to specific questions only if the failure to ask them would render his trial “fundamentally unfair.” Here Judge Hyman stated he would allow Cottrell to ask whether a juror would consider mitigating circumstances as presented by the defense and as instructed by the court. “This general question covers whether a juror would refuse to consider mitigating circumstances and does not render appellant’s trial unfair. Accordingly, this issue has no merit.” Hill, 331 S.C. 94, 501 S.E.2d 122.

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

Counsel [Mr. McGuire] also improperly asked each of these 2 jurors about *specific mitigating circumstances* in contravention of Judge Hyman's prior ruling in accordance with this Court's prior opinions. Hill, 331 S.C. 94, 501 S.E.2d 122; Powers, 331 S.C. 37, 501 S.E.2d 116. When asked if they thought it was relevant or important in sentencing what kind of life the defendant had lived, his background, his walk in life, whether he was a drug addict, or mentally ill; however, these jurors had not been instructed on the law, and stated no; that was not important or relevant to them. (R. 1472, 1503, & *See also* 3895, ll. 11-13 [Cottrell characterizing these jurors' responses]).⁶ The jurors did not testify they would not consider these specific mitigating circumstances if instructed to do so by the Court. They were not asked this question by learned defense counsel. (R. 1462-1512). They were only asked what was relevant or important to them not knowing the law.

However, each of these jurors stated under oath, upon questioning by Judge Hyman, they would consider aggravating and mitigating circumstances or evidence before determining and imposing a sentence in this case, and they would follow the trial court's instructions, including that they must consider any aggravating and any mitigating circumstances or evidence

⁶ The State objected to this improper questioning of the 1st challenged juror, and allowed the 2nd challenged juror to clarify his response to this improper line of questioning. (R. 1472-73, 1508).

introduced in evidence in the penalty phase before deciding whether to impose a life sentence or a death sentence. (R. 1462-1512). Judge Hyman, viewing the 2 jurors' *voir dire* as a whole, specifically found the jurors were not mitigation impaired and were qualified to serve over Cottrell's objection. (R. 1486-87; 1510-11). As this Court correctly found in its Opinion, viewing the 2 jurors' *voir dire* as a whole, Judge Hyman did not abuse his discretion in qualifying the 2 jurors. (1462-1512). They were not mitigation impaired. Further, the jurors were instructed at the penalty phase' conclusion they must consider all mitigation evidence whether statutory or non-statutory including that related to the defendant himself. (R. 4346-68).

Standard of Review

Generally, “[i]n criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous.” State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010). Determinations of whether a juror is qualified to serve on a capital jury panel are left to the sole discretion of the circuit court. State v. Dickerson, 395 S.C. 101, 716 S.E.2d 895 (2011); State v. Evins, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007). Deference is paid to the trial judge who sees and hears the juror's responses. Dickerson, 395 S.C. 1, 716 S.E.2d at 903. In making a determination as to whether a juror is qualified to serve in a capital case, a trial judge should not single out any 1 question and answer, but rather review the questioning process in its entirety. State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984).

“[A] prospective juror may be excluded for cause when his views on capital punishment are such as would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” State v. Sapp, 366 S.C. 283, 290-91, 621 S.E.2d 883, 886 (2005)(citing Wainwright v. Witt, 469 U.S. 412, 424 (1985)). “The ultimate

consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him.” Sapp, 366 S.C. at 291, 621 S.E.2d at 887.

In reviewing the circuit court’s decision on the qualification of a juror for capital jury service, this Court “must examine the juror’s responses in light of the entire *voir dire* and will not reverse the circuit court’s decision unless it is wholly unsupported by the evidence.” Dickerson, 395 S.C. 101, 716 S.E.2d at 903; Evins, 373 S.C. at 418, 645 S.E.2d at 911; State v. Green, 301 S.C. 347, 354, 392 S.E.2d 157, 160-61 (1990); State v. Cain, 297 S.C. 497, 377 S.E.2d 556 (1988); State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987)(same); State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985); State v. Gaskins, 284 S.C. 105, 112, 326 S.E.2d 132, 137 (1985). “This Court will not consider only isolated statements made during *voir dire* but will examine the entire colloquy with the venireman [or venirewoman] in order to review his [or her] qualifications.” State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179, 180-81 (1981).

The Lack of Merit of Cottrell’s argument

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

Cottrell argues however the 2 jurors should not have been qualified because they were *allegedly* mitigation impaired. He bases his argument on the jurors' limited responses to **improper, leading, specific questions he asked** about *a specific mitigating circumstance or circumstances*, i.e. the defendant's background, mental health, or life history. (R. 1472-73, 1485, 1502-03, 1509-10). However, his argument is in contravention of the proper standard of review for the trial judge and for this Court on appellate review. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (in determining whether a juror is qualified to serve in a capital case, a trial judge should not single out any 1 question and answer, but rather review the questioning process in its entirety); Dickerson, 395 S.C. 101, 716 S.E.2d at 903 (this Court "must examine the juror's responses in light of the entire *voir dire* and will not reverse the circuit court's decision unless it is wholly unsupported by the evidence."); Gilbert, 277 S.C. 53, 283 S.E.2d at 180-81 ("This Court will not consider only isolated statements made during *voir dire* but will examine the entire colloquy with the venireman [or venirewoman] in order to review his [or her] qualifications.").

Cottrell makes his argument by piecing together language or various statements from U.S. Supreme Court decisions over the last 40 years.⁷ Respondent does not dispute the specific holding in each of those cases. However, they are not controlling on the facts of this particular case given the entire *voir dire* responses of each of these 2 jurors' under oath which shows Cottrell is incorrect, and the jurors were not mitigation impaired. **(R. 1462-1512)**. Cain, *supra*

⁷ See Abdul Kabir v. Quarterman, 550 U.S. 233 (2007); Smith v. Texas, 543 U.S. 37 (2004); Tennard v. Dretke, 542 U.S. 274 (2004); Wiggins v. Smith, 539 U.S. 510 (2003); Morgan, 504 U.S. 719; McCoy v. North Carolina, 494 U.S. 433 (1990); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Adams v. Texas, 448 U.S. 38 (1980); Ross v. Oklahoma, 487 U.S. 81 (1988); Wainwright, 469 U.S. 412; Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The majority of the cases cited by Cottrell deal with the limitation of the admissibility or consideration of mitigating circumstances by State law or procedure. See Abdul Kabir, 550 U.S. 233. Others deal with a state court judge who believed he was constrained by state law not to consider mitigation evidence. See Eddings, 455 U.S. 104.

(responses of challenged prospective jurors must be examined in context of the entire *voir dire*); Gilbert, *supra* (this Court will not consider only isolated statements made during *voir dire* but will examine the entire colloquy with the venire-person in order to review his or her qualifications); Gaskins, 284 S.C. at 112, 326 S.E.2d at 137 (similar).⁸

When jurors are summoned for capital jury service, they have little if any idea what they will be asked or instructed by the court to consider as far as evidence in a capital sentencing proceeding. They have little if any idea what is relevant or required to consider in a capital sentencing proceeding, as they are not trained jurists or trained capital litigators or attorneys.⁹ They have not reviewed years of U.S. Supreme Court' or this Court's precedent regarding what is relevant in determining whether to sentence a defendant to death or life in prison. They have not been trained or even instructed on the law.

And, they are not fully instructed on the law by the court after they are selected as potential jurors but only in a limited fashion. (See R. 1183; 1255- 57; 1288-89). Again, they are only instructed in a general limited sense after they are selected to serve on the jury panel itself. (See R. 3260; 3881-83). It is only before they retire to deliberate on a sentencing recommendation that they are fully instructed on the law and what they must consider in determining whether to impose a life or death sentence. (See R. 4346-68). Jurors are presumed to follow the law as instructed by the trial court. Parker v. Randolph, 442 U.S. 62 (1979); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986).

When jurors appear for capital juror service, they may have or have preconceived notions about what is important or relevant in capital sentencing. Again, they have not been instructed

⁸ Of note, Cottrell conceded another juror who testified similar to the 2 disputed jurors was qualified to serve. (See R. 2335-38).

⁹ This lack of knowledge is demonstrated by the *voir dire* of 1 of the jurors challenged here and another juror questioned after the 2 jurors at issue here. (R. 1503; 1769-73).

on the law and what they must consider in determining the appropriate sentence. During individual *voir dire*, most all prospective jurors are being asked broad questions about concepts and procedures they know little or nothing about.¹⁰ It should be expected many of the answers will demonstrate that disadvantage. See, State v. Bell, 302 S.C. 18, 25, 393 S.E.2d 364, 368 (1990)(“the other two jurors initially misunderstood the bifurcation of the trial, but later, after clarification, responded that they could impose either the death penalty or a life sentence. The trial judge, therefore, did not abuse his discretion in qualifying the challenged jurors.”); Green, 301 S.C. at 354-55, 392 S.E.2d at 161 (“With regard to Mr. Brown, we find that while his responses indicated some confusion on his part, he demonstrated the ability to consider all evidence before reaching a decision.”). As Judge Hyman noted on the record during the questioning of these 2 jurors, the *voir dire* process should be used to uncover real issues with juror qualification. A juror should not be disqualified just because a party may simply point to a misstep or a few missteps in the dialogue. Id. This is why this Court has repeatedly held the entire *voir dire* of the challenged juror must be reviewed. Dickerson; Cain; Gilbert. What is important with regard to the issue before this Court is whether the particular jurors can follow the law as instructed by the court regarding what they are required to consider in determining the appropriate sentence in a capital case. And, additionally what they are instructed by the trial court before they retire to deliberate.

Each of these 2 challenged jurors, specifically informed Judge Hyman under oath, they would not impose a death or life sentence until after first considering the aggravating **and** mitigating circumstances introduced in evidence as instructed by Judge Hyman. (R. 1462-1512).

¹⁰ For example, neither juror was even aware of the legal definition of murder in South Carolina. They had to be instructed by the trial court and counsel. The record shows the jurors also lacked knowledge about other legal issues involving the penalty phase. (R. 1462-1512).

Cottrell ignores the fact this Court has addressed similar isolated responses by jurors in the past and found based on the entire *voir dire* the juror was qualified to serve. See Cain, 297 S.C. 497, 377 S.E.2d 556 (a juror who initially stated the mitigating factors of age and background would make no difference in her sentencing consideration, was qualified for service after she stated she would follow the law as the trial judge instructed, and vote for either life imprisonment or the death penalty); Gilbert, 277 S.C. 53, 283 S.E.2d 179 (a juror that initially responded she would not consider the lack of a prior criminal record as a mitigating factor, was properly qualified after stating she would follow the instructions of the court as to the consideration of any mitigating factor); See also State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985)(juror was qualified to serve who initially stated he would be in favor of the death penalty in every murder case, but on questioning stated he would consider any mitigation circumstance, and would follow the judge's charge on the law).

A defendant is entitled to question a prospective juror *on the general subject of mitigating circumstances*, in order to determine if such juror would follow the instructions of the trial judge, i.e. to consider mitigating circumstances. Morgan, *supra*. Judge Hyman allowed this. However, a defendant does not have the right to question jurors whether or not they would consider *specific mitigating circumstances*, or what their opinion is of any *specific mitigating circumstance*. Hill, *supra*; Powers, *supra*; United States v. Tipton, 90 F.3d 861 (4th Cir. 1996). The underlying rationale for limiting such questioning is that it might cause a juror to believe that he has pledged or committed himself to a future course of action when considering evidence of such mitigating circumstances. Powers, *referencing State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252, *cert. denied* 513 U.S. 1134 (1995); State v. Wilson, 74 Ohio St.3d 381, 659 N.E.2d 292 (1996); State v. Drutzer, 928 S.W.2d 854 (Mo. 1996); Hill, *supra*; State v. Patterson, 324 S.C. 5, 482 S.E.2d 760

(1997). Cottrell's counsel repeatedly asked improper questions regarding specific mitigating circumstances. Judge Hyman appropriately prohibited this improper inquiry.¹¹

The questioning by Cottrell's counsel on these specific mitigating circumstances was not proper questioning, in contravention of Judge Hyman's prior ruling, in contravention of this Court's prior opinions, and an attempt to stake out the jurors. Additionally, Cottrell asked these jurors specifically if these specific mitigating circumstances were "relevant" or "important" to them or not. While the answer to this question may have been informative to defense counsel as to how Cottrell should use his peremptory strikes, i.e. what weight the juror would give a specific mitigating circumstance, it did not disqualify these 2 particular jurors given their entire *voir dire*. (R. 1462-1512). Dickerson; Cain; Gilbert.¹² Additionally, as Judge Hyman pointed out, Mr. McGuire did not follow up with the critical question, i.e. if Judge Hyman instructed the juror he or she must give meaningful consideration to all mitigating circumstances, including the defendant's background or mental health, could this juror follow the court's instructions or would he or she be unable to follow the court's instructions in this regard. (R. 1510-11).¹³

¹¹ Judge Hyman reiterated his proper ruling later during *voir dire* of another juror when defense counsel wanted to ask about *specific mitigating circumstances*. (See R. 2213-20).

¹² At this time, the 2 jurors would not have known that the defendant's background or life history was a specific mitigating circumstance they must consider. They had only been charged *generally* and to a *limited extent* on mitigating circumstances. To the jurors, they were being asked what was important to them in sentencing, and they were being asked in a vacuum. (See R. 359, ll. 6-8). Further, they had been repeatedly told there was no right or wrong answer to *voir dire* questions; they only need give honest answers to the questions posed.

¹³ Cottrell contends he could not ask this question because it would have been attempting to "stake out" the juror; however, this is not true. The improper "staking out" question had already been asked. Powers, referencing Skipper, 337 N.C. 1, 446 S.E.2d 252; Wilson, 74 Ohio St.3d 381, 659 N.E.2d 292; Drutzer, 928 S.W.2d 854; Hill; Patterson, 324 S.C. 5, 482 S.E.2d 760. And, nothing, not even Judge Hyman's prior ruling or this Court's prior opinions, stopped learned counsel from asking the improper question to 2 different jurors. The question Judge Hyman noted Mr. McGuire never asked would not have been improper, but whether the juror could follow the court's instructions or not. Counsel simply chose not to ask the question to

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

Specifically, Juror Moses testified as follows under oath:

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

A: Yes sir.

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

A: Yes, sir.

Q: And is that still your understanding - -

A: Yes, sir.

(R. 1463). After the Court explained the State first had to prove an aggravating circumstance, Juror Moses testified as follows:

Q: But if they, the State, if the State were able to establish beyond a reasonable doubt to the unanimous satisfaction of the jury [an aggravating circumstance], **then the jury would be obligated, must consider** any mitigating or attenuating, anything that extenuates this offense. Do you understand that?

A: Yes, sir.

Q: And there are some that are statutory, that is, established by the law. But the unique thing about the mitigating circumstances is you, as the jury, could also consider non-statutory factors about the case that you felt were appropriate in mitigation.

And even if could you not find any mitigating justification there, the jury could still grant mercy even if there had been a finding of an aggravating circumstance and recommend a life sentence. Do you understand that?

A: Yes, sir.

which a negative response would have disqualified the juror. And, then, counsel chose to seat each juror, the 1st and 2nd jurors seated on the jury, when he had 9 peremptory strikes remaining.

Q: Okay. Now, **would you be able to follow my instructions and the law in that regard?**
Could you engage in that process?

A. Yes, sir.

(R. 1465–66)(emph. add.). This juror also testified she would follow Judge Hyman’s instructions on the law; and, she would follow his instructions even if she personally disagreed with the law:

Q: Now, if you were a juror in this case and I instructed you as to the law, could you follow that law?

A. Yes sir.

Q: Would you follow the law even if you felt very strongly that the law shouldn’t be that way or that the law is not right? Could you still, upon my instruction, apply the law as I give it to you to the facts as the jury found them to be?

A. Yes, sir.

Q: Would you be guided by the law as I gave it to you? Okay.

(R. 1467). This juror also testified she considered prison a severe environment, life in prison without parole to be a very severe sentence, and a sentence of life without parole to be an appropriate penalty or punishment for someone who committed murder, an intentional killing with malice. (R. 1472). This juror also testified as follows:

Q: Again, we’re here to see if you can follow the law, and I’m going to state a principle of law, and I’m going to state a principle of law, the judge will correct me if it’s inaccurate. The law is that once a juror, **when considering all the evidence in the case in the penalty phase or punishment or sentencing phase**, and they come to their individual moral judgment, and if it would do harm or do violence to their conscience to change that, that would be a violation of the juror oath. Is that a principle of law that you could follow?

A: Yes, sir.

(R. 1478-79). At the conclusion of her entire *voir dire*, Judge Hyman found:

THE COURT: I am confident that this juror is qualified to serve on this jury. I questioned her and I listened very carefully as the defense and the State questioned

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

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

(R. 1486–87).

Similarly, Juror Decker testified he would have to hear the facts and evidence in aggravation and mitigation before deciding on the proper punishment. (R. 1492). He also indicated he was the type of juror who would want to hear the evidence in aggravation and mitigation before rendering a decision. (R. 1492). Specifically, he testified as follows:

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

A: Correct.

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

A: Yes.

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

A: Yes.

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

yesterday about aggravating and mitigating circumstances?¹⁴

A: Yes.

(R. 1492). After explaining the State must prove an aggravating circumstance for the Defendant to be eligible for the death penalty, Juror Decker testified as follows:

Q: Okay. Even after that, the State would not be entitled to a recommendation of the death penalty until the jury had also considered evidence in mitigation. Mitigation means things that make something less culpable, less serious, extenuating circumstances. Do you understand what I mean by that?

A: Yes, sir.

Q: Okay. So unless - - or **if that evidence was put up, you would be required as a juror to consider it.** And even when the State had established beyond a reasonable doubt and if the State can do that. I'm not suggesting they can. But if that was done, an aggravating circumstance, the jury could consider not only the legally established mitigation but any mitigating circumstance that the jury found appropriate. You could decide what would be an appropriate mitigator.

Or for no reason at all. Just because the jury wanted to grant mercy, the jury could say life instead of death. Do you understand that?

A: Yes, sir.

Q. Okay. **And if I were to instruct you as to the law, could you follow it that way?**

A. **Yeah.**

(R. 1494–95)(emph. add.). Juror Decker also testified he would follow the law as Judge Hyman instructed him even if he disagreed with it. (R. 1495). Juror Decker also specifically testified as follows:

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

¹⁴ The previous day, before the jury pool was split into panels of 6 for individual *voir dire*, Judge Hyman generally defined aggravating circumstances as something that makes the offense worse and mitigating circumstances as something that lessens the severity of the offense or the defendant's culpability.

But if we got to that phase and if the State were to produce evidence of aggravation and if the defendant were required to produce - - **or did produce evidence in mitigation, would you listen to the evidence offered by each party, the defendant and the State, would you consider all that evidence, would you consider the law as I give it to you and could you - - could you - - based upon consideration of the mitigating and aggravating circumstances and the application of the law impose either the life sentence or the death penalty?**

A: **Yes, sir.**

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

A: Yes.

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

A: Yes, sir.

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

A: **Yes, sir.**

(R. 1497–98)(emph. add.). Juror Decker also reiterated later in *voir dire*, in determining whether to impose life or death, he would consider both aggravating and mitigating evidence. (R. 1508–09). He also testified he considered life in prison a severe penalty and the death penalty “a last resort.” (R. 1507). And, he testified as follows:

Q: Just briefly, I think you indicated you were a C type juror?

A: Yes.

Q: You could take all of the facts and put them into a pot and come up with your own decision about how you feel **considering everything?**

A: **Yes.**

Q: And that’s still your opinion relating to this process?

A: Yes, sir.

Q: Okay. Just to clarify, I think, for - - it seemed a little unclear maybe, but, you

know, the first process is the murder itself, on whether he committed the crime. And then if, you as a member of the jury, agree unanimously that he committed the crime, **it's only then the second phase that you'll hear other information that may make a murder worse, or the defense perhaps may put up information to make it seem not as bad. And you can consider both of that before you decide what sentence the defendant should suffer** would be, **be it life** imprisonment or **death**; is that true?

A: Yes.

Q: Consider both of them?

A: Yes.

(R. 1508-09)(emph. add.).

Judge Hyman specifically found at the conclusion of Juror Decker's *voir dire*:

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

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

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

(R. 1510-11).

Considering the entirety of these 2 jurors' *voir dire* responses, there is no merit to the argument in the petition for rehearing. Dickerson, *supra*; Cain, *supra*; Gaskins, *supra*. In short, a juror's answers should be considered in light of their lack of training in the law, and the lack of instruction by the court, when considering qualification. The trial judge is in the best position to determine if the suspect answer is disqualifying or whether the juror can be fair. See Dickerson,

395 S.C. at 166 716 S.E.2d at 903 (“The circuit judge was more persuaded by the juror’s consistent affirmation he would follow the law and wait to hear all of the evidence than by his apparent confusion over the State’s burden, and we believe his ultimate determination of Juror 370’s qualification to serve is supported by the record.”); Green, 301 S.C. at 354, 392 S.E.2d at 161 (“we find that while his responses indicated some confusion on his part, he demonstrated the ability to consider all evidence before reaching a decision.”).¹⁵

Furthermore, the jurors were appropriately instructed by Judge Hyman on the law on numerous occasions. Prior to the jury being divided into panels of 6 for individual *voir dire*, Judge Hyman instructed the entire jury pool on the difference between a non-capital and capital murder case, and how, if found guilty, the State must prove at least 1 aggravating circumstance in the penalty phase for the defendant to be eligible for the death penalty. He explained by “aggravate,” he meant to make worse or exacerbate the circumstance. (R. 1287-88). He also explained to the jury it could return a life sentence even if the jury found an aggravating circumstance. (R. 1288). Judge Hyman also instructed the jury as follows:

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

¹⁵ After the qualification of these 2 jurors, and other jurors, on the 3rd day of individual *voir dire*, in order to speed up the process, the parties agreed to allow Judge Hyman to give each panel of 6 jurors a preliminary instruction regarding how a death penalty case proceeds, including consideration of aggravation and mitigating evidence, both statutory and non-statutory, in determining the appropriate sentence, instead of doing the same with each individual juror as Judge Hyman had done the first 2 days. This was done as agreed. (See R. 1932-34, 1948-49, 2041-52, 2167-76, 2285-94, 2365-74, 2442-52, 2562-70, 2653-62, 2706-16, 2777-87, 2848-58, 2915-26, 3013-22, 3077-94, 3149-55). As a result, Cottrell’s argument that the judge and his jury were permeated with misunderstanding about the law of consideration of mitigating evidence is simply not supported by the record. (See R. 1145-3214).

(R. 1288)(emph. add.). Judge Hyman further instructed the jury: “For those of you who will serve in this case, **you must accept and apply the law exactly as I give it to you.**” (R. 1289). At that time, Judge Hyman did not specifically explain what all of the different kinds of mitigation evidence there are.

Prior to closing arguments in the penalty phase, Judge Hyman instructed the jury:

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

(R. 4307)(emph. add.).

At the end of the penalty phase, before it retired to deliberate on the sentence, Judge Hyman instructed the jury on the law regarding what they **must** consider in determining the appropriate sentence. (R. 4346-68). “Explaining specific legal points and thereby eliminating jurors’ misconceptions is the very reason jury instructions exist.” State v. Matthews, 296 S.C. 379, 384, 373 S.E.2d 587, 590 (1988). The law presumes all 12 jurors followed Judge Hyman’s instructions. Parker, 442 U.S. 62; Pierce, 289 S.C. 430, 346 S.E.2d 707.

Judge Hyman instructed the jury they are the judges of the facts, but he was the judge of the law, and under their oaths they must apply the law as he instructed it to them. (R. 4348–49, 4367). He also instructed the jury: “Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all of the evidence in the case and that you will follow the law as I have explained it to you.” (R. 4367).

Judge Hyman instructed the jury they “**must**” consider both aggravating **and** mitigating evidence in determining the appropriate sentence. (R. 4358; 4360–62). He defined what mitigating evidence is. (R. 4361). He instructed the jury they “**must**” consider both statutory

and non-statutory mitigating evidence. (R. 4360–62). He defined both statutory and non-statutory mitigating evidence. (R. 4360–62).

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

Judge Hyman instructed the jury: “You **must consider** any other circumstance that you find *of any nature whatsoever relating either to the offense or to the defendant* as a reason not to impose the death penalty.” (R. 4362)(emph. add.). *Any factor* may be taken into account as a reason for not imposing the death penalty on the defendant. (R. 4362– 63). In determining the appropriate sentence, the jury “**will consider** the aggravating circumstance or circumstances.... you found **and the mitigating circumstances**, and you will then decide whether you will recommend the death penalty or life imprisonment. (R. 4365)(emph. add.). He also instructed the jury as follows:

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

(R. 4365–66)(emph. add.).¹⁶

¹⁶ Judge Hyman correctly charged the jury it must consider all mitigating evidence before determining whether to impose a life or death sentence. State v. Hicks, 499 S.E.2d 209 (1998);

Judge Hyman also gave the jury a written copy of his instructions at the close of his charge. (R. 4346). And, the “Statutory Instructions” provided to the jury, and read to them by Judge Hyman, also stated: “You **must also consider** any non-statutory mitigating circumstances.” (R. 4361; 4365)(emph. add.). Jurors are presumed to follow the trial court’s instructions. See CSX Transp., Inc. v. Hensley, 556 U.S. 838 (2009); Penry v. Johnson, 532 U.S. 782, 789 (2001); United States v. Olano, 507 U.S. 725, 740 (1993); Greer v. Miller, 483 U.S. 756, 766 n. 8, (1987); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975). As a result, there is no merit to Cottrell’s argument in his petition for rehearing that the jurors were not instructed on the law that they must consider all statutory and non-statutory mitigation evidence including mitigation evidence about the defendant himself.

CONCLUSION

Based on the entire *voir dire* of these 2 jurors, along with the mandatory instructions given by Judge Hyman, the jurors would have meaningfully considered all mitigating circumstances, including statutory and non-statutory. This Court did not misapprehend the record or the law or overlook any point or argument. Rule 221(a), SCACR. The Petition for Rehearing must be denied.

II. Appellate Issue Three

A.

Cottrell argues this Court’s Opinion in the present appeal, as to appellate issue 3, contradicts this Court’s Opinion in State v. Cottrell, 376 S.C. 260, 657 S.E.2d 451 (2008) (*Cottrell I.*). Cottrell is wrong.

State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991); Cain; State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987).

At his first trial, Cottrell was convicted of all charges including murder and sentenced to death. This Court reversed the murder conviction and death sentence and remanded for a new trial due to the trial court's failure to instruct the jury on the lesser included offense of voluntary manslaughter. Cottrell, 376 S.C. at 264-65, 657 S.E.2d at 453-54 (*Cottrell I*).¹⁷ This Court found in viewing the evidence in the light most favorable to Cottrell there was evidence from which the jury could infer the victim, Officer McGarry, "reacted in an impermissibly aggressive manner, physically assaulting and then shooting appellant when appellant exercised his constitutional right to walk away." Therefore, since the evidence was susceptible to more than 1 inference, the trial judge erred:

in holding as a matter of law the victim [Officer McGarry] was effectuating a lawful arrest in a lawful manner when he tackled appellant from behind. The evidence in this case presented a jury question whether the arrest was lawful but effectuated through the victim's unnecessary use of violence, thereby entitling appellant to a voluntary manslaughter charge under Linder.

Id., citing State v. Linder, 276 S.C. 304, 308, 278 S.E.2d 335, 227 (1981). In a footnote to its holding, this Court stated:

We are confident that the victim's acts are explained by his knowledge that appellant was a suspect in a murder case and therefore likely to be armed. The jury, however, heard no evidence of this other crime and thus it cannot be used to bolster the lawfulness of appellant's detention or the victim's use of force in determining whether the evidence warranted a voluntary manslaughter charge.

Cottrell, 376 S.C. 260, 657 S.E.2d 451, 454, n. 3 (*Cottrell I*).

In contrast, in the re-trial, in the guilt phase, the jury heard the evidence Officer McGarry was aware Cottrell was a suspect in a crime involving a shooting of another person in Horry County [a murder] and therefore was likely to be armed; **and**, at the close of the guilt phase, Judge Hyman instructed the jury on the lesser included offense of voluntary manslaughter and on

¹⁷ The convictions and sentences for AWIK [Guthinger], resisting arrest, and grand larceny were not reversed or vacated. Id.

the defense of self-defense. (R. 3288-3301, 3838-60; Verdict Form). As a result, this Court's Opinion in the present case does not contradict *Cottrell I*. Furthermore, as this Court correctly stated in its Opinion in this case:

Lastly, for the purposes of the Fourth Amendment, we find the seizure did not occur at the moment McGarry began interacting with Cottrell, nor when McGarry informed him that he would like to perform a pat-down for weapons; rather, the seizure occurred only when McGarry placed his hands on Cottrell in an effort to restrict his movement, and at that time, witnesses corroborated that Cottrell's right hand was located near his waist band—an indicator to an experienced officer like McGarry that Cottrell may have been reaching for a weapon. See California v. Hodari D., 499 U.S. 621, 626-29 (1991)(finding suspect was not seized when he did not submit to a police officer's authority after receiving orders to stop, and the seizure only occurred once the officer tackled the suspect).

State v. Cottrell, Shearhouse Advance Sheets, Opinion No., p. 26 (2017).

Additionally, based on the evidence presented, we find Cottrell was not entitled to a jury charge on reasonable suspicion, but rather, the focus for the jury in determining the lawfulness of the stop was the reasonableness of the manner in which McGarry acted. While the lawfulness of an arrest is within the province of a jury's deliberation, our manslaughter jurisprudence does not dictate that the evidence of reasonable suspicion is necessarily a component for the jury to consider—the inquiry may be limited to analyzing the manner in which the officer acted, and whether he used a proportionate amount of force. This fact is illustrated by the fact that both parties asked the trial judge to rule on the lawfulness of McGarry's Terry stop as a matter of law in pre-trial hearings. While the trial judge declined to rule at that time, preferring to see how the issue would develop at trial and what evidence the parties would offer, his reason for excluding Johnson's testimony is clarified by his post-trial order, where the trial judge found McGarry possessed reasonable suspicion as a matter of law. We are confident that after hearing Johnson's testimony, the trial judge was able to determine that Johnson himself possessed a reasonable suspicion, and therefore, his testimony was properly excluded to prevent it from unduly prejudicing or confusing the jury, instead allowing the jury to limit its inquiry to the reasonableness of the manner in which McGarry acted.

Id. at 27. As shown, this Court's Opinion in the present case does not contradict this Court's Opinion in *Cottrell I*.

Furthermore, the evidence presented in this case was different. It included Cottrell's own confession to shooting Officer McGarry and why he shot McGarry, given at the hospital to a

SLED agent. That statement also included Cottrell's admission it was he [Cottrell] who fired first and it was Officer Guthinger who shot Cottrell, not McGarry. The jury also heard from Cottrell's own witness in the guilt phase, Diane Lawson, who testified Cottrell fired the first shot, killing McGarry, and McGarry's gun discharged as he fell backward to the pavement.

B.

Cottrell also argues this Court misapprehends his arguments and the record on the issue of whether Judge John erred in excluding Det. Johnson's testimony on the Hartman murder. Cottrell is wrong. This Court correctly addressed this issue finding Judge John did not abuse his discretion in excluding the testimony under Rules 401 and 403, SCRE and Cottrell was not denied his constitutional right to present a defense. Further, this Court correctly found any error would be harmless on this record. This Court's holding is fully supported by the Record.

Judge Hyman did not err in limiting the guilt phase testimony of Johnson on the Hartman' murder investigation as the proffered evidence was not relevant, as McGarry had articulable reasonable suspicion to conduct an investigatory stop and attempted pat down, and its potential for undue prejudice to Cottrell outweighed any probative value because it would have injected detailed evidence of the other murder and Cottrell's criminal activity into the guilt phase determination when it had no probative value as to the culpability of Cottrell in the McGarry homicide and would have confused issues before the jury in the guilt phase and prejudiced Cottrell. The limitation did not deprive Cottrell of his right to present a meaningful defense and preserved his right to due process and a fundamentally fair trial. This Court did not misapprehend any point or argument of Cottrell or any facts or law. Rule 221(a), SCACR.

What Occurred Below

At trial, Cottrell sought to introduce additional testimony of Johnson detailing his investigation of the murder of Rick Hartman, and how he identified Cottrell as a suspect in that murder, in an odd effort to show law enforcement *allegedly* lacked reasonable articulable suspicion to conduct a stop and attempted Terry pat down of Cottrell.¹⁸ Pretrial, there was a proffer of Johnson's testimony and others. At issue was the limits on admissibility of information developed during the Horry County (HCPD) investigation of the Hartman murder, as relayed to the Myrtle Beach Police Dept. (MBPD) and eventually to the victim Officer McGarry. The articulable suspicion developed in the Hartman murder investigation served as part of the basis for Officer McGarry's brief stop of Cottrell to check for warrants and attempted Terry pat down for weapons the evening McGarry was killed. (R. 675-907, Tr. Sept. 8, 2014, 1-233). The State established at the pre-trial hearing Johnson had developed the following information in the Hartman murder at the time Officer McGarry approached Cottrell outside the *Dunkin Donuts*:

On Saturday morning, November 23, 2002, Hartman's body was discovered in his pick-up truck on a secluded road in Horry County still seated in the driver's seat. He had been shot 4 times by someone sitting in a position of trust, in the passenger seat of Hartman's truck. An empty gym bag was found next to Hartman on the seat, in which he normally carried his money or drugs. Hartman died from the gunshot wounds, specifically 1 to the back of the head. The truck was found in an isolated area consistent with a covert drug transaction. (R. 691-732; 945, Ex. 5, Sept. 8, 2014 hearing; See also R. 3919-58).

¹⁸ Hartman was killed on November 23, 2002, roughly 37 days prior to Officer McGarry's murder at the hands of Cottrell on December 29th.

Interviews with numerous named witnesses, who knew Hartman and were present at his residence after midnight on November 23rd, revealed in those early morning hours Hartman made several phone calls to and received several calls **from a man Hartman knew, a male drug source**, in an attempt by Hartman to purchase drugs and to arrange a drug transaction. The victim was “cutting up” and joking with the man on the other end of the line, indicating a close relationship with the caller. During the calls, Hartman referred to the man on the other end of the line as “**buddy**” and told the man it was “**too cold for us to ride wave runners [jet skis] today.**” In the last call, Hartman told the man that he [Hartman] would not come to his [the man’s] home, but would “meet him half-way.” Several witnesses informed HCPD Hartman would not have left his home at that late hour unless it was to meet someone he trusted. Hartman left his home at approximately 4:00 a.m. in his truck to go buy those drugs when he was killed. His body was discovered after daylight by a passing motorist, and police were called to the scene. (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-58).

HCPD discovered through interviewing several witnesses who knew Hartman, Hartman had employed Cottrell as a driver and **as security** for his escort [prostitution] service, and **Cottrell regularly sold or supplied marijuana and cocaine to Hartman**. HCPD also discovered through interviewing a named witness that **Cottrell was 1 of only 4 people Hartman rode jet skis with and Cottrell was 1 of only 2 males Hartman rode jet skis with**. The other 3 individuals who had ridden jet skis with Hartman in the past were cooperating with HCPD and providing information and indicated they were not involved in Hartman’s murder. The other male Hartman had rode jet skis with, Ware Kimmell, was a bondsman and did not sell drugs to Hartman. Several witnesses also told police **Hartman trusted Cottrell**. (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-75).

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

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

HCPD discovered through interviewing several different witnesses who knew Hartman, Cottrell, & Amber Counts that **Cottrell and Amber were seeing each other romantically** in the days leading up to Hartman's murder, and in fact **Amber was pregnant with Cottrell's child.** When police interviewed Amber the afternoon following Hartman's murder, **Amber was attempting to move out and leave her residence, and Amber told police she did not have a boyfriend.** HCPD also discovered through interviewing another witness that Cottrell stayed with Amber the Saturday evening following Hartman's murder. That same day, **Amber called another witness and told her that Cottrell had given her [Amber] an engagement ring.**¹⁹ (R. 691-732; 945, Ex. 5, Sept. 8, 2014; R. 3919-58).

¹⁹ It is noted in the HCPD investigation report of the Hartman murder introduced at the pre-trial hearing, that prior to Officer McGarry's murder, Amber Counts repeatedly denied during the investigation of Hartman's murder that she had a boyfriend and never gave police Cottrell's name as a person who was connected with Hartman or could have committed his murder. The investigation report also notes HCPD believed Amber was being deceptive with them regarding Cottrell and her relationship to him because other named witnesses had informed police Amber was dating or seeing Cottrell romantically. (R. 945, Ex. 5, Sept. 8, 2014).

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

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

HCPD learned **Cottrell had been arrested in the last year for possession with intent to distribute marijuana,** and **Halcomb had paid Cottrell's bond** to get Cottrell out of jail. Police also learned **Cottrell was residing with Halcomb** at various residences. (R. 732-62, 3919-58).

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

The record also shows HCPD had zeroed in on Cottrell as a suspect because they were attempting to locate him to interview him, had photographed 1 address at which he had resided,

and had subpoenaed his phone records and were waiting on receipt of the same when Officer McGarry was murdered by Cottrell. (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-58).²⁰

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

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

Prock testified that as a narcotics supervisor she reviewed McGarry's "high court" case files before sending them to the Solicitor for prosecution. This review ensured McGarry had obtained Cottrell's NCIC "rap sheet" and had reviewed it for any prior record for charging enhancements on the PWID charge. McGarry obtained Cottrell's August 2002 rap sheet which showed an arrest and pending charge for attempted murder in New York. (R. 732-62).

²⁰These phone records eventually revealed it was Cottrell who Hartman was talking to before he disappeared from his home in his truck and was murdered at the secluded location.

MBPD Officer Mike Guthinger testified he and Officer McGarry entered the *Dunkin Donuts* when they both noticed Cottrell behaving loudly and somewhat boisterously at the service counter. McGarry's demeanor changed upon seeing Cottrell. McGarry whispered to Guthinger, "suspect 10-61, 10-32." Guthinger testified to MBPD's radio codes in use at that time, as well as his practical understanding of what this communication meant to him personally. Guthinger testified "10-61" is a "shooting suspect," which referred back to the HCPD investigation into Hartman's murder. The second, "10-32" is a "person with a gun" or "person with a concealed gun," which covered the present threat on December 29, 2002, facing McGarry and the innocent public in the *Dunkin Donuts*. (R. 763-870).

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

Cottrell gave a post Miranda statement, which Judge Hyman found was voluntarily given at a prior Denno hearing. (R. 571-660). Cottrell's statement corroborates the fact McGarry was attempting to conduct a brief investigative stop to determine if there were any outstanding warrants on Cottrell and an attempted Terry pat down for weapons. Cottrell stated McGarry "asked for my I.D. and when I showed it to him he said he was going to pat me down. I told him no and I walked off." Cottrell told officers he was carrying an illegal firearm, a pistol, in his waistband, and he did not want McGarry to pat him down. The record shows while walking away hurriedly, Cottrell reached in his front waistband, and McGarry pursued Cottrell on foot and attempted to control Cottrell's right hand. Cottrell eventually pulled with his right hand the illegally carried handgun he was concealing under his baggy shirt and fatally shot Officer McGarry in the face. The evidence presented showed McGarry was waiting for the answer to this warrant check via dispatch when he became locked in the fatal struggle and was shot. When the call back came to inform McGarry there were no outstanding warrants, McGarry did not answer because he had already been shot. (R. 577-660; 762-870, 871-93; 3555-63; 3934-36).

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

Cottrell argues Judge Hyman’s ruling, preventing him from calling Johnson to detail to the jury the evidence in the Hartman murder investigation, violated his constitutional right to present a defense. Cottrell argues police did not have articulable suspicion to conduct a Terry stop, and as a result, neither did Officer McGarry, and as a result, if the jury heard Johnson’s testimony, they could have found the murder of McGarry was either voluntary manslaughter or self-defense. This argument has no merit as Judge Hyman did not err in limiting Johnson’s testimony under Rule 401 or 403, SCRE.²¹

Law

“The Constitution guarantees criminal defendant’s ‘a meaningful opportunity to present a complete defense,’” Crane v. Kentucky 476 U.S. 683, 690 [citation omitted] (1986), (quoting California v. Trombetta, 467 U.S. 479, 485 [citation omitted] (1984), but we have also recognized that “state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials[.]” Nevada v. Jackson, 133 S.Ct. 1990 (2013)(quoting Holmes v. South Carolina, 547 U.S. 319, 324 (2006)(quoting United States v. Scheffer, 523 U.S. 303 308 (1998). “Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence.” Id., referencing 547 U.S. at 331 (rule did not rationally serve any discernible purpose); Rock v. Arkansas, 483 U.S. 44, 61 (1987)(rule arbitrary); Chambers v. Mississippi,

²¹ Under this ground, Cottrell also argued Judge Hyman erred in admitting specific testimony of Prock. This argument was completely without merit. Prock was simply asked to explain what police “ten codes” were, and if she had walked in to the *Dunkin Donuts* and saw Cottrell, how would she have described the situation to Officer Guthinger. She testified she would have said the same thing Officer McGarry said to Guthinger, “10-61, 10-32 county.” (R. 3291). This testimony is not speculative, and there could be no prejudice in any event. Guthinger testified this is what McGarry said to him upon recognizing Cottrell.

410 U.S. 284, 302-03 (1973)(State did not even attempt to explain the reason for its rule); Washington v. Texas, 388 U.S. 14, 22, 87 (1967)(rule could not be rationally defended)

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

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

A judge has a responsibility for safeguarding both the rights of the accused and the rights of the public in the administration of criminal justice. State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct. App. 2005). The conduct of a trial, including the admission and rejection of proffered

testimony is largely within the sound discretion of the trial judge. State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534 (1941).

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

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

The 4th Amendment to the U.S. Constitution provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. The S.C. Constitution of 1895 contains near exact language. S.C. Const. art. I, § 10. The 4th Amendment governs those cases where a person is detained, even briefly, by the police even if ultimately they are not arrested. Terry v. Ohio, 392 U.S. 1, 16 (1968). Such a seizure is a reasonable one under the 4th Amendment where the facts available to the officer at the time of the stop would cause another reasonable man to believe that the action taken was appropriate. Id. at 21-22, 88 S.Ct. at 1880. Put another way, the reasonable suspicion must be something more than an inarticulate hunch or simple good faith. Id.

Here, in the present case, Cottrell was briefly stopped based on suspicion of his involvement in the murder of Hartman. Such stops, contrary to Cottrell's assertions, are squarely within the limits of the 4th Amendment. See United States v. Hensley, 469 U.S. 221, 229 (1985)(Where police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, check identification, or check for outstanding warrants, in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice.). The Court reasoned that leaving police action until probable cause is obtained would hinder investigations and may potentially allow suspects to escape. Hensley, 469 U.S. at 229. The Court also explicitly recognized the more serious the felony the person being detained is suspected of gives a greater deference to the interest of law enforcement as it involves a greater threat to public safety. Id. Here Cottrell was suspected of having committed the most serious felony known to the law [murder] and therefore of posing a risk to the public's safety. Such a situation is exactly of the type which the Court considered in Hensley. Here "[t]he law enforcement interests at stake in these circumstances outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes." Id.

Cottrell contends Officer McGarry was unaware of sufficient factual knowledge so the detention or stop by McGarry was unreasonable under the 4th Amendment. Cottrell is wrong. The testimony in the record is undisputed HCPD had developed Cottrell as a suspect in Hartman's murder. This was communicated to MBPD by Johnson, and to Officer McGarry, i.e. Prock informed McGarry based on HCPD's investigation Cottrell was a suspect in the shooting murder of Hartman. The record shows Officer McGarry immediately recognized Cottrell as a suspect in the Hartman' murder upon entering the *Dunkin Donuts* and communicated the same to

Officer Guthinger. McGarry indicated to Guthinger he was going to run an NCIC check on Cottrell to make sure there were no outstanding warrants, i.e. for the murder of Hartman, on Cottrell. This is exactly what occurred. This was reasonable under the 4th Amendment as Officer McGarry, aware Cottrell was a suspect in Hartman's murder, had not heard back from Horry County in approximately 4 weeks; and, there might be outstanding warrants on Cottrell for the murder. For the safety of the patrons of the *Dunkin Donuts*, and so as not to embarrass Cottrell, McGarry approached Cottrell outside the store on the sidewalk and asked Cottrell if he remembered him. After some brief conversation, McGarry asked for Cottrell's identification informing Cottrell he was going to run an NCIC check to see if there were any outstanding warrants on Cottrell, and he could not remember how to spell Cottrell's name accurately. Cottrell went to a vehicle to get his identification [the Halcomb car according to Diane Lawson] and returned and handed it to McGarry who immediately ran the NCIC check over the radio.

As this Court noted in its Opinion, not all personal encounters between police and citizens constitute a "seizure" of the person, thereby bringing into play the 4th Amendment. State v. Culbreath, 300 S.C. 232, 387 S.E.2d 255 (1990); State v. Foster, 269 S.C. 373, 237 S.E.2d 589 (1977). The purpose of the 4th Amendment is not to eliminate all contact between police and citizenry, but to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals. United States v. Mendenhall, 446 U.S. 544 (1980).

In determining whether an encounter between a law enforcement official and a citizen constitutes a seizure, and thereby implicates the protections of the 4th Amendment, the correct inquiry is whether, considering all of the circumstances surrounding the encounter, a reasonable person would have believed that he was not free to leave. Mendenhall, 446 U.S. 544. A

“seizure” occurs when an officer, by use of physical force or show of authority, restrains an individual’s freedom of movement, even though the detention is short and falls short of an arrest. Sikes v. State, 323 S.C. 28, 488 S.E.2d 560 (1994); Cone v. Nettles, 308 S.C. 109, 417 S.E.2d 523 (1992); State v. Kirkpatrick, 320 S.C. 38, 462 S.E.2d 884 (Ct. App. 1995).

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

As a result, as this Court correctly found, the initial encounter between McGarry and Cottrell on the sidewalk immediately outside the *Dunkin Donuts* was not a seizure. Culbreath, *supra*; Foster, *supra*. McGarry approached Cottrell on foot in public and asked for Cottrell’s I.D. According to 2 witnesses, 1 in the *Dunkin Donuts*, and 1 in the Halcomb car, Cottrell went to a car to retrieve his driver’s license and returned and provided it to McGarry. While McGarry was running the NCIC check and waiting on a response, he informed Cottrell he was going to pat him down for weapons. Cottrell said no, and turned and walked away. At this point, Cottrell obviously felt he was free to walk away, and did so. At this point, as this Court correctly found, there still was not a seizure of Cottrell’s person. Mendenhall, 446 U.S. 544; Foster, *supra*. And, as this Court found, even the initial pursuit of Cottrell by Officer McGarry was not a seizure, as the pursuit of a fleeing suspect is not a seizure. Hodari D., 499 U.S. 621; Cone, *supra*. It was when Officer McGarry grabbed Cottrell’s right hand, in an attempt to control it, that the seizure

actually occurred. That seizure was reasonable under the 4th Amendment as Cottrell was reaching in his front waistband for a concealed weapon.

However, even if the entire encounter from its inception was to be considered an investigative detention or Terry stop, the stop was reasonable under the 4th Amendment. Under Terry, a police officer may briefly detain a suspect, if the officer has a reasonable suspicion the person has been involved in or is wanted in connection with a completed felony, as well as in cases where there is a reasonable suspicion a person is committing a crime, or is about to commit a crime. Hensley, 469 U.S. 221; United States v. Place, 462 U.S. 696 (1983); State v. Khingratsaipon, 352 S.C. 32, 572 S.E.2d 456 (2002); State v. Alexander, 309 S.C. 495, 424 S.E.2d 526 (1992); Culbreath, 300 S.C. 232, 387 S.E.2d 255; Foster, 269 S.C. 373, 237 S.E.2d 589; State v. Dean, 292, S.C. 136, 317 S.E.2d 744 (1984); State v. Morris, 312 S.C. 116, 439 S.E.2d 291 (Ct. App. 1993). A reasonable suspicion must be based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion” and requires a particularized and objective basis that would lead one to suspect another of criminal activity. United States v. Cortez, 449 U.S. 411 (1981); Khingratsaipon, 352 S.C. 32, 572 S.E.2d 456; State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999); State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (Ct. App. 1997); State v. Butler, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000). A reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or “hunch,” **but less than** the level of suspicion required for probable cause. Butler, 343 S.C. 198, 539 S.E.2d 414.²² Thus, in the present case, McGarry did not have to have probable cause but

²² Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 155, 317 S.E.2d 746 (1984). Probable cause “does not demand any showing that such a belief be correct or more likely true than false.” State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004).

less. He must have had only an articulable and reasonable suspicion that Cottrell had been involved in, or was about to be involved in criminal activity. State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996).

In determining whether an investigative stop is justified, the totality of the circumstances, or “the whole picture” must be considered, which includes the inferences drawn from a set of facts, as understood by those versed in law enforcement. United States v. Arvizu, 534 U.S. 266 (2002); United States v. Sokolow, 490 U.S. 1 (1989); Cortez, 449 U.S. 411; Lesley, 326 S.C. 641, 486 S.E.2d 276. A seizure of a person must be reasonable and reasonableness depends on the balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers. United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Foster, *supra*. Probabilities, not certainties, must govern the determination of a justified stop. Cortez, *supra*. The burden is on the State to articulate facts sufficient to support reasonable suspicion. Brown v. Texas, 443 U.S. 47 (1979); Butler, 343 S.C. 198, 539 S.E.2d 414.

In State v. Rodriguez, 323 S.C. 484, 476 S.E.2d 161 (Ct. App. 1996), the Court listed some of the circumstances to be considered when applying the balancing test between the public interest and the individual’s right: (1) the seriousness of the offense; (2) the degree of likelihood the person detained may have witnessed or been involved in the offense; (3) the proximity in time and space from the scene of the crime; (4) the urgency of the occasion; (5) the nature of the detention and its extent; (6) the means and procedures employed by the officer; and (7) the presence of any circumstances suggesting harassment or a deliberate effort to avoid the necessity of securing a warrant. Id., at 493, 476 S.E.2d 161.

In deciding whether to conduct a Terry stop, an officer may rely on information provided by other officers as well as any information known to the team of officers conducting the

investigation. United States v. Navarrete-Barron, 192 F.3d 786 (8th Cir. 1999)(citing United States v. Robinson, 119 F.3d 663, 666-67 (8th Cir. 1997)). Terry stops are not limited to crimes currently being committed or about to be committed, but are also permissible for crimes that have already been committed. See Hensley, *supra*, referencing Terry, 392 U.S. at 26; State v. Wright, 416 S.C. 353, 785 S.E.2d 479 (Ct. App. 2016), *Geathers, J., concurring*. If police have a reasonable suspicion ground in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion. *Id.* at 229.

Officer McGarry had reasonable articulable suspicion to conduct an investigative or Terry stop of Cottrell. McGarry was aware Cottrell was a suspect in the shooting murder of Hartman in Horry County. Cottrell, 376 S.C. 260, 657 S.E.2d 451, 454, n. 3, (*Cottrell I.*) (“We are confident that the victim’s acts are explained by his knowledge that appellant was a suspect in a murder case and therefore likely to be armed.” However, this information was not before the jury). McGarry had not heard back from HCPD regarding the Hartman murder investigation in approximately 4 weeks. McGarry was aware Cottrell had an outstanding charge from New York for attempted murder. McGarry was aware he had arrested Cottrell on a previous occasion for PWID marijuana. McGarry could see Cottrell was with a white male associate [Halcomb], and Cottrell moved toward a “gold” or “champagne” colored Honda parked near Halcomb’s vehicle, consistent with the request from HCPD for information regarding the Hartman murder. McGarry requested Officer Guthinger identify the black car’s driver [Halcomb], consistent with HCPD’s request for assistance in identifying “Red”. McGarry was aware Cottrell and Halcomb were allegedly involved in the loan shark business, and he had investigated an alleged kidnapping in which Cottrell was at the home of the alleged victim. When McGarry informed Cottrell at

Dunkin Donuts he was going to pat Cottrell down for weapons for officer safety, Cottrell stated no and turned and walked away quickly toward the “gold” or “champagne” colored Honda. Cottrell reached into his front waistband with his right hand as he quickly walked away from McGarry. Cottrell, 376 S.C. 260, 657 S.E.2d 451, 454, n. 3. See Lesley, *supra* (Terry stop was justified where facts gave rise to reasonable suspicion that defendant may have been involved in drive by shooting 2 days before); United States v. Brugal, 209 F.3d 353 (4th Cir. 1999)(after checking defendant’s driver’s license and rental agreement, officers had reasonable suspicion to further detain defendant who left interstate after apparently noticing drug checkpoint).

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

Cottrell disregards the standard to which police officers are to be held in regards to reasonable suspicion. Indeed reasonable suspicion itself is a nontechnical, commonsense concept. Ornelas v. United States, 517 U.S. 690, 695 (1996). It is not probable cause. The Supreme Court has explicitly advised against unrealistic second guessing of the actions of police in such situations; and furthermore, the question to be asked is not whether there is some

alternative means but whether police were unreasonable not to pursue it if in fact such an alternative existed. United States v. Sharpe, 470 U.S. 675, 686-87 (1985). Further, “courts must give due weight to common sense judgments reached by officers in light of their experience and training.” State v. Taylor, 401 S.C. 104, 113, 736 S.E.2d 663, 667 (2014).

Here, Officer McGarry had received information from HCPD that Cottrell was a suspect in a shooting murder; McGarry had had previous contact with Cottrell in which he had arrested him for a drug distribution related offense, McGarry was aware Cottrell had an outstanding charge for attempted murder in New York; and McGarry had previously investigated Cottrell for operation of a loan sharking business and possible kidnapping.²³ All of these facts together, when viewed as a common sense judgment reached by McGarry in light of his experience and training, readily rise to the level of reasonable suspicion justifying a brief stop to determine if there were any outstanding warrants on Cottrell. Terry, supra; Cottrell, supra.

As to Cottrell’s argument Officer McGarry could not conduct a Terry stop of Cottrell at the *Dunkin Donuts* because Johnson, who was investigating the Hartman murder, did not have articulable suspicion to conduct a Terry stop on Cottrell, Cottrell is incorrect. As shown by the testimony and evidence presented before Judge Hyman at the pre-trial hearing, Johnson did have articulable suspicion to conduct a Terry stop of Cottrell. The investigation of Hartman’s murder had determined Cottrell had the means [Cottrell carried a gun and Hartman was shot to death], motive [robbery *or* animosity with Hartman over escorts], and opportunity to murder Hartman [Cottrell was not at Hartman’s home when the phone calls were taking place luring Hartman to

²³ Although the information of the outstanding attempted murder charge in New York and the incident involving Mr. and Mrs. Mangum was known to Officer McGarry, the State did not seek to introduce this before the jury so as to not prejudice Cottrell. The State limited the testimony before the jury to the fact that Officer McGarry was aware Cottrell was a suspect *in a shooting* in Horry County. Cottrell brought out in his opening statement it was a murder in Horry County. This evidence was presented before Judge Hyman in the pre-trial hearing.

his death], and Cottrell was the person who lured Hartman to his death [Cottrell was the only male who rode jet skis with Hartman and also sold him drugs including cocaine].

As a result, Cottrell's claim Johnson did not have articulable suspicion to conduct a brief investigative or Terry stop is unfounded. Johnson's testimony would have only further strengthened the State's case that Officer McGarry's stop and attempted Terry pat down of Cottrell was lawful. As a result, McGarry had reasonable articulable suspicion to conduct a Terry stop of Cottrell on the night of December 29, 2002, whenever that Terry stop formally began.

Officer McGarry also had more than sufficient reasonable articulable suspicion to suspect Cottrell of being armed at the time sufficient to conduct an attempted Terry pat down for weapons that never occurred. When an officer is justified in believing the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. Terry, 392 U.S. at 24. The officer need not be absolutely certain the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief his safety or that of others was in danger. Id. “[A]nd in justifying the particular intrusion the police officer must be able to point to specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion... And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief that the action taken was appropriate’?” Terry, 392 U.S. at 21-22.

It is accepted a police officer has the authority to search an individual for weapons where the officer has reason to believe the person is armed and dangerous. Khingratsaphon, 352 S.C. at 69, 572 S.E.2d at 459 (*citing* Ybarra, 444 U.S. 85). An officer “need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” Terry, 392 U.S. at 27. The purpose of the pat-down search authorized by Terry is not to discover evidence of some crime, but instead to allow an officer to conduct his investigation without fear of being harmed. Adams v. Williams, 407 U.S. 143, 146 (1972). The present case is squarely one where “a reasonably prudent man in the circumstances was warranted in the belief that his safety or that of others was in danger.” Terry, *supra*.

Officer McGarry was confronting a person he knew was a suspect in a murder. Under such circumstances, McGarry was completely justified in having a reasonable suspicion Cottrell was armed. Also where there is a nexus between the crime believed to have been committed and guns then this too will give rise to a reasonable suspicion of a suspect being armed.²⁴ Here, McGarry encountered Cottrell while he was a suspect in a **shooting murder**, knew Cottrell had an outstanding charge for attempted murder from New York, had previously arrested Cottrell for drugs involving an intent to distribute, and had investigated Cottrell for a case of potential kidnapping. Cottrell was wearing a baggy football type jersey and baggy pants. As a result, McGarry could not definitively tell if Cottrell was armed without conducting a pat down for

²⁴ Several cases have previously recognized certain classes of crimes will help give rise to a reasonable suspicion due to the “indisputable nexus” between these crimes and weapons. State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006)(*citations omitted*)(drug offenses have an indisputable nexus with guns); State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999)(officer was reasonably prudent in giving pat-down to suspect in armed robbery, carjacking, and kidnapping he met on the street); State v. Abrams, 322 S.C. 286, 288, 471 S.E.2d 716, 717 (Ct. App. 1996)(per curiam)(police were justified in giving pat down to suspect when they were investigating a civil disturbance, it was in a known drug area, and it was early in the morning).

officer safety. All of these factors together clearly show Officer McGarry had several articulable facts he reasonably believed Cottrell was armed and therefore his *attempted* “pat down” of Cottrell for officer safety was reasonable and lawful.

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

Cottrell contends his 4th Amendment rights were violated not because inadmissible evidence was introduced, but because the jury was not allowed to hear Johnson’s testimony. This theory is “novel.” Whether or not an investigative stop and attempted Terry pat down was unreasonable under the 4th Amendment is not a matter for the jury in South Carolina, but instead is an issue determined by the trial court. *See State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000).²⁵ Importantly, Cottrell does not argue on appeal he should have been granted a directed verdict of not guilty of murder. As this Court correctly found, Cottrell’s 4th Amendment rights were not violated because Johnson and McGarry had reasonable articulable suspicion.

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

²⁵ In fact, many of the cases cited by Cottrell previously, deal with a remand to determine in a *pre-trial suppression hearing* whether the investigating officer had reasonable articulable suspicion to conduct a Terry stop, not the relevance of this evidence before the jury. (See BOA).

eyewitnesses from both the State and Cottrell regarding what occurred at the *Dunkin Donuts*, and included expert witnesses offered by both the State and Cottrell. The jury was also correctly charged in this regard on the law of murder, voluntary manslaughter, and self-defense.

Cottrell next contends Judge Hyman's exclusion of Johnson's testimony under SCRE 401, 402, & 403 violated his rights under the 14th and/or the 6th Amendment. Whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. Holmes, 547 U.S. at 324. The right is designed to protect the weighty interests of the accused from arbitrary rules disproportionate to the function they serve. Id. However, both state and federal rule makers have broad authority to create rules which exclude evidence from criminal trials. Nevada, 133 S.Ct. at 1992 (*per curiam*). "Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." Id.

Here Cottrell does not challenge that Rules 401 and 403, SCRE, are *per se* unreasonable but instead, as applied to him, they violate his rights. This is squarely against precedent where the Supreme Court has found a state rule of evidence violates a defendant's right to present a complete defense. *E.g.* Chambers, 410 U.S. 284 (State's rule defendant could not impeach his own witness was a violation of due process, state did not attempt to defend rule or explain its rationale); Washington, 388 U.S. 14 (rule cannot be rationally defended); Rock, 483 U.S. 44 (rule prohibiting all hypnotically refreshed testimony was arbitrary). Under these precedents, the whole rule is what denies the defendant a right to a complete defense not an unfavorable application of a longstanding rule to the defendant. "The accused does not have an unfettered

right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” Illinois v. Taylor, 484 U.S. 400, 410 (1988).

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

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

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

exceptional circumstances.” Jamison v. Ford Motor Co., 373 S.C. 248, 269, 644 S.E.2d 755, 766 (Ct. App. 2007), *cert. dismissed*; United States v. Simpson, 910 F.2d 154, 157 (4th Cir. 1990)(The decision whether to admit evidence under this rule is again left to the sound discretion of the trial judge, and the decision will only be set aside in extraordinary circumstances where the discretion has been plainly abused.).

Here Judge Hyman denied admission of Johnson’s testimony for several reasons, including: the testimony would have opened up a “mini-trial” on the murder Cottrell was suspected of committing [Hartman’s murder], which would have misled and confused the jury in the guilt phase, and the introduction of Johnson’s testimony would have had a substantially outweighed prejudicial effect on Cottrell. (R. 691-732; 945, Ex. 5, Sept. 8, 2014). These reasons are amply supported by an examination of the whole record, were clearly within the discretion of the trial court, and therefore cannot be a basis for a claim Cottrell’s right to present a complete defense was violated. *See State v. McGrady*, 232 N.C. App. 95, 106, 753 S.E.2d 361, 370 (N.C. App. 2014)(in context of N.C.R.Evid. 702, the trial court’s exclusion was within the bounds of the rule and thus did not violate defendant’s right to present a defense).

What Judge Hyman prevented from occurring was substantial undue prejudice to Cottrell from the jury hearing in the guilt phase Cottrell’s past criminal behavior and bad acts including the following: (1) Cottrell was a security or body guard for an illegal prostitution ring; (2) Cottrell was a driver for prostitutes in the illegal prostitution ring; (3) Cottrell was known to carry a gun; (4) Cottrell was considered to be “a scary individual” by people associated with the escort service who did not want to associate with Cottrell; (5) Cottrell had gotten 2 of the escorts [prostitutes] pregnant and “beat up” the first prostitute he got pregnant, Lindsey; (6) Cottrell and Halcomb had bragged to Hartman they had robbed “drug dealers” and showed Hartman the cash

and guns they had stolen; (7) Cottrell supplied Hartman with both cocaine and marijuana; (8) Cottrell also supplied cocaine to Michelle Hill another employee of the escort business in the past; (9) Cottrell and Halcomb were going to Pennsylvania to purchase a load of marijuana with the assistance of Hartman; (10) Hartman had allowed Cottrell to drive his truck to New Jersey to pick up large amounts of drugs; (11) Cottrell had previously been arrested by McGarry for PWID marijuana;²⁶ (12) McGarry was aware Cottrell had an outstanding criminal charge from New York for attempted murder; (13) McGarry had another previous run in with Cottrell involving a possible illegal loan-shark business and the possible kidnapping of husband and wife debtors; (14) Cottrell's driver's license had been suspended; (15) Cottrell and Hartman had argued over Cottrell getting 1 prostitute pregnant and taking another prostitute (Amber) away from her work on Thursday without explanation, and Hartman was murdered early Saturday morning; (16) Hartman was attempting to purchase drugs over the phone the night of his murder; he knew the individual he was talking to over the phone; he and the individual rode jet skis together, and the only other male individual who rode jet skis with Hartman did not supply Hartman with drugs, only Cottrell;²⁷ (17) And, finally, Hartman was found dead just a few hours later shot multiple times in the head by someone he met on a secluded road in Horry County and

²⁶ The State did not introduce the PWID marijuana charge before the jury, only that Officer McGarry had stopped Cottrell and written some "tickets."

²⁷ The fallacy of Cottrell's argument is revealed in the argument below on this issue where defense counsel sought to introduce only limited facts on the Hartman murder investigation and what police knew and limit the State on what it could elicit from Johnson on cross-examination regarding the same, i.e. that Hartman and Cottrell rode jet skis together but the jury should not hear Cottrell was the only person who rode jet skis with Hartman and also sold Hartman drugs including cocaine. (R. 3589-98). This is contrary to case law. Whether police have reasonable articulable facts to conduct an investigatory or Terry stop, depends on the totality of the circumstances available to the investigating officers. Arvizu, 534 U.S. 266; Sokolow, 490 U.S. 1; Cortez, 449 U.S. 411; Lesley, 326 S.C. 641, 486 S.E.2d 276.

the shooter had been seated in the passenger seat of Hartman's truck when the murder was committed. (R. 691-732; R. 945, Ex. 5, Sept. 8, 2014; R. 3919-58).

And, as stated, whether Officer McGarry acted in an impermissibly aggressive manner in seizing Cottrell after Cottrell walked away, Cottrell, *supra*, was fully vetted before the jury. Both the State and Cottrell called numerous eyewitnesses and expert witnesses to what occurred at the *Dunkin Donuts* on December 29, 2002. And, the jury was appropriately charged on the law regarding murder, voluntary manslaughter, and self-defense. Id.

Also here, Cottrell was allowed to cross-examine Prock as to the information relayed to McGarry prior to the incident. Essentially, Cottrell was able to elicit most of what he asked for from Prock. Where a defendant has the ability to cross-examine a witness and impeach a witness his rights are not violated, even if the defendant is unable to produce all of the testimony they wish. People v. Masters, 365 P.3d 861, 904 (Cal. 2016). A routine application of evidentiary rules does nothing to implicate a criminal defendant's constitutional rights. Id. (*citing* People v. Jones, 306 P.3d 1136 (Cal. 2013)). Here Judge Hyman correctly applied Rule 403 to the testimony in question. There is ample reasoning to support his decision and no error. Further, he ruled Cottrell could call any witness, including Johnson, to contradict or impeach any testimony of Prock, if she testified to anything Cottrell believed was not true. Cottrell chose not to call Johnson to contradict or impeach the testimony of Prock. (R. 3689-90).

Even if there was some error, the failure to admit Johnson's testimony was harmless under an evidentiary ruling standard or any standard including Chapman v. California, 386 U.S. 18, 24 (1967). However, Cottrell is incorrect that this Court applied the wrong standard. This Court applied State v. Jenkins, 412 S.C. 643, 651, 773 S.E.2d 906, 909 (2015) ("beyond a reasonable doubt the trial error did not contribute to the guilty verdict"). Since the evidence was

cumulative to Prock's, and more prejudicial, there is no reversible error. Further, there can be no reversible error where the testimony would have shown Johnson did have reasonable articulable suspicion to conduct an investigative detention or stop and attempted Terry pat down, and would have resulted in a wealth of evidence extremely prejudicial to Cottrell in the guilt phase.²⁸ Beyond a reasonable doubt, the error, if any, did not contribute to the verdict.

CONCLUSION

Johnson's testimony pre-trial and in the sentencing phase shows HCPD had reasonable articulable suspicion to conduct a Terry stop or attempted pat down on Cottrell. Further, the testimony of the pre-trial hearing and guilt phase establishes Officer McGarry had reasonable suspicion to conduct a Terry stop and attempted pat down. Cottrell does not even attempt to say how things would have been different in this context had Johnson testified. Instead, he vaguely asserts the jury may have possibly thought the original stop and attempted Terry pat down was unreasonable if they had heard it. This is irrelevant as this was not the issue before the jury but the reasonableness of the manner in which McGarry acted and whether he used excessive force after he seized Cottrell. This was fully vetted before the jury. Reviewing this case for prejudicial error, it is clear from the overwhelming evidence this jury would have found murder regardless of Johnson's testimony. In fact, as this Court found, the testimony from Johnson would make malice more evident. Therefore, Cottrell's entire contention, even should the trial court have committed error, is harmless and does not warrant reversal. This Court did not misapprehend the record or the law or overlook any point or argument. Rule 221 (a), SCACR. The Petition for Rehearing must be denied.

²⁸ The State called Johnson in the penalty phase and introduced almost all of this evidence as aggravating character evidence, and the State called other witnesses in the penalty phase who established Cottrell murdered Rick Hartman. (R. 3919-68, 3971-4025, 4066-73, 3900-11).

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ANTHONY MABRY
Senior Assistant Attorney General
S.C. Bar No. 11973
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-6305

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit
P. O. Drawer 1276
Conway, South Carolina 29526

By:


ANTHONY MABRY

ATTORNEYS FOR RESPONDENT

January 29, 2018

CERTIFICATE OF SERVICE

I, Anthony Mabry, certify that I have served the **Return to Petition for Rehearing** in the foregoing action by depositing copies in the United States mail, postage prepaid, addressed to his attorneys of record:

Keir M. Weyble, Esquire
Sheri Lynn Johnson, Esquire
Cornell Law School
Hughes Hall
Ithaca, NY 14853

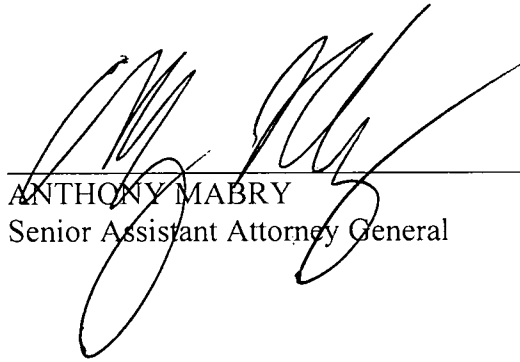
Robert M. Dudek, Esquire
Chief Appellate Defender
Division of Appellate Defense
P. O. Box 11589
Columbia, SC 29211

RECEIVED

JAN 29 2018

S.C. SUPREME COURT

This 29th day of January, 2018.



ANTHONY MABRY
Senior Assistant Attorney General