STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM ANDERSON COUNTY
Court of General Sessions

Alexander Macaulay, Circuit Court Judge

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Case No. 2007-GS-04-649

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

v.

RAYMONDEZE RIVERA ..... *Appellant*

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

I. WHETHER APPELLANT'S RIGHTS, AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO PERMIT HIM TO TESTIFY ON HIS OWN BEHALF AT THE GUILT-OR-INNOCENCE PHASE OF HIS CAPITAL TRIAL?

II. WHETHER APPELLANT'S RIGHT TO SELF-REPRESENTATION, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. 1, § 14 OF THE SOUTH CAROLINA CONSTITUTION, WAS VIOLATED BY THE TRIAL COURT'S REPEATED REFUSALS TO PERMIT HIM TO DISCHARGE APPOINTED COUNSEL AND PROCEED *PRO SE*?

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IV. WHETHER THE SOLICITOR'S PEREMPTORY CHALLENGE OF JUROR 64, WHICH HE CLAIMED WAS BASED ON THE JUROR'S CATHOLICISM, WAS PRETEXTUAL GIVEN THAT THE JUROR DECLARED HER RELIGIOUS AFFILIATION WOULD NOT AFFECT HER, AND THAT THE SOLICITOR DECLINED TO CHALLENGE A WHITE CATHOLIC JUROR?

V. WHETHER APPELLANT'S RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WAS VIOLATED BY THE SOLICITOR'S INDUCEMENT OF A CONFESSION THROUGH PROMISES TO SEEK THE DEATH PENALTY AGAINST HIM, TO PROVIDE HIM WITH A CELL TO HIMSELF, AND TO PERMIT HIM TO SEE A CHAPLAIN?

VI. APPELLANT'S RIGHT TO PRESENT EVIDENCE IN MITIGATION OF PUNISHMENT, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WAS VIOLATED BY THE TRIAL COURT'S REFUSAL TO ADMIT PROOF THAT QUALIFIED MENTAL HEALTH PROFESSIONALS HAD DIAGNOSED HIM WITH A SERIOUS MENTAL ILLNESS ON THE GROUND THAT THEY DID NOT HOLD "MEDICAL" DEGREES?

VII. APPELLANT'S RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND

S.C. CODE § 16-3-25(C)(1), WERE VIOLATED WHEN THE PROSECUTION WAS PERMITTED TO URGE THE JURY, THROUGH ARGUMENT AND EVIDENCE, TO IMPOSE A SENTENCE OF DEATH FOR A HOMICIDE AS TO WHICH HE HAD NOT – AND COULD NOT HAVE – BEEN FOUND DEATH-ELIGIBLE?

## STATEMENT OF THE CASE

Appellant, Raymondeze Rivera (hereinafter Rivera), was arrested in Douglasville, Georgia, on the evening of December 15, 2006, in connection with the homicides of two women – Asha Wiley and Kwana Burns – in Anderson, South Carolina, earlier that same week. Tr. 2027; 2030; *see also* Tr. 2360.[1] There was no apparent motive for the killings, which occurred approximately three days apart and involved victims who did not know each other; Rivera had no previous relationship with either woman, he had no connection to the Anderson area, and there was no evidence to suggest robbery or sexual assault. *See* Tr. 1887-89.

Within hours of the arrest, Anderson Police Lt. John Zamberlin attempted to interview Rivera at the Douglasville, Georgia jail. Rivera came across as "polite, calm [and] likable," Tr. 2038, l. 16, but he declined to make a statement, and Zamberlin went back to Anderson empty handed. Tr. 2039. Four days later, Zamberlin returned to the Douglasville jail for the stated purpose of obtaining an additional set of Rivera's fingerprints. Tr. 2046-47. As the fingerprinting session concluded, Rivera informed Zamberlin that his cooperation could be had in exchange for three promises from the prosecution: first, that they seek the death penalty against him; second, that he be held in a jail cell by himself; and third, that he be permitted to see a chaplain at the jail. Tr. 2055. Zamberlin

[1] "Tr." refers to the Transcript of Record of Rivera's February 2010 capital trial. This brief will also refer to portions of five pre-trial hearings, identified as follows: Supp. Tr. A (transcript of Dec. 8, 2008 hearing); Supp. Tr. B (transcript of May 27, 2009 hearing); Supp. Tr. C (transcript of June 4, 2009 hearing); Supp. Tr. D (transcript of Nov. 10, 2009 hearing); and Supp. Tr. E (transcript of Dec. 1-2, 2009 hearing).

immediately conveyed this information to the Solicitor, and she quickly prepared a letter promising the three actions Rivera had identified. Tr. 2058. The next day, Zamberlin returned to Douglasville, presented the Solicitor's written promises to Rivera, and proceeded to take a detailed written confession to the killings of Kwana Burns and Asha Wiley.[2] Tr. 2058-59.

Rivera was indicted for the murder of Kwana Burns on February 20, 2007.[3] R *. Nearly a year later, on February 13, 2008, the State gave formal notice of its intent to seek the death penalty. R *. By order dated August 1, 2008, the Hon. J.C. Nicholson appointed John D. Delgado as lead counsel, and William S. McGuire as co-counsel for the Burns case. R *. And on May 7, 2009, the State notified the defense of its intent to rely upon a single statutory aggravating circumstance to establish Rivera's legal eligibility for a sentence of death: "That the defendant, Raymondeze Lamon Rivera, the person who committed this murder, has a previous conviction for murder. S.C. Code Ann. § 16-3-20(C)(a)(2)." R *.

Just over two months after their appointment, Rivera made the first of several attempts to have trial counsel relieved and proceed *pro se*.[4] At a December 8, 2008 hearing on Rivera's request, attorney Delgado explained to Judge Nicholson that his client was "delusional and paranoid," and

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[2]The confession was later admitted against Rivera over defense objection. *See* Tr. 2060; Supp. Tr. C 53-54.

[3]The case against Rivera for the unrelated Asha Wiley homicide proceeded separately. Rivera was tried, convicted and sentenced to life in prison for that offense in February, 2008, and the conviction was recently affirmed on direct appeal. *See State v. Rivera*, No. 2011-UP-138 (Ct. App. April 15, 2011). As noted below, that conviction supplied the only statutory aggravating circumstance for the Kwana Burns homicide, which is the subject of this appeal.

[4]Rivera's complaint was that counsel had not complied with several instructions. *See* Supp. Tr. A 10-13. As described *infra*, Rivera made three more attempts to waive his right to counsel and proceed *pro se*, but the trial court refused to permit him to do so.

that "[t]he doctors have given to him Seroquel, an antipsychotic medicine that treats both schizophrenia and bipolar disease." Supp. Tr. A, ll. 18-20. The court took the matter under advisement and ordered an evaluation. At a May 29, 2009 hearing on the results of the evaluation, Rivera withdrew his request to relieve counsel. Supp. Tr. B 3-4. Dr. Donna Schwartz-Watts then testified, explaining that Rivera's "medications were increased" following the December hearing, Supp. Tr. B. 9, ll. 5-6, that this had "improved his mental state," *id.* at 9, l. 7-8, and that he was competent to stand trial, *id.* at 20.

In the autumn of 2009, Rivera again moved to dismiss his appointed counsel. At a November 10, 2009 hearing, he maintained his desire to proceed *pro se*, but Judge Nicholson denied his motion on the ground that he lacked the legal sophistication to represent himself. Supp. Tr. D 20. Rivera renewed his request to proceed without counsel two more times – once at the start of jury selection, *see* Tr. 68-69, and again while jury selection was proceeding, *see* Tr. 1000 – but each time the Hon. Alexander Macaulay[5] denied it on the ground that, in his view, Rivera was better off maintaining the assistance of appointed counsel. *See* Tr. 75; 1002-03.

Jury selection began on February 2, 2010. Throughout the *voir dire* process, the parties and the court haggled over the scope of permissible questioning and the constitutional threshold for disqualification of a prospective juror. Taking account of the prosecution's intent to rely upon Rivera's murder conviction in the Wiley case, defense counsel contended that any panelist who would always choose the death penalty where a defendant had murdered twice, and/or would disregard mitigation in such a case, was constitutionally unqualified to serve. *See, e.g.*, Tr.173-75.

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[5]Judge Macaulay replaced Judge Nicholson by order of the Chief Justice dated December 21, 2009, and presided over the remainder of the trial level proceedings. R *.

The trial court disagreed, maintaining that panelists were qualified so long as they could deny a *general* propensity to automatically impose death, regardless of their specific *voir dire* responses indicating that, where a defendant had murdered twice (like Rivera), the death penalty would be the only acceptable sentence and/or mitigating evidence would be irrelevant. *See, e.g.*, Tr. 348-39. In the end, at least three jurors were seated, over defense objection, after asserting their views that death was the only proper punishment for a defendant who had murdered twice, that mitigating evidence was irrelevant in such a case, or both.

An all-white jury was seated after the prosecution struck two minority prospective jurors. Defense counsel challenged the removal of one of those prospective jurors, Juror 64, an Hispanic woman, under *Batson v. Kentucky*. Tr. 1859. The Solicitor sought to justify the strike on the basis of the prospective juror's Catholicism and purported hesitation in responding to questions about the death penalty. *See* Tr. 1858-59. The defense responded that the prosecution had accepted a white juror who was also Catholic, and had accepted other whites who had shown far more discomfort with the death penalty than could be inferred from Juror 64's statements. Tr. 1861-64. The trial court summarily denied the *Batson* challenge, stating only that, "as far as the strike of Juror 64[,] the reason given was racially and gender neutral." Tr. 1865, ll. 14-16.

At the guilt-or-innocence phase, defense counsel did not contest the evidence indicating Rivera had committed the homicide of Kwana Burns. *See* Tr. 1891-92. Instead, counsel focused on introducing and acclimating the jurors to the mitigation theory upon which the defense expected the sentencing phase decision to turn. To that end, defense counsel's guilt-or-innocence phase opening statement described certain bizarre admissions made by Rivera during the trial of the Wiley

case,[6] then observed: "[C]an we make any sense of that? No, you can't. And you won't. And the reason for it is that he is mentally ill. He suffers from bipolar disorder." Tr. 1893, ll. 18-21. Counsel went on to suggest a link between Rivera's psychological diagnosis and his propensity for intense hostility toward women:

> Mr. Rivera says and indicates [in his statement to Zamberlin] that he has had an extraordinary dysfunctional relationship with women. He cannot maintain the normal relationships with a woman because if a woman turns ... her back on him, he takes that, because of his mental illness, his bipolar disease, to such a level, he thinks that it is a complete refutation of who he is.

Tr. 1895, ll. 19-25. Defense counsel also took the opportunity to address three "[h]orryfing, horrendous, gut-wrenching" letters Rivera had written to Kwana Burns' family a few months before trial, and asserted that they, too, were products of "his mental illness ...." Tr. 1898, ll. 11-16.

The evidentiary portion of the guilt-or-innocence phase included a series of prosecution witnesses who established that Kwana Burns had been the victim of homicide, *see* Tr. 1917-40; 2137-52, that the circumstances and the physical evidence suggested Rivera had been present and involved, *see* Tr. 1942-2033; 2153-84, and that Rivera had confessed to the crime, *see* Tr. 2033-73. After the State rested, the trial court addressed Rivera's right to testify on his own behalf, and Rivera announced his desire to do so. Tr. 2187-90. Defense counsel expressed their disagreement and suggested he be evaluated to determine his "competency ... to make this decision." Tr. 2195, l. 17. The court declined that suggestion, and instead required Rivera to proffer his testimony, as a court's witness, so the judge could assess whether it would be "material, relevant, and [whether] the

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[6]As counsel described it, Rivera testified at the Wiley trial that "he was a contract killer with a code name, Circle K. He got his instructions ... from a post office box in Atlanta. And he was here on an assignment to kill Kwana Burns." Tr. 1893, ll. 13-16.

probative value outweighs any prejudice to his case." Tr. 2196, ll. 21-22.

The ensuing colloquy was brief, consisting of approximately five exchanges in which the judge asked Rivera what he was "going to testify to," and Rivera answered, "the killing of Kwana Burns." Tr. 2199-2200. Without explaining how or why Rivera's responses had been unsatisfactory, the judge abruptly ended the exchange, declaring "Then you don't testify." Tr. 2200, l. 24. The court then stated its belief that Rivera's proffer had not met the previously outlined admissibility criteria. Tr. 2201. Rivera personally objected to the court's ruling, Tr. 2203-04, and to the court's subsequent instruction to the jury that he had voluntarily chosen not to testify, Tr. 2229. The court also noted that "the State feels that the Court has erred too in ... limiting the testimony of the Defendant only to those matters that would be relevant, material, and probative value ... not outweighed by the prejudice." Tr. 2205, ll. 4-8. The jury deliberated for approximately eleven (11) minutes before finding Rivera guilty of the murder of Kwana Burns. Tr. 2231.

At the penalty phase, the State's evidence and arguments were crafted to persuade the jurors that Rivera should be sentenced to death, not for the Kwana Burns murder alone (which was the subject of the trial), but for the *combination* of that offense and the Asha Wiley murder (which had been the subject of a previous, non-capital trial). The prosecution made this explicit in its opening statement, telling the jurors in plain terms that, "At the end of this trial, we're going to get up and ask you to render a verdict that this case deserves, that Asha Wiley and Kwana Burns deserves [sic]." Tr. 2263, ll. 2-4. The evidence that followed adhered to that theme, as the State devoted nearly all of its presentation to evidence detailing the Wiley homicide and its impact.[7] *See, e.g.*, Tr. 2284-

[7]As described *infra*, the prosecution also featured the testimony of another woman, Phoebe Kenney, who gave a detailed and emotional account of unadjudicated bad acts allegedly committed by Rivera.

2309; 2360-68. Finally, the prosecution closed with an argument that repeatedly linked the Wiley and Burns cases, and urged the jury to calibrate its sentencing verdict to respond to both murders: "He's already serving a life sentence for the murder of Asha Wiley. ... Life is the minimum sentence that you can give in this case. Is the minimum sentence appropriate for someone who brutally strangled two innocent women ...." Tr. 2729, ll. 8-13.[8]

In keeping with the strategy they had outlined during their guilt-or-innocence phase opening statement, defense counsel built their sentencing presentation on the proposition that Rivera suffered from bipolar disorder, having endured severe and chronic abuse as a child and adolescent. They began by laying the groundwork through a series of family members and acquaintances, who described the features of Rivera's background that would lend support to the expert testimony that was to come. *See* Tr. 2422-89. When the time came to translate the background information into a formal diagnosis of bipolar disorder, however (and in so doing substantiate the claim counsel had been making from the outset), the trial court refused to permit the testimony, insisting that Rivera's illness constituted a "medical condition" that none the defense's three mental health experts were qualified to report. *See, e.g.*, Tr. 2595, l. 25. As a result, the mitigation case presented to the jurors was confined to the testimony describing Rivera's background, which the prosecution attacked as

[8] *See also, e.g.*, Tr. 2716, ll. 15-19 ("Ladies and gentlemen, the circumstances of these crimes are none other than horrific. .. A stranger came to Anderson Mall. He preyed on two women and he planned to kill Asha and Kwana as soon as he met them."); *id.* at 2717, ll. 18-24 ("Little did Asha know as she was planning the rest of her life, he was planning the end of hers. ... Little did Kwana know that her first night in her new home would be her last. ¶ ... There was only death for Asha and Kwana. And the manner in which he killed them was so personal."); *id.* at 2720, ll. 11-12 ("Ladies and gentlemen, the circumstances of these crimes speak for themselves."); *id.* at 2726, ll. 3-4 ("There should have been tomorrow for Asha. There should have been tomorrow for Kwana.").

uncorroborated, inconsistent and self-serving. *See* Tr. 2724-25.[9]

The jury was instructed to consider the single, "person with a prior conviction for murder" aggravating circumstance, Tr. 2781, l. 25 - 2782, l. 1, and two statutory mitigating circumstances: that "the murder was committed while the defendant was under the influence of mental or emotional disturbance," and "the age or mentality of the defendant at the time of the crime." Tr. 2788, ll. 4-8. After just over three and a half hours of deliberations,[10] the jury returned a verdict recommending the death penalty, Tr. 2799, and the trial court sentenced Rivera accordingly, Tr. 2813.

## ARGUMENT

### I. APPELLANT'S RIGHTS, AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, § 14 OF THE SOUTH CAROLINA CONSTITUTION, WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO PERMIT HIM TO TESTIFY ON HIS OWN BEHALF AT THE GUILT-OR-INNOCENCE PHASE OF HIS CAPITAL TRIAL.

#### A. Relevant facts.

After the State rested at the guilt-or-innocence phase, the trial court informed Rivera that he had the right to testify on his own behalf, Tr. 2187-88, and Rivera repeatedly indicated his desire to

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[9] The jury also heard from Rivera himself, who gave a closing statement against the advice of counsel in which he explained that he "took [his] pain and [his] anger out on" the victims, and that, in his own view, he did not "deserve mercy." Tr. 2763, ll. 8-10.

[10] Deliberations were briefly suspended as the trial court responded to three questions from the jury:

> Was the death penalty sought in the Asha Wiley case? No. Two, if Mr. Rivera is sentenced to life imprisonment, will he be granted a single cell? I do not know. Three, does a death sentence automatically generate an appeal? Section 16-3-25(A) of our Code of Laws in pertinent part provides whenever the death penalty is imposed and upon the judgment becoming final in the trial court, the sentence will be reviewed on the record by the Supreme Court of South Carolina.

Tr. 2796, ll. 12-21.

do so, Tr. 2190; 2197; 2199. During the accompanying discussion, defense counsel notified the court that they had "explained to [Rivera] on innumerable occasions [that testifying] was not in his interest," and that they would "refuse to call him to the stand." Tr. 2193, ll. 11-12, 16-17. The judge reiterated that Rivera had an "absolute right[] to testify if he wants to provided that his testimony is material, relevant, and the probative value outweighs any prejudice to his case." Tr. 2196, ll. 19-22. In order to determine whether Rivera's proposed testimony met these criteria, the court proposed a "unique procedure" whereby Rivera would be called as a court's witness, outside the presence of the jury, and required to proffer the testimony he intended to give. Tr. 2196, l. 14. After Rivera again expressed his desire to testify, Tr. 2197, he was sworn as a court's witness. Tr. 2199. The court then undertook the following colloquy:

Q: (by the Court) What's the testimony you wish to give?

A: (by Rivera) About the murders in Anderson County.

Q: Pardon?

A: The murders in Anderson County, sir.

Q: Murders? Both murders?

A: Right.

Q: No. What's the testimony you want to give us about the death of Kwana Burns?

A: Okay. That will be fine, sir.

Q: What do you want to testify to?

A: To what happened, sir.

Q: Pardon?

A: To what happened.

Q: And what are you going to testify to?

A: About the killing of Kwana Burns.

Q: You're what?

A: The killing of Kwana Burns.

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

A: I just said it, Judge.

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

A: That is my testimony, Your Honor.

Q: Then you don't testify.

A: That's fine with me.[11]

Q: Very well. Step down.

A: All right.

Tr. 2199, l. 25 - 2201, l. 2.

On the basis of this brief colloquy, the court ruled that "the defendant has exercised his right to testify and declined to testify to anything that would be helpful to the jury in reaching the issues in this case." Tr. 2201, ll. 11-13. Citing Rule 403 of the South Carolina Rules of Evidence, the court further declared that "whatever probative value" Rivera's testimony may have had was "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, and also

[11] As described below, Rivera quickly clarified that the court's ruling was not "fine with" him.

undue delay, waste of time, and needless presentation." Tr. 2201, ll. 17-23. Rivera objected to the court's ruling on Sixth and Fourteenth Amendment grounds. Tr. 2203, l. 24 - 2204, l. 2. Upon further questioning from the court, Rivera stated that if he were allowed to take the stand, he would testify "[a]bout the details of the case." Tr. 2204, l. 9. The court responded that such testimony would not be "material, relevant, and ... the probative value [would be] outweighed by the prejudice." " Tr. 2204, ll. 19-21. After declaring that "fortunately, it's not for you to testify to anything you want to," Tr. 2204, ll. 17-18, the court noted Rivera's objection, but did not alter its ruling.[12] Finally, the court noted the prosecution's view that it had "erred" in excluding Rivera's testimony. Tr. 2205, l. 5.

**B. Relevant legal principles and discussion.**

"At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Harris v. New York*, 401 U.S. 222, 225 (1971). The idea "that a criminal defendant has a due process right to testify in his own behalf ... has long been assumed." *Nix v. Whiteside*, 475 U.S. 157, 164 (1986). Fifty years ago, the Supreme Court noted that "decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case." *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961). Even before that, the right to testify was considered "basic in our system of jurisprudence." *In re*

[12]Rivera objected again after the trial court instructed the jury that he had exercised his right not to testify. *See* Tr. 2212, ll. 17-24 (jury charge); Tr. 2228, l. 20 - 2229, l. 7 (Rivera's objection).

*Oliver*, 333 U.S. 257, 273 (1948). "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972). As this Court has itself made clear, "[t]he denial of the right to testify at either phase of a capital trial, absent a showing on the record of a knowing and voluntary waiver, constitutes reversible error." *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993).

"The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." *Rock*, 483 U.S. at 51. It is one of a number of "rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975); *see also Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). In addition to the Fourteenth Amendment's Due Process Clause, the right also has roots in the Compulsory Process Clause of the Sixth Amendment, the Sixth Amendment right of self-representation, and the Self-Incrimination Clause of the Fifth Amendment. *Rock*, 483 U.S. at 51; *see also Riggins v. Nevada*, 504 U.S. 127, 144-45 (1992) (Kennedy, J. concurring).[13]

The right to testify is also guaranteed by the South Carolina Constitution, which provides that "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense by himself or by his counsel or by both." S.C. Const. Art. I, § 14. "The right to be fully heard has always been regarded as one of greatest value, not only to the accused, but to the due administration of justice, and any limitation of this right which has seemed to deprive the accused of a full and fair hearing has generally been held error, entitling the defendant to a new trial." *State v. McIntire*, 221

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[13]Far from a modern invention, the right has been a bedrock feature of the common law for centuries. "At one time, every litigant was *required* to 'appear before the court in his own person and conduct his own cause *in his own words*.'" *Faretta*, 422 U.S. at 823 (emphasis added) (citation omitted).

S.C. 504, 521, 71 S.E.2d 410, 418 (1952); *see also State v. Lyle*, 125 S.C. 406, 436-37, 118 S.E. 803, 814 (1923) (observing that, " where there is serious doubt as to the admissibility of [defense] evidence, the doubt should always be resolved in defendant's favor.").

Irrespective of the content of a defendant's testimony, his right to testify is of great value in and of itself. "The right to testify is perhaps the defendant's most obviously expressive entitlement. The Court has repeatedly affirmed that every defendant has the right to tell his story in his own way." Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants* 80 N.Y.U.L. REV. 1449, 1479 (2005). "Even more fundamental to a personal defense than the right of self-representation ... is an accused's right to present his own version of events *in his own words*." *Rock*, 488 U.S. at 52 (emphasis added). This element of the right to testify is part of "a broad expressive commitment. Defendants have the constitutional right to choose whether to speak or to remain silent, and ultimately to control the messages sent by their own criminal defenses. This expressive privilege recognizes the inherent value in speakerhood and its intimate connection to personal autonomy, dignity, and democratic participatory values." Natapoff, 80 N.Y.U.L. REV. at 1480. Thus, the right to testify is violated whenever a defendant is prevented from testifying, regardless of the persuasiveness or tactical value of his proposed testimony.

Under the legal principles described above, the trial court's refusal to permit Rivera to testify was an obvious – indeed, reversible – error. *Ray, supra.* To the extent the trial court sought to justify its decision, it did so only on the ground that Rivera's testimony was subject to, and excludable under, SCRE 403. While the very premise of this rationale was dubious,[14] even if the

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[14]*See* H. Mitchell Caldwell and Carlo Spiga, *Crippling the Defense of an Accused: The Constitutionality of the Criminal Defendant's Right to Testify*, 6 WYO. L. REV. 87, 126 (2006) ("To treat the defendant's testimony in the same manner as any other witness is error. A defendant is the

trial court had been correct to proceed under Rule 403, its application of the rule was both wrong and insufficient to sustain its ruling.

"[R]estrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Rock*, 483 U.S. at 55-56. "[T]he rules of evidence ... anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party."[15] *Payne v. Tennessee*, 501 U.S. 808, 823 (1991) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983)).[16] Nowhere is this presumption of admissibility more appropriate than in the case of a criminal defendant wishing to testify on his own behalf. In fact, it has been understood for centuries "that the shutting out of his sworn evidence could be positively hurtful to the accused, and that innocence was in fact aided, not prejudiced, by the opportunity of the accused to testify under oath." *Ferguson*, 365 U.S. at 580-581. Thus, the exclusion of the accused's testimony in a criminal case affirmatively *inhibits*, rather than promotes, the truth-seeking objectives of the South Carolina Rules of Evidence.

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only witness in a criminal proceeding who has an absolute right to testify. Often times the defendant is the only witness to the event and none can deny the impact of a defendant's testimony on the jury.").

[15]Similarly, SCRE 102 provides that the Rules of Evidence "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

[16]*See also Washington v. Texas*, 388 U.S. 14, 22 (1967) (quoting *Rosen v. United States*, 245 U.S. 467 (1918)) ("'[T]he truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court.'").

Aside from subverting the fundamental interests of both Rivera and the system in which he was tried, the trial court's decision was also unfaithful to Rule 403 itself. The Rule provides, as does its identically-worded federal analogue, that "[a]lthough 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." SCRE 403. The "exclusion of relevant evidence on this basis is said to be an extraordinary remedy to be used sparingly." 29 Am Jur 2d Evidence § 330.[17] "Since Rule 403 requires that the probative value of the challenged evidence be substantially outweighed by the danger of prejudice, the rule favors the admissibility of relevant evidence, and tilts toward its admission in close cases." 29 Am Jur 2d Evidence § 334. And in reviewing a decision to exclude evidence under the Rule, "[a]n appellate court does not reweigh the value of the material against the potential harm, but looks at the evidence in the light most favorable to its proponent, thus maximizing its probative value and minimizing its prejudicial effect." 29 Am Jur 2d Evidence § 336.

In this case, the trial court asserted that Rivera's testimony was excludable because it had "no probative value." Tr. 2200, l. 20. Given that Rivera was the defendant on trial, and that he proposed to testify about "the details of," Tr. 2204, l. 9, a homicide to which there were no eyewitnesses, the trial court's characterization is difficult to fathom. Indeed, the testimony Rivera attempted to give went to the very heart of the case – "the killing of Kwana Burns," Tr. 2200, l. 14, 16 – and posed no threat of confusing or misleading the jury. *See* 29 Am Jur 2d Evidence § 354 ("[E]vidence that goes

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[17] *See also, e.g., Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) ("Rule 403 was designed to keep evidence not germane to any issue outside the purview of the jury's consideration."); Jack B. Weinstein et al., EVIDENCE 22 (9th ed. 1997) ("Courts use the power to exclude prejudicial evidence with caution.").

to the fundamental issue should not be excluded, where its admission would cause only slight confusion, if any, and would not mislead the jury.").

Furthermore, even if Rivera's testimony could somehow have been regarded as having only little probative value, its exclusion would still have been unjustified given the absence of necessary prejudice. *See* SCRE 403; 29 Am Jur 2d Evidence § 342 ("[A] finding of slight probative value is ... insufficient by itself to warrant the exclusion of evidence; the prejudice from its admission must substantially outweigh that value."). As this Court has recognized, "'unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v Alexander*, 303 S.C. 377, 382, 303 S.C. 377, 382 (1991).[18] Here there is simply no indication that Rivera's testimony "[a]bout the details of the case," Tr. 2204, would have been unduly prejudicial in the sense contemplated by Rule 403, nor did the trial court even purport to make any specific, record-based findings to that effect. To be sure, Rivera's testimony may have reduced his own prospects for acquittal, but discretion to choose that course rested exclusively with Rivera himself, and it was certainly not a concern for Rule 403, or for the trial court. *Rock*, 483 U.S. at 50 (quoting *Ferguson*, 365 U.S. at 581) ("permitting a defendant to testify advances both the 'detection of guilt' and 'the protection of innocence'"); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("It is ... recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify

[18] *See also Old Chief v United States*, 519 U.S. 172, 180 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.").

in his or her own behalf ....").[19]

In sum, the trial court's misapplication of Rule 403 denied Rivera a right "[e]ven more fundamental to a personal defense than the right of self-representation, [his] right to present his own version of events in his own words." *Rock*, 483 U.S. at 52. Under the well-settled precedents of this Court and the Supreme Court of the United States, the trial court's error mandates reversal. *Rock*, *supra*; *Ray*, *supra*; *McIntire*, *supra*.

## II. APPELLANT'S RIGHT TO SELF-REPRESENTATION, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. 1, § 14 OF THE SOUTH CAROLINA CONSTITUTION, WAS VIOLATED BY THE TRIAL COURT'S REPEATED REFUSALS TO PERMIT HIM TO DISCHARGE APPOINTED COUNSEL AND PROCEED *PRO SE*.

Beginning well before his capital trial, Rivera made repeated, clearly articulated attempts to waive his right to counsel and proceed *pro se*. Each time, however, the trial court responded by requiring that Rivera satisfy additional, legally irrelevant criteria, or by insisting that, regardless of his own considered judgment, Rivera's interests would be better served by maintaining the assistance of appointed counsel. The resulting denials of Rivera's requests violated his right to self-representation, and now require reversal.

### A. Relevant facts.

Nearly three months before jury selection began, the court heard argument on Rivera's

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[19] *See also United States v. Midgett*, 342 F.3d 321, 327 (4th Cir. 2003) (holding that trial court erred in forcing defendant to choose between testifying and maintaining assistance of counsel on basis of "mere[] belie[f] [that] the defendant's testimony would be dramatically outweighed by other evidence ...."); Francis A. Gilligan & Edward J. Imwinkelried, *Waiver Raised to the Second Power: Waivers of Evidentiary Privileges by Lawyers Representing Accused being Tried in Absentia*, 56 S.C. L. Rev. 509, 517 (2005) ("The [Supreme] Court has forcefully held that only the accused has a constitutional right to testify, and the emphatic nature of the Court's language has convinced the lower courts that only the accused may choose whether to testify; the defense counsel may not usurp that decision.").

motion to appoint different counsel or permit him to proceed *pro se*. The court quickly made clear that it was "not going to appoint anyone else," to which Rivera immediately responded, "Then I'll proceed *pro se*." Supp. Tr. D 11, ll. 3-4, 7. Rivera continued:

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

Supp. Tr. D 11, ll. 14-22.

At that point, the court interrupted Rivera to ask whether he was aware of "the qualifications or the criteria" for authorization to proceed *pro se*. Supp. Tr. D 11, l. 25 - 12, l. 1. Rivera responded by acknowledging the requirement that he "knowingly, intelligently and voluntarily waive [his] rights," and asserting that he had "done that." Supp. Tr. D 12, l. 14 - 17. The court then stated that it was going to "ask [Rivera] some questions," and proceeded quiz him on his knowledge of the rules of evidence and courtroom procedure, his educational background, his children, and whether he had "ever lived with the[ir] mother." Supp. Tr. D 12-19. After cooperating through much of the exchange, Rivera eventually objected that the court's questions had become "too personal" and did not "have anything to do with proceeding *pro se*." Supp. Tr. D 19, ll. 13, 19-20. Shortly thereafter, the court denied Rivera's motion: "I don't think you voluntarily, intelligently, willingly made a decision to proceed *pro se*, and that motion is denied." Supp. Tr. D 20, ll. 13-15.

Later in the same hearing, the court attempted to revisit the motion to proceed *pro se*, but Rivera declined to answer additional questions. *See* Supp. Tr. D 26-28. The court then supplemented its earlier ruling with the following remarks:

> ... I believe it's an attempt to delay and manipulate the proceedings and basically make a mockery out of the whole judicial system. And based on th[e] [judge's] observations previously at [the Wiley] trial, I find that he is not competent to represent himself. And the motion to proceed *pro se* is denied.

Supp. Tr. D 28, ll. 20-25.

On the first day of jury selection, Rivera renewed his motion to relieve counsel and proceed *pro se*:

> Your Honor, if I may, I would like to renew my motion again to relieve counsel. Your Honor, to thrust counsel upon me against my specific wish violates the logic of the amendment. I have a right to a freedom of choice under the Constitution. And to force any attorney on me can only lead me to believe that the law is against me. For this reason in order to relieve myself of counsel, I know I must knowingly and intelligently relieve those benefits with an open eye. The right to defend is considered personal – [court interrupts to address court reporter] Again, Your Honor, I'm the Defendant and not my lawyers appointed to me nor the State prepared the consequences with my permission. If I'm the Defendant, therefore, I must be free personally to decide whether or not in a particular case counsel is to my advantage. And although I may conduct my own defense, ultimately to my attorney, my choice must be honored out of respect for the individual whose life was lost.

Tr. 68, l. 9 - Tr. 69, l. 16. This time, the court attempted to rebuff Rivera's request by explaining that the attorneys appointed to represent him were among the best in the state. *See* Tr. 70, ll. 7-11 ("You have some of the best attorneys that we have in South Carolina representing you in these two gentlemen. So I'm not sure if the person who feels that he knows how to represent himself is the best person to represent himself. Is there anything else?"). When that effort failed, the court debated Rivera on the merits of several issues over which he had disagreed with appointed counsel. *See* Tr. 70-75. Finally, the discussion of Rivera's request to proceed *pro se* concluded with this exchange:

Rivera: I mean, that's about it, Your Honor. As long as I knowingly

and intelligently waive my rights under the Constitution, that's it.

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

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

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

Rivera: That's fine.

Court: All right. Anything else?

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

Rivera tried one more time later in the jury selection proceedings, notifying the court of his disagreement with a remark made to him by his attorney, and again renewing his request to discharge counsel and proceed *pro se*:

> I've pleaded with the Court on various occasions and asked you to relieve me of counsel. I think it's my constitutional right under *Feretta v. California* and *State v. Brewer*. But the Court insists to force attorneys upon me. And clearly it's a conflict of interest.

Tr. 1000, ll. 14-19. Once again, the court responded by emphasizing that Rivera had shown no prejudice, *see* Tr. 1001, ll. 18-21 ("So rather than finding you prejudiced in any way, I find that you have benefitted from the experience and ability that has been afforded you as far as representation."), and denied the request, Tr. 1002, l. 25 - Tr. 1003, l. 2 ("Oh, and for the record to be clear, the Court has heard and declines to grant the motion to relieve counsel.").

**B. Relevant legal principles and discussion.**

"It is well-established that an accused may waive the right to counsel and proceed *pro se*." *State v. Brewer*, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997) (per curiam) (citing *Faretta v. California*, 422 U.S. 806, 836 (1975)); *see also State v. Starnes*, 388 S.C. 590, 600, 698 S.E.2d 604, 610 (2010) ("The South Carolina Constitution provides that every criminal defendant has the right to represent himself and makes no distinction between capital and non-capital defendants. Additionally, the United States Supreme Court has interpreted the United States Constitution as providing a right to self-representation.") (citing S.C. Const. art. 1, § 14, and *Faretta, supra*).

In *Brewer*, this Court concisely articulated the considerations – both legitimate and illegitimate – associated with an assessment of a capital defendant's assertion of his right to self-representation:

> Although a defendant's decision to proceed *pro se* may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta v. California,* 422 U.S. at 834. The right to proceed *pro se* must be clearly asserted by the defendant prior to trial. *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991); *United States v. Lorick*, 753 F.2d 1295 (4th Cir.1985). The trial judge has the responsibility to ensure that the accused is informed of the dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel. *Faretta v. California, supra*; *State v. Dixon*,[269 S.C. 107, 236 S.E.2d 419 (1977)]. The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding. *Graves v. State*, 309 S.C. 307, 422 S.E.2d 125 (1992). A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel. *Faretta v. California*, *supra*; *United States v. Bennett*, 539 F.2d 45 (10th Cir.1976).

*Brewer*, 328 S.C. at 119, 492 S.E.2d at 98.

In this case, the court's denials of Rivera's repeated – and exceptionally well-articulated – invocations of his right to self-representation contravened virtually every principle recognized in *Brewer*. It is indisputable that Rivera, who exhibited obvious familiarity with *Faretta*, "clearly asserted" his right to proceed *pro se* nearly three months prior to trial, again at the start of jury selection, and yet again before jury selection had concluded. However, instead of seeing to it that Rivera was "informed of the dangers and disadvantages of self-representation, and [sought to] make[] a knowing and intelligent waiver of the right to counsel," *Brewer*, *supra*, the court reacted to his requests in ways expressly forbidden by *Faretta* and this Court's precedents.

When Rivera asserted his right to self-representation at the November 9, 2009 hearing, the court responded by questioning Rivera's "expertise [and] technical legal knowledge," and used the results of that inquiry – which had no relevance to whether Rivera "made a knowing and intelligent waiver of the right to counsel" – to deny the request.[20] *Brewer*, *supra*. When Rivera renewed his motion to proceed *pro se* at the start of jury selection and again later, the trial judge again eschewed the inquiry mandated by *Faretta*, and instead insisted that the right to self-representation would be honored only upon a showing of "prejudice," and only where its assertion was not "ill-considered." Tr. 75, ln. 16, 19; *see also* Tr. 1001, ln. 18-21. Nothing in *Faretta* or this Court's cases authorized the rejection of Rivera's request on those grounds. *See*, *e g.*, *Faretta*, 422 U.S. at 834 ("And

[20]The judge's supplemental observation later in the same hearing that Rivera was "not competent to represent himself," Supp. Tr. D, ll. 24-25, also provides no justification for the denial of his request. In context, the judge's reference to competence related, not to Rivera's mental or psychiatric fitness for self-representation, as would be permissible under *Indiana v. Edwards*, 554 U.S. 164, 177-78 (2008), but to his legal knowledge and courtroom skills, which were irrelevant under settled law.

although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'") (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)); *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) ("A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one.") (citing *Brewer*, 328 S.C. at 120, 492 S.E.2d at 99).

As this Court has made clear, the only relevant questions for the court below were whether Rivera's requests to proceed *pro se* were clear, and whether they reflected a knowing and intelligent waiver of his right to counsel. Rivera's statements easily met each of these criteria. There was no hint of ambiguity in any of his assertions of the right to self-representation, and Rivera himself expressly acknowledged the requirement that his waiver of counsel be knowing and voluntary, and insisted the waiver he was attempting to make satisfied that standard. *See* Supp. Tr. D. 12, ll. 14 - 17; Tr. 75, ll. 10-11. Nothing more was required of Rivera, and the trial court's refusal to permit him to proceed *pro se* despite his repeated and proper invocations of that right was reversible error.

## III. APPELLANT'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY, AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 3, 14 AND 15 OF THE SOUTH CAROLINA CONSTITUTION, WAS VIOLATED AS A RESULT OF THE QUALIFICATION AND SEATING OF THREE JURORS WHOSE VIEWS PREVENTED OR SUBSTANTIALLY IMPAIRED THEIR ABILITY TO IMPOSE A SENTENCE LESS THAN DEATH, OR TO CONSIDER EVIDENCE IN MITIGATION OF PUNISHMENT.

To afford Rivera a fair, impartial and individualized sentencing determination, the jurors empaneled for his trial had to possess two characteristics: an ability to consider a sentence less than death for a defendant who had twice committed intentional murder; and an ability to consider evidence of such a defendant's troubled background in mitigation of punishment. During *voir dire*,

three panelists gave specific responses indicating that they lacked these characteristics. Despite those responses, the trial court, over defense objection, permitted all three to be seated as jurors because each had later agreed in response to leading questions that, as a general matter, they would want to know the facts before giving a person the death penalty. Their participation violated Rivera's right to be tried by twelve jurors whose views on the death penalty and the relevance of evidence in mitigation of punishment would not "'prevent or substantially impair the performance of [their] duties as ... in accordance with [their] instructions and [their] oath.'" *Morgan v. Illinois*, 504 U.S. 719, 728 (1992) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

### A. Relevant facts.

The examination of prospective jurors at Rivera's trial followed a fairly consistent pattern: the judge would begin with approximately twenty-five questions, the first portion of which dealt with the panelist's general status and availability to serve, and the remainder of which covered the mechanics of a capital trial. Once these preliminary matters were completed, defense counsel, and then the prosecution, were permitted to conduct individual *voir dire* of each panelist, with the judge occasionally interrupting or following up with additional inquiries of his own. The relevant portions of the *voir dire* of the jurors challenged here – Jurors 29, 222 and 247 – are set forth below.

#### 1. Juror 29.

Juror 29 was a sixty-two year old white woman. After the standard exchange with the judge, defense counsel conducted the following examination:

> Q: So to get started, the definition of murder in South Carolina is that a person kills another unlawfully with malice aforethought. And the way the law explains it, and the Court will charge you on it, is that the killer was operating with black and malignant heart, fatally bent on evil and intentionally, willfully, deliberately took another person's

life. In that situation, what's your feeling about the death penalty as the appropriate penalty?

A: I believe in it in that situation.

Q: Okay. On your questionnaire you indicated that you thought the death penalty was appropriate if the person basically meant to take an innocent life?

A: Right.

Q: And you still feel that way?

A: Planned ahead.

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

A: Yes.

Q: – innocent life, they should receive the death penalty?

A: Yes.

Q: And that's still your view?

A: Yes.

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

A: Right.

Q: They weren't frivolously given?

A: No.

Q: You really thought about it?

A: Yes.

Tr. 326, l. 2 - Tr. 327, l. 13. After several objections and associated discussion, defense counsel and

Juror 29 continued:

> Q: Okay. Now, the Judge would instruct you that you specifically have to consider all of the aggravating circumstances brought forward by the State. And in this sort of situation I'm talking about, that would be a prior conviction for murder. Now, the Judge would also instruct you that you had to consider anything that might be called mitigation which could be something in the defendant's background, something you see in the facts of the case, that sort of thing. Now, knowing all of that, sitting on a murder case where ... you're satisfied and the eleven other jurors are satisfied beyond a reasonable doubt a defendant deliberately, intentionally took the life of another and had murdered before. In that situation is the life penalty severe enough to punish that kind of case?
>
> A: No.
>
> Q: Okay. Because we would be talking about two deliberate murders?
>
> A. Two separate, deliberate murders.
>
> ...
>
> Q: And in fixing punishment for a defendant – I'm not talking about this case, just any case – who had deliberately taken a life and then deliberately taken another life, would things like the defendant's background, if he grew up poor, would these things be relevant to you in making your decision?
>
> A: No.

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

The prosecution's *voir dire* of Juror 29 began with a series of leading questions concerning death eligibility and capital sentencing procedure in general, *see* Tr. 335-338, and then turned to the juror's general willingness to hear evidence and vote for life and death:

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

A: Yes.

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

A: Yes.

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

A: Yes.

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

A: Yes.

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

A: Yes, definitely.

Tr. 338, l. 12 - Tr. 339, l. 6.

When the initial round of questioning concluded, defense counsel moved to challenge Juror 29 for cause on the grounds that "she was automatic death penalty," that a life sentence could never "be severe enough to punish" a defendant who had killed twice, and that she considered mitigating evidence about such a defendant's background irrelevant. Tr. 341, ll. 3, 9-10, 12-15. After hearing argument from both sides, the court brought the juror back and posed one final question:

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

A: No.

Tr. 348, l. 22 - Tr. 349, l. 1. Without hearing further argument, and without attempting to determine

how Juror 29's general inclination to consider "circumstances" and "characteristics" could be reconciled with her earlier, specific statements about a defendant who had killed twice, the judge concluded that, in light of "the entire *voir dire*," she was qualified. Tr. 349, ll. 5-6.

**2. Juror 222**

The *voir dire* of Juror 222, a twenty-six year old white woman, followed a similar course. After preliminary questioning by the judge, defense counsel's examination of the juror included the following exchanges:

> Q: And as an example, I'm going to give you the situation of the person that you just judged, sat through on the first part, you found him guilty of murder. And then what makes this case worse is that it was actually the second murder that person committed. Could a life in prison sentence ever be appropriate for a double-murder case?
>
> [objection by the Solicitor and comment by the court]
>
> Q: Well, there would be other evidence, of course. There would be evidence in mitigation. For instance, like background factors of a defendant like his childhood, stuff like that. You'd be able to consider all of that. Knowing that, could a life sentence punishment be appropriate or severe enough for somebody who, for example, murdered twice?
>
> A: No.

Tr. 1137, l. 14 - Tr. 1138, l. 8.[21]

The prosecution again began its *voir dire* with a series of leading questions about death eligibility and the trial process, and then posed a series of general questions about the juror's willingness to be fair:

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[21]When asked earlier in her *voir dire* for her "thoughts about the death penalty for [an intentional murder] case," Juror 222 responded that, "I think – honestly, I don't think it's used enough." Tr. 1136, ll. 11-13.

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

A: Yes, ma'am.

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

A: Yes, ma'am.

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

A: Yes, ma'am.

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

A: Yes, ma'am.

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

A: No.

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

A: Uh-uh (negative).

Q: You don't know?

A: No, ma'am.

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

A: Yes, ma'am.

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

After the State's questioning had ended, defense counsel moved to challenge Juror 222 for cause, contending that she was "pretty much automatic death penalty just on murder," and that, "even knowing the kinds of mitigation in question, she also indicated life would never be appropriate or severe enough for" the case of a defendant who had murdered twice. Tr. 1145, ll. 3-7; *see also id.* at ll. 7-10 ("So obviously mitigation evidence is not relevant to her. She's mitigation impaired. She's substantially impaired as a juror."). The prosecution opposed defense counsel's challenge, insisting that the juror was qualified because "she wants to hear the whole entire story before she makes a decision." Tr. 1145, ll. 18-19.

Relying on "the totality of the *voir dire*," the court found Juror 222 qualified. Tr. 1145, l. 25. The court also reiterated its understanding of the standard by which the panelists' qualifications were to be measured:

> The fact does remain that we're looking to eliminate anyone who would *ipso facto*, absolutely without any question, either vote for death or could never vote for death.

Tr. 1146, l. 4-7.

**3. Juror 247**

The trial court's preliminary *voir dire* of Juror 247, a sixty-seven year old white man, followed the course established with prior panelists. Tr. 1105-1111. Defense counsel began his questioning by stating South Carolina's definition of murder, then initiated this exchange:

> Q: What are your views about the death penalty for just that kind of killing?
>
> A: Well, this is the way I look at it. If a person kills somebody just out of just care – not carelessness, but he just wants to kill somebody, if he does it just out of pleasure, I would say, then I have no problem with sending him to it. I think that's where he needs to go.

* * *

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

Q: Sure.

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

Tr. 1111, l. 24 - Tr. 1113, l. 3.

After an effort by the court and counsel to clarify the procedural context in which the jury would be required to make its decision, defense counsel asked whether "a life in prison sentence [could] be appropriate for somebody who's killed twice?" Tr. 1115, l. 25 - Tr. 1116, l. 1. At the prosecution's request, the court then added that mitigating information would also be available for consideration, Tr. 1116, ll. 4-8, and the *voir dire* continued:

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

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

Q: Well –

Court: It depends on the facts of the facts of the case. ... But you'll hear – you haven't heard the facts as yet. What [defense counsel] wants to know, would you absolutely impose the death sentence on any murder case that he's described?

Q: The double case murder.

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

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

A: It is. It is.

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

A: Uh-huh (affirmative).

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

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

Q: Okay.

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

Tr. 1116, l. 9 - Tr. 1117, l. 19.

Finally, defense counsel inquired about Juror 247's views on mitigating evidence:

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

A: What do you mean background? Like what?

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

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

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

A: Well, I still say if you kill somebody, and you just and you didn't have to, you just do it for the fun of it – I mean, that's what it looks

like – I wouldn't have – no, I wouldn't consider that.

Tr. 1117, l. 23 - Tr. 1118, l. 13.

The Solicitor's questioning followed the standard script of leading questions covering death-eligibility, procedure, and Juror 247's desire to know the "facts and circumstances" of a case before deciding whether to sentence a defendant to death. *See* Tr. 1122-1123. The judge then concluded the *voir dire* with this general question:

> Q: In a death penalty case, would you always or automatically vote for the death penalty even though the law provides that you may impose a sentence of life without parole depending upon the circumstances of a particular case and the characteristics of an individual defendant?
>
> A: I would listen to everything, and then I would go – if I thought he got life in prison or if it's the death penalty, like I said, you know, I would have to listen to the case before I could really tell you how, you know, what I would do. But I would be open to listening to it. And, I mean, I haven't got my mind made up that this guy's going to do this or this guy's going do that or the ladies or whatever.

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

Defense counsel moved to challenge Juror 247 for cause on the grounds that he would always impose death for an intentional homicide, and he was unwilling to consider mitigating evidence. Once again, the trial court found the juror qualified:

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

Tr. 1127, ll. 9-13.

The defense exhausted all of its peremptory strikes, and Jurors 29, 222 and 247 each went on to serve on the jury that convicted Rivera and sentenced him to death. *See* Tr. 1845-57.

**B. Relevant legal principles and discussion.**

"It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988). "[T]he proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt,* 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). In South Carolina, as in all other death penalty states, a capital juror's "duties" include the consideration in "good faith" of all lawful sentencing options, and of "mitigating circumstances," as prescribed by the statutory scheme. *Morgan v. Illinois*, 504 U.S. at 729.[22] A proper regard for these "principles ... demand[s] inquiry into whether the views of prospective jurors on the death penalty would disqualify them from sitting." *Morgan*, 504 U.S. at 731.

The issue in *Morgan* was whether the inquiry undertaken by the Illinois trial judge, which was limited to slight variations on whether panelists could "follow the law," whether they could be "fair and impartial," and whether they would "automatically" vote against a death sentence, was sufficient to detect individuals with disqualifying views. *Morgan*, 504 U.S. at 723-24. In finding the judge's inquiry inadequate, the Supreme Court emphasized that a juror's general expressions of fairmindedness and impartiality are simply not probative of the distinct and constitutionally essential

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[22]*See also id.* at 738 ("Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is *sufficient* to preclude imposition of the death penalty."); *id.* at 739 ("Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.").

question of that same individual's capacity to actually consider the lawful sentencing options that follow a conviction for capital murder. *Morgan*, 504 U.S. at 735 ("As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed."). "*Witherspoon* and its succeeding cases," the Court explained, "would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath." *Id.* at 734-35.

Where jurors' *voir dire* responses reveal "such inconsistent beliefs – that they can follow the law, but that they will always vote to impose death for conviction of a capital offense," *Morgan*, 504 U.S. at 735 n.9, those jurors are constitutionally unqualified under the standard articulated in *Wainwright v. Witt*, *supra*. *See also Morgan*, 504 U.S. at 731-32. In *Ross v. Oklahoma*, *supra*, for example, a panelist "initially indicated that he could vote to recommend a life sentence if the circumstances were appropriate. On further examination by defense counsel, [however, the juror] declared that if the jury found [Ross] guilty, he would vote to impose death automatically. " *Ross*, 487 U.S. at 83-84. While that panelist was ultimately removed with a peremptory challenge, the Supreme Court readily acknowledged (as did the State and the Oklahoma Court of Criminal Appeals) that the trial court's refusal to excuse the juror for cause on the basis of his *voir dire* responses was "error" under *Witt*.[23] *Ross*, 487 U.S. at 85; *see also id.* ("Had [the unqualified

[23]The constitutional challenge raised in *Ross* concerned the deprivation of a defense peremptory challenge brought about by the trial court's erroneous refusal to remove the juror in question for cause. While the Supreme Court agreed the juror should have been removed, it rejected Ross's further contention that his rights to an impartial jury and due process were violated when he was forced to expend a strike to prevent the unqualified panelist from being seated. *See Ross*, 487

panelist] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the panelist] for cause, the sentence would have to be overturned."); *Morgan*, 504 U.S. at 728 ("[In *Ross*,] we announced our considered view that ... the trial court's failure to remove the juror for cause was constitutional error under the standard enunciated in *Witt*.").

In this case, the trial court ignored *Morgan*'s emphasis on the critical distinction between meaningless assertions of general fairness on one hand, and disqualifying specific admissions of impairment on the other. The court had before it two categories of *voir dire* responses from Jurors 29, 222 and 247: (1) responses specifically indicating each panelist's strong commitment to the death penalty and indifference to mitigation for a defendant who had twice killed intentionally, as the court and the parties knew the evidence would show at Rivera's trial; and (2) subsequent responses indicating the panelists' agreement that, in general, they would want to know the facts and circumstances before deciding whether to give someone the death penalty. In *Morgan*, the Court made plain that responses in the second category are well known to mask "dogmatic views," *Morgan*, 504 U.S. at 735, that would, if revealed, disqualify a panelist under *Witt*, and went on to hold that the mere "*risk* that such jurors may have been empaneled" required reversal, *id.* at 736 (emphasis added). Here, the trial court had no need to speculate about mere risk; Jurors 29, 222 and 247 had each given specific, unambiguous responses indicating that, at least in cases bearing the characteristic that would come to define this one – *i.e.*, two intentional murders – "death should be imposed *ipso facto* ...." *Morgan*, 504 U.S. at 735. Under *Morgan* and *Witt*, those responses were

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U.S. at 87.

more than enough to mandate removal for cause.[24]

That the trial court's qualification and seating of Jurors 29, 222 and 247 was reversible error is confirmed by *Ross*, which involved the erroneous qualification of a juror under circumstances materially indistinguishable from those presented here. Just as in *Ross*, Jurors 29, 222 and 247 gave *voir dire* responses indicating that, while they could vote for a life sentence under some circumstances, death would be the only appropriate punishment for the defendant who was about to be tried.[25] When confronted with the same combination of responses in *Ross*, the Supreme Court had no difficulty recognizing that the juror's potential fitness for service in a some other case could

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[24]*See, e.g., State v. Evins*, 373 S.C. 404, 419, 645 S.E.2d 904, 911 (2007) (upholding removal for cause where panelist was "predisposed to recommend a sentence of death in the case of an intentional killing," as evidenced by *voir dire* response that, "if you intentionally kill somebody, you know what you were doing, death penalty, but self-defense, life sentence").

[25]*Compare Ross*, 487 U.S. at 83-84 (finding error where panelist "initially indicated that he could vote to recommend a life sentence if the circumstances were appropriate," but later "declared that if the jury found [Ross] guilty, he would vote to impose death automatically"), *with* Tr. 338, ll. 13-15 (Juror 29) ("Q: ... [D]o you feel that you would wait until you hear all of it before making a decision ...? A: Yes."); Tr. 331, l.24 - Tr. 332, l. 1 (Juror 29) ("Q: In that situation [involving a defendant convicted of two intentional murders] is the life penalty severe enough to punish that kind of case? A: No."); Tr. 332, ll. 12-18 (Juror 29) ("Q: And in fixing punishment for a defendant ... who had deliberately taken a life and then deliberately taken another life, would things like the defendant's background, if he grew up poor, would these things be relevant to you in making your decision? A: No."); Tr. 1143, ll. 19-25 (Juror 222) ("Q: And in this case, you haven't heard the facts and circumstances, have you? A: No. Q: So is it fair to say that even if the Defendant is found guilty of murder, that you don't know right now whether the defendant should receive life or death? A: Uh-uh (negative)."); Tr. 1138, ll. 5-8 (Juror 222) ("... [C]ould a life sentence punishment be appropriate or severe enough for somebody who, for example, murdered twice? A: No."); Tr. 1123, ll. 12-16 (Juror 247) ("Q: Is it fair to say that at this point right now, since you haven't heard any of the testimony of the evidence, that you don't know whether life without parole is appropriate or if death is appropriate? A: I have no idea until I've heard the case."); Tr. 1117, ll. 14 - 19 (Juror 247) ("Q: This is the deliberate, intentional choice to take an innocent life. A: Then I would think he would get the death penalty. ... I mean, that's the way I feel."); Tr. 1117, l. 25 - 1118, l. 13 (Juror 247) ("Q: ... [W]ould background factors of a defendant be relevant in fixing punishment for somebody who murdered twice? ... A: ... [N]o, I wouldn't consider that.").

not offset his view that death was the only appropriate sentence for the defendant in the case for which he was actually being considered. In this case, the trial court took precisely the opposite approach, crediting the panelists' agreement with broad propositions of fairness and open-mindedness while ignoring their specifically articulated commitment to death in a case like Rivera's. That cannot be reconciled with the Supreme Court's conclusion in *Ross*, or with the purposes of individual *voir dire* in capital cases described in *Morgan*.[26] Because the trial court's errors resulted in the seating of three jurors who were constitutionally unqualified to serve, reversal is mandatory. *See Ross*, 487 U.S. at 85; *Morgan*, 504 U.S. at 729 ("If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.").

## IV. THE SOLICITOR'S PEREMPTORY CHALLENGE OF JUROR 64, WHICH HE CLAIMED WAS BASED ON THE JUROR'S CATHOLICISM, WAS PRETEXTUAL GIVEN THAT THE JUROR DECLARED HER RELIGIOUS AFFILIATION WOULD NOT AFFECT HER, AND THAT THE SOLICITOR DECLINED TO CHALLENGE A WHITE CATHOLIC JUROR.

The Equal Protection Clause prohibits the prosecution from removing of a prospective juror on account of his or her race. *Batson v. Kentucky*, 476 U.S.79, 89 (1986). Where there is no dispute that a *prima facie* case of purposeful discrimination has been shown and no dispute that the proffered justifications for a strike satisfy the low threshold of facial neutrality, the critical question is whether those justifications "should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). Resolution of this question requires a careful assessment of the totality of the circumstances, including the presence or absence of record support for the claimed reason, *State v. Davis*, 306 S.C.

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[26]As reflected in *Morgan*, the purpose of *voir dire* in a capital case is to identify individuals whose "views would 'prevent or substantially impair'" them from carrying out the legislatively and constitutionally mandated sentencing procedure in the case to be tried. *See Morgan*, 504 U.S. at 738. For the individual defendant on trial, there is no difference between a juror who could not be fair in *any* case and a juror whose capacity for impartiality will be impaired by the facts or circumstances unique to the *defendant's own* case. Either way, that defendant will not receive a fair trial.

246, 249, 411 S.E.2d 220, 221 (1991), and the prosecutors' treatment of similarly situated white jurors. *State v. Cochran*, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct.App. 2006). Here, the prosecution's first reason for striking juror 64 is lacks support in the record, and both of its reasons are impeached by its failure to strike similarly situated white jurors.

**A. Relevant facts.**

Rivera's jury was all white. Two minority jurors were peremptorily struck by the prosecution, including Juror 64, who was Hispanic. Tr. 1860.

**1. The *voir dire* of Juror 64.**

In response to the court's questions, Juror 64 responded affirmatively that she could "listen to the law, accept and apply that law as I would instruct you as the Court even though you may not agree with that law or you think it ought to be some other way." Tr. 646, ll. 19-24. She then agreed that she could "decide this case based solely on the evidence presented in this courtroom and disregard anything you may have heard, read or seen about this case." Tr. 646, l. 25 - 647, l. 3. Finally, she stated that she would be able to render a sentence of either life or death, depending on the evidence presented. Tr. 650, ll. 4-8.

At no point during the *voir dire* by the parties did Juror 64 equivocate, or say anything that suggested she would be a weak juror for the prosecution. When defense counsel asked Juror 64 whether she "very much want[ed] to follow the law and the Judge's instructions," she responded that she did, and that she would be comfortable writing her name on the indictment in the event that Rivera was sentenced to death. Tr. 655, ll. 1-3. She also affirmed that she would be able to "consider all the evidence, both the aggravation evidence and something called mitigation evidence, before making up [her] mind with regard to penalty." Tr. 655, ll. 11-15.

The Solicitor then asked Juror 64 if she would "wait until [she] hear[d] all the evidence that comes in before [she]'d make up [her] decision on whether to give a sentence of life or death," to which she responded that she would. Tr. 657, ll. 1-4. In response to the Solicitor's inquiry regarding "any moral, ethical, philosophical, moral makeup reasons" why she would not be able to sit in judgment of another person, she stated "No, sir, I do not have a problem." Tr. 657, ll. 15-18. At this point, the Solicitor noted that Juror 64 had listed her religion as Catholic, and asked whether the Catholic Church's opposition to the death penalty might "in any way, shape or form affect [her] ability to sit in judgment of another person and either decide whether he should receive life or death." Tr. 657, ll. 22-25. She replied that it would not, and repeated her answer when asked a second time. Tr. 658, ll. 1, 3. Responding to further questioning, she reiterated that she could vote for a sentence of death if she felt that the facts warranted it, and that she could sign her name on the sentencing sheet under those circumstances. Tr. 659-60.

After the court and both attorneys had finished their examinations, the court concluded that, "Considering the entire *voir dire*, I find that Juror 64 ... will be fair, unbiased, impartial and able to carry out the law as explained to her." Tr. 660, ll. 20-25. Furthermore, the court specifically found that "*this juror's beliefs or attitudes toward the death penalty would not prevent or substantially impair the performance of her duties as a juror in accordance with the law, the Court's instructions and the jurors oath.*" Tr. 660, l. 25 - 661, l. 4 (emphasis added). The court therefore, without objection, found Juror 64 to be qualified to serve on Rivera's jury. Tr. 661, l. 5.

**2. The prosecutions's peremptory strike of Juror 64.**

The Solicitor claimed he used his first peremptory strike against Juror 64 "because of her hesitation on some of her answers. And additionally, the fact that she was Catholic ... and her overall

demeanor in answering questions." Tr. 1859, ll. 7-10. The court found these reasons to be facially race and gender neutral. Tr. 1859, ll. 17-18. Defense counsel responded that Juror 64 was one of "only three minority jurors called in the general strike for the first twelve," and that two of those three had been stricken by the State. Tr. 1859, l. 22- 1860, l. 7. Then defense counsel pointed out that Juror 104, whom the State failed to strike, was also Catholic, and argued that that reason for striking Juror 64 was "on its face, not genuine [but] pretextual." Tr. 1860, l. 8-12.

The State then returned to its alternative rationale for striking Juror 64, her purported hesitation concerning the death penalty. Tr. 1860-61. Defense counsel responded that Juror 248 – a white female – had been seated despite her hesitation regarding capital punishment, and the fact that she had said "not only was she leaning towards life ... she also said she would almost, almost always go that way." Tr. 1862, ll. 1-3; *see also* Tr. 1175; 1186. Defense counsel also pointed to Juror 33, who had been seated despite expressing reservations about the death penalty. Tr. 1863, l. 24 - 1864, l. 7. The court denied Rivera's *Batson* motion, Tr. 1868, without either addressing these comparisons or making a credibility determination, instead merely repeating that "as far as the strike of Juror 64[,] the reason given was racially and gender neutral." Tr. 1865, ll. 14-16.

**B. Relevant legal principles and discussion.**

"[T]he State's privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause," which "forbids the prosecutor to challenge potential jurors solely on account of their race." *Batson v. Kentucky*, 476 U.S. at 89. "Under the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race." *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000). This prohibition extends to jurors of all races, including

Hispanics such as Juror 64. *See Hernandez v New York*, 500 U.S. 352 (1991). The removal of even a single juror on the basis of her race is a violation of Equal Protection. *Batson*, 476 U.S. at 95.

Determination of whether a challenge was racially motivated requires a three-step analysis: "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race.... Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question.... Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003) (*Miller-El I*).

"[T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. At this stage, 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.'" *Miller-El I*, 537 U.S. at 339 (quoting *Purkett v. Elem,* 514 U.S. 765, 768 (1995) (per curiam)). At bottom, "the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez*, 500 U.S. at 365.

Because neither the existence of a *prima facie* case of discrimination nor the facial neutrality of the State's proffered reasons are disputed, the sole issue here is whether those proffered reasons were pretextual. Here, the State proffered Juror 64's purported reservations about the death penalty and her Catholic affiliation as the bases for its strike. The trial court was satisfied by the showing of facially neutral reasons, and failed to evaluate whether those reasons were pretextual. Comparison of those reasons to the record, however, reveals them to be pretextual. *See Riddle v. State*, 314 S.C. 1, 14, 443 S.E.2d 557, 565 (1994) (emphasis in original) ("This Court has made clear that whether

a proffered reason is racially neutral is to be determined by examining the totality of the facts and circumstances *in the record* surrounding the strike.").

"South Carolina case law recognizes that vacillating or hesitant responses by a potential juror on *voir dire* about the imposition of the death penalty is a racially neutral explanation for a peremptory challenge," *State v. Shuler*, 344 S.C. 604, 620-21, 545 S.E.2d 805, 813 (2001), but this explanation is impermissible where, as here, it is unsupported by the record. In *State v. Davis*, 306 S.C. 246, 411 S.E.2d 220 (1991), the State purported to rely upon a juror's alleged "great reluctance" to impose the death penalty as grounds for striking her where the juror had said that she "might have a little" trouble signing the sentencing sheet in the event of a death sentence. *Davis*, 306 S.C. at 248, 411 S.E.2d at 221-22. This Court, however, reversed, finding that "the record indicates the Solicitor's evaluation of [the juror]'s responses on *voir dire* is not supported by the record. [She] did not demonstrate 'great reluctance' regarding her ability to vote for imposition of the death penalty. In fact, in her responses to questioning, [she] did not vacillate at all in asserting her ability to consider a death sentence." *Davis*, 306 S.C. at 249, 411 S.E.2d at 221-22; *see also Miller-El v. Dretke*, 545 U.S. 231, 242 (2005) (finding evidence of pretext where juror "twice averred, without apparent hesitation, that he could sit on Miller-El's jury and make a decision to impose this penalty.").

Juror 64 was similarly unwavering. She affirmed multiple times – to the judge, to defense counsel, and to the Solicitor – that she would have no difficulty following the law as explained by the court and voting for death if the facts demanded it. *See* Tr. 650; 655; 657; 658; 659. Indeed, the trial court – having had the opportunity to observe Juror 64's demeanor throughout the entirety of *voir dire* – found as much immediately thereafter when it stated that "*this juror's beliefs or attitudes*

*toward the death penalty would not prevent or substantially impair the performance of her duties as a juror in accordance with the law, the Court's instructions and the jurors oath.*" Tr. 660, l. 25 - 661, l. 4 (emphasis added). Such "[a]n express finding by the trial court will, unless clearly erroneous, trump counsel's stated perception of a prospective juror's demeanor and disposition." *Cochran*, 369 S.C. at 317, 631 S.E.2d at 299; *cf. State v. Lindsey*, 372 S.C. 185, 190-93, 642 S.E.2d 557, 560-62 (2007) (judge's observation of hesitation during questioning supported removing the juror). "This Court has made clear that whether a proffered reason is racially neutral is to be determined by examining the totality of the facts and circumstances *in the record* surrounding the strike." *Riddle*, 314 S.C. at 14, 443 S.E.2d at 565 (emphasis in original); *see also Snyder v Louisiana*, 552 U.S. 472, 479 (2008) (noting that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike," but distinguishing Snyder's case on the basis that "the record does not show that the trial judge actually made a determination concerning [the challenged juror's] demeanor.").

But even if the Solicitor – and trial court – *had* observed some nonverbal hesitation, reliance on that hesitation should have been deemed pretextual for the simple reason that the prosecutor did not strike white jurors *who went further and expressed* hesitation. Both Juror 33 and Juror 248 did exactly that; they were white, and they were not struck. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El II*, 545 U.S. at 241; *see also State v. Cochran*, 369 S.C. at 315, 631 S.E.2d at 298 (pretext "is generally established by showing similarly situated members of another race were seated on the jury." ).

The Solicitor's reliance on Juror 64's Catholicism was equally and obviously pretextual.[27] It is important to note that the Solicitor questioned Juror 64 about her Catholicism, and that she clearly answered that it would not inhibit her ability to impose the death penalty. Under those circumstances, it is extremely unlikely that her Catholicism was the true reason for the Solicitor's strike; where a juror's answer resolves a potential concern, it is unlikely that reliance on that concern is the true reason for a strike. *See Snyder*, 552 U.S. at 480-82 (discounting reliance on juror's earlier concern about missing course work obligations because, after the clerk obtained information from the dean that it would pose no problem, the juror "did not express any further concern about serving on the jury, and the prosecution did not choose to question him more deeply about this matter"). Even more probative, however, is the fact that the Solicitor did not strike Juror 104, a white Catholic.

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[27]Even if it had been genuine, reliance on Juror 64's Catholicism would have been impermissible. The Supreme Court of the United States has not yet addressed whether religion-based challenges violate the Equal Protection Clause and/or the First Amendment religion clauses, but by its reasoning in *Batson* and *J.E.B. v. Alabama*, 511 U.S. 127 (1994), religion-based challenges are also impermissible. *J.E.B.* held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality," *id.* at 128, but limited its holding with the statement that, "Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." *Id.* at 143. Discrimination based upon religion, however, does not receive rational basis review, but receives heightened scrutiny, just as gender does. *Larsen v. Valente*, 456 U.S. 228 (1982). As Justice Thomas, joined by Justice Scalia pointed out in a dissent from the denial of certiorari, the rationale of *Batson* and *J.E.B.* compels the conclusion that religion-based peremptory challenges are also impermissible. *Davis v Minnesota*, 511 U.S. 1115 (1994) (Thomas, J., dissenting). The circumstances presented by this case are more extreme than in *Davis*, where the state court below explicitly noted that, "Ordinarily ..., inquiry on *voir dire* into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper," and that "proper questioning ... should be limited to asking jurors if they knew of any reason why they could not sit, if they would have any difficulty in following the law as given by the court, or if they would have any difficulty in sitting in judgment." *Davis v. Minnsota*, 504 N.W. 2d 767, 772 (Minn. 1993). Here, in contrast, the juror was specifically questioned whether her Catholicism would interfere with her consideration of the death penalty, and stated clearly that it would not. Consequently, any decision to strike her on the basis of her religious affiliation was "an unconstitutional proxy for juror competence and impartiality." *J.E.B.* 511 U.S. at 129.

*Miller-El II*, 545 U.S. at 241; *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298.

Thus, the "reason" of Juror 64's Catholicism, like the "reason" of her purported hesitation to impose the death penalty, first falters because the record undermines its descriptive accuracy, and then utterly fails because the record reveals white jurors who possessed the same characteristics, but were not struck.

## V. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WAS VIOLATED BY THE SOLICITOR'S INDUCEMENT OF A CONFESSION THROUGH PROMISES TO SEEK THE DEATH PENALTY AGAINST HIM, TO PROVIDE HIM WITH A CELL TO HIMSELF, AND TO PERMIT HIM TO SEE A CHAPLAIN.

Rivera, arrested and charged with two murders, confessed only after he sought and received a promise from the Solicitor that she would seek the death penalty if he did so. Because the suicidal nature of this request put the State on notice that they were bargaining with a mentally ill person, it was overreaching for the State to take advantage of Rivera's mental instability. *Cf. Colorado v. Connelly,* 479 U.S. 157 (1986) (finding no overreaching by the state where a mentally ill defendant spontaneously confessed to a police officer in a public setting because the "essential link between coercive activity of the State, . . . and a resulting confession by a defendant," was absent.) The Fifth and Fourteenth Amendments' prohibitions against inducing confessions by overbearing the will of a vulnerable defendant render the admission of his statement at trial unconstitutional error. *Mincey v Arizona*, 437 U. S. 385, 401 (1978) (finding confession involuntary because, given the particular circumstances of the case, the confession was unlikely to have been the product of a free and rational will.)

### A. Relevant facts.

When Rivera was first arrested and incarcerated, he invoked his right to counsel and refused

to talk to any of the investigating officers. Tr. 2039, ll. 7-13. A week later, during re-fingerprinting, he asked to speak with Officer John Zamberlin of the Anderson Police Department. Tr. 2049, l. 9-14. Rivera told Zamberlin that he would "cooperate," if granted three requests by the "D.A.'s" office. Tr. 2053, ll. 10-11. He asked that the Solicitor promise in writing "to seek the death penalty;" that he would be housed "in jail alone by self;" and that he would be permitted to "see chaplain when he gets to jail." Tr. 2055, ll. 7-9. Zamberlin did not attempt to speak to Rivera further, but immediately called Solicitor Christina Adams. Tr. 2056, ll. 5-16. The next day, Adams wrote a letter to Rivera promising:

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

Tr. 2058, ll. 12-19. Zamberlin gave that letter to Rivera, who then confessed. Tr. 2059-61.

Counsel argued that the confession was inadmissible because it was obtained through promises in violation of the rule of *Bram v. United States*, 168 U.S. 532 (1897), *see* Tr. 133-35; Defense Brief in Support of Motion to Suppress Defendant's Statement Due to the Statement Being Procured by a Promise from the Prosecutor and Therefore Involuntary, at 4-5, but the trial court denied the motion to suppress, finding "no promise of leniency or threat" based upon the fact that Rivera had initiated the request, Tr. 137, ll. 7-8. During the guilt phase, the Solicitor read Rivera's confession to the murder of Kwana Burns into the record, Tr. 2064, and during the penalty phase, Zamberlin testified over defense objection that Rivera confessed to six other killings in three states.[28]

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[28]The prosecution presented no evidence purporting to substantiate the confession to these other crimes, nor has Rivera ever been charged in connection with any of them.

Tr. 2389, ll. 13-18.

**B. Relevant legal principles and discussion.**

"[O]urs is an accusatorial, and not an inquisitorial, system." *Rogers v. Richmond*, 365 U. S. 534, 541 (1961). Older due process cases bar the admission of involuntary confessions, including all those "obtained by any direct or implied promises, however slight ...." *Bram v. United States* 168 U.S. 532, 542-43 (1897) (internal quotations omitted); *Hutto v. Ross* 429 U.S. 28, 30 (1976) ("The test is whether the confession was '... obtained by any direct or implied promises, however slight ....'") (quoting *Bram*, 168 U.S. at 542-43); *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (quoting *Hutto*, 429 U.S. at 30). Although this *per se* rule no longer states the law, promises are part of the "totality of the circumstances" which must be considered in evaluating whether a confession was coerced. *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991).

The core concern in the voluntariness analysis has always been to prevent police overreaching. *See Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (citing *Brown v. Mississippi*, 297 U.S. 278 (1936)). Indeed, three quarters of a century ago, the Court suppressed a confession extracted through torture because the actions of the police were "revolting to the sense of justice." *Brown v. Mississippi*, 297 U.S. at 286. Thus, in the absence of overreaching, no due process violation is possible, regardless of the state of mind of the defendant, because the "essential link between coercive activity of the State, ... and a resulting confession by a defendant," is missing. *Connelly*, 479 U.S. at 165.

But "the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U.S.199, 206 (1960). The Supreme Court "has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular

suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller v. Fenton*, 474 U.S. 104, 109 (1985). Here, the police and prosecutor were faced with an obviously suicidal man. Rivera did not try to bargain for his life, or other favors, but for death itself. Promising him that the State would seek death, house him in isolation, and permit him to see the chaplain to induce his confession was unconstitutional overreaching.

The Court in *Connelly* was careful to explain that, while "mere examination of the confessant's state of mind can never conclude the due process inquiry," "mental condition is surely relevant to an individual's susceptibility to police coercion ...." Thus, in *Spano v. New York*, 360 U.S. 315, 321-22 (1959), the Court relied on the emotional instability, lack of education, and immigrant status of the defendant in finding involuntary a confession elicited primarily through leading questions during an all-night incommunicado interrogation. Similarly, in *Blackburn v. Alabama*, the Court found a confession involuntary when police learned of the defendant's mental problems, then systematically exploited them with coercive tactics. *Blackburn*, 361 U.S. at 207-08; *see also Mincey*, 437 U.S. at 398-99 (finding involuntary a confession obtained from a defendant who was seriously wounded and in an intensive care unit despite an absence "of some of the gross abuses that have led the Court in other cases to find confessions involuntary"). Thus, while a spontaneous statement caused by a defendant's mental illness or condition may be voluntary, a confession elicited through police exploitation of a mental illness or condition is involuntary.

The trial court was wrong to rely upon the fact that Rivera initiated contact with the Solicitor as precluding involuntariness. That Rivera initiated the exchange does not diminish the coercive nature of the State's actions; torture performed at the behest of the defendant would still be torture

and would still violate due process. Indeed, it was the bizarre nature of Rivera's requests that had to have alerted the State to the likelihood that he was mentally ill. Zamberlin and Adams catered to Rivera's suicidal depression by promising that the Solicitor's Office would seek the death penalty, thereby deliberately exploiting a mentally ill individual in violation of the Due Process Clause.

Although the fact of initiation is relevant in other contexts, neither of those situations is present here. First, the *Miranda* right to counsel may be waived after an initial invocation only if the accused her- or himself "initiates further communication," *Edwards v. Arizona*, 451 U.S. 477, 485 (1981), but this is because *Miranda* is aimed at the question of whether an individual is willingly facing questioning without an attorney – not whether particular tactics of interrogation are likely to overbear the defendant's will. Consequently, the Supreme Court has not imported *Edwards* into the general voluntariness analysis. *See Connelly*, 479 U.S. at 163. Second, some state courts have tolerated defendant-initiated promises when they resemble, or are part of, the plea-bargaining process. *See, e g , Bible v. State*, 162 S.W.3d 234 (Tx.Ct. Crim. App. 2005); *Ex parte Siebert*, 555 So.2d 780 (Ala. 1989); *State v. Torres*, 588 P.2d 852 (Ariz. Ct. App. 1978). Whether these cases are right or wrong, they are inapposite here because Rivera's negotiations with the Solicitor's Office did not secure for him anything resembling a bargain. Although obtaining a private cell and seeing the chaplain are arguably benefits, Rivera's request that the Solicitor's Office seek the death penalty cannot be seen as anything but an act of self-harm or a particularly elaborate form of suicide by cop. Due process prohibits promises that exploit such extreme vulnerability.

## VI. APPELLANT'S RIGHT TO PRESENT EVIDENCE IN MITIGATION OF PUNISHMENT, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WAS VIOLATED BY THE TRIAL COURT'S REFUSAL TO ADMIT PROOF THAT QUALIFIED MENTAL HEALTH PROFESSIONALS HAD DIAGNOSED HIM WITH A SERIOUS MENTAL ILLNESS ON THE GROUND THAT THEY DID NOT HOLD "MEDICAL" DEGREES.

The task faced by the defense at trial was to confront a wide assortment of aggravating evidence about Rivera and his conduct, some closely connected to the Kwana Burns homicide, and some quite attenuated from that offense. Defense counsel's plan for meeting that challenge was straightforward: they would demonstrate for the jury that Rivera endured a deeply troubled and abusive upbringing, and that he had emerged from those circumstances with a recognized, diagnosable mental illness – bipolar disorder – which would help to explain both his commission of the offense and his self-destructive conduct at trial. As it happened, however, the defense was barred from carrying out the central element of this strategy when the trial judge insisted that only a person with a "medical" degree could inform the jury of Rivera's mental illness. As discussed below, the trial judge's idiosyncratic demand had no basis in South Carolina law or practice, and the resulting exclusion of all proof of Rivera's bipolar disorder constituted a clear violation of one of the most fundamental rights in all of modern capital sentencing law.

### A. Relevant facts.

According to reports generated by South Carolina Department of Corrections mental health personnel, *see* Tr. 2606-07, Rivera suffers from bipolar disorder, an Axis I mental illness characterized by recurrent manic episodes, sometimes with psychotic features, and by "grandiose and persecutory delusions, irritability, agitation, and catatonic symptoms." Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) 386–87 (4th ed. 2000). Up until the penalty phase of

Rivera's trial, this fact was never in dispute; on the contrary, it was all but taken for granted by the parties and the judge. *See, e.g.*, Supp. Tr. A 14, ll. 18-20; Tr. 1910, l. 24 -1911, l. 7.

Recognizing that Rivera's mental illness had been a powerful influence on his judgment and behavior, both at the time of the crime and throughout the ensuing legal proceedings, defense counsel built their capital sentencing strategy around it. Counsel began putting this plan into motion in the guilt-or innocence phase opening statement, during which they told the jury to expect evidence of Rivera's history of bizarre claims and behaviors, his diagnosis, and his need for anti-psychotic medication:

> In that chair right here in February of 2008, two years ago right now, Raymondeze Rivera got on that stand and said that he was a contract killer with a code name, Circle K. He got his instructions – he got his instructions from a post office in Atlanta. And he was here on an assignment to kill Kwana Burns. Can I say that to you again? Does any rational reasonable human being—can we make any sense of that? No, you can't. And you won't. And the reason for it is that he is mentally ill. He suffers from bipolar disorder. While you were here in your jury room at three o'clock, he was taking medicine that the law enforcement was giving him. It's called Seraquel. He takes it twice a day. He has a major mental illness, and he takes an anti-psychotic medicine twice a day for that illness.
>
> * * *
>
> [I]f a woman turns his or her back—her back on him, he takes that, because of his mental illness, his bipolar disease, to such a level, he thinks that it is a complete refutation of who he is. And he becomes another person. And that's what we intend to show you happened on December 13th and the morning of the 14th in December, 2006, here.

Tr. 1893, ll. 11-25; 1895, l. 22 - 1896, l. 3.

After Rivera was found guilty and the prosecution had put on its case in aggravation, the defense began to present the evidence it had promised since the outset. Had it gone as expected, the

evidence would have emerged in two phases: lay witness testimony describing Rivera and the circumstances of his background, and then expert testimony explaining the effects of what the lay witnesses described, including the bipolar disorder with which Rivera had been diagnosed. The first phase unfolded as expected, as a half dozen witnesses provided their recollections and observations of Rivera and his family dating back to his childhood. *See generally* Tr. 2422 2489. When the time came to present the evidence of Rivera's mental illness, however, the defense's plan unraveled.

Defense counsel's first attempt to elicit expert testimony concerning bipolar disorder came during the direct examination of Dr. Arlene Andrews, a psychologist and professor of social work at the University of South Carolina.[29] Dr. Andrews testified that, based on her interviews with Rivera and members of his family, and her review of various records, she had concluded that Rivera "suffered from a very serious emotional and behavioral disturbance," Tr. at 2494, ll. 24-25, which "evolved into a mental disorder that's been exacerbated, or increased, by the fact that he experienced extreme physical abuse and very persistent psychological abuse throughout his developmental years," Tr. 2495, ll. 1-4.[30] Dr. Andrews then began to explain some of the ways in which Rivera's illness manifested itself, and why previous remedial attempts had failed:

> [H]e felt like he had demons inside of him because he would be so angry and then so sorry. And he – it could – it would be the littlest things that bothered him, and then he would seem very concerned because he felt like he had these demons. ... And he did get ordered into anger management, but that was not what he needed. Anger management is for people who have a simple anger problem or need to learn some communication skills. He has a very profound

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[29]Dr. Andrews holds a bachelor's degree from Duke University, and both a master's degree in social work and a Ph.D. in clinical community psychology from the University of South Carolina. Tr. 2490-91.

[30]She also noted a long history of mental illness running through Rivera's family. Tr. at 2497.

disability.

Tr. 2543, ll. 14-23. At that point, the prosecution objected on the ground that Dr. Andrews "had not been qualified as an expert in what might be wrong with him," and expressed its opposition to "any testimony about any disability or diagnosis." Tr. 2544, ll. 2-4. With two more expert witnesses prepared to testify, defense counsel moved on. *Id*

The defense's second attempt to present the evidence of Rivera's bipolar disorder came during the testimony of Dr. Nicholas Cooper-Lewter, a psychologist and lecturer in the University of South Carolina's social work program.[31] During direct examination, Dr. Cooper-Lewter mentioned Rivera's self-report that he "had been diagnosed with bipolar." Tr. 2592, ll. 14-15. The prosecution immediately objected, contending that the doctor was "not qualified to diagnose Mr. Rivera with any mental illness, and there's been no evidence of that." Tr. 2592, ll. 16-18. After observing that bipolar disorder was a "medical condition that requires expert testimony," the trial court instructed defense counsel to proceed. Tr. 2592, ll. 24-25. Counsel then asked Dr. Cooper-Lewter whether he had observed "diagnosable conditions" in Rivera, and the prosecution objected again. Tr. 2593, ll. 3-4. This time, the court sent the jury out and a lengthy argument took place. Among other things, defense counsel noted that Dr. Cooper-Lewter had seen and relied upon the diagnostic and medication records prepared by the South Carolina Department of Corrections' own personnel, Tr. 2593, l. 24 - 2594, l. 4, and that he was "licensed ... in the state of South Carolina, to give diagnosis [sic]," Tr. 2601, ll. 18-20; *see also* Tr. 2603, ll. 3-15 (Dr. Cooper-Lewter noting that he teaches diagnosis to university students and routinely provides diagnoses at the request of

[31]Dr. Cooper-Lewter holds a bachelor' degree from Ashland College, an M.S.W. from the University of Minnesota, and a Ph.D. in psychology from California Coastal University. Tr. 2582.

insurance companies as part of his private practice). Counsel further asserted that the evidence of Rivera's bipolar disorder was admissible under the Supreme Court's Eighth Amendment jurisprudence, Tr. 2596, ll. 11-22, and was relevant to the two statutory mitigating circumstances upon which the defense intended to rely, Tr. 2599-2602. Counsel went on to make a proffer of Dr. Cooper-Lewter's qualification to diagnose bipolar disorder and the bases for that diagnosis in Rivera's case, Tr. 2603-07,[32] and then reiterated that exclusion of the evidence would violate "the Sixth, the Eighth and the Fourteenth Amendments to the United States Constitution and Article I, Sections 3, 14, and 15 of the South Carolina Constitution." Tr. 2608, ll. 19-23.

In response, the trial court held firm to the view that bipolar disorder was a "medical condition" that could only be diagnosed – and conveyed to a jury – by "a psychiatrist or somebody else in the medical field." Tr. 2594, l. 24; *see also* Tr. 2597, ll. 4-7 (The court: "But he's not an expert in ... psychiatric or other medical fields."); Tr. 2602, ll. 22-24 (The court: "[A] bipolar [sic] or manic depressive is a diagnosis – diagnosable medical condition. Is it or do you know?"). In the end, the trial court refused to permit Dr. Cooper-Lewter to reference Rivera's bipolar disorder, and when the jurors returned he instructed them to

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

Tr. 2611, ll. 7-17.

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[32]In connection with the proffer, the South Carolina Department of Corrections' report on Rivera was made part of the record as Court Exhibit 15. Tr. 2607.

Defense counsel made their final attempt to put the critical evidence of Rivera's bipolar disorder before the jury through the testimony of Dr. Marti Loring, an expert in trauma and development.[33] During an *in camera* proffer prior to the start of her direct examination, Dr. Loring explained that she is licensed by the state of Georgia, and is authorized to make diagnoses, including bipolar disorder. Tr. 2631-32. The trial court again held firm, insisting that, "if you want to get bipolar in, put a physician or a psychiatrist in to do it because that is a medical diagnosis." Tr. 2632, ll. 23-25. Soon thereafter, the court put an end to the issue:

> I find that bipolar, obviously, whatever the diagnosis was made was not made by a psychologist or social worker, but a person trained in medicine. So therefore the reference to bipolar will be excluded. If you want to breach or broach the question of conditions that affect what bipolar, manic depression, is, then you'd have to do that with someone qualified.

Tr. 2636, ll. 17-23; *see also* Tr. 2637, ll. 7-8 (noting defense counsel's objection).

Despite having prevented them from hearing the evidence of Rivera's bipolar disorder, the trial court later charged the jurors to consider the statutory mitigating circumstances set forth at S.C. Code Ann. § 16-3-20(b)(6) ("the defendant was under the influence of mental or emotional disturbance"), and (b)(7) (" the age or mentality of the defendant at the time of the crime"). Tr. 2788, ll. 4-8. While the exclusion of the defense's evidence made it highly unlikely that the jury would find or give any meaningful weight to those factors, the prosecution seized the opportunity created by the incomplete record to diminish that chance even further during closing argument:

> He got help through the system with anger management classes. He got help through the church. He has had chance after chance after

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[33]Dr. Loring received a bachelor's degree from Vassar College, where her major was psychology, a master's degree in social work and social research from Bryn Mawr Graduate School, and a Ph.D. in social work from Emory University. Tr. 2630.

> chance to rehabilitate himself and he chooses not to over and over and over again. He doesn't deserve any more chances, ladies and gentlemen. He has chosen to turn his back on everyone. His choice. Nobody else's. Enough is enough.

Tr. 2728, ll. 9-15. Had the jury heard the excluded evidence, this argument would have been implausible. In light of the record as limited by the trial court, however, the jury likely found it persuasive.

**B. Relevant legal principles and discussion.**

**1. The trial court's insistence that bipolar disorder is a "medical diagnosis" admissible only through the testimony of a "physician or psychiatrist" is contrary to settled South Carolina law.**

As described above, the trial court's sole basis for excluding the evidence of Rivera's mental illness was that the witnesses called by defense counsel did not possess medical degrees. That decision was flatly contrary to longstanding state law. Pursuant to S.C. Code Ann. § 40-55-50(A)(1)(a), the practice of psychology is defined to include the "[a]ssessment of individual, family, or group behavioral, emotional, and/or intellectual functioning for the purpose of ... diagnosing mental disorders." Consistent with this definition, this Court has explicitly held "that a psychologist, once qualified as an expert witness by reason of education, training, and experience, is competent to testify as to diagnosis, prognosis, and causation of mental and emotional disturbance." *Howle v PYA/Monarch, Inc.*, 288 S.C. 586, 594, 344 S.E.2d 157, 161 (1986).[34] In this case, both Dr.

[34] *See also Howle*, 288 S.C. at 593, 344 S.E.2d at 160 (quoting *United States v. Riggleman*, 411 F.2d 1190 (4th Circ. 1969)) ('the determination of a psychologist's competence to render an expert opinion based on his findings as to the presence or absence of mental disease or defect ... does not depend upon his claim to the title of psychologist or psychiatrist.'"); *Honea v. Prior*, 295 S.C. 526, 531, 369 S.E.2d 846, 849 (1988) ("With respect to the qualifications of an observing witness to give expert testimony concerning a person's mental condition, it is not necessary that the witness be specially skilled in the subject of mental disorders or that the witness be a psychiatrist."); *State v. Henry*, 329 S.C. 266, 276, 495 S.E.2d 463, 468 (1997) ("The extension of the rationale articulated

Andrews and Dr. Cooper-Lewter possessed doctoral degrees in psychology, and were sufficiently educated, trained and experienced to inform the jury of the fact and effects of Rivera's bipolar disorder.[35]

Moreover, Dr. Loring should also have been permitted to testify about bipolar disorder. Under South Carolina law, a witness may be qualified as an expert so long as she "has acquired by study or practical experience such knowledge of the subject matter of h[er] testimony as would enable h[er] to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." *State v. White*, 372 S.C. 364, 374-75, 642 S.E.2d 607, 612 (2007). A witness may also be qualified to testify outside her field of

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in *Honea* to the criminal trial venue is a logical and commonsensical approach to the qualification of an expert to render an opinion on PTSD.").

[35]*Accord, e.g.*, *State v. Hoskins*, 14 P.3d 997, 1019 (Ariz. 2000) ("The defendant's expert, clinical psychologist Richard Lanyon ... diagnosed defendant as suffering from Bipolar II Disorder, a mental illness characterized only in part by poor judgment and impulsivity . ... Dr. Bayless, also an experienced clinical psychologist, rejected Lanyon's Bipolar II Disorder diagnosis, in part because the disorder requires a major episode of depression."); *State v. Pearce*, 994 So.2d 1094, 1102 (Fla. 2008) ("Based on the records and his examination of Pearce, Dr. Carpenter, a licensed psychologist, could have testified to the following mitigating factors: (1) Pearce suffers from a bipolar disorder; ... Dr. Henry Dee, a licensed clinical psychologist and clinical neuropsychologist, ... concluded that Pearce was under the influence of extreme mental or emotional disturbance when the offense was committed. ... Dr. Robert Berland, a board certified forensic psychologist, ... found evidence of a chronic or long-standing psychotic disturbance, a biologically caused mental illness."); *Krempentz v. State*, 872 N.E.2d 605, 615 (Ind. 2007) ("Dr. Paul Yoder, a clinical psychologist, ... diagnosed Krempetz with 'Bipolar I disorder, mixed, severe with psychotic features ... Schizoaffective Disorder ... Post-traumatic Stress Disorder ... [and] antisocial traits.'"); *Crawford v. State*, 787 So.2d 1236, 1240 (Miss. 2001) ("Dr. L.D. Hutt, a Memphis clinical psychologist, ... testified that, in his opinion, Crawford was suffering from a bipolar disorder, manic type at the time of the attack." (emphasis added)); *State v. Lyons*, 468 S.E.2d 204, 210 (N.C. 1996) (psychologist testified at trial regarding his opinion of "the defendant's specific psychiatric diagnoses"); *State v. Trimble*, 911 N.E.2d 242, 276–77 (Ohio 2009) ("Dr. Robert Smith, a clinical psychologist who specializes in chemical dependencies, conducted a psychological evaluation of Trimble [and concluded that, at the time of the murders] Trimble was suffering from several psychological conditions then. These included a bipolar II disorder ...." (emphasis added)).

specialty, provided that she has acquired competence in the relevant area by study, experience, or both, and that, by virtue of the witness' knowledge or skill, she is better able than the jury to form an opinion on the subject at issue. *Howle*, 288 S.C. at 592, 344 S.E.2d at 160. Dr. Loring easily met this standard. Although her doctoral degree was in Sociology, she had majored in psychology as an undergraduate, she had accumulated substantial experience in the field of trauma and development, and she was authorized under a license issued by the state of Georgia to diagnose the very disorder about which defense counsel sought to have her testify.

Given the qualifications of the experts proffered by the defense, and South Carolina's unambiguous rules authorizing similarly credentialed witnesses to testify to diagnoses, the trial court's exclusion of Rivera's bipolar disorder evidence constituted a clear abuse of discretion. *See, e.g.*, *Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). As discussed below, it also amounted to an equally clear violation of the Eighth and Fourteenth Amendments.

**2. The trial court's exclusion of probative, non-cumulative mitigating evidence violated the Eighth and Fourteenth Amendments.**

In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Supreme Court held that in capital cases the Eighth and Fourteenth Amendments require that "the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record." *Lockett*, 438 U.S. at 604-05. The purpose of this mandate is to ensure "'consideration of the character and record of the individual offender and the circumstances of the particular offense,'" which the Court has long regarded as "'a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Penry v Lynaugh*, 492 U.S. 302, 316 (1989) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

Since its decision in *Lockett* more than thirty years ago, the Court has exhibited little

tolerance for rules whose purpose or effect is to restrict the admission of mitigating evidence. *See, e.g., Tennard v. Dretke*, 524 U.S. 274, 285 (2004) ("[A] State cannot bar 'the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death" (internal quotations omitted)); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (holding that capital defendant must be allowed to present evidence of adaptability because "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'"). Thus, where a capital defendant's evidence meets the "'low threshold for relevance, which is satisfied by 'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonable deem to have mitigating value,'" it must be admitted and considered by the sentencer. *Smith v. Texas*, 543 U.S. 37, 43–44 (2004) (quoting *Tennard*, 524 U.S. at 284-85); *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982).

In this case, the trial court's refusal to admit expert testimony that Rivera was diagnosed with bipolar disorder both violated the *Lockett* rule and undermined the critical Eighth Amendment interests that rule was put in place to protect. The evidence of Rivera's bipolar disorder and its impact on his mental state unquestionably fell well within the broad relevance parameters – *i.e.*, the only constitutional admissibility criterion – described in *Tennard* and *Penry*. Moreover, as counsel promised in the opening statement, mental illness was the key to making sense of Rivera's seemingly inexplicable actions, and, in turn, to the generation of mitigating value under South Carolina's capital sentencing scheme. By excluding the evidence, the trial court kept defense counsel from fulfilling the pledge they had made to the jury, and all but foreclosed any real possibility that the jurors would find either of the two statutory mitigating circumstances, each of which turned on the defendant's mental state. As a result, Rivera was denied the "individualized assessment of the appropriateness

of the death penalty" to which he was entitled under the Eighth and Fourteenth Amendments. *Penry*, 492 U.S. at 319 (referencing *Lockett* and *Eddings*).[36]

## VII. APPELLANT'S RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND S.C. CODE § 16-3-25(C)(1), WERE VIOLATED WHEN THE PROSECUTION WAS PERMITTED TO URGE THE JURY, THROUGH ARGUMENT AND EVIDENCE, TO IMPOSE A SENTENCE OF DEATH FOR A HOMICIDE AS TO WHICH HE HAD NOT – AND COULD NOT HAVE – BEEN FOUND DEATH-ELIGIBLE.

The trial that produced the judgment challenged in this appeal concerned a single homicide: the murder of Kwana Burns. While Rivera had also been convicted of the homicide of Asha Wiley, that case lacked a statutory aggravating factor essential for a capital prosecution, and was resolved two years earlier in a separate, non-capital trial. Despite these circumstances, the prosecution formulated its arguments and evidence at the penalty phase of the Burns trial to induce the jury to view its task as the selection of a sentence, not only for the murder of Kwana Burns – *i.e* , Rivera's only death-eligible offense – but for the *combination* of the Burns and Wiley murders. As discussed below, the death sentence subsequently imposed by Rivera's jury is incompatible with the Eighth Amendment mandate that the death penalty be reserved for offenses that fall within an objectively narrowed class, and with S.C. Code § 16-3-25(C)(1)'s closely related prohibition against imposition of a sentence of death "under the influence of [an] arbitrary factor[.]"

### A. Relevant facts.

The prosecution used its penalty phase opening statement to review the basic procedural concepts the jury would be expected to apply, to preview the types of evidence the jury would hear,

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[36]Additionally, to the extent the prosecution's penalty phase closing argument capitalized on the void in the defense evidence brought about by the trial court's error, that argument also violated due process. *See Green v. Georgia* 442 U.S. 95 (1979) (per curiam); *Chaffee v. State*, 294 S.C. 88, 91-92, 362 S.E.2d 875, 877 (1987).

and to frame the central question the jurors would be asked to resolve at the conclusion of the case. To those ends, the prosecution began by claiming that the penalty phase would "be focused upon the circumstances surrounding the death of Kwana Burns, how it impacted her family, her friends, her loved ones." Tr. 2259, ll. 21-23. From there, the prosecutor explained that the jury would be shown proof of Rivera's conviction for the Wiley murder to satisfy "a statutory aggravating circumstance," and that "some of" the "aggravating evidence" the jury would hear was also "going to deal with Asha Wiley." Tr. 2260, ll. 3, 20-21. After previewing the details of the Wiley homicide and noting that it was "eerily similar" to the Burns case, Tr. 2261, l. 11, the prosecutor closed by telling the jurors how the State would be expecting them to resolve the case: "At the end of this trial, we're going to get up and ask you to render a verdict that *this case* deserves, that *Asha Wiley and Kwana Burns* deserves [sic]." Tr. 2263, ll. 2-4 (emphasis added).

Contrary to the summary it gave in the opening statement, the prosecution did not "focus[]" its penalty phase presentation on the circumstances and effects of the Burns homicide. In fact, of the eleven witnesses called by the State, nine testified about matters unconnected to the Burns case, and eight of those nine dealt exclusively with the Wiley homicide. The testimony of the eight Wiley witnesses unfolded as if Rivera were being tried for her murder all over again: the prosecution began with testimony from a friend who described interactions with Asha Wiley in the days prior to her death, and assistance the friend provided to law enforcement in the days following the homicide, Tr. 2284-90; seven of the next eight witnesses described the discovery and investigation of Wiley's murder, and the development of forensic evidence linking Rivera to the offense, Tr. 2290-2309.[37]

[37]The additional witness in this sequence was Phoebe Kenney, who had no connection to either Wiley or Burns, and instead testified about her own unadjudicated allegations against Rivera and the impact she claimed they had on her. Tr. 2315-38.

The prosecution's final witness, Lt. Zamberlin, related statements taken from Rivera about Phoebe Kenney, Asha Wiley and Kwana Burns.

Having concentrated the bulk of its evidentiary presentation on re-proving the Wiley murder in all of its particulars, the prosecution used its closing argument to unify the Wiley and Burns cases, and to frame the jury's task as the selection of a sentence for the combination of the two crimes. For example, early in her closing argument the Solicitor asserted:

> Ladies and gentlemen, the circumstances of *these crimes* are none other than horrific. You heard the descriptions and you have seen the pictures. A stranger came to Anderson Mall. He preyed on *two women* and he *planned to kill Asha and Kwana* as soon as he met them.

Tr. 2716, ll. 15-19 (emphasis added). As her argument went on, the Solicitor continued to reinforce the link between Wiley and Burns:

> He preyed upon *these women*, ladies and gentleman. He's a man I would marry next week if he asked me. Little did Asha know as she was planning the rest of her life, he was planning the end of hers. Call me. You're on my mind. Little did Kwana know that her first night in her new home would be her last. ... There was only death for *Asha and Kwana*. And the manner in which he killed *them* was so personal. ... [H]e watched *them* die. He felt *them* die.

Tr. 2717, l. 16 -2718, l. 1 (emphasis added).

> He methodically and meticulously cleaned and [sic] *Asha and Kwana's bodies* to destroy all evidence. He went through *each apartment and each home*, and he wiped down everything that he thought he had touched in an attempt to erase all evidence of his existence in Anderson, South Carolina. He erased his number from Asha's cell phone before he killed her because he planned to kill her.

Tr. 2718, l. 22 - 2719, l. 3 (emphasis added).

> He wants you to know every horrible, graphic detail of what he did to these *two innocent women*. And then he calls *them*. ... He calls *them*

after they're dead to hear their voices.

Tr. 2719, l. 24 - 2720, l. 4 (emphasis added).

> He planned to kill [Phoebe Kenney] just like he planned to kill *Asha and Kwana*. ... He cleans her. Just like he cleaned *Asha and Kwana*.

Tr. 2722, ll. 14-18 (emphasis added).

> [H]e continued his life of terror right here in Anderson, South Carolina when he strangled *two innocent women* to death in a matter of three days.

Tr. 2723, l. 23 - 2724, l.1 (emphasis added).

> There should have been tomorrow for Asha. There should have been tomorrow for Kwana.

Tr. 2726, ll. 3-4.

Finally, after making clear that Rivera was "already serving a life sentence for the murder of Asha Wiley," and that life was the "minimum" sentence available "in this case," the Solicitor presented her view of the dispositive question in terms no juror could fail to understand:

> Is the minimum sentence appropriate for someone who brutally strangled *two innocent women* ...?

Tr. 2729, ll. 8-13 (emphasis added).

**B. Relevant legal principles and discussion.**

Since the start of the "modern era" of American capital punishment thirty five years ago, it has been black letter Eighth Amendment law that a defendant may not be sentenced to death unless his offense has been found to be accompanied by one or more aggravating circumstances, identified by the legislature, which "genuinely narrow the class of persons eligible for the death penalty ...." *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *see also, e.g., Gregg v. Georgia,* 428 U.S. 153, 196-97

(1976); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). South Carolina's statutory capital sentencing scheme reflects this Eighth Amendment requirement by mandating that, "[i]f no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years to life." S.C. Code Ann. § 16-3-20(B).

The purpose of using statutory aggravating circumstances to narrow the class of eligible defendants is to minimize the risk of arbitrary or capricious imposition of the death penalty. *See, e.g., Zant*, 462 U.S. at 874; *Gregg*, 428 U.S. at 189. This, too, is reflected in South Carolina's statutory scheme. At the trial level, the scheme works to minimize the risk of arbitrariness by requiring consideration, not only of statutory aggravating circumstances which narrow the class of eligible defendants, but also of a range of mitigating circumstances. *See* S.C. Code Ann. § 16-3-20(B) & (C). Taken together, these considerations facilitate individualized, rationally guided sentencing determinations based on the character of the defendant and the circumstances of the capital crime, as required by the Eighth Amendment. *See, e.g., Zant*, 462 U.S. at 879.

At the appellate level, South Carolina law guards against arbitrariness by requiring direct review of all capital cases, during which this "Court shall determine whether," *inter alia*, "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor[.]" S.C. Code § 16-3-25(C). As *State v. Motts*, 391 S.C. 635, 707 S.E.2d 804 (2011), recently made clear, this review is "mandatory," such that a defendant "cannot waive this Court's statutorily-imposed duty to review his capital sentence." *Motts*, 391 S.C. at ___, 707 S.E.2d at 811; *see also Gregg*, 428 U.S. at 198 (characterizing Georgia's version of mandatory appellate review in capital cases as an "important additional safeguard"). Thus, even where, as here, trial counsel fails to lodge a contemporaneous objection to the introduction of an arbitrary factor, this Court remains

statutorily obligated to consider the existence and effect of any such factor, and to reverse a death sentence tainted by arbitrariness.

In this case, the prosecution's arguments and evidence concerning the Wiley homicide combined to introduce an arbitrary factor unlike – and more corruptive than – any this Court has confronted before.[38] By repeatedly encouraging the jury to view its task as the selection of a sentence fit for the perpetrator of *both* murders and sufficient to do justice for *both* victims, and by reinforcing that message through an evidentiary presentation dominated by the details of the Wiley homicide, the prosecution managed to violate core principles governing *both* the death-eligibility and sentence-selection stages of a capital trial.

With regard to death-eligibility, the prosecution's use of the Wiley homicide was a naked ploy to circumvent the federal- and state-law barriers that prevented the State from seeking a death sentence at the Wiley trial itself. Those barriers serve the constitutionally indispensable purpose of separating rational, Eighth Amendment-compliant capital sentencing schemes from the irrational and arbitrary schemes rejected in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). The prosecution's insistence that the jury choose a death sentence that both "Asha Wiley and Kwana Burns deserve[d]," Tr. 2263, l. 4, and that the jurors ask themselves whether a life sentence would be "appropriate for someone who brutally strangled two innocent women," Tr. 2729, ll. 12-13, flew in the face of that fundamental principle.

The prosecution's tactics were equally offensive to the rules governing the selection stage

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[38]This Court has previously identified an arbitrary factor requiring reversal of a death sentence where the prosecutor made improper comments during closing argument, *State v. Northcutt*, 372 S.C. 207, 222-23, 641 S.E.2d 873, 881-82 (2007), and where the prosecution presented evidence of general prison conditions, *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007).

of a capital sentencing proceeding. While it is not impermissible for a prosecutor to utilize evidence of a capital defendant's prior bad acts as simply indicative of his character, *see, e.g., State v. Plath*, 281 S.C. 1, 9, 313 S.E.2d 619, 623 (1984), the State observed no such limit in this case.[39] As described above, Rivera's prosecutors repeatedly characterized the crime for which the jury was to impose a sentence as the *combination* of the Wiley and Burns homicides, and they explicitly urged the jurors to deliver a verdict responsive to both crimes. Simply put, the law permitted the State to request a death sentence for only *one* murder, but the prosecutors took it upon themselves to ignore that limitation and add a *second* murder to the sentencing equation. Under any rational construction of the Eighth Amendment and South Carolina law, that second murder functioned as an impermissible arbitrary factor which tainted the jury's penalty phase verdict. In *State v. Bennett*, 369 S.C. 219, 230, 632 S.E.2d 281, 287 (2006), this Court acknowledged "the need to protect a capital defendant from unfair prejudice and prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant's prior crimes." The prosecution did that and much more in this case, and under S.C. Code § 16-3-25(C), the resulting death sentence cannot be permitted to stand.

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[39]As the Supreme Court has repeatedly made clear, evidence is admissible against the defendant in a capital sentencing proceeding only if it is probative of "the 'character and record of the individual offender and the circumstances of the particular offense.'" *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987)); *see also, e.g., State v. Burkhart*, 371 S.C. at 487, 640 S.E.2d at 453 ("We have long held that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime."). The lone exception to this limitation was recognized in *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), where the Court authorized the admission of victim impact evidence showing "the specific harm caused by the defendant" through his commission of the capital offense. As this Court explained in *State v. Bennett*, 369 S.C. at 228-29, 632 S.E.2d at 286-87, evidence of a defendant's bad acts *other than* the capital offense for which he is on trial – in this case, the evidence concerning Asha Wiley and Phoebe Kenney – cannot properly be categorized as "victim impact" evidence admissible under *Payne*.

## CONCLUSION

WHEREFORE, for all of the foregoing reasons, Rivera's conviction and death sentence should be reversed, and the matter remanded for a new trial.

Respectfully submitted,

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June 6, 2011.

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM ANDERSON COUNTY
Court of General Sessions

Alexander Macaulay, Circuit Court Judge

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Case No. 2007-GS-04-649

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

v.

RAYMONDEZE RIVERA ..... *Appellant*

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DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL

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Appellant proposes the following materials be included in the Record on Appeal:

Transcript of trial

All transcripts of pre-trial proceedings, including pre-trial hearings held on: Dec. 8, 2008; May 27, 2009; June 4, 2009; Nov. 10, 2009; and Dec. 1-2, 2009.

True billed indictment

Notice of Intent to Seek Death Penalty

Order appointing counsel

Brief in Support of Motion to Suppress Defendant's Statement Due to the Statement Being Procured by a Promise from the Prosecutor and Therefore Involuntary

Order relieving Judge Nicholson and appointing Judge Macaulay.

I certify that this designation contains no matter which is irrelevant to this appeal.

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June 6, 2011