

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JEFFREY HERRMANN,

APPELLANT

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FINAL BRIEF OF APPELLANT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUES ON APPEAL.....3

STATEMENT OF THE CASE .....4

ARGUMENT.....8

CONCLUSION.....15

## TABLE OF AUTHORITIES

### **Cases**

<u>Guam v. Dela Rosa</u> , 644 F.2d 1257 (9 <sup>th</sup> Cir. 1980).....	8
<u>Lee v. United States</u> , 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952) .....	11
<u>State v. Burkhart</u> , 350 S.C. 252, 565 S.E.2d 298 (2002) .....	11
<u>State v. Cole</u> , 338 S.C. 97, 525 S.E.2d 511 (2000).....	12
<u>State v. Franklin</u> , 267 S.C. 240, 226 S.E.2d 896 (1976) .....	14
<u>State v. Mattison</u> , 388 S.C. 469, 697 S.E.2d 578 (2010).....	11, 12
<u>State v. Pittman</u> , 373 S.C. 527, 647 S.E.2d 144 (2007).....	11
<u>State v. Smith</u> , 276 S.C. 494, 280 S.E.2d 200 (1981).....	13
<u>States v. Brooks</u> , 928 F.2d 1403 (4 <sup>th</sup> Cir. 1991).....	9
<u>States v. Williams</u> , 59 F.3d 1180 .....	11
<u>United States v. Griffin</u> , 382 F.2d 823 (6 <sup>th</sup> Cir.1967).....	10
<u>United States v. Bosch</u> , 914 F.2d 1239 (9 <sup>th</sup> Cir.1990).....	10
<u>United States v. Garcia</u> , 528 F.2d 580 (5 <sup>th</sup> Cir.1976) .....	10, 11
<u>United States v. Hill</u> , 627 F.2d 1052 (10 <sup>th</sup> Cir.1980).....	10
<u>United States v. Luck</u> , 611 F.3d 183 (4 <sup>th</sup> Cir. 2010) .....	9, 10, 11
<u>United States v. Morgan</u> , 555 F.2d 238 (9 <sup>th</sup> Cir. 1977).....	8
<u>Wasman v. United States</u> , 468 U.S. 559 (1984) .....	13

### **Other Authorities**

Devitt & Blackmar, <u>Jury Practice and Instructions</u> § 17.02 (3d ed.1977).....	9
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### STATEMENT OF ISSUES ON APPEAL

1. Did the judge err in refusing to instruct the jury that the testimony of an informer who provides evidence against the defendant for expected gain, the hope of reward or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness?
2. Did the judge err in refusing to reconsider the 45 year sentence imposed when, at sentencing, the Appellant failed to fully argue mitigation facts in support of a sentence of 30 years?

## STATEMENT OF THE CASE

In November of 2009, the Charleston County Grand Jury indicted Herrmann for murder, indictment #2009-GS-10-9048. On January 4, 2010, Herrmann proceeded to jury trial before the Honorable Christi L. Harrington. Attorneys Rodney D. Davis and Cody Groeber represented Herrmann at trial. On January 7, 2010, the jury returned a verdict of guilty. Judge Harrington sentenced Herrmann to 45 years. On January 15, 2010, Herrmann filed a motion to amend sentence. On February 8, 2010, Judge Harrington denied the motion to amend sentence. On February 17, 2010, counsel received written notice of Judge Harrington's denial of the motion to amend sentence. A timely notice of intent to appeal was filed on February 22, 2010. This appeal follows.

## STATEMENT OF FACTS

In July of 2000, Lieutenant Scarborough with the Charleston County Sheriff's Department conducted a missing person investigation for Ala "Ali" Sarhan. (R. p. 419, lines 9 – p. 420, lines 1-25). According to an agent with the United States Immigration and Customs Enforcement, Sarhan, an Iraqi citizen, was granted permission to enter the United States on September 17, 1992. (R. p. 30, lines 8-25). The agent testified that Sarhan was later granted permanent resident status. (R. p. 34, lines 6-23). According to the agent, Sarhan's left foot had been amputated and he wore a prosthetic. (R. p. 32, lines 3-24).

Eight years later in July of 2008, Officer Richardson with the Mount Pleasant Police Department arrested Jason Cumbee, at his home in McClellanville, on a bench warrant for driving under suspension third offense. During the ride back to Mount Pleasant, in an attempt to avoid going to jail, Cumbee told the officer that he had information about a murder and the location of a body. (R. p. 408, lines 16-23; p. 188, lines 5-8). Cumbee eventually led investigators to a boat landing where a dive team recovered Ali Sarhan's car from the bottom of the Wadmalaw Creek. The investigators discovered skeletal remains in the trunk of the car. (R. p. 473, lines 4- p. 474, lines 1-21). Dr. Suzanne Abel testified at trial as an expert in forensic anthropology. Dr. Abel testified that the skeletal remains were that of a male in his late twenties to early thirties who was approximately five feet five or six inches tall. (R. pp. 652-658). Dr. Abel testified that the left leg had a prosthesis. (R. p. 649, lines 16-22). Dr. Abel also testified that she observed a gunshot wound to the skull. (R. p. 663, lines 9 – p. 664 – 670).

Cumbee gave many different statements to police. Cumbee was later charged as a co-defendant with accessory after the fact to murder. Cumbee testified against Herrmann at trial and admitted that some of the many statements he had given police were not truthful. (R. p. 193, lines 21 – p. 194, 195, lines 1-5). In 2000, Cumbee's sixteen year old sister Shanna and Herrmann lived together. Cumbee admitted that in 2000, he was using drugs. (R. p. 160, lines 2-8). Cumbee testified that in 2000, Herrmann and Ali Sarhan were selling cocaine. (R. p. 162, lines 12 – p. 163, 164, lines 1-22). According to Cumbee, Herrmann discussed robbing Ali. (R. p. 164, lines 7-22). Cumbee testified that he arranged for Herrmann to buy a gun from a person named Jazz. (R. pp. 182-183). At trial, Cumbee testified that he was with Herrmann when Herrmann drove a black car into the Wadmalaw Creek. (R. p. 167, lines 16 – p. 168 – 175).

Brian Korth also testified against Herrmann at trial. Korth shared a jail cell with Herrmann after his arrest. Korth admitted having an extensive criminal history. (R. p. 539, lines 22-25). Korth admitted that he was testifying because he wanted a deal. (R. p. 563, lines 21-25). According to Korth, Herrmann admitted shooting Ali in the ear, putting him in the trunk and dumping the car off of a boat landing. (R. pp. 554-557). Korth testified that Herrmann told him he got the gun from a large one legged man named Jazz. (R. p. 558, lines 7-19). Korth also testified that Herrmann told him that he went to Ali's trailer after dumping the car in the creek to make sure there was nothing in the trailer to connect him to Ali. (R. p. 560, lines 13- p. 561 lines 1-16).

Shanna Cumbee, Herrmann's girlfriend in 2000, and the sister of Jason Cumbee, testified that Herrmann told her he was riding in the car with Ali. At some point Herrmann thought Ali was reaching for a gun so he shot first, hitting Ali in the ear. (R. p. 299, lines 3-

14). Melissa Hollander, Herrmann's girlfriend in 2008, testified that Herrmann told her that years earlier he had been involved in a drug deal gone bad and shot a man in self-defense. (R. p. 357, lines 1-15).

Herrmann did not present evidence at trial. The judge instructed the jury on the law of self-defense. The jury returned a verdict of guilty and the judge sentenced Herrmann to 45 years. Herrmann filed a motion to amend sentence. The motion was denied in a written order without the benefit of a hearing.

## ARGUMENTS

1. The judge erred in refusing to instruct the jury that the testimony of an informer who provides evidence against the defendant for expected gain, the hope of reward or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness.

During the charge conference counsel for Herrmann requested a charge specifically addressing the credibility of a jailhouse informer. (R. pp. 755 – 764). Counsel submitted a written request to charge which was marked as Court’s Exhibit #8. (R. p. 915). Counsel requested that the judge instruct the jury that, “The testimony of an informer who provides evidence against the Defendant for expected gain, the hope of a reward or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer’s testimony has been affected by interest, or by prejudice against the defendant.” (R. p. 915). In support of the request to charge, counsel cited Guam v. Dela Rosa, 644 F.2d 1257 (9<sup>th</sup> Cir. 1980) and United States v. Morgan, 555 F.2d 238 (9<sup>th</sup> Cir. 1977). The judge denied the request to charge. (Tr. p. 1128, lines 7 – p. 1129, lines 1-6). The judge erred.

Bryan Korth was an informer whose testimony required a cautionary instruction. Korth was a jail house snitch, not a co-defendant nor a person with first hand knowledge of the incident. While Korth was not a paid informer and was not granted immunity for his testimony, Korth admitted that he was testifying against Herrmann because he wanted a deal. (R. p. 563, lines 21-25). Korth was facing a federal probation violation, in addition to having pending assault and battery of a high and aggravated nature charges in Berkeley County, the other county, in addition to Charleston, under the jurisdiction of the Ninth Circuit Solicitor’s Office. (R. pp. 540-543). In a published stipulation, the jury learned that

Assistant Solicitor Julie Cardillo contacted both Assistant United States Attorney Rhett Dehart and Korth's attorney, Bob Haley and advised that Korth cooperated with the State in the prosecution of Herrmann. (R. p. 601). In United States v. Brooks, 928 F.2d 1403 (4<sup>th</sup> Cir. 1991) the Fourth Circuit Court of Appeals found that the witness did not qualify as an informer because there was no evidence that the witness was seeking personal advantage from his testimony. In the present case Korth was clearly seeking personal advantage from his testimony against Herrmann.

In United States v. Luck, 611 F.3d 183, 186-187 (4<sup>th</sup> Cir. 2010), the Court addressed the "informant instruction" and wrote:

Luck argues that his trial counsel was ineffective because he failed to request an "informant instruction" consisting of the following:

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant.

United States v. Brooks, 928 F.2d 1403, 1409 (4<sup>th</sup> Cir.1991) (quoting Devitt & Blackmar, Jury Practice and Instructions § 17.02 (3d ed.1977)). He argues that this Court should follow several circuits in holding that this instruction is always mandatory, or at the least, that in this case counsel was ineffective for failing to request the instruction.

The Court in Luck found it did not have to decide when an informant instruction is necessary because, "This case presents the classic case of a professional informant paid for his services, which in turn makes it the obvious case for an informant instruction. See, e.g., Garcia, 528 F.2d at 588 (remarking, in an analogous case where the government's

main witness was a professional, paid witness, that there was “more than the usual need for a cautionary instruction”).” 611 F.3d at 188. In Luck the Court reversed the conviction and remanded for a new trial finding that counsel was ineffective in failing to request the informant instruction and that the defendant was prejudiced by counsel’s deficient performance.

Although the Court in Luck did not find it necessary to decide when the informant instruction was necessary, the Court noted that other circuits found the instruction necessary when the testimony is uncorroborated. The Court wrote:

Among the other circuits that have considered this question, there is a consensus that an informant instruction is necessary when the informant's testimony is uncorroborated by other evidence. See United States v. Bosch, 914 F.2d 1239, 1247 (9th Cir.1990); United States v. Hill, 627 F.2d 1052, 1054-55 (10th Cir.1980); United States v. Garcia, 528 F.2d 580, 587-88 (5th Cir.1976); United States v. Griffin, 382 F.2d 823, 828 (6th Cir.1967)

United States v. Luck, 611 F.3d 183, 187-188 (4<sup>th</sup> Cir. 2010). While portions of Korth’s testimony are somewhat corroborated by the testifying co-defendant, Jason Cumbee, Korth’s testimony that Herrmann went to Ali’s trailer after dumping the car in the Wadmalaw Creek is totally uncorroborated. (R. p. 560, lines 13- p. 561 lines 1-16). The informant instruction was necessary in this case.

The judge generally instructed the jury about credibility of witnesses. (R. p. 875, lines 23 – p. 876, 877, lines 1-5). Under the facts of this case, however, the instruction was not adequate. As the Court wrote in Luck:

These courts have explained that an informant instruction is necessary because a general witness credibility instruction is not sufficiently cautionary for informants because of special concerns about the incentive that they have to fabricate information for their own benefit. See United

States v. Williams, 59 F.3d 1180, jury aware that an informant's testimony is to be viewed with caution); Garcia, 528 F.2d at 588 (“When the case is close and the witness particularly unreliable ... this Court has declared that the failure to give a cautionary instruction amounts to plain error.”); see also On Lee v. United States, 343 U.S. 747, 757-58, 72 S.Ct. 967, 96 L.Ed. 1270 (1952) (“The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.”). In other words, the other witnesses, even biased witnesses, because of the potential for perjury born out of self-interest. See Alexandra Natapoff, Snitching 77 (2009) (“[W]hen defendants do go to trial, numerous exonerations reveal just how often juries believe lying criminal informants, even when juries know that the informant is being compensated and has the incentive to lie. A report by the Center on Wrongful Convictions at Northwestern School of Law describes fifty-one wrongful capital convictions, each one involving perjured informant testimony accepted by jurors as true.”).

United States v. Luck, 611 F.3d 183, 187-188 (4<sup>th</sup> Cir. 2010).

“An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion.” State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). “To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” *Id.* at 479, 697 S.E.2d 578, 697 S.E.2d at 583 (citing State v. Burkhardt, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002)). “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). “The law to be charged must be determined from the evidence presented at trial.” State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000) (citations omitted);

Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted) (stating that appellate courts should “consider the court's jury charge as a whole in light of the evidence and issues presented at trial”). When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. *Id.* at 101, 697 S.E.2d 578, 525 S.E.2d at 512–13 (citations omitted).

Viewing the evidence in the light most favorable to the defendant, the general credibility of witnesses charge given did not adequately cover the law and the failure to give the requested informant instruction constituted an abuse of discretion.

2. The judge erred in refusing to reconsider the 45 year sentence imposed when, at sentencing, the Appellant failed to fully argue mitigation facts in support of a sentence of 30 years.

On January 15, 2010, eight days after the judge sentenced Herrmann to 45 years in prison, counsel for Herrmann filed a motion to amend sentence. (R. p. 919). The motion to amend sentence was based on the fact that Appellant failed to fully argue mitigation facts in support of a 30 year sentence. Appellant's educational, vocational and psychological histories were not fully presented to the sentencing judge and appellant's family members were too emotional to be able to address the sentencing judge. (R. p. 919). In the motion to amend sentence, counsel requests a hearing to present the additional mitigating evidence. In a written order signed February 8, 2010, the judge denied the motion to amend sentence without holding a hearing where the additional evidence could have been presented. The judge erred.

The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Wasman v. United States, 468 U.S. 559, 563 (1984).

“If justice is to be done, a sentencing judge should know all the material facts. Fair administration of justice demands that the judge will not act on surmise or suspicion but will impose sentences with insight and understanding. Hence, the judge is required to listen and


give careful consideration to any information material to punishment.” State v. Franklin, 267 S.C. 240, 245, 226 S.E.2d 896, 897 (1976).

The judge’s refusal to allow appellant to present additional mitigation evidence constitutes an abuse of discretion. The judge had a duty to give careful consideration to information material to punishment, including appellant’s educational, vocational and psychological histories as well as information from family members. The judge erred in refusing to hear the additional evidence and reconsider the 45 year sentence.

CONCLUSION

Based on the argument presented in issue one, Herrmann's conviction and sentence should be reversed and the case remanded for a new trial. Alternatively, as to issue two, the case should be remanded for a hearing on the motion to amend sentence so that the additional mitigation evidence can be presented.

Respectfully submitted,

  
Kathrine H. Hudgins  
Appellate Defender

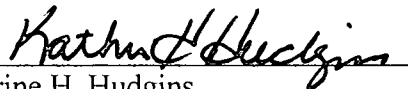
ATTORNEY FOR APPELLANT

This 19th day of November, 2012.

CERTIFICATE OF COUNSEL

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

November 19th, 2012



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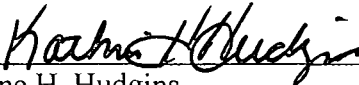
APPELLANT

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CERTIFICATE OF SERVICE

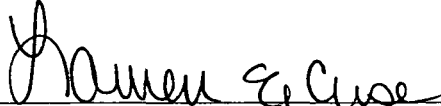
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The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Alphonso Simon, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of November, 2012.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 19th day of November, 2012.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: August 23, 2014.

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