

The State v. Jessie Waylon Sapp

Opinion File 26051

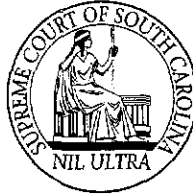
CT# 2003-26633

Case File

Record on Appeal (4 volumes)

Final Brief of Appellant

Final Brief of Respondent



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 5, 2006

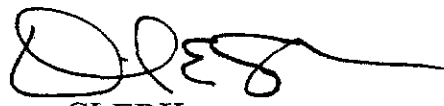
Chief Attorney Joseph L. Savitz, III
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Sapp, Jesse Waylon

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,



CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Ralph E. Hoisington

The Supreme Court of South Carolina

The State,

Respondent,

v.

Jesse Waylon Sapp,

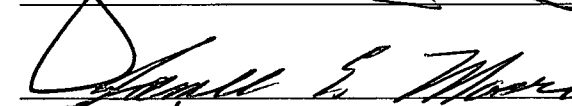
Appellant.

ORDER

This Court affirmed appellant's conviction and sentence on direct appeal. State v. Sapp, Op. No. 26051 (S.C. Sup. Ct. filed October 24, 2005). Appellant now seeks a stay of execution to allow him to seek a writ of certiorari from the United States Supreme Court (USSC). The State does not oppose the request.

The motion for stay of execution is granted. The stay shall remain in effect to the extent provided by *In re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

 C. J.

 J.

 J.

 J.

Waller, J., not participating

Columbia, South Carolina

January 5, 2006



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SC SUPREME COURT

HENRY MCMASTER
ATTORNEY GENERAL

December 8, 2005

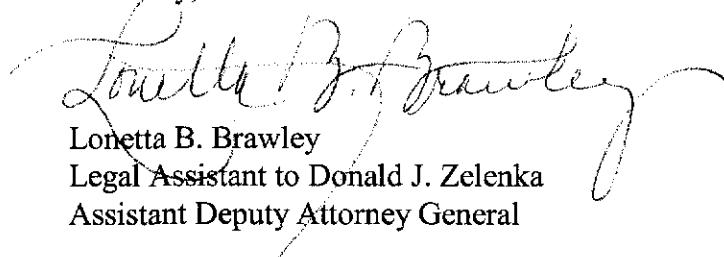
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. Jessie Waylon Sapp

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the ***Return to Motion to Stay Execution*** in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel, Joseph L. Savitz, III, with same.

Sincerely,



Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Assistant Deputy Attorney General

/lbb
Enclosures

cc: Joseph L. Savitz, III, Esquire
Sandi Wofford, Victims Assistance

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Appeal from Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

JESSE WAYLON SAPP,

Appellant

RETURN TO MOTION TO STAY EXECUTION

 The Respondent, through undersigned counsel, hereby make a Return to the Petition for a Stay of Execution received on December 6, 2005 to allow him to file a petition for writ of certiorari in the United States Supreme Court up to and including March 1, 2006. Respondents do not oppose the stay request pursuant to the mandates of this Court in In Re Stays of Execution In Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). Respondents will show this Court the following reasons:

I.

Sapp direct appeal was affirmed on October 24, 2005 and a petition for rehearing was denied on December 1, 2005. State v. Jessie W. SAPP, Op. No. 26051 (SCSCT Oct. 24, 2005). Pursuant to federal law, Sapp has ninety days from the denial of the rehearing petition to seek

certiorari. This date would be March 1, 2005.

II.

In his petition, he asserts that he intends to raise the following issue from the Brief of Appellant:

The judge erred by excusing potential juror Kathleen McNair for cause, since her religious beliefs regarding capital punishment would not have prevented nor substantially impaired the performance of her duties as a juror in accordance with her instructions and her oath.

This issue was raised and decided by this Court on the merits and raises a federal constitutional claim.

III.

This Court in its Order concerning capital cases, *In Re Stays of Execution In Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), stated that the Court will issue a stay in the direct appeal setting for filing certiorari, if the Petitioner files a stay motion setting forth the questions and "as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court," this Court will grant a stay of execution for ninety (90) days from the date of the remittitur.

A review of the record before this Court reveals the issue was preserved at trial and on appeal. Therefore, under *In Re Stays*, Respondent concedes the stay is appropriate, although there is no likelihood of success on the merits on certiorari for the reasons set forth in this Court's Opinion.

WHEREFORE, Respondent has made a Return to the Motion.

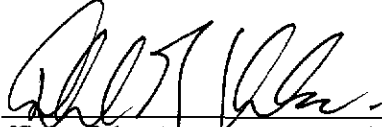
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

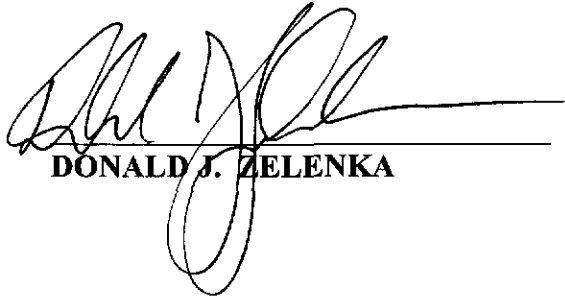
By: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305


Columbia, South Carolina
December 8, 2005

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the *Return to Petition for Stay of Execution* in the foregoing action on Joseph L. Savitz, III, Deputy Chief Attorney, at the South Carolina Office of Appellate Defense, 1205 Pendleton Street, Suite 306, Columbia, SC 29201 by depositing in the United States mail, postage prepaid this 8th day of December 2005.



DONALD J. ZELENKA

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Chief Attorney

Wanda H. Carter
Deputy Chief Attorney

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Telephone: (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

December 6, 2005

The Honorable Daniel E. Shearouse
Clerk, SC Supreme Court
Post Office Box 11330
Columbia, SC 29211

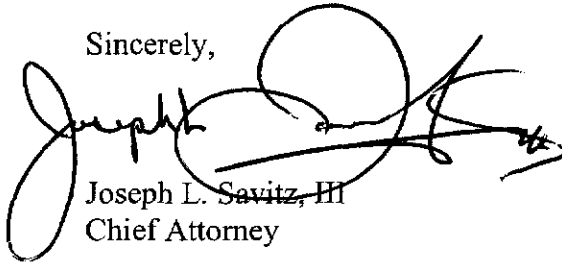
Re: The State v. Jessie Waylon Sapp

Dear Mr. Shearouse:

Enclosed is our motion for stay of execution so that we might seek certiorari from the United States Supreme Court.

Please do not hesitate to contact me if you have any questions or I may be of further assistance.

Sincerely,



Joseph L. Savitz, III
Chief Attorney

JLS,III/kde

cc: Donald J. Zelenka
Jessie Waylon Sapp

RECEIVED
2005 DEC -6 PM 4:10
SC SUPREME COURT

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Berkeley County
R. Markley Dennis, Jr., Judge

THE STATE,

RESPONDENT,

V.

JESSIE WAYLON SAPP,

APPELLANT

MOTION FOR STAY OF EXECUTION

Counsel for Jessie Waylon Sapp petitions the Court for a ninety-day stay of execution, until March 1, 2006, to allow him to seek certiorari from United States Supreme Court.

I

Sapp's convictions and death sentence were affirmed by the Court in State v. Jessie Waylon Sapp, Opinion No. 26051, filed October 24, 2005. Counsel petitioned for rehearing November 7, 2005. The Court denied rehearing December 1, 2005.

II

In Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140, 141 (1996), the Court stated:

After the execution notice is issued following the conclusion of the direct appeal, a capital defendant (defendant) wishing to have the

execution stayed pending a petition for a writ of certiorari to the United States Supreme Court shall make, within ten (10) days of the date of the execution notice, an appropriate motion for this Court to stay the execution... The must set forth the federal question(s) the defendant *intends to raise in the petition for writ of certiorari*. As long as one of the federal questions asserted has been adequately preserved under state law so that it can be reviewed by the United States Supreme Court, this Court will, as it must..., grant a stay of execution for ninety (90) days from the date the remittitur was sent for the defendant to file a petition for a writ of certiorari. [Footnote omitted.]

III

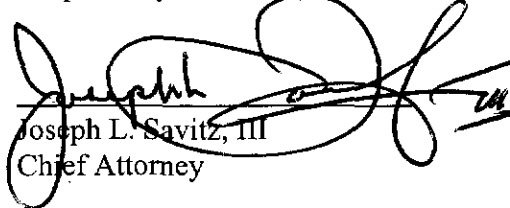
In the petition for writ of certiorari, counsel for Sapp will present the following issue, as stated in the Brief of Appellant:

The judge erred by excusing potential juror Kathleen McNair for cause, since her religious beliefs regarding capital punishment would not have prevented nor substantially impaired the performance of her duties as a juror in accordance with her instructions and her oath.

Counsel also sought rehearing on this ground.

Based on the above, counsel requests a ninety-day stay of execution, until March 1, 2006, in which to file a petition for writ of certiorari in the United States Supreme Court.

Respectfully submitted,


Joseph L. Savitz, III
Chief Attorney

Attorney for Appellant

This 6th day of December, 2005.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Judge

THE STATE,

RESPONDENT,

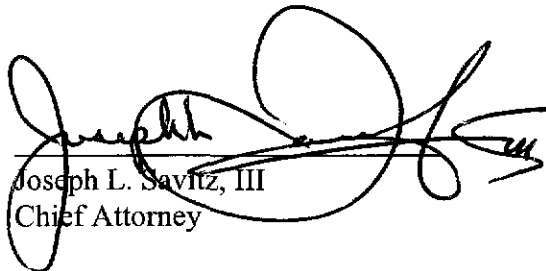
V.

JESSIE WAYLON SAPP,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the motion for stay of execution in the above entitled case has been served upon Donald J. Zelenka, Esquire, this 6th day of December, 2005.



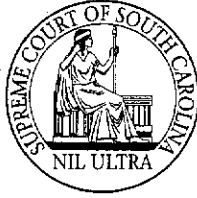
Joseph L. Savitz, III
Chief Attorney

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 6th day
of December, 2005.

Karen D. Elliott (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080
FAX (803) 734-1499

December 1, 2005

REMITTITUR

The Honorable Mary P. Brown
Clerk of Court, Berkeley County
300-B California Ave
PO Box 219
Moncks Corner, SC 29461-0219

Re: The State v. Sapp, Jesse Waylon
2002-GS-08-01146, 01683, 01684, 01685, 01687
2003-GS-08-00686

Dear Mrs. Brown:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

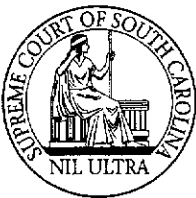
CLERK

DES/dmh

Enclosure

The Honorable Mary P. Brown
Page Two
December 1, 2005

cc: Acting Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Ralph E. Hoisington



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

December 1, 2005

Acting Chief Attorney Joseph L. Savitz, III
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Sapp, Jesse Waylon

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

“Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

December 01, 2005.”

Acting Chief Attorney Joseph L. Savitz, III
Page Two
December 1, 2005

The remittitur is today being forwarded to the lower court.

Very truly yours,



CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Ralph E. Hoisington

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

JESSIE WAYLON SAPP,

APPELLANT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26051

PETITION FOR REHEARING

RECEIVED
2005 NOV -7 PM 4:16
SC SUPREME COURT

Counsel for Jessie Waylon Sapp petitions for rehearing, pursuant to Appellate Practice Rule 221(a), of the Court's opinion affirming Sapp's death sentence. That rule states in part, "A petition for rehearing ... shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Specifically, counsel petitions for rehearing of the Court's disposition of the second issue in the appeal, where the judge precluded the defense from eliciting testimony from Sapp's girlfriend, a key State's witness in aggravation of punishment at sentencing, that she did not want to see Sapp put to death.

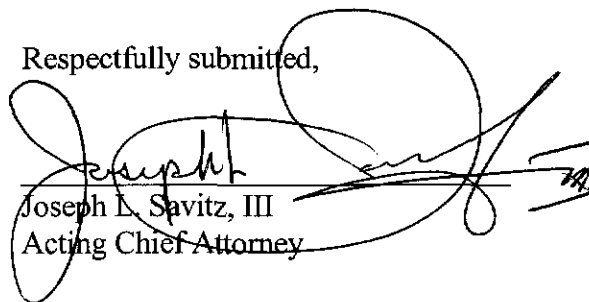
The Court wrote, "Although we agree that [Sapp's girlfriend] should have been allowed to testify as to whether she wished to see Sapp put to death, her failure to respond to this question was

in no way prejudicial.” “initially,” the Court stated, “It is implicit from [her] testimony that she would have answered that she did not wish to see Sapp put to death.” This is irrelevant, because the judge instructed the jury that the question – and by implication, her answer – was inappropriate. ROA p. 1716, lines 4–16.

The Court also holds that Sapp’s girlfriend’s testimony would have been cumulative to the testimony of his mother and nephew. The Court’s opinion ignores the crucial distinction that Sapp’s girlfriend was a State’s witness and his mother and nephew were defense witnesses. Evidence that the girlfriend did not want Sapp to die was admissible to rebut the balance of her testimony, which the State elicited in aggravation of punishment. The Court’s opinion fails to address the due process ramifications of this issue. See, for example, *Gardner v. Florida*, 430 U.S. 349 (1977).

For these reasons, the Court should grant rehearing and reverse Jessie Waylon Sapp’s death sentence.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Joseph L. Savitz, III', is written over a horizontal line. To the right of the signature, there is a small, handwritten mark that looks like '7/11'.

Joseph L. Savitz, III
Acting Chief Attorney

This 7th day of November, 2005.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

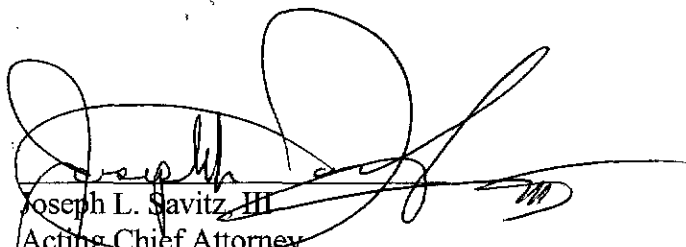
V.

JESSIE WAYLON SAPP,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, this 7th day of November, 2005.


Joseph L. Savitz, III
Acting Chief Attorney
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 7th day
of November, 2005.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 13, 2007.

Petition for Rehearing is denied.

George

J.

James E. Moore

J.

John H. Walker Jr.

J.

Ed. Sumner

J.

Carlton. Stevens

J.

December 1, 2005

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Jesse Waylon Sapp,

Appellant.

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26051
Heard September 21, 2005 - Filed October 24, 2005

AFFIRMED

Joseph L. Savitz, III, Acting Chief Attorney, South Carolina Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

JUSTICE WALLER: Appellant, Jessie Waylon Sapp, was convicted of the murder of a South Carolina Highway Patrolman in Berkeley County and was sentenced to death.¹ We affirm.

¹ Sapp was also convicted of possession with intent to distribute (PWID) Ecstasy, 3rd offense, PWID cocaine, PWID morphine sulfate, possession of Xanax, 3rd offense, and unlawfully

FACTS

At approximately 2:30 a.m., on July 7, 2002, four state highway patrolmen were conducting a driver's license checkpoint in Berkeley County. A pick-up truck with a female driver and male passenger approached the checkpoint and were stopped by Patrolman Patrick Sigwald. When Sigwald noticed alcohol containers in the back of the truck, he instructed the driver, Kathryn Boles, to pull over to the right shoulder of the road. Sigwald then approached the passenger side of the truck and asked the passenger, Sapp, for the registration and insurance certificate. Sapp opened the glove box and began looking for papers. Sigwald noticed an empty beer bottle on the front floor board and asked Sapp to hand it to him. The driver of the truck (Boles) spoke up and indicated the beer had been her first one that night. Sigwald asked Boles to step to the rear of the vehicle and she complied. At that point, Corporal Jeff Johnson, the supervisor, came up and spoke to Sigwald, asking if Boles was under age twenty-one. Patrolman Sigwald handed Corporal Johnson Sapp's driver's license. Johnson took the driver's license and approached the right-hand side of the truck, toward Sapp. Sigwald heard a loud bang, and heard Johnson say, "you sorry bastard." Sigwald heard another gunshot, then several more, and saw Johnson firing shots at Sapp, who was running away. Sigwald opened fire and Sapp eventually fell to the ground, wounded.

Sigwald saw Johnson lying face down on the pavement. He turned Johnson over and opened his bullet-proof vest, and saw one bullet hole right below the vest. Johnson bled to death at the scene. Sapp was charged with murder, and the state sought the death penalty based upon the aggravating circumstances that Sapp had created a great risk of death to more than one person, and that he had murdered a state law enforcement officer. S.C. Code Ann. § 16-3-20 (C)(a)(3) and (7)(2003). He was found guilty of murder, and sentenced to death. This appeal follows.

carrying a pistol. He was given concurrent 20 year sentences on the PWID offenses, 1 year for the weapon offense, and 2 years for the Xanax offense.

ISSUES

1. Did the trial court err in excusing a potential juror for cause due to her religious beliefs concerning the death penalty?
2. Did the trial court err in sustaining the state's objection to testimony of Sapp's girlfriend as to whether she would like to see Sapp put to death?

1. REMOVAL OF JUROR FOR CAUSE

During *voir dire* of potential juror Kathleen McNair, the trial court explained the three types of death penalty jurors: i.e., Type 1 would always vote for death if the offense of murder were established; Type 2 would never vote for the death penalty; and Type 3 would consider the facts of the case to decide if death were appropriate. When asked which of these three types she was, McNair responded "well, as a matter of fact, I don't believe in the death penalty because of my religion." The court engaged in the following colloquy with McNair:

Q. Okay. Well, let me ask you, when you say you don't believe in it, I appreciate that and I understand that. You further stated that it's a part of your religion?

A. Yeah, that's the only thing.

Q. Okay. That's no problem. But the law of South Carolina would be and I would instruct you that the death penalty may be warranted in some cases.

A. I understand.

Q. You understand?

A. I understand that.

Q. But you're saying, as a juror you couldn't consider that law?

A. **No, I couldn't just because of my belief. That's all.**

Q. Your belief would prevent you?

A. It is my religion, that's it. But otherwise, you know, it should be – you know, it should be that way. But to me, I can't.

Q. You could never do that?

A. I can't decide on that because of my religion. I'm sorry but - -

Q. I understand. As I said, there are no correct answers to any of these. It's merely how you feel.

(emphasis supplied). The solicitor then queried McNair as follows:

Q. Would it then be impossible if you sat on a jury for you to consider the death penalty based on your beliefs? And let me take it one step further. If you're sitting on a jury with the other 11 jurors and they all said the death penalty and you sort of believe, well, maybe the death penalty if it ever is appropriate might be appropriate here, could you sign your name on the death penalty verdict saying I'm calling for the death of the defendant?

A. Oh, this is hard.

Q. You're not required to.

A. I probably will. But because of my beliefs - what I'm telling you, I probably would because of the type of crime.

Q. You're saying you probably would call for the death penalty if you thought it was appropriate?

A. Yes, because of the crime.

Q. Okay. So depending on the circumstances of the case, you would set aside your religion?

A. Oh - -

Q. Again, we're not trying to put you in a position you can't be in.

A. I understand.

Q. We're just trying to find out - - because if you're on the jury and you realize you couldn't, it would be too late for you to give both sides a fair trial.

Q. So that's why we ask you up front. So tell me about it again, just tell me what your feelings are about the death penalty.

A. If I put my religion aside, if it wasn't my religion, I believe in it, I will go for the death penalty.

Q. Yes, ma'am. But do you understand you don't have to put your religion aside?

A. I understand.

Q. When you go back there, you are who you are.

A. I am who I am, uh-huh.

Q. Now, knowing you do not have to put your religion aside, would that put you in a position that you couldn't deal with by being on the jury and having to determine the death penalty?

A. I could deal with it. I know I can deal with it because I believe in God. So I could deal with it.

Q. Could you do it if you thought it were appropriate? Could you return a death penalty verdict and sign your name on a death penalty warrant?

A. If it was appropriate, yes.

Q. Appropriate is a term that you would have to make a determination after you hear the facts. Are there—have you had an opportunity to think about the death penalty other than in your—in the sense of your religion?

A. I did thought about it. . . . (brief colloquy with court)

Q. What religion are you?

A. I'm a Methodist.

Q. And what is the teaching of that religion regarding the death penalty?

A. Thou shall not kill.

Q. Would that affect your ability to deliberate on a jury?

At this point, counsel for Sapp objected that she had already answered the question and the court overruled the objection, finding this a critical issue. The court then queried whether Ms. McNair needed a moment. (The court reporter's note indicates the juror was crying). The trial court indicated the record was to reflect that the juror was emotionally distraught.

After discussing the matter with counsel, the trial court ruled:

Considering the answers given by Ms. McNair, observing also her demeanor in the courtroom during the examination and the questions propounded by the solicitor, which she never answered, became so emotionally distraught by the question, "Would that affect your ability to deliberate on a jury," and she never answered the question. Given

her answers and her inconsistency or the inconsistency of her answers, given the feelings that she articulated to my questions and to the solicitor's questions that her religious beliefs were very sincere and deep seeded with her in her life, I would conclude that her inability to answer the question affecting her ability to deliberate and constantly apologizing is a human reaction to suggest that she couldn't consider it. And therefore, she felt inadequate because she couldn't. And that would be the only justification for somebody becoming emotionally distraught and apologizing. So given that and given her demeanor and considering the totality and completeness of her answers, I would agree that she's not qualified. And the record is clear that Mr. Sapp finds and would argue that she is qualified and has stated – clearly I don't argue with the position that she indicated at one point that, yes, she could invoke—award the death penalty. But I believe it would substantially affect her ability to consider both sentences, that is her religious belief.

Sapp asserts the trial court erred in excusing McNair for cause. We disagree. We find the record fully supports the trial court's removal of the juror.

The exclusion of venire persons simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction is unconstitutional. Witherspoon v. Illinois, 391 U.S. 510 (1968). However, a prospective juror may be excluded for cause when his views on capital punishment are such as would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985). See also State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004), cert. denied 125 S.Ct. 2942 (2005); State v. Council, 335 S.C. 1, 515 S.E.2d 508, cert. denied, 528 U.S. 1050 (1999); S.C. Code Ann. § 16-3-20(E) (juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire *voir dire*. Council, *supra*. The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly

unsupported by the evidence. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915 (1993), overruled on other grounds, Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him. Id. On review, the trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881 (1990). See also Wainwright, supra, (there will be situations where the trial court is left with the definite impression that prospective juror would be unable to faithfully and impartially apply the law and this is why deference must be paid to trial court who sees and hears the juror).

Here, McNair unequivocally stated, at the outset, that she could not consider the law regarding imposing the death penalty because of her religious beliefs, going on to apologize and state that "I can't decide that because of my religion." After being questioned by the solicitor as to whether she could put aside her religion if she was on a death penalty jury and the other 11 members agreed on a sentence of death, she eventually stated that she probably would. Ultimately, however, when questioned as to whether the Methodist teaching that "Thou shalt not kill" would affect her ability to deliberate on the jury, McNair broke down in tears and was unable to answer the question.

Given the deference which is afforded to trial courts in assessing a death penalty juror's qualification, and McNair's initial responses that she could not vote for death due to her religious beliefs, we affirm the trial court's disqualification of McNair. Accord Commonwealth v. Duffy, 855 A.2d 764 (Pa. 2004) (where voir dire indicated juror was somewhat unclear as to her convictions regarding imposition of the death penalty, and these concerns could have substantially impaired her ability to function as an impartial juror, the trial court was in the best position to make that determination and did not abuse its discretion in dismissing the prospective juror for cause).

2. ACCOMPLICE'S OPINION OF SENTENCE

At sentencing, counsel for Sapp cross-examined Kathryn Boles, the driver of the pick-up truck and Sapp's former girlfriend, as to her relationship with Sapp. After stating that she was not "in love" with Sapp, but did love him, counsel asked whether she would like to see him put to death. The state objected that the question was inappropriate, and the court sustained the objection. Sapp contends Boles should have been permitted to respond to his inquiry. Although we agree that Boles should have been allowed to testify as to whether she wished to see Sapp put to death, her failure to respond to this question was in no way prejudicial.

In State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, cert. denied, 531 U.S. 840 (2000), this Court stated:

In [State v.] Torrence, we adopted the Georgia Supreme Court's distinction between a plea for mercy and the ultimate question to be decided by the jury: "[A]lthough a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, a defendant may not present witnesses to testify merely to their religious and philosophical attitudes about the death penalty Nor is a defendant entitled to present the opinion of a witness about what verdict the jury 'ought' to reach." Torrence, 305 S.C. at 45, 51, 406 S.E.2d 315, at 318 (quoting Childs v. State, 257 Ga. 243, 357 S.E.2d 48, 60 (1987)).

In Johnson, notwithstanding the ruling that the trial court should have permitted Johnson to inquire of his sister whether she wanted him to die, we found no prejudice to Johnson because the sister was able to make a general plea for mercy on her brother's behalf in the form of testimony concerning their abusive family life, and the fact that she expressed her love and affection for Johnson at trial.

More recently, in State v. Wise, 359 S.C. 14, 596 S.E.2d 475, 481-482, cert. denied 125 S.Ct. 355 (2004), we addressed the issue of whether the trial court erred in refusing to allow a surviving victim to testify on cross-examination during the sentencing phase of the trial that he did not personally

believe Wise should receive the death penalty. We reiterated our holding in Johnson, stating, “[a] close relative of a defendant, such as his sister, may be asked whether she wants the defendant to die, which is akin to asking her to make a general plea for mercy and not explicitly directed toward eliciting her opinion of what verdict the jury should reach.” 359 S.C. at 26, 596 S.E.2d at 481.²

Under Johnson and Wise, Boles should have been permitted to answer the question as to whether she would like to see Sapp put to death. However, we find no prejudice. Initially, it is implicit from Boles’ testimony that she would have answered that she did not wish to see Sapp put to death. Further, given Boles’ testimony that she loved Sapp and had known him for years, we find her testimony akin to that in Johnson in which Johnson’s sister was able to express her love for him.

In addition, Sapp’s mother testified at sentencing, stating, “I’m begging you, please don’t take my son’s life. To take my son’s life is not going to bring back Corporal Johnson. . . Please if you kill my son, you’re going to devastate the community again and more and more families. Please don’t do it. Please don’t kill him.” Sapp’s nine-year old nephew James also testified that if Sapp were gone from him, it would be the worst thing ever. In light of this testimony, Sapp cannot demonstrate prejudice. See State v. Myers, 359 S.C. 40, 596 S.E.2d 488, cert. denied, 125 S.Ct. 485 (2004) (exclusion of testimony is harmless where it is cumulative to other testimony in the record); State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v. Gaskins, 284 S.C. 105, 127, 326 S.E.2d 132, 145 (erroneous admission of evidence in sentencing phase may be reviewed for harmless error), cert. denied, 471 U.S. 1120 (1985), overruled in part on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

² However, in Wise, we held the trial court properly prohibited the defendant from inquiring of a security officer who had been shot by Wise whether he thought Wise should be sentenced to death, stating, “[w]e accept as true the proffer by Appellant’s attorney Vance would testify he told the media shortly after the shootings he did not personally believe Appellant should receive the death penalty. However, such a statement by Vance would not constitute a plea for mercy on behalf of Appellant. Instead, it would constitute Vance’ opinion of what verdict--life in prison versus the death penalty--the jury should reach. Accordingly, the trial judge properly disallowed the question, recognizing it was an attempt to elicit an inadmissible opinion from a witness.” 596 S.E.2d at 482.

PROPORTIONALITY REVIEW

We have conducted a proportionality review pursuant to S.C. Code Ann. § 16-3-25(C) (2003). We find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of prior cases shows the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999), cert. denied 529 U.S. 1025 (2000); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991), cert. denied, 503 U.S. 993, (1992); State v. South, 285 S.C. 529, 331 S.E.2d 775, cert. denied 474 U.S. 888 (1985).

AFFIRMED.³

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

³ The remaining issues are affirmed pursuant to Rule 220(b)(1), SCACR, and the following authorities: Sapp's Issue 2- In re McCracken, 346 S.C. 87, 93, 551 S.E.2d 235, 238-39 (2001) (contemporaneous objection is required to preserve issues regarding a closing argument for review); State v. Wiggins, 330 S.C. 538, 550, 500 S.E.2d 489, 496 (1998) (failure to object to comments made during argument precludes appellate review of the issue); Sapp's Issue 4- State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996), cert. denied 520 U.S. 1268 (1997) (failure to request charge on additional statutory mitigating circumstances precludes review of issue on appeal); Sapp's Issue 5- State v. Crisp, 362 S.C. 412, 608 S.E.2d 429, 433-434 (2005) (aggravating circumstances need not be alleged in indictment for murder); State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (alleged defects in indictment do not deprive trial court of subject matter jurisdiction).

ORIGINAL

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Acting Chief Attorney

Wanda H. Carter
Acting Deputy Chief Attorney

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Telephone: (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

September 19, 2005

RECEIVED
2005 SEP 19 PM 4:16
SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

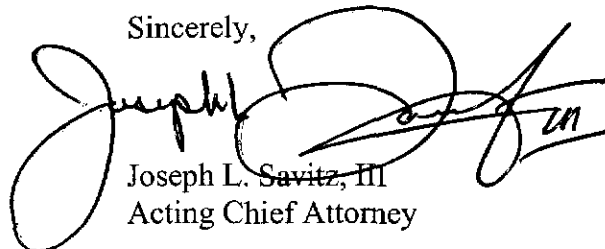
Re: The State v. Jessie Waylon Sapp

Dear Mr. Shearouse:

The Court has scheduled this capital appeal for argument Wednesday morning, September 21, at 10:30. With the Court's permission, I intend to address Arguments 1 and 3 of my brief in the allotted twenty minutes. Upon further review, I do not feel that Argument 2 is preserved for direct appeal and the record below was not sufficiently developed to support Argument 4 at this time. The Court has, of course, rejected Argument 5 in cases decided after the filing of our brief, so that argument is abandoned.

Please thank the Court for its courtesy and cooperation. Do not hesitate to contact me if you have any questions or I may be of further assistance.

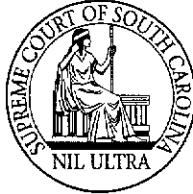
Sincerely,



Joseph L. Savitz, III
Acting Chief Attorney

JLS,III/kde

cc: Donald J. Zelenka
Jessie Waylon Sapp



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 14, 2005

Acting Chief Attorney Joseph L. Savitz, III
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Assistant Deputy Attorney General Donald J. Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: The State v. Sapp, Jessie Waylon

Dear Counsel:

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows:

Appellant	20 minutes
Respondent	20 minutes
Appellant in Reply	10 minutes

Acting Chief Attorney Joseph L. Savitz, III
Re: The State v. Sapp, Jessie Waylon
September 14, 2005
Page two

Reminder:

This case is scheduled for hearing at 10:30 a.m. on Wednesday, September 21, 2005.

Very truly yours,

Daniel E. Shearouse, Clerk

By Jean J. Peebles
Administrative Assistant

DES/jjp

cc: Solicitor Ralph E. Hoisington



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Acting Chief Attorney Joseph L. Savitz, III
From: Daniel E. Shearouse
Date: July 20, 2005
RE: September Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the September 2005 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of September 20, 21 and 22, 2005. Please notify this office in writing prior to July 27, 2005 as to any scheduling conflicts for the September term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Sapp, Jessie Waylon



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka

From: Daniel E. Shearouse

Date: July 20, 2005

RE: September Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the September 2005 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of September 20, 21 and 22, 2005. Please notify this office in writing prior to July 27, 2005 as to any scheduling conflicts for the September term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Sapp, Jessie Waylon



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

May 19, 2005

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *The State v. Jesse Waylon Sapp*

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) copies of the ***Final Brief of Respondent*** in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Assistant Deputy Attorney General

lbb
Enclosures

cc: Joseph L. Savitz, III, Esquire
Ralph E. Hoisington, Solicitor
Sandi Wofford, Victims Assistance

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

APR 29 2005

S.C. Supreme Court

THE STATE,

RESPONDENT,

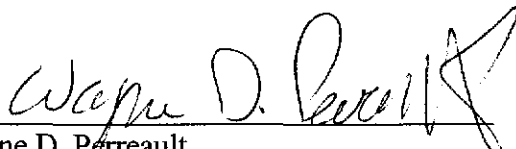
V.

JESSIE WAYLON SAPP,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 29th day of April, 2005.


Wayne D. Perreault
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 29th day of April, 2005.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

ORIGINAL

RECEIVED
APR 29 2005
S.C. SUPREME COURT

THE STATE,

RESPONDENT,

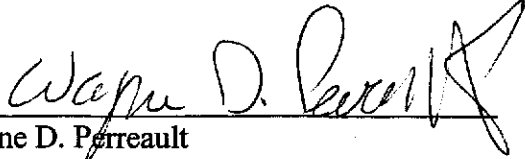
V.

JESSIE WAYLON SAPP,

APPELLANT

CERTIFICATE OF SERVICE

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Wayne D. Perreault
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 29th day of April, 2005.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007.

The Supreme Court of South Carolina

The State,

Respondent

v.

Jessie Waylon Sapp,

Appellant.

The Honorable R. Markley Dennis, Jr.
Berkeley County

Trial Court Case No. 2002-GS-08-01146

2002-GS-08-01683

2002-GS-08-01684

2002-GS-08-01685

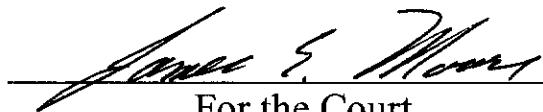
2002-GS-08-01687

2003-GS-08-00686

ORDER

For good cause having been shown, the time for serving and filing the record on appeal in the above entitled matter is hereby extended until April 29, 2005.

IT IS SO ORDERED.

 J.
For the Court

Columbia, South Carolina

March 31, 2005

cc: Acting Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JESSIE WAYLON SAPP,

APPELLANT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE RECORD ON APPEAL

Counsel for Jessie Waylon Sapp respectfully requests an additional thirty days (until April 29) in which to file the record on appeal in this death penalty case. Counsel has previously received one thirty-day extension in connection with this step in the process. In support of this request, counsel shows:

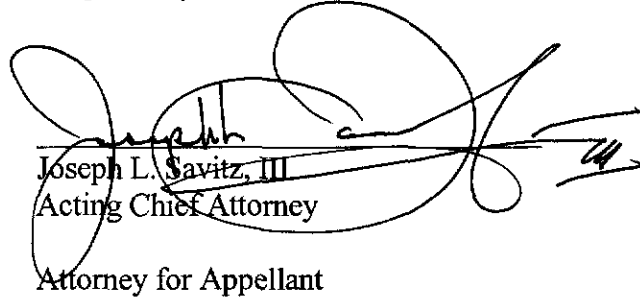
(1) Counsel is handling a heavy caseload of other capital and noncapital appeals. Counsel has also been attending to various administrative matters, including the merger of Appellate Defense with Indigent Defense and the yearly budget process.

(2) Counsel makes this request in good faith and not for purposes of delay.

(3) Counsel for the Attorney General's office does not oppose this request, as shown by his signature.

WHEREFORE, counsel for appellant requests an additional thirty days (until April 29) in which to file the record on appeal in this death penalty case.

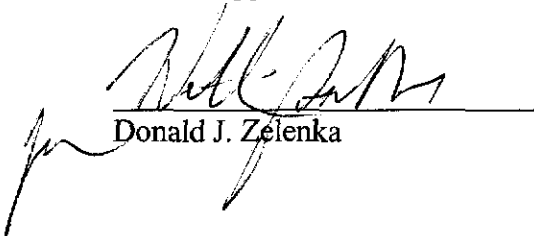
Respectfully submitted,



Joseph L. Savitz, III
Acting Chief Attorney
Attorney for Appellant

This 30th day of March, 2005

I do not oppose:



Donald J. Zelenka

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

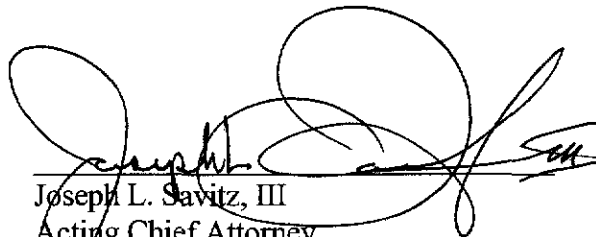
V.

JESSIE WAYLON SAPP,

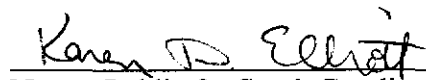
APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the petition for extension of time in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, this 30th day of March, 2005.


Joseph L. Savitz, III
Acting Chief Attorney
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 30th day of March, 2005.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007

The Supreme Court of South Carolina

The State,

Respondent

v.

Jessie Waylon Sapp,

Appellant.

The Honorable R. Markley Dennis, Jr.
Berkeley County

Trial Court Case No. 2002-GS-08-01146
2002-GS-08-01683
2002-GS-08-01684
2002-GS-08-01685
2002-GS-08-01687
2003-GS-08-00686

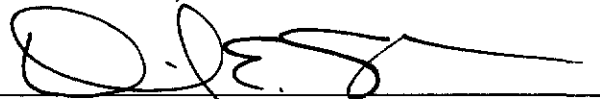
ORDER

For good cause having been shown, the time for serving and filing the record on appeal in the above entitled matter is hereby extended until March 30, 2005.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

March 1, 2005

cc: Acting Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka

ORIGINAL

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Acting Chief Attorney

Wanda P. Hagler
Acting Deputy Chief Attorney

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Telephone: (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

February 28, 2005

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

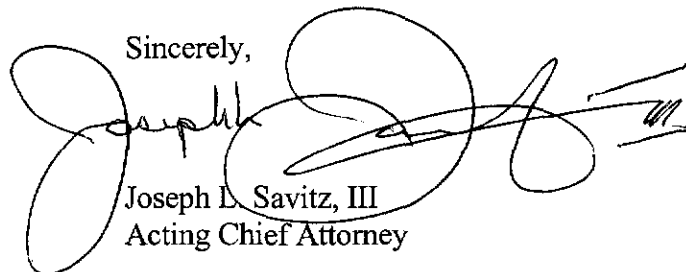
Re: The State v. Jessie Waylon Sapp

Dear Mr. Shearouse:

The record on appeal in this capital case is due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting an extension until March 30, 2005, in which to serve and file the record.

By copy of this letter, I am informing Donald J. Zelenka, of the Attorney General's Office, of my request.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joseph L. Savitz, III', is written over a circular stamp. The signature is fluid and cursive, with a large loop at the end.

Joseph L. Savitz, III
Acting Chief Attorney

JLS,III/kde

cc: Donald J. Zelenka



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

January 27, 2005

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *The State v. Jessie Waylon Sapp*

Dear Mr. Shearouse:

Enclosed please find the original and one (1) copy of the *Initial Brief of Respondent* in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,



Donald W. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Joseph L. Savitz, III, Esquire
Ralph E. Hoisington, Solicitor, 9th Circuit
Sandi Wofford, Victims Assistance

RECEIVED

JAN 31 2005

S.C. SUPREME COURT

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Initial Brief of Respondent* and *Designation of Matter* in the foregoing matter on opposing counsel by depositing in the United States mail, postage prepaid, on the following:

Joseph L. Savitz, III
Acting Chief Attorney
S.C. Office of Appellate Defense
1205 Pendleton Street, Suite 306
Columbia, South Carolina 29201

This 27th day of January, 2005.


DONALD J. ZELENA

The Supreme Court of South Carolina

The State,

Respondent,

v.

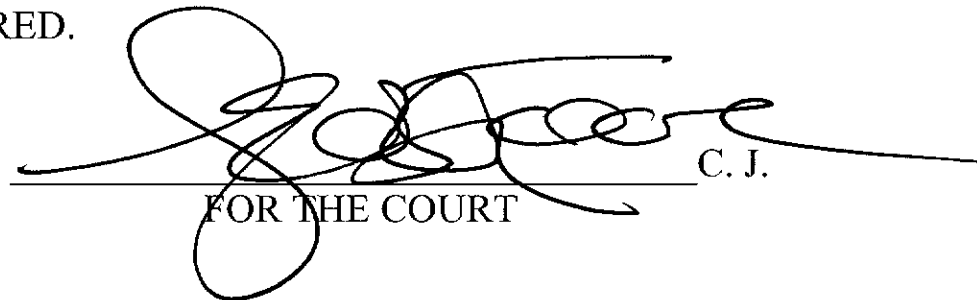
Jessie Waylon Sapp,

Appellant.

ORDER

The State seeks a third extension of time in which to serve and file its initial brief and designation of matter in this case. The motion is granted. The State shall serve and file its initial brief and designation of matter within thirty days of the date of this order. No further extensions will be granted.

IT IS SO ORDERED.


C. J.
FOR THE COURT

Columbia, South Carolina

December 31, 2004

cc: Acting Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

December 28, 2004

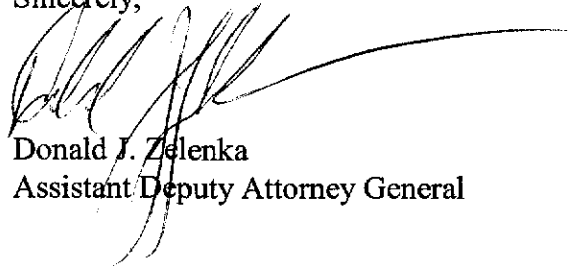
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *The State v. Jessie Waylon Sapp*

Dear Mr. Shearouse:

Enclosed please find a Motion to Enlarge Time for Filing Initial Brief of Respondent and Designation of Matter in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Joseph Savitz, III, Esquire

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Berkeley County
R. Markley Dennis, Circuit Court Judge

THE STATE,

Respondent,

v.

JESSIE WAYLON SAPP,

Appellant.

**MOTION TO ENLARGE TIME FOR
FILING INITIAL BRIEF OF RESPONDENT
AND DESIGNATION OF MATTER**

The Respondents, above-named, hereby make a motion to this Court to extend the time for filing the Initial Brief of Respondent and Designation of Matter from December 28, 2004 for a period of thirty (30) days up to and including January 27, 2005. The Respondents had made an initial request on October 25, 2004 and November 24, 2004, and this is the Respondents third request for an extension. This request is due to the extensive length of the record on capital appeal and the five (5) issues currently raised before this Court.

Respondents have been involved in numerous litigations in both state and federal court during this time period which has prevented the completion of this brief in a sufficient and timely manner. Respondents below-signed counsel has attempted to contact opposing counsel, Joseph L. Savitz of the South Carolina Office of Appellate Defense, but was unable to reach him due to

his annual leave.

Respondents' counsel are cognizant of this Court's policy on extension in capital cases and will do all to ensure that no further extensions will be required prior to this briefing being completed.

Wherefore Respondents respectfully request an extension of a period of time of thirty (30) days up to and including January 27, 2005 to complete this brief.

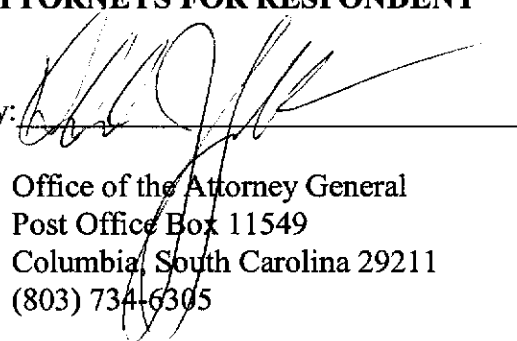
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

December 28, 2004

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

FILED
2004 DEC 28
SOUTH CAROLINA
SUPREME COURT

Appeal from Berkeley County
R. Markley Dennis, Circuit Court Judge

THE STATE,

Respondent,

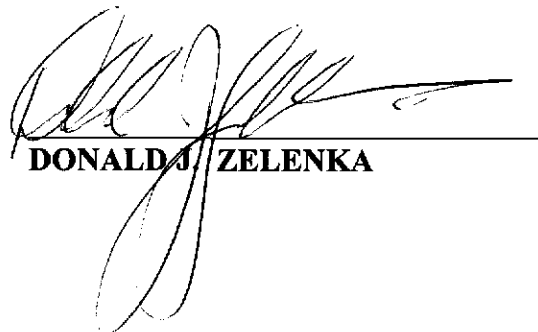
v.

JESSIE WAYLON SAPP,

Appellant.

CERTIFICATE OF SERVICE

*I, Donald J. Zelenka, hereby certify that I have served Respondents **Motion to Enlarge Time for Filing Initial Brief of Respondent** on Joseph Savitz at 1205 Pendleton Street, Room 306, Columbia, South Carolina 29201 by depositing copies in the United States Mail, postage prepaid this 28th day of December 2004.*



DONALD J. ZELENKA

The Supreme Court of South Carolina

The State,

Respondent

v.

Jessie Waylon Sapp,

Appellant.

The Honorable R. Markley Dennis, Jr.
Berkeley County

Trial Court Case No. 2002-GS-08-01146
2002-GS-08-01683
2002-GS-08-01684
2002-GS-08-01685
2002-GS-08-01687
2003-GS-08-00686

ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Respondent and Designation of Matter in the above entitled matter is hereby extended until December 28, 2004.

IT IS SO ORDERED.



For the Court

J.

Columbia, South Carolina

November 29, 2004

cc: Acting Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

November 24, 2004

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. Jessie Waylon Sapp

Dear Mr. Shearouse:

Enclosed please find a Motion to Enlarge Time for Filing Initial Brief of Respondent in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,

A handwritten signature in cursive script, reading "Lonetta B. Brawley".

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Assistant Deputy Attorney General

lbb
Enclosure
cc: Joseph Savitz, III, Esquire

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

FILED
2004 NOV 24 PM 4:40
SOUTH CAROLINA
CLERK OF COURT

Appeal from Berkeley County
R. Markley Dennis, Circuit Court Judge

THE STATE,

Respondent,

v.

JESSIE WAYLON SAPP,

Appellant.

**MOTION TO ENLARGE TIME FOR
FILING INITIAL BRIEF OF RESPONDENT
AND DESIGNATION OF MATTER**

The Respondents, above-named, hereby make a motion to this Court to extend the time for filing the Initial Brief of Respondent and Designation of Matter from November 24, 2004 for a period of thirty (30) days up to and including December 24, 2004. The Respondents had made an initial request on October 25, 2004 and this is the Respondents second request for an extension. This request is due to the extensive length of the record on capital appeal and the five (5) issues currently raised before this Court.

Respondents have been involved in numerous litigations in both state and federal court during this time period which has prevented the completion of this brief in a sufficient and timely manner. Respondents below-signed counsel has attempted to contact opposing counsel, Joseph L. Savitz of the South Carolina Office of Appellate Defense, but was unable to reach him due to

his annual leave.

Respondents' counsel are cognizant of this Court's policy on extension in capital cases and will do all to ensure that no further extensions will be required prior to this briefing being completed.

Wherefore Respondents respectfully request an extension of a period of time of thirty (30) days up to and including December 24, 2004 to complete this brief.

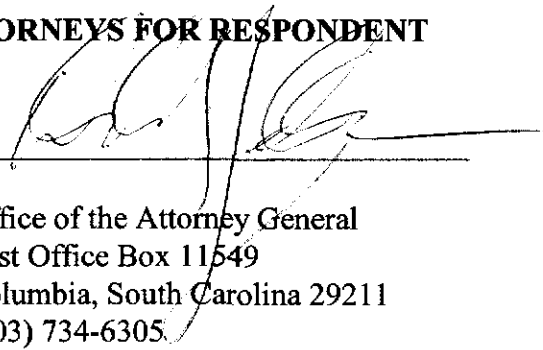
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

November 24, 2004

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Berkeley County
R. Markley Dennis, Circuit Court Judge

THE STATE,

Respondent,

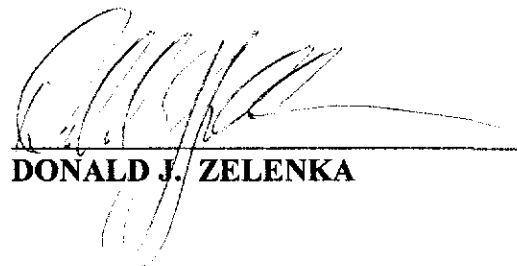
v.

JESSIE WAYLON SAPP,

Appellant.

CERTIFICATE OF SERVICE

*I, Donald J. Zelenka, hereby certify that I have served Respondents **Motion to Enlarge Time for Filing Initial Brief of Respondent** on Joseph Savitz at 1205 Pendleton Street, Room 306, Columbia, South Carolina 29201 by depositing copies in the United States Mail, postage prepaid this 24th day of November 2004.*



DONALD J. ZELENKA

The Supreme Court of South Carolina

The State,

Respondent

v.

Jessie Waylon Sapp,

Appellant.

The Honorable R. Markley Dennis, Jr.
Berkeley County
Trial Court Case No. 2002-GS-08-01146
2002-GS-08-01683
2002-GS-08-01684
2002-GS-08-01685
2002-GS-08-01687
2003-GS-08-00686

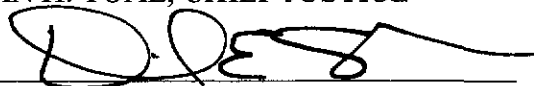
ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Respondent and Designation of Matter in the above entitled matter is hereby extended until November 24, 2004.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

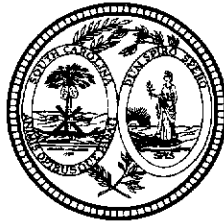
BY


Clerk

Columbia, South Carolina

October 26, 2004

cc: Acting Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka
Blair Cunningham Jennings, Esquire



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

October 25, 2004

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: State v. Jessie Waylon Sapp
Berkeley County Murder Appeal - Death Penalty

Dear Mr. Shearouse:

The Initial Brief of Respondent in the above-referenced case is due to be filed on the above date. Due to Respondent's heavy caseload and other court commitments, I am requesting an extension of thirty (30) days to file and serve Respondent's Brief.

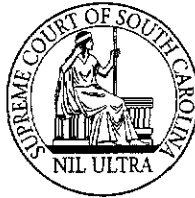
By copy of this letter I am informing opposing counsel of this request. Thank you for your consideration.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/ lbb

cc: Robert M. Dudek, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080
FAX (803) 734-1499

August 27, 2004

Acting Chief Attorney Joseph L. Savitz, III
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Sapp, Jessie Waylon

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka

The Supreme Court of South Carolina

The State,

Respondent,

v.

Jessie Waylon Sapp,

Appellant.

ORDER

Appellant moves for a fourth extension of time in which to serve and file his initial brief and designation of matter to be included in the record on appeal. Counsel for the State does not oppose the request.

The motion is granted. Appellant shall serve and file his initial brief and designation of matter to be included in the record on appeal no later than September 10, 2004. No further extensions will be granted.

IT IS SO ORDERED


C. J.
FOR THE COURT

Columbia, South Carolina

August 27, 2004

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JESSIE WAYLON SAPP,

APPELLANT

RECEIVED
2009 APR 25 PM 4:18
SC SUPREME COURT

MOTION FOR EXTENSION OF TIME
IN WHICH TO FILE INITIAL BRIEF OF APPELLANT
AND DESIGNATION OF MATTER

Counsel for Jessie Waylon Sapp petitions the Court for a sixteen-day extension of time until September 10 in which to file the initial brief and designation of matter in this death penalty direct appeal. In support of this request, counsel states:

(1) He will make no further requests for extensions (barring extraordinary circumstances) in connection with this stage of the appellate process. He has previously received three thirty-day extensions. Counsel for the State has no objection to this final extension request, as indicated by his signature below.

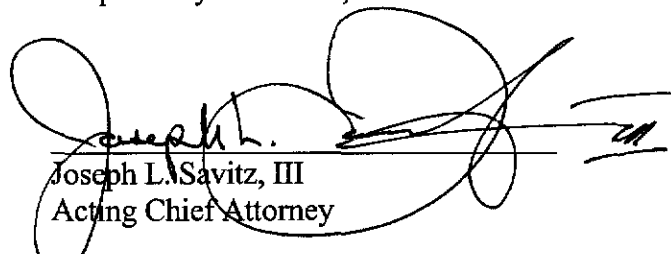
(2) Counsel has finished reading the trial transcript and has identified the issues he intends to present to the Court. However, he has not yet completed researching these issues, nor has he written the initial brief.

(3) In addition to handling administrative responsibilities and a full non-capital caseload, on August 4 counsel filed the initial brief in the capital case of State v. Angle Joe Perrie Vazquez. He began working on the Sapp appeal the following day. Counsel has also been involved in the competency remand in State v. Hastings Arthur Wise, another capital case.

(4) Counsel makes this request in good faith and not for purposes of delay.

Accordingly, counsel for Jessie Waylon Sapp petitions the Court for a sixteen-day extension of time until September 10 in which to file the initial brief and designation of matter in this death penalty direct appeal.

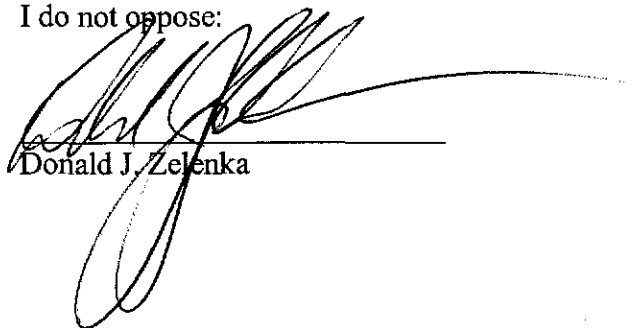
Respectfully submitted,



Joseph L. Savitz, III
Acting Chief Attorney
Attorney for Appellant

This 25th day of August, 2004

I do not oppose:



Donald J. Zelenka

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

RECEIVED
2004 AUG 25 PM 4:18
SC SUPREME COURT

THE STATE,

RESPONDENT,

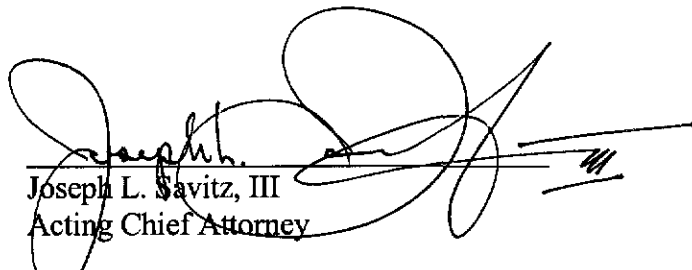
V.

JESSIE WAYLON SAPP,

APPELLANT

CERTIFICATE OF SERVICE

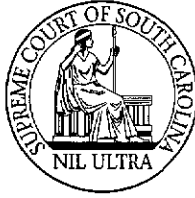
The undersigned attorney hereby certifies that a true copy of the petition for extension of time in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, this 25th day of August, 2004.


Joseph L. Savitz, III
Acting Chief Attorney
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 25th day of August, 2004.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080
FAX (803) 734-1499

August 4, 2004

Acting Chief Attorney Joseph L. Savitz, III
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Sapp, Jessie Waylon

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka

The Supreme Court of South Carolina

The State,

Respondent,

v.

Jessie Waylon Sapp,

Appellant.

ORDER

Appellant seeks a third extension of time in which to serve and file his initial brief and designation of matter to be included in the record on appeal. Respondent does not oppose the request. The motion is granted. Appellant shall serve and file his initial brief and designation of matter within thirty (30) days of the date of this order.

IT IS SO ORDERED.


C. J.
FOR THE COURT

Columbia, South Carolina

August 4, 2004

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JESSIE WAYLON SAPP,

APPELLANT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT
AND DESIGNATION OF MATTER

Counsel for Jessie Waylon Sapp respectfully requests an additional thirty days (until August 25) in which to file the initial brief and designation of matter in this death penalty case. Counsel has previously received two thirty-day extension in connection with this step in the process. In support of this request, counsel shows:

(1) Counsel has been unable to read the transcript in this case because he has been (a) attending to administrative responsibilities, including the budget process; (b) overseeing the restructuring of the office into direct appeal and post-conviction sections; (c) handling a full non-

ORIGINAL

RECEIVED
2004 JUL 26 PM 4:17
SC SUPREME COURT

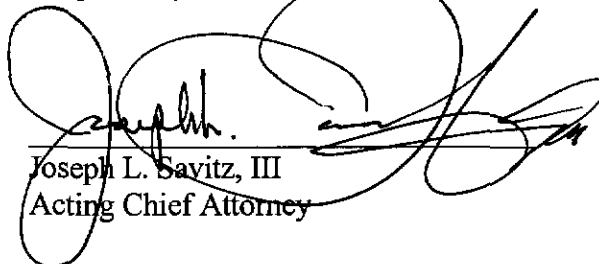
capital caseload; and (d) transporting his father to and from the Mayo Clinic in Jacksonville, Florida.

(2) Counsel makes this request in good faith and not for purposes of delay.

(3) Counsel for the Attorney General's office does not oppose this request, as shown by his signature.

WHEREFORE, counsel for appellant requests an additional thirty days (until August 25) in which to file the initial brief and designation of matter in this death penalty case.

Respectfully submitted,

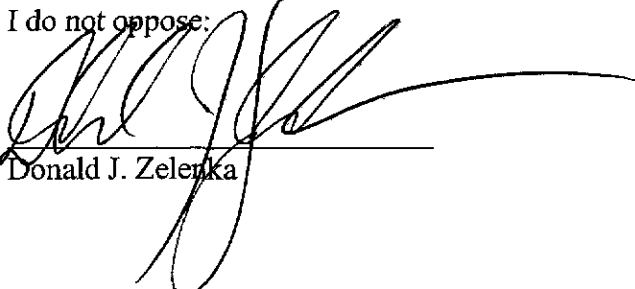
A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Joseph L. Savitz, III
Acting Chief Attorney

Attorney for Appellant

This 26th day of July, 2004

I do not oppose:

A large, stylized handwritten signature in black ink, with a long horizontal stroke extending to the right.

Donald J. Zelenka

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

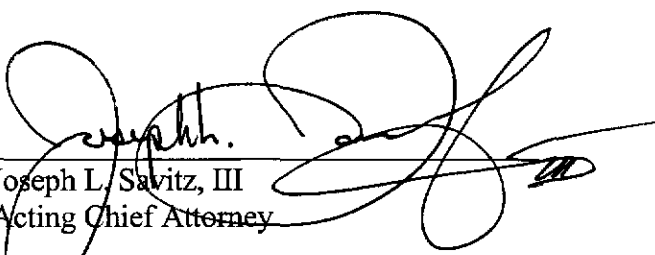
V.

JESSIE WAYLON SAPP,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the petition for extension of time in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, this 26th day of July, 2004.


Joseph L. Savitz, III
Acting Chief Attorney

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 26th day of July, 2004.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007

The Supreme Court of South Carolina

The State,

Respondent

v.

Jessie Waylon Sapp,

Appellant.

The Honorable R. Markley Dennis, Jr.

Berkeley County

Trial Court Case No. 2002-GS-08-01146

2002-GS-08-01683

2002-GS-08-01684

2002-GS-08-01685

2002-GS-08-01687

2003-GS-08-00686

ORDER

For good cause having been shown, the time for serving and filing Appellant's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until July 26, 2004.

IT IS SO ORDERED.


FOR THE COURT

Columbia, South Carolina

June 28, 2004

cc: Acting Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka

The Supreme Court of South Carolina

The State,

Respondent

v.

Jessie Waylon Sapp,

Appellant

The Honorable R. Markley Dennis, Jr.
Berkeley County

Trial Court Case No. 2002-GS-08-01146

2002-GS-08-01683

2002-GS-08-01684

2002-GS-08-01685

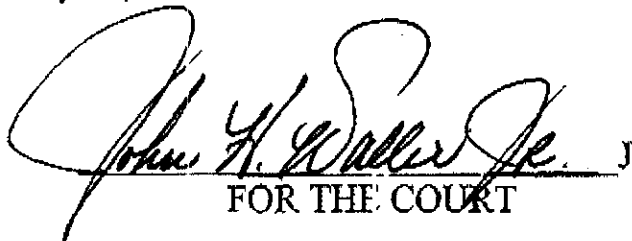
2002-GS-08-01687

2003-GS-08-00686

ORDER

For good cause having been shown, the time for serving and filing
Appellant's Initial Brief and Designation of Matter in the above entitled
matter is hereby extended until July 26, 2004.

IT IS SO ORDERED.


FOR THE COURT

Columbia, South Carolina

June 28, 2004

cc: Acting Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JESSIE WAYLON SAPP,

APPELLANT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT
AND DESIGNATION OF MATTER

Counsel for Jessie Waylon Sapp respectfully requests an additional thirty days (until July 26) in which to file the initial brief and designation of matter in this death penalty case. Counsel has previously received one thirty-day extension in connection with this step in the process. In support of this request, counsel shows:

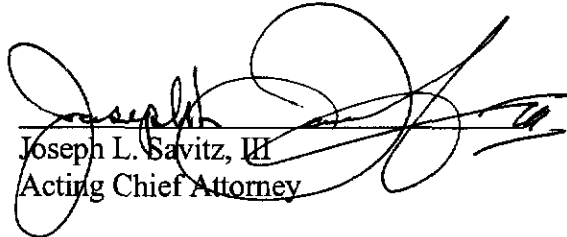
- (1) Counsel is handling a heavy caseload of other capital and noncapital appeals along with various administrative duties.
- (2) Counsel makes this request in good faith and not for purposes of delay.
- (3) Counsel for the Attorney General's office does not oppose this request, as shown by

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SC SUPREME COURT

his signature.

WHEREFORE, counsel for appellant requests an additional thirty days (until July 26) in which to file the initial brief and designation of matter in this death penalty case.

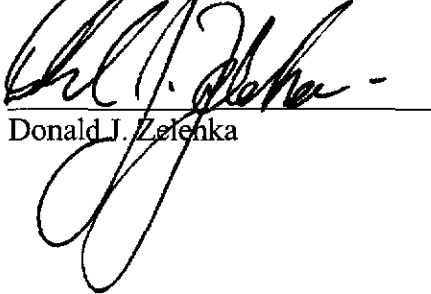
Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph L. Savitz, III", written over a horizontal line.

Attorney for Appellant

This 24th day of June, 2004

I do not oppose:

A handwritten signature in black ink, appearing to read "Donald J. Zelenka", written over a horizontal line.

Donald J. Zelenka

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

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SC SUPREME COURT

THE STATE,

RESPONDENT,

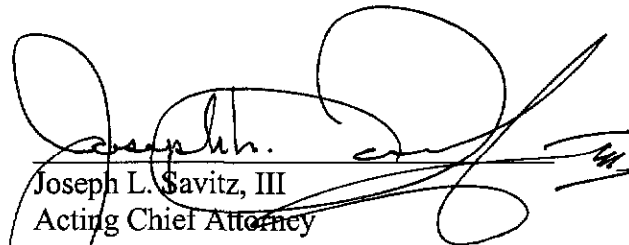
V.

JESSIE WAYLON SAPP,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the petition for extension of time in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, this 24th day of June, 2004.


Joseph L. Savitz, III
Acting Chief Attorney
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 24th day of June, 2004.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007

The Supreme Court of South Carolina

The State,

Respondent

v.

Jessie Waylon Sapp,

Appellant.

The Honorable R. Markley Dennis, Jr.

Berkeley County

Trial Court Case No. 2002-GS-08-01146
2002-GS-08-01683
2002-GS-08-01684
2002-GS-08-01685
2002-GS-08-01687
2003-GS-08-00686

ORDER

For good cause having been shown, the time for serving and filing the Appellant's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until June 24, 2004.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

May 26, 2004

cc: Acting Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka

ORIGINAL

RECEIVED

South Carolina Office of Appellate Defense

2004 MAY 25 PM 3:55

Joseph L. Savitz, III
Acting Chief Attorney

Wanda P. Hagler
Acting Deputy Chief Attorney

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Telephone: (803) 734-1330
Fax: (803) 734-1397

SC SUPREME COURT

Robert M. Pachak
Robert M. Oudejans
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

May 25, 2004

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

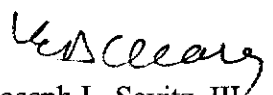
Re: The State v. Jessie Waylon Sapp

Dear Mr. Shearouse:

The initial brief of appellant and designation of matter in this capital case are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting an extension until June 24, 2004, in which to serve and file the brief.

By copy of this letter, I am informing Donald J. Zelenka, of the Attorney General's Office, of my request.

Sincerely,


Joseph L. Savitz, III
Acting Chief Attorney

JLS,III/kde

cc: Donald J. Zelenka

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Acting Chief Attorney

Wanda P. Hagler
Acting Deputy Chief Attorney

1205 Pendleton Street, Room 306
Columbia, SC 29201

Telephone (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

March 26, 2004

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

The State v. Jessie Waylon Sapp

3/26/04

I would appreciate you beginning our time limits from the above dates, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,



Sandra R. Wessinger
Legal Assistant

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Acting Chief Attorney
Wanda H. Haile
Acting Deputy Chief Attorney

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Telephone: (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

RECEIPT

I, Debbie M. Hopkins, of the South Carolina Supreme Court, have received the following original trial transcript(s) in the death penalty case of STATE V. JESSIE WAYLON SAPP

1. October 18, 2002 (Martin)
2. May 2, 2003 (Martin)
3. May 9-17, 2003 (Martin)

Debbie M. Hopkins
(Name)

Date: 3-9-04

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Acting Chief Attorney
Wanda H. Haile
Acting Deputy Chief Attorney

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Telephone: (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

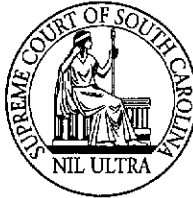
RECEIPT

I, Debbie M. Hopkins, of the South Carolina Supreme Court, have received the following original trial transcript(s) in the death penalty case of STATE V. JESSIE WAYLON SAPP

1. July 29, 2002 (Cooley)
2. August 1, 2002 (Cooley)

Debbie M. Hopkins
(Name)

Date: 3-9-04



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1060

FAX (803) 734-1499

November 10, 2003

Assistant Appellate Defender Robert M. Dudek
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Sapp, Jessie Waylon

Dear Counsel:

This is in response to your letter of November 6, 2003 in the above entitled matter.

Please be advised that the time limits for perfecting this appeal will begin once you are in receipt of all transcripts requested in this matter.

Very truly yours,

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka

South Carolina Office of Appellate Defense

ORIGINAL

Daniel T. Stacey
Chief Attorney
Joseph L. Savitz, III
Deputy Chief Attorney

Wanda H. Haile
Senior Assistant Appellate Defender

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Telephone: (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

November 6, 2003

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. Jessie Waylon Sapp

Dear Mr. Shearouse:

A notice of intent to appeal was served and filed with your office on May 28, 2003. Our office was notified of this filing on May 30, 2003. We opened our file and on June 10, 2003, requested the sentencing hearing from Court Reporter Karen Croft as this was the only hearing date we were aware of at the time. On that same day, we wrote to trial counsel Robert J. Johnson requesting that he check his records and inform us of any additional pretrial or post-trial hearing dates. Mr. Johnston wrote and advised us of four additional pre-trial hearing dates. Those hearings were requested from the court reporters.

During a routine check of death penalty cases pending receipt of transcripts, we noticed that we had not confirmed in writing the dates provided previously by trial counsel. It is our policy that, after trial counsel has provided us with the hearing dates, to confirm these dates and again request that he check his billing records for any possible additional hearings. We wrote to Mr. Johnston and after speaking with him on the phone we learned that Paul Archer was the other attorney appointed to represent Mr. Sapp.

We wrote to Mr. Archer requesting all hearing dates, and he called and informed us that he did not have those dates and that we should contact Mr. Johnston. Mr. Johnston advised us that, although Peter Beck and Glenn Churchill were appointed to represent Mr. Sapp prior to his appointment, he did not think there were any hearings held prior to his appointment. However, we both agreed it would be best to check with Mr. Beck and Mr. Churchill. Therefore, out of an abundance of caution, we wrote to Mr. Beck and Mr. Churchill requesting that they check their records for any hearings held during their appointment of Mr. Sapp.

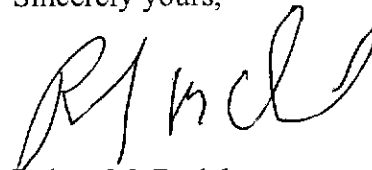
Honorable Daniel E. Shearouse
November 6, 2003
Page 2

Both attorneys wrote to indicate that the only hearing they were aware of was an October 18, 2002, hearing to substitute Mr. Archer and Mr. Johnston as counsel. In order to have a complete record for the Court's review, that hearing was requested from the court reporter, who is also the court reporter who took the majority of the hearings in this case. I do not anticipate this additional hearing hindering the time period for receiving the other transcripts.

I hope this is a sufficient explanation of why the motion to substitute counsel hearing was requested from the court reporter. Our policy is to write trial counsel when the case is initially opened. When we receive a response from trial counsel, we confirm the dates in writing and again request that he check all records for any hearings he may have missed. We have also, at times, asked attorneys for their billing records if it appears good notes were not kept of hearing dates, and if they feel comfortable with us having them. Periodically during the time we are waiting on transcripts, we closely monitor the receipt of the transcripts and when we have received the majority of the transcripts, we again write to trial counsel requesting confirmation that we indeed have all of the hearing dates. When we have received all transcripts that we were notified of by counsel, we contact your office with the receipt date and the 60-day time limit is accordingly set.

Should you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written in a cursive style.

Robert M. Dudek
Assistant Appellate Defender

RMD/srw

cc: Donald J. Zelenka, Esquire

South Carolina Office of Appellate Defense

Daniel T. Stacey
Chief Attorney
Joseph L. Savitz, III
Deputy Chief Attorney
Wanda H. Haile
Senior Assistant Appellate Defender

1205 Pendleton Street, Room 306
Columbia, SC 29201
Telephone (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

October 30, 2003

Ms. Karen Croft
Circuit Court Reporter
1721-B West Avalon Circle
Charleston, SC 29407

Dear Ms. Croft:

Our office has been requested to perfect the appeal arising out of:

The State v. Jessie Waylon Sapp

Indictment #: 02-GS-08-01146

County: Berkeley

Date of Trial: October 18, 2002 (Mtn to Substitute Counsel)

Presiding Judge: R. Markley Dennis, Jr.

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

It has been brought to our attention that the State Printing Office experiences problems when the transcript is prepared on onionskin paper. **PLEASE DO NOT USE ONIONSKIN PAPER.**

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

Ms. Karen Croft
October 30, 2003
Page Two

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Sandra R. Wise".

Sandra R. Wise
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

South Carolina Office of Appellate Defense

Daniel T. Stacey
Chief Attorney
Joseph L. Savitz, III
Deputy Chief Attorney

Wanda H. Haile
Senior Assistant Appellate Defender

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Columbia, S.C. 29201

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Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

October 23, 2003

Glenn P. Churchill, Esquire
Attorney at Law
Post Office Box 370
Charleston, South Carolina 29402-0370

Re: The State v. Jessie Waylon Sapp (capital case)

Dear Mr. Churchill:

Our office has taken over representation of the above named individual on his appeal to the South Carolina Supreme Court. I have spoken with Robert Johnston and Paul Archer, who indicated that you and Peter Beck were the attorneys who represented Mr. Sapp prior to their representation. I need to confirm whether there were any hearings held in this case during your representation. The following are currently the only hearing dates that I have:

1. May 19, 2003;
2. November 26, 2002;
3. May 2, 2003;
4. May 9, 2003;
5. March 26, 2003;
6. May 19, 2003.

I am requesting that you search your records thoroughly and let me know other hearing dates not listed above. If you suspect that there were additional hearings, but a search would prove to be too time-consuming, please feel free to forward your billing records on this case. The Supreme Court does not like to grant extensions for missing transcripts, especially in death penalty cases, and I appreciate your immediate assistance and cooperation in this matter.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,



Sandra R. Wise
Legal Assistant

cc: Honorable Daniel E. Shearouse

South Carolina Office of Appellate Defense

Daniel T. Stacey
Chief Attorney
Joseph L. Savitz, III
Deputy Chief Attorney

Wanda H. Haile
Senior Assistant Appellate Defender

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Telephone: (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

October 23, 2003

W. Peter Beck, Esquire
Attorney at Law
23 Broad Street
Charleston, South Carolina 29401

Re: The State v. Jessie Waylon Sapp (capital case)

Dear Mr. Beck:

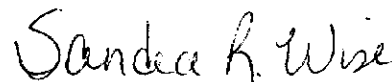
Our office has taken over representation of the above named individual on his appeal to the South Carolina Supreme Court. I have spoken with Robert Johnston and Paul Archer, who indicated that you and Glenn Churchill were the attorneys who represented Mr. Sapp prior to their representation. I need to confirm whether there were any hearings held in this case during your representation. The following are currently the only hearing dates that I have:

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4. May 9, 2003;
5. March 26, 2003;
6. May 19, 2003.

I am requesting that you search your records thoroughly and let me know other hearing dates not listed above. If you suspect that there were additional hearings, but a search would prove to too time-consuming, please feel free to forward your billing records on this case. The Supreme Court does not like to grant extensions for missing transcripts, especially in death penalty cases, and I appreciate your immediate assistance and cooperation in this matter.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,



Sandra R. Wise
Legal Assistant

cc: Honorable Daniel E. Shearouse

South Carolina Office of Appellate Defense

Daniel T. Stacey
Chief Attorney
Joseph L. Savitz, III
Deputy Chief Attorney

Wanda H. Haile
Senior Assistant Appellate Defender

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Columbia, S.C. 29201

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Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

October 15, 2003

Robert J. Johnston, Esquire
Attorney at Law
Post Office Box 15035
Surfside Beach, South Carolina 29587

Re: The State v. Jessie Waylon Sapp
Death penalty case from Berkeley County

Dear Mr. Johnston:

As you know, our office has taken over representation of Mr. Sapp on his capital appeal to the South Carolina Supreme Court. It is imperative pursuant to the order of former Chief Justice Finney that our office be informed in writing of all pre-trial, trial, motions and post-trial hearings. The order also provides that this office must be given the date of each hearing, the judge, the county in which the hearing was held, the name of the court reporter and a brief description of the hearing.

I appreciate your prompt attention since the Supreme Court looks with strong disfavor upon an extension request in a death penalty case that is mandated by a missing hearing. I have listed below the hearings we are aware of at the present time, along with the name of the court reporter that hearing has been requested from. I do not know what type of hearings these are and would appreciate it if you could clarify that information.

1. November 26, 2002 – Brenda Cooley;
2. May 2, 2003 – Karen Croft;
3. May 9, 2003 – Karen Croft;
4. May 19, 2003 – Karen Croft;
5. May 26, 2003 – Deborah Garrison.

I am requesting that you search your records thoroughly and let me know each hearing date, with the information listed in Justice Finney's order, that is not listed above. If we have all the hearing dates, the county in which the hearing took place and the judge, we can usually

Robert J. Johnston, Esquire
October 15, 2003
Page 2

locate the correct court reporter. Nonetheless, I would appreciate your assistance with the name of the court reporter, as well. If you are unable to check this information, please feel free to forward a copy of your billing records and I will check those for any additional hearing dates.

If you have any questions or need additional information, please do not hesitate to contact me. Kindly understand that the Supreme Court does not relieve you from continuing to represent Mr. Sapp until we have this information in our possession. I appreciate and thank you in advance for your immediate attention so that we can properly represent Mr. Sapp on appeal.

Sincerely yours,

A handwritten signature in cursive script that reads "Sandra R. Wise".

Sandra R. Wise
Legal Assistant

Cc: Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court

South Carolina Office of Appellate Defense

Daniel T. Stacey
Chief Attorney
Joseph L. Savitz, III
Deputy Chief Attorney
Wanda H. Haile
Senior Assistant Appellate Defender

1122 Lady Street, Suite 940
Columbia, SC 29201-3243
Telephone (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

June 10, 2003

Ms. Karen Croft
Circuit Court Reporter
1721-B West Avalon Circle
Charleston, SC 29407

Dear Ms. Croft:

Our office has been requested to perfect the appeal arising out of:

The State v. Jessie Waylon Sapp

Indictment #: 02-GS-08-01146

County: Berkeley

Date of Trial: May 19, 2003 (Death Penalty)

Presiding Judge: R. Markley Dennis, Jr.

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed DI-4 form and include the original criminal case number (Indictment number) where the space is provided.

It has been brought to our attention that the State Printing Office experiences problems when the transcript is prepared on onionskin paper. **PLEASE DO NOT USE ONIONSKIN PAPER.**

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

Ms. Karen Croft
June 10, 2003
Page Two

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Sandra R. Wise".

Sandra R. Wise
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

South Carolina Office of Appellate Defense

Daniel T. Stacey
Chief Attorney
Joseph L. Savitz, III
Deputy Chief Attorney

Wanda H. Haile
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Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Katherine Carruth Link
Eleanor Duffy Cleary
Assistant Appellate Defenders

June 10, 2003

Robert J. Johnson, Esquire
Attorney at Law
Post Office Box 15035
Surfside Beach, South Carolina 29587

Re: The State v. Jessie Waylon Sapp (capital case)

Dear Mr. Johnson:

As you know, our office has taken over representation of the above named individual on his appeal to the South Carolina Supreme Court. I need to confirm dates and court reporters for all hearings, both pre-trial and post-trial, held in this case. The following is currently the only hearing date that I have:

1. Sentencing Hearing - May 19, 2003 - Court Reporter - Karen Croft

I am requesting that you search your records thoroughly and let me know other hearing dates not listed above. The Supreme Court does not like to grant extensions for missing transcripts, especially in death penalty cases, and I appreciate your immediate assistance and cooperation in this matter.

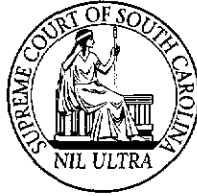
If you have any questions or need additional information, please do not hesitate to contact me. I appreciate and thank you in advance for your immediate attention to this problem.

Sincerely yours,



Sandra R. Wise
Legal Assistant

cc: Honorable Daniel E. Shearouse



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 30, 2003

The Honorable R. Markley Dennis, Jr.
300 B California Avenue
P O Box 1800
Moncks Corner, SC 29461-1800

Re: The State v. Sapp, Jessie Waylon

Dear Judge Dennis:

As you know, the trial judge must submit a Death Penalty Sentencing Report to the Supreme Court on all death penalty cases. Please find enclosed a copy of this questionnaire for your convenience in completing the report in the above matter.

Very truly yours,



CLERK

DES/dmh

Enclosure

RECEIVED

MAY 29 2003

S.C. SUPREME COURT

FILED

MAY 21 2003

CASE _____ JUDGE _____

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC



STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

vs.)

JESSE W. SAPP)

Defendant)

IN THE COURT OF GENERAL SESSIONS

Case No. 03-GS-08-0686

CLERK'S NOTICE OF DEATH SENTENCE

The Defendant Jesse W. Sapp, was found guilty of the offense of murder. The Defendant was represented by Attorneys Paul Archer and Robert Johnston, The Courtyard, Suite 210, 1500 Business 17, Surfside Beach, SC 29575. Mailing address: Post office Box 15035. Surfside Beach, SC 29587 (843) 828-1137. The jury has recommended that the Defendant should be sentence to death.

It was therefore ordered by Judge R. Markeley Dennis, Jr, Presiding Judge that the Defendant , Jesse W. Sapp, be taken to the Berkeley County Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close safe confinement until the 21st day of November, 2003, upon which day between the hours of six o'clock P.M., or upon an Order of Execution issued by the South Carolina Supreme Court, the Defendant, shall suffer death by electrocution or by lethal injection in the manner provided by law.

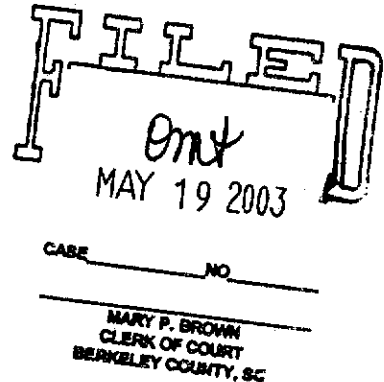
Mary P. Brown
Mary P. Brown, Clerk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF GENERAL SESSIONS
Case No. 03-GS-08-0686

THE STATE OF SOUTH CAROLINA,)
vs.)
JESSE W. SAPP,)
Defendant.)

SENTENCE



The Defendant, Jesse W. Sapp, has been found by the jury to be guilty of the offense of murder. The jury has recommended that the Defendant should be sentenced to death.

It is, therefore, the judgment of the law and the Sentence of the Court that the Defendant, Jesse W. Sapp, be taken to the Berkeley County Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 21st day of November, 2003, upon which day between the hours of six o'clock P.M. and six o'clock A.M., or upon an Order of Execution issued by the South Carolina Supreme Court, the Defendant, Jesse W. Sapp, shall suffer death by electrocution or by lethal injection in the manner provided by law.

R. MARKLEY DENNIS, JR.
Presiding Judge

Moncks Corner, South Carolina

May 19, 2003

5/19/03
Omt
cc: Dept. of Corr.

hs

FILED
MAY 19 2003

CASE _____ NO _____

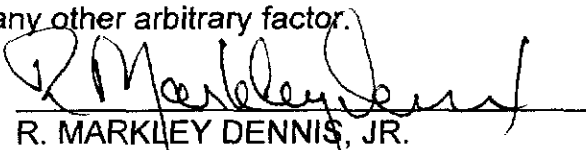
STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC
IN THE COURT OF GENERAL SESSIONS
Case No. 03-GS-08-0686

THE STATE OF SOUTH CAROLINA,)
vs.)
JESSE W. SAPP,)
Defendant.)

AFFIRMATION OF DEATH SENTENCE

As the Trial Judge in the above entitled action, and prior to the imposition of the death sentence upon the Defendant, Jesse W. Sapp, I find as an affirmation fact that the evidence of the case warrants the imposition of the death penalty and its imposition is not a result of prejudice, passion, or any other arbitrary factor.


R. MARKLEY DENNIS, JR.
Presiding Judge

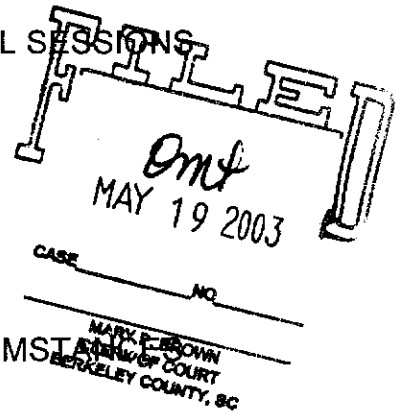
Moncks Corner, South Carolina

May 19, 2003

RB

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF GENERAL SESSIONS
Case No. 03-GS-08-0686



THE STATE OF SOUTH CAROLINA,)
vs.)
JESSE W. SAPP,)
Defendant.)

AGGRAVATING CIRCUMSTANCES

We, the jury in the above entitled case, find beyond a reasonable doubt the following statutory aggravating circumstance(s):

- 1) The offender Jesse Sapp by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon which normally would be hazardous to the lives of more than one person.
Jesse Sapp fired two shots. 2) The murder of a state law

enforcement officer during or because of the performance of his official duties; officer Johnson.

Matthew T. Smith
Presiding Juror

Lewie F. Fisher
Juror

Joe T. ...
Juror

Joe Smith
Juror

Rachel C. ...
Juror

Shane M. ...
Juror

hs

Thomas D. Bauman
Juror

Byrd Rollins
Juror

Barbara E. Simmons
Juror

Cynthia A. White
Juror

James W. Peck
Juror

Deborah M. Carter
Juror

Moncks Corner, South Carolina

May 19, 2003

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF GENERAL SESSIONS
Case No. 03-GS-08-0686

FILED
MAY 19 2003
omt

THE STATE OF SOUTH CAROLINA,)
VS.)
JESSE W. SAPP,)
Defendant.)

RECOMMENDATION OF SENTENCE
DEATH PENALTY

CASE NO.
CLERK OF COURT
BERKELEY COUNTY, SC

We, the jury in the above entitled case, having found beyond a reasonable doubt
the existence of the following statutory aggravating circumstance(s), to-wit:

- 1) The offender Jesse Sapp by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon which normally would be hazardous to the lives of more than one person. Jesse Sapp fired two shots. 2) The murder of a state,

now recommend to the Court that the Defendant, Jesse W. Sapp, be sentenced to death.

law enforcement officer during or because of the performance of his official duties; officer Johnson.

[Signature]
Presiding Juror

[Signature]
Juror

[Signature]
Juror

[Signature]
Juror

hs

Richard C. Evans
Juror

Theresa M. [Signature]
Juror

Thomas D. Bannister
Juror

Supp. Roltz
Juror

Barbara E. Scrimmon
Juror

Cynthia A. White
Juror

James W. Peak
Juror

Deborah M. Carter
Juror

Moncks Corner, South Carolina

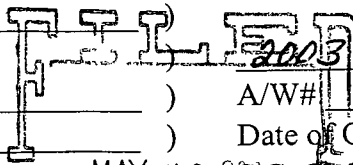
May 19, 2003

COUNTY OF
STATE

Berkley

VS.

Jesse W. Sapp



- GS - 08 - 0686

A/W#

DI

Date of Offense:

July 7, 2002

AKA:

Race:

W

Sex:

M

Age:

MAY

19

S.C. Code §:

16-3-10

DOB:

CDR Code #:

0 / 1 / 1 / 6

Address:

CASE

NO.

☐ CASE RESTORED

DL#:

SID#:

MARY A. BROWN
CLERK OF COURT
BERKLEY COUNTY, SC.

SENTENCE

☐ PLEA

☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Murder

in violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 1 / 6

☐ NON-VIOLENT

☒ VIOLENT

☐ SERIOUS

☒ MOST SERIOUS

☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

P.S.C. [Signature]
Solicitor

[Signature]
Defendant

[Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of — days/months/years or ☐ under the Youthful Offender Act not to exceed — years and/or to pay a fine of \$ Death; provided that upon the service of — days/months/years and/or payment of \$ —; plus costs and assessments as applicable*; the balance is suspended with probation for — months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ — plus 20% fee: \$ —

Payment Terms: —

☐ set by SCDPPPS —

Recipient: —

*Fine: \$ —

§14-1-206 (Assessments 100%) \$ —

§14-1-211(A)(1) (Surcharge) \$ 100.00

§14-1-211(A)(2) (Surcharge) \$ —

§56-5-2995 (DUI Assessment) \$ —

3% to County (if paid in installments) . . \$ 3.00

TOTAL \$ 103.00

Allie M. Tucker
Clerk of Court/Deputy Clerk

[Signature]
Court Reporter: Baren Craft

PTUP —

— days/hours Public Service Employment

Obtain GED —

Attend Voc. Rehab. or Job Corp. —

May serve W/E beginning —

Substance Abuse Counseling —

Random Drug/Alcohol Testing —

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ — beginning —

\$ — paid to Public Defender Fund

Other: —

PRESIDING JUDGE [Signature]

Judge Code: 0 / 0 / 6 / 0

Sentence Date: 5/19/03

02-07-BJ-0708

SLED, Garrison

ARREST WARRANT NUMBER
DIRECT INDICTMENT

ACTION OF GRAND JURY

True Bill

Julia Bn
Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2003-GS-08-0680

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

APRIL TERM 2003

THE STATE

vs.

JESSE W. SAPP

Indictment for

MURDER

2003 APR -9 PM 4:24
CLERK OF COURT
BERKELEY COUNTY, S.C.
df

FILED

RS

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

STATE OF SOUTH CAROLINA

- VERSUS -

JESSE SAPP,

Defendant.

IN THE COURT OF GENERAL SESSIONS
INDICTMENT NO. 03-GS-08-0686

VERDICT FORM

FILED
MAY 17 2003

CASE NO.
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

On the charge of MURDER WE, THE JURY in the above-entitled
action, find the Defendant, JESSE SAPP:

X GUILTY.

____ NOT GUILTY.

M. T. Smith
Presiding Juror

MONCKS CORNER, SOUTH CAROLINA

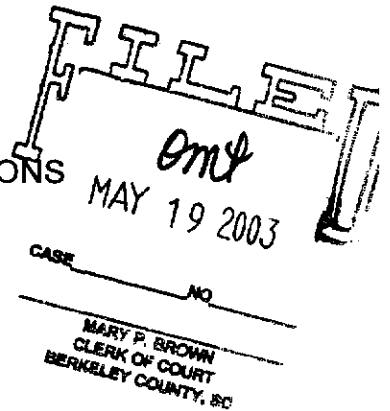
May 17 2003

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF GENERAL SESSIONS
Case No. 03-GS-08-0686

THE STATE OF SOUTH CAROLINA,)
vs.)
JESSE W. SAPP,)
Defendant.)

STATUTORY INSTRUCTIONS



In determining whether to recommend that the Defendant, Jesse W. Sapp, be sentenced by the Court to Life Imprisonment or to Death, you may consider the following statutory **AGGRAVATING CIRCUMSTANCE(S)**:

1. The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon which normally would be hazardous to the lives of more than one person.

2. The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

You may also consider the following MITIGATING CIRCUMSTANCES(S):

1. The Defendant has no significant history of prior criminal conviction involving the use of violence against another person.

2. The murder was committed while the defendant was under the influence of mental or emotional disturbance.

3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired.

Engli

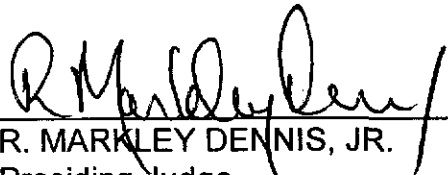
hs

4. The age or mentality of the defendant at the time of the crime.

You may also consider any NON-STATUTORY Mitigating circumstances(s).

Moncks Corner, South Carolina

May 19, 2003


R. MARKLEY DENNIS, JR.
Presiding Judge

Ray 12

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
THE STATE,)
VS.)
JESSE W. SAPP,)
Defendant.)

IN THE COURT OF GENERAL SESSIONS
Case No. 2003-GS-08-0686

ORDER FOR SEQUESTRATION

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

2003 MAY 20 AM 9:33

FILED

IT IS HEREBY ORDERED this 15th day of May, 2003, that the jurors in this case shall be sequestered and shall thereafter be kept in custody of the South Carolina Law Enforcement Division for the duration of this trial, or until further notice from this Court; and it is

FURTHER ORDERED AS FOLLOWS:

1. The South Carolina Law Enforcement Division, in cooperation with the Clerk of Court, shall make arrangements for appropriate accommodations for the jury during the trial, and shall provide for adequate security of the jury in accordance with the policies and procedures set forth by the Court.

a. The lodging facility must be able to provide a room to be designated as the T.V./Lounge area (this could be a conference room), which shall be equipped with at least two (2) televisions and two (2) VCR's.

b. The lodging facility must be able to provide a room (can be standard room) with two (2) telephone extensions. This will serve as the telephone room for all calls, which will allow for proper monitoring and logging according to the sequestration manual.

FILED
Randy

RS

2. The South Carolina Law Enforcement Division shall make satisfactory arrangements to assist the jurors in securing apparel and personal items from their homes.

3. The South Carolina Law Enforcement Division shall make appropriate arrangements for the furnishing of vehicles (including the hiring of vehicles, if necessary), for the transportation of jurors between their place of lodging and the Courthouse.

4. During the period of sequestration, the Clerk of Court, in cooperation with the South Carolina Law Enforcement Division, shall provide to each of the jurors and alternate jurors so sequestered, breakfast, lunch, and dinner.

5. The South Carolina Law Enforcement Division shall maintain appropriate sequestered jury records during the trial, including, but not limited to:

- a. A record of agents' assignments to shifts and duty stations;
- b. A record of jurors' quarters;
- c. A record of persons entering the area of the jurors' quarters;
- d. A record of telephone calls to and from the jurors' quarters.

The assigned South Carolina Law Enforcement Division personnel shall make certain that no member of the jury:

- a. Has any unauthorized contact with any outside person.
- b. Reads newspapers, magazines, periodicals, or listens to radio or television newscasts or bulletins pertaining to the trial or programs where the theme resembles the case being heard or decided on.

RMS/12

c. Has any discussion with any outside person pertaining to the case.

d. Has written or telephonic communication with any person except under the direct supervision of the assigned South Carolina Law Enforcement Division personnel.

e. Leaves his or her room unescorted.

6. While not in session, any communication with the Court shall be made in writing and placed in a sealed envelope by the jury or individual juror, and upon being turned over to the South Carolina Law Enforcement Division personnel will be promptly delivered to the Court.

7. The county government will pay all per diem incurred by the South Carolina Law Enforcement Division personnel assigned to the jury.

8. The Clerk of Court, in accordance with the South Carolina Law Enforcement Division, shall make appropriate arrangements for suitable recreation for the jury.

9. Mail and packages, to and from jurors, shall be censored to insure that no information relative to the trial is transmitted.

10. The Court, if necessary, shall provide laundry services to the jurors at government expense.

11. The South Carolina Law Enforcement Division shall make provisions to transport any juror who has an unexpected medical need to a doctor, whose name the juror shall furnish to the agents. This will be at the Judge's direction only!

Ruey/3

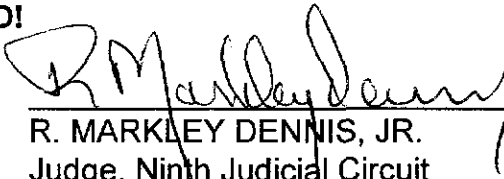
12. The South Carolina Law Enforcement Division shall monitor all television programs made available to the jurors, thereby eliminating the possibility of seeing news bulletins concerning this case.

13. The South Carolina Law Enforcement Division shall admonish its personnel assigned to jury custody not to fraternize with any juror or jurors other than such is necessary to carry out his specific duties set out herein, and specifically refrain from discussing his official duty in other cases.

14. All costs will be the responsibility of the County, except tobacco and alcohol products.

15. This Order may be altered, amended, and/or changed from time to time as in the Court's judgment conditions warrant.

AND IT IS SO ORDERED!


R. MARKLEY DENNIS, JR.
Judge, Ninth Judicial Circuit

MONCKS CORNER, SOUTH CAROLINA

MAY 15, 2003

Rug/14

Robert J. Johnston
Attorney at Law
PHONE (843) 828-1137
FAX (843) 828-0618

The Courtyard, Suite 210
1500 Business 17
Surfside Beach, SC 29575

MAILING ADDRESS:
Post Office Box 15035
Surfside Beach, SC 29587

May 28, 2003

Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: **STATE OF SOUTH CAROLINA VS. JESSIE WAYLON SAPP**

Case/Indictment Numbers: 2003-GS-08-0686, 2002-GS-08-1146, 2002-GS-08-1683,
2002-GS-08-1684, 2002-GS-08-1685 and 2002-GS-08-1687

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal attached to the sentencing orders of the Honorable R. Markely Dennis, Jr. dated May 19, 2003. As indicated in my Proofs of Service, I have sent a copy of same to the Respondent, and the Berkeley County Clerk's Office.

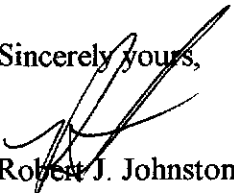
As the Petitioner is indigent, I am requesting that the Office of Appellate Defense appeal the case for the Petitioner.

Please provide me with a clocked copy of both the Notice of Appeal and the Proofs of Service. I have enclosed a stamped, self-addressed envelope for this purpose.

Thank you and should you have any questions, please feel free to contact me.

With kindest regards, I am

Sincerely yours,


Robert J. Johnston

RJJ/ckg
Enclosure(s)
cc: Jessie Waylon Sapp

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of General Sessions

Indictment Nos.: 2003-GS-08-0686, 2002-GS-08-1146, 2002-GS-08-1683, 2002-GS-08-1684, 2002-GS-08-1685 and 2002-GS-08-1687

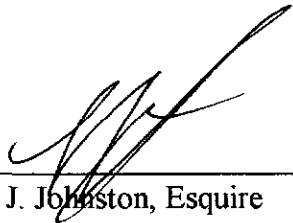
The State Respondent

v.

Jessie Waylon Sapp..... Appellate

NOTICE OF APPEAL

JESSIE WAYLON SAPP appeals his conviction of Murder with the sentence of death, Unlawful Carrying a Pistol, Possession with Intent to Distribute Ecstasy (3rd Offense), Possession with the Intent to Distribute Cocaine (3rd Offense), Possession of Xanax (3rd Offense) and Possession with Intent to Distribute Morphine Sulfate (3rd Offense). Mr. Sapp was sentenced to death for the charge of Murder, one year for the charge of Unlawful Carrying a Pistol, 20 years for the charge of Possession with Intent to Distribute Ecstasy (3rd Offense), 20 years for the charge of Possession with the Intent to Distribute Cocaine (3rd Offense), 2 years for the charge of Possession of Xanax (3rd Offense) and 20 years for the charge of Possession with Intent to Distribute Morphine Sulfate (3rd Offense). The above sentences were imposed by the Honorable R. Markely Dennis, Jr. on May 19, 2003. Appellate has received written notice of this Order as of May 19, 2003.



Robert J. Johnston, Esquire



Paul Archer, Esquire

Other Counsel of Record:

Blair C. Jennings, Esquire
Ninth Circuit Solicitor's Office
300-B California Avenue
Monks Corner, South Carolina 29461

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:COUNTY OF Berkeley
STATE

AKA:

Race:

Sex:

Age:

DOB:

SSN:

Address:

DL#:

SID#:

MARY F. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

A/W#

Date of Offense:

C. Code §:

CDR Code #:

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Murderin violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 1 / 6☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of Death days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:\$ \$14-1-206 (Assessments 100%).....\$ \$14-1-211(A)(1) (Surcharge).....\$ 100.00\$14-1-211(A)(2) (Surcharge).....\$ \$56-5-2995 (DUI Assessment).....\$ 3% to County (if paid in installments).....\$ 3.00TOTAL.....\$ 103.00

PTUP

 days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling Random Drug/Alcohol Testing Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender FundOther:

PRESIDING JUDGE

Judge Code: 010610Sentence Date: 5/19/03

White - Clerk

Green - Corrections

Canary - Probation

Pink ☒ Defendant

COUNTY OF Berkeley
STATE vs.
Jesse W. Sapp
AKA:
Race: W Sex: M Age: 2
DOB: 1 S# 2
Address:
DL#: SID#:

2002 - GS - 08 - 1146
A/W# G040341
Date of Offense: July 7, 2002
S.C. Code §: 16-23-20
CDR Code #: 0 / 0 / 4 / 4
☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Unlawful Carrying a Pistol

in violation of § 16-23-20 of the S.C. Code of Laws, bearing CDR Code # 0 / 0 / 4 / 4

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State

ATTEST:

Bai C. Jung
Solitor

Defendant

Pan An
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 1 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$, provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on.

☒ The Defendant is given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ plus 20% fee. \$
Payment Terms:
☐ set by SCDPPPS

Recipient:
*Fine: 107.50 \$
§14-1-206 (Assessments 100%) 100.00 \$
§14-1-211(A)(1) (Surcharge) 100.00 \$
§14-1-211(A)(2) (Surcharge) \$
§56-5-2995 (DUI Assessment) 3.00 \$
3% to County (if paid in installments) 3.00 \$
TOTAL 103.00 \$

PTUP
 days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

PRESIDING JUDGE R. M. [Signature]
Judge Code: 0 / 8 / 6 / 0
Sentence Date: 5/19/2003

Court Reporter: Karen Croft

White - Clerk

Green - Corrections

Canary - Probation

Pink ☒ Defendant

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

COUNTY OF Berkeley
 STATE VS.
Jesse W. Sapp
 AKA: _____
 Race: W Sex: M Age: _____
 DOB: _____ SS#: _____
 Address: _____
 DL#: _____ SID#: _____

2002 - GS - 08 - 1683
 A/W#: H213755
 Date of Offense: July 7, 2002
 S.C. Code §: 44-53-370(6)(2)
 CDR Code #: 2 / 9 / 2 / 1
☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
 TO: Possession with Intent to Distribute Ecstasy (3rd offense)
 in violation of § 44-53-370(6)(2) of the S.C. Code of Laws, bearing CDR Code # 2 / 9 / 2 / 1
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45
 The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
 ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☒ The Defendant is given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the
 State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: 1075.00 \$

\$14-1-206 (Assessments 100%) \$

\$14-1-211(A)(1) (Surcharge) \$ 100.00

\$14-1-211(A)(2) (Surcharge) \$

\$56-5-2995 (DUI Assessment) \$

3% to County (if paid in installments) \$ 300TOTAL \$ 10300

Allie M. Tucker

Clerk of Court Deputy Clerk

Court Reporter: Karen Crow

PTUP

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

PRESIDING JUDGE

Judge Code: 0 / 0 / 6 / 0Sentence Date: 5/19/03

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

COUNTY OF Berkeley
STATE VS.
Jesse W. Sapp
AKA: _____
Race: W Sex: M Age: _____
DOB: _____ SS# _____
Address: _____
DL#: _____ SID#: _____

2002 - GS - 08 - 1684
A/W#: H213756
Date of Offense: July 7, 2002
S.C. Code §: 44-53-370(6)(1)
CDR Code #: 0 / 1 / 8 / 5
☐ CASE RESTORED

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Possession with the Intent to Distribute Cocaine (3rd offense)
in violation of § 44-53-370(6)(1) of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 8 / 5
☒ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State
ATTEST:

Blair C. [Signature]
Solicitor

Defendant

[Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☒ The Defendant is given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the
State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____
Payment Terms: _____
☐ set by SCDPPPS _____

Recipient: _____
*Fine: \$ _____
\$14-1-206 (Assessments 100%) \$ _____
\$14-1-211(A)(1) (Surcharge) \$ 100.00
\$14-1-211(A)(2) (Surcharge) \$ _____
\$56-5-2995 (DUI Assessment) \$ _____
3% to County (if paid in installments) \$ 3.00
TOTAL \$ 103.00

Allie M. Tucker
Clerk of Court/ Deputy Clerk

Court Reporter: Baren [Signature]

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____
\$ _____ paid to Public Defender Fund
Other: _____

PRESIDING JUDGE [Signature]
Judge Code: 0 / 0 / 6 / 0
Sentence Date: 5/19/03

White - Clerk

Green - Corrections

Canary - Probation

Pink ☒ Defendant

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

COUNTY OF Berkeley
 STATE VS.
Jesse W. Sapp
 AKA: _____
 Race: W Sex: M Age: _____
 DOB: _____ SS#: _____
 Address: _____
 DL#: _____ SID#: _____

2002 - GS - 08 - 1685
 A/W#: H213766
 Date of Offense: July 7, 2002
 S.C. Code §: 44-53-370(6)(3)
 CDR Code #: 0 / 1 / 8 / 0
☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL☒ CONVICTED OF or ☐ PLEADS

In disposition of the said indictment comes now the Defendant who was convicted
 TO: Possession of Kanax (3rd offense)
 in violation of § 44-53-370(6)(3) of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 8 / 0

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST.

Solicitor Blair C. [Signature]Defendant [Signature]Attorney for Defendant [Signature]

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 2 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____, provided that upon the service of _____ days/months/years and/or payment
 of \$ _____, plus costs and assessments as applicable*; the balance is suspended with probation for _____
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the
 State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: _____

§14-1-206 (Assessments 100%)... \$ 107.50

§14-1-211(A)(1) (Surcharge)... \$ 100.00

§14-1-211(A)(2) (Surcharge)... \$ _____

§56-5-2995 (DUI Assessment)... \$ _____

3% to County (if paid in installments)... \$ 3.00

TOTAL... \$ 103.00

Allie M. Tucker
 Clerk of Court Deputy Clerk

Court Reporter: Karen Croft

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

PRESIDING JUDGE [Signature]

Judge Code: 0 / 0 / 8 / 0 / 1

Sentence Date: 5/19/03

White - Clerk

Green - Corrections

Canary - Probation

Pink ☒ Defendant

STATE OF SOUTH CAROLINA

843 719 4509 P.04

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

COUNTY OF Berkeley
 STATE VS.
Jesse W. Sapp
 AKA. _____
 Race: W Sex: M Age: _____
 DOB: _____ SS#: _____
 Address: _____
 DL#: _____ SID#: _____

2002 - GS - 08 - 1687
 A/W#: H213768
 Date of Offense: July 7, 2002
 S.C. Code §. 44-53-370(6)(i)
 CDR Code #: 0 / 1 / 8 / 5
☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
 TO: Possession with Intent to Distribute Morphine Sulfate (3rd offense)
 in violation of § 44-53-370(6)(i) of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 8 / 5
☒ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45
 The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
 ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☒ The Defendant is given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the
 State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
☐ set by SCDPPPS _____

Recipient: _____
 *Fine:\$ _____
 §14-1-206 (Assessments 100%).\$ _____
 §14-1-211(A)(1) (Surcharge)\$ 100.00
 §14-1-211(A)(2) (Surcharge)\$ _____
 §56-5-2995 (DUI Assessment)\$ _____
 3% to County (if paid in installments) . \$ 3.00
 TOTAL\$ 103.00

PTUP _____

_____ days/hours Public Service Employment
 Obtain GED _____
 Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling _____
 Random Drug/Alcohol Testing _____
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: _____

Allie M. Tucker
 Clerk of Court/ Deputy Clerk
Karen Croft
 Court Reporter:

PRESIDING JUDGE

Judge Code: 0 / 0 / 6 / 0Sentence Date: 5/19/03

White - Clerk

Green - Corrections

Canary - Probation

Pink Defendant

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of General Sessions

Indictment Nos.: Indictment Nos.: 2003-GS-08-0686, 2002-GS-08-1146, 2002-GS-08-1683, 2002-GS-08-1684, 2002-GS-08-1685, and 2002-GS-08-1687

The State Respondent

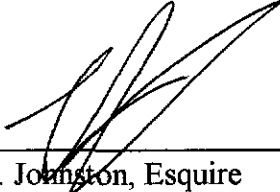
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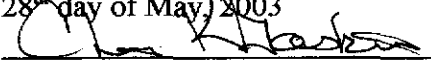
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Robert J. Johnston, Esquire

SWORN to before me this
28th day of May, 2003

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 02/15/11

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of General Sessions

Indictment Nos.: Indictment Nos.: 2003-GS-08-0686, 2002-GS-08-1146, 2002-GS-08-1683, 2002-GS-08-1684, 2002-GS-08-1685, and 2002-GS-08-1687

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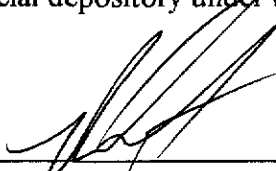
v.

Jessie Waylon Sapp..... Appellate

AFFIDAVIT OF SERVICE

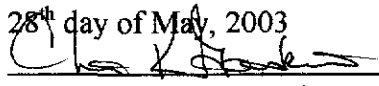
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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

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SEP 10 2004

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JESSIE WAYLON SAPP,

APPELLANT

INITIAL BRIEF OF APPELLANT

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SC SUPREME COURT

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STATEMENT OF ISSUES ON APPEAL

1. The judge erred by excusing potential juror Kathleen McNair for cause, since her religious beliefs regarding capital punishment would not have prevented nor substantially impaired the performance of her duties as a juror in accordance with her instructions and her oath.

2. The judge erred by allowing the solicitor to argue at the start of the sentencing phase that Sapp had shown “[n]o sorrow” after the jury found him guilty of murder.

3. The judge erred by forbidding Sapp’s girlfriend, who was called as a State’s witness at sentencing, to testify that she did not want to see Sapp “put to death.”

4. The judge erred by failing to obtain a waiver of, or instruct the jury on, the statutory mitigator provided by S.C. Code §16–3–20 (C)(b)(8): “The defendant was provoked by the victim into committing the murder.”

5. The lower court was without subject–matter jurisdiction to sentence Sapp to death, since the indictment charging him with murder did not contain the two statutory aggravating circumstances upon which the State relied in seeking the death penalty.

STATEMENT OF THE CASE

On April 9, 2003, a Berkeley County grand jury indicted Jessie Waylon Sapp for the murder of Highway Patrol Trooper Kenneth J. Johnson. The State's evidence indicated that Sapp shot Johnson once in the abdomen as Johnson approached the stolen vehicle in which Sapp was a passenger. He had in his possession a substantial amount of controlled substances and was also on escape. Sapp himself was severely wounded by Johnson's fellow officers as he attempted to flee the scene on foot. In addition to murder, the State also indicted Sapp for several drug offenses and unlawful possession of a pistol.

The solicitor elected to seek the death penalty, relying on two statutory aggravating circumstances:

- (1) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and
- (2) The murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county detention facility employee, or fireman or former fireman during or because of the performance of his official duties.

S.C. Code §16-3-20 (C)(a)(3) and (7). Judge R. Markeley Dennis, Jr., presided at Sapp's jury trial May 9 through 17, 2003. The State contended that Sapp had murdered Trooper Johnson because he did not want to return to jail. The defense suggested that Johnson had been killed by a bullet from another trooper's gun, but introduced no evidence during the guilt phase. The jury found Sapp guilty as charged.

At sentencing, the defense relied on four statutory mitigators:

- (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person;
- (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
- (3) The capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
- (4) The age or mentality of the defendant at the time of the crime.

Section 16-3-20 (C)(b)(1), (2), (6) and (7). There was evidence Sapp was intoxicated from a combination of drugs and alcohol at the time of the incident. The jury recommended death, and the judge sentenced Sapp accordingly.

ARGUMENT

I.

The judge erred by excusing potential juror Kathleen McNair for cause, since her religious beliefs regarding capital punishment would not have prevented nor substantially impaired the performance of her duties as a juror in accordance with her instructions and her oath.

The twelfth potential juror was Kathleen McNair, a black female. Tr. p. 566, lines 17 & 18. She stated, "I don't believe in the death penalty because of my religion." Tr. p. 568, lines 18–20. The judge then questioned her as follows:

Q. But the law of South Carolina would be, and I would instruct you, that the death penalty may be warranted in some cases.

A. I understand . . .

Q. But you're saying, as a juror, you couldn't consider that law?

A. No, I couldn't just because of my belief. That's all.

Q. Your belief would prevent you?

A. It is my religion, that's it. But otherwise, you know, . . . it should be that way. But to me, I can't.

Q. You could never do that?

A. I can't decide on that because of my religion.

Tr. p. 569, lines 1–17. The solicitor next asked:

Q. The beliefs that you hold are strongly held, is that correct?

A. It is.

Q. Okay. And it would do a disservice to you to ask you to go against those beliefs, would it not?

A. Well, I think so because of my deep roots, religion from childhood . . . I was taught even as a child, you know, that we shouldn't take someone's life because we cannot make life and we should not take it. And it was like that in our household and always has been so . . .

Q. Would it then be impossible, if you sat on a jury, for you to consider the death penalty based on your beliefs? And let me take it one step further: if you are sitting on a jury with the other eleven jurors and they all said the death penalty and you sort of believed, well, maybe the death penalty if it ever is appropriate might be appropriate here, could you sign your name on the death penalty verdict saying, "I'm calling for the death of the defendant?"

A. Oh, this is hard.

Q. You are not required to.

A. I probably will. But because of my beliefs -- what I'm telling you, I probably would because of the type of crime.

Q. You are saying you probably would call for the death penalty if you thought it was appropriate?

A. Yes, because of the crime.

Q. Okay. So, depending on the circumstances of the crime, you would set aside your religion?

A. Oh --

Q. Again, we're not trying to put you in a position you can't be in.

A. I understand . . .

Q. So, that's why we ask you up front. So tell me about it again, just tell me what your feelings are about the death penalty.

A. If I put my religion aside, if it wasn't my religion, I believe in it, I will go for the death penalty.

Q. Yes, ma'am. But do you understand you don't have to put your religion aside?

A. I understand. . .

Q. Now, knowing you do not have to put your religion aside, would that put you in a position that you couldn't deal with being on the jury and having to determine the death penalty?

A. I could deal with it. I know I can deal with it because I believe in God. So, I could deal with it.

Q. Could you do it if you thought it were appropriate? Could you return a death penalty verdict and sign your name on a death penalty warrant?

A. If it was appropriate, yes . . .

Q. What religion are you?

A. I'm a Methodist.

Q. And what is the teaching of that religion regarding the death penalty?

A. "Thou shalt not kill."

Q. Would that affect your ability to deliberate on a jury?

Tr. p. 570, line 2 – p. 573, line 12. At this point, defense counsel objected and McNair began sobbing. Tr. p. 573, lines 13–23. The defense did not question her. Tr. p. 574, lines 11 & 12.

The solicitor asked the judge to remove McNair for cause. Specifically, he felt that her religious beliefs would substantially impair her ability to sit on a death penalty case. Tr. p. 574, line 25 – p. 575, line 9. Defense counsel disagreed. Tr. p. 575, lines 11–16; tr. p.

577, lines 11–17. The judge granted the State’s motion, based on McNair’s answers and demeanor. Tr. p. 576, line 15 – p. 577, line 10. Accordingly, he excused her from further service. Tr. p. 577, line 19 – p. 578, line 2.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court held that a state infringes a capital defendant’s right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment. In Wainwright v. Witt, 469 S.C. 412 (1985), the Court modified Witherspoon and held that “the proper standard for determining when a prospective juror may be excluded 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 instruction and his oath’.” 469 U.S. at 424, quoting Adams v. Texas, 448 U.S. 38, 45 (1980). See, also, State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997), and State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992).

This standard does not require that a juror’s bias be proved with “unmistakable clarity.” Id. However:

It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCree, 476 U.S. 162, 176 (1986). Moreover:

The state’s power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would “frustrate the state’s legitimate interest in administering constitutional capital sentencing schemes by

not following their oath.”

Gray v. Mississippi, 481 U.S. 648, 658 (1987), quoting Wainwright v. Witt, 469 U.S. at 423.

Exclusions for cause which violate the Witherspoon-Witt standard cannot be harmless error.

Id.

In Wainwright v. Witt, the Court held that a prospective juror was properly excused for cause when she answered the prosecutor’s questions as follows:

Q. Do you have any religious beliefs or personal beliefs against the death penalty?

...

A. I am afraid of being a little personal, but definitely not religious.

Q. Now, would that interfere with you sitting as a juror in this case?

A. I am afraid it would...

Q. Would it interfere with judging the guilt or innocence of the defendant in this case?

A. I think so.

Q. You think it would?

A. I think it would.

469 U.S. at 415–16. In Darden v. Wainwright, 477 U.S. 168, 178 (1986), a prospective juror responded affirmatively when asked by the judge, “Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote recommend a death penalty regardless of the facts?” The Supreme Court observed, “The precise wording of the question asked of [the juror], and the answer he gave, do not by themselves compel

the conclusion that he could not under any circumstance recommend the death penalty.” Id. The same holds true here.

The fact that McNair believed her religion was opposed to the death penalty is, in the final analysis, irrelevant. The real issue is whether she was willing to temporarily set aside that belief in deference to the rule of law. (In this regard, the solicitor’s statement to McNair that “You don’t have to put your religion aside” is both misleading and wrong.) McNair plainly stated that she could set aside her religious beliefs and sentence someone to death “[i]f it was appropriate.” Compare State v. Elmore, 286 S.C. 70, 332 S.E.2d 762, 763 (1985) (juror “repeatedly stated she was opposed to the death penalty” and “never stated she could, in fact, impose the death penalty”); United States v. Jackson, 327 F.2d 273, 295 (4th Cir. 2003) (juror gave “ambiguous answers to questions about his beliefs on the death penalty”); and United States v. Tipton, 90 F.3d 861, 880 (4th Cir. 1996) (Prospective jurors “each expressed reservations, never retracted, sufficient to warrant the... determination that they would substantially impair the juror’s performance of duty to vote for the death penalty if the evidence and law so dictated”).

Accordingly, the judge erred by excusing McNair for cause. Since the error cannot have been harmless, the Court should reverse Sapp’s death sentence and remand for resentencing.

II.

The judge erred by allowing the solicitor to argue at the start of the sentencing phase that Sapp had shown "[n]o sorrow" after the jury found him guilty of murder.

Sapp began crying when the jury found him guilty of Trooper Johnson's murder.

Tr. p. 1606, lines 23 & 24. In his opening argument at sentencing, the solicitor pounced:

Ladies and gentlemen, there are all types of tears in the world. Tears of compassion; there are tears of sorrow and there are tears of self-pity. I submit to you the ones you saw were self-pity. "Why me? Why does this have to happen to me?" No sorrow, that's what that was.

Tr. p. 606, line 24 – p. 607, line 4. Defense counsel did not object to this argument. Nevertheless, it is clearly improper for a solicitor to argue at sentencing that a capital defendant has failed to demonstrate remorse during the guilt phase.

Since the death penalty was reinstated in 1977, this Court has held - consistently and unequivocally - that the State may not seek a death sentence by arguing that the defendant has not apologized for his crimes or otherwise expressed remorse. Every capital defendant has a right to "put the State to its proof." State v. Brown, 289 S.C. 581, 347 S.E.2d 882, 887 (1986). A defendant has no burden of proof at sentencing. State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986). The State always carries "the overall burden of proof." State v. Hicks, 330 S.C. 207, 499 S.E.2d 209, 215 (1998).

In State v. Sloan, 278 S.C. 435, 298 S.E.2d 92, 95 (1982), the solicitor asked the jury, "Has anyone said to you he's sorry, sorry for what he did?" In State v. Arther, 290 S.C. 291, 350 S.E.2d 187, 191 (1986), the solicitor stated:

Remorse. You've heard the evidence. You know what happened. Remorse. Did he say, "I'm sorry, I didn't mean to do it. I didn't appreciate the criminality of my conduct at the

time."... Have you heard that from him?

In State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10, 13 (1987), the State argued, "I ask you to consider all of the evidence. You have seen no remorse."

In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317, 319 (1987), the solicitor asked, "Don't you think he ought to apologize?" In State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22, 23 (1988), the State argued, "[D]oes he look sorry to you?... Have you seen any remorse?" In Diddlemeyer, 371 S.E.2d at 795, the solicitor stated:

When would [the death penalty] be appropriate if not in this case? He knew what he was doing. Planned, schemed and designed to do it and never, ever, after having done it showed remorse.

See, also, State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000), and State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986). The Court reversed the death sentences in each of these cases, observing on several occasions that, as far as trial errors are concerned, such arguments are "especially egregious." See for example State v. Hawkins, 357 S.E.2d at 13, and State v. Sloan, 298 S.E.2d at 95.

In short, the State cannot argue lack of remorse as a reason to impose the death penalty, particularly where the accused does not testify. "[R]emorse is not an appropriate matter for consideration by the jury when a defendant pleads not guilty and does not testify." State v. Hawkins, 357 S.E.2d at 13. In State v. Johnson, 360 S.E.2d at 319, the Court explained, "Comments by the prosecution upon an accused's failure to express remorse invite the jury to draw an adverse inference merely because the defendant did not appear penitent." This argument is particularly unfair in South Carolina, "where a defendant must plead not guilty to have his sentence determined by a jury." State v.

Sloan, 298 S.E.2d at 95 (emphasis in original), citing S.C. Code Section 16-3-20 (B); see also State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982).

Since the solicitor expressly argued that Sapp's purported failure to display "sorrow" for his crimes during the guilt phase justified a death sentence, the Court should reverse that sentence and remand for resentencing.

III.

The judge erred by forbidding Sapp's girlfriend, who was called as a State's witness at sentencing, to testify that she did not want to see Sapp "put to death."

The driver of the vehicle in which Sapp was a passenger the night Trooper Johnson was killed was Sapp's girlfriend, Kathryn Boles, who worked as a stripper in Columbia. Tr. p. 1690, lines 6 & 7. Sapp had met Boles several years earlier, when she worked for an escort service. Tr. p. 1701, lines 4–14. Boles was a State's witness during the sentencing phase of Sapp's trial. She was then in rehab for drug and alcohol addiction. Tr. p. 1689, lines 11–21.

At the time of the incident, Boles testified, Sapp "didn't have a job" and made his money as "a drug dealer." Tr. p. 1692, lines 6–10. Her opportunity to view the shooting itself was somewhat limited, since she was on the other side of the truck talking to another trooper. Tr. p. 1696, line 8 – p. 1698, line 22. The real reason the State called Boles as a witness was presumably to depict Sapp's poor character. She testified that he had previously been arrested with five pounds of marijuana. Tr. p. 1704, line 9 – p. 1705, line 13. Boles also related two separate incidents where Sapp had pulled guns on other men who were interested in her. Tr. p. 1706, line 15 – p. 1711, line 25.

The following exchange occurred during the cross-examination of Boles:

DEFENSE COUNSEL: Do you think Jesse was in love with you?

BOLES: Yes, I do.

Q. Were you in love with Jesse?

A. No, I was not.

Q. But you did like him, obviously. You hung around with him.

A. I love him, but I do not want to be with him.

Q. Okay. Would you like to see Jesse put to death?

SOLICITOR: That's inappropriate, you honor.

THE COURT: Sustained. Don't answer the question. That's an inappropriate question.

Tr. p. 1716, lines 4–16. Defense counsel asked Boles no further questions. Tr. p. 1716, line 17.

In State v. Matthews, 296 S.C. 379, 373 S.E.2d 587, 595 (1988), the Court held that the trial judge had properly prohibited defense counsel “from asking members of [the defendant’s] family which sentence they thought [he] should receive,” because this line of questioning “went to the ultimate issue to be decided by the jury – life imprisonment versus the death penalty – and was properly reserved for jury determination.” [Emphasis in original.] In State v. Torrence, 305 S.C. 45, 406 S.E.2d 315, 318 (1991), the Court distinguished Matthews and adopted the Georgia Supreme Court’s distinction between a plea for mercy and an opinion on the ultimate question to be decided by the jury:

[A]lthough a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, a defendant may not present witnesses to testify merely to their religious or philosophical attitudes about the death penalty... Nor is a defendant entitled to present the opinion of a witness about what verdict the jury “ought” to reach.

Childs v. State, 257 Ga. 243, 357 S.E.2d 48, 60 (1987) (citation omitted). In State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, 524 (2000), the Court held that it was error for

the judge to prohibit defense counsel from asking the defendant's sister "whether she wanted [him] to die."

In State v. Wise, 359 S.C. 14, 596 S.E.2d 475, 481–2 (2004), the Court recently summarized the law relating to this issue:

[A] capital defendant may present witnesses who know and care for him, and who are willing on that basis to plead with the jury for mercy on his behalf. Thus, a close relative of a defendant, such as his mother, may make a general plea for mercy for the life of her son. [Citation omitted.] A close relative of defendant, such as his sister, may be asked whether she wants the defendant to die, which is akin to asking her to make a general plea for mercy and not explicitly directed toward eliciting her opinion of what verdict the jury should reach. [Citation omitted.]

Boles had known Sapp for approximately six years at the time of his trial and had been his girlfriend for much of that period. Compare State v. Wise. The question she was asked by defense counsel – "Would you like to see Jessie put to death?" – is indistinguishable from the type of question approved by the Court in Johnson and Wise.

Moreover, evidence that Boles did not want Sapp to die was admissible to rebut the balance of her testimony, which the State elicited in aggravation of punishment. Due process prohibits a defendant from being sentenced to death "on the basis of information which he had no opportunity to deny or explain." Gardner v. Florida, 430 U.S. 349, 362 (1977).

For these reasons, the Court should reverse Sapp's death sentence and remand for resentencing.

IV.

The judge erred by failing to obtain a waiver of, or instruct the jury on, the statutory mitigator provided by S.C. Code §16-3-20 (C)(b)(8): “The defendant was provoked by the victim into committing the murder.”

The State’s primary eyewitnesses testified during the guilt phase, “I saw the trooper walk around to the passenger’s side of the truck and . . . I don’t know if he opened the door or if the passenger [Sapp] opened the door. When the passenger stepped out of the truck, he pulled his gun and shot before his feet even hit the ground.” Tr. p. 1159, line 22 – p. 1160, line 3. At the sentencing phase, a SLED agent who had interrogated Sapp testified that “Sapp stated . . . that he saw the trooper come up with his gun out and that he, Mr. Sapp, pulled out his gun and shot and the trooper shot.” Tr. p. 1654, line 2 – p. 1657, line 15.

Taken together, this testimony was evidence that the victim had opened the passenger’s door with his gun drawn, even though Sapp had not, by all appearances, committed any criminal offense. At most, at that point Trooper Johnson may have suspected that, like Kathryn Boles, Sapp had an open container of alcohol. Tr. p. 1085, line 9 – p. 1087, line 3.

S.C. Code §16-3-20 (C)(b)(8) provides, as a mitigating circumstance, that “[t]he defendant was provoked by the victim into committing the murder.” This mitigator does not appear to have been interpreted by the Court. Obviously, it is not coextensive with voluntary manslaughter, given the prohibition against arguing residual doubt at sentencing. See State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994).

In State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816, 823 (1990), the Court held, “The trial judge has a duty to review all statutory mitigating circumstances and instruct the jury as to any which may be supported by the evidence and not merely those requested by the defendant.” The Court later adopted the following procedure in State v. Victor, 300 S.C. 220, 387 S.E.2d 248, 250 (1989):

Once the trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record: (1) to waive the submission of those he does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence that he wishes submitted to the jury.

See, also, State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000).

The judge erred by failing to obtain a waiver of, or instruct the jury on, the “provocation” mitigator provided by Section 16–3–20(c)(b)(8). For this reason, the Court should reverse Sapp’s death sentence and remand for resentencing.

V.

The lower court was without subject-matter jurisdiction to sentence Sapp to death, since the indictment charging him with murder did not contain the two statutory aggravating circumstances upon which the State relied in seeking the death penalty.

The body of the indictment charging Sapp with murder reads as follows:

Jessie W. Sapp did in Berkeley County on or about the 7th day of July, 2002 feloniously, willfully and unlawfully of his malice aforethought, kill and murder South Carolina Highway Patrol Trooper Kenneth J. Johnson by means of a gunshot wound and... Trooper Johnson did die in Berkeley County or Charleston County as a proximate result of that gunshot wound on or about the 7th day of July, 2002. This action being in violation of Section 16-3-10, South Carolina Code of Laws (1976), as amended.

ROA p. *. The indictment alleges neither of the two aggravating circumstances upon which the State relied to obtain a death sentence.

Article I, Section 11, of the South Carolina Constitution provides in relevant part:

No person may be held to answer for any crime [such as murder]... unless on a presentment or indictment of a grand jury of the county where the crime has been committed...

S.C. Code Section 17-19-20 states:

Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charge may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

Section 17-19-30 adds:

Every indictment for murder shall be deemed and judged sufficient and good in law which, in addition to setting forth

the time and place, together with a plain statement, divested of all useless phraseology, of the manner in which the death of the deceased was caused, charges that the defendant did feloniously, willfully and of his malice aforethought kill and murder the deceased.

An indictment must contain the necessary elements of the offense intended to be charged. State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003); Browning v. State, 320 S.C. 366, 165 S.E.2d 358 (1995).

Although the crime of “murder” is defined in Section 16–3–10, it remains a common-law offense in South Carolina. State v. Bowers, 65 S.C. 207, 43 S.E. 656 (1903). Punishment for murder – particularly capital punishment – is a legislative creation. S.C. Code Section 16–3–20.

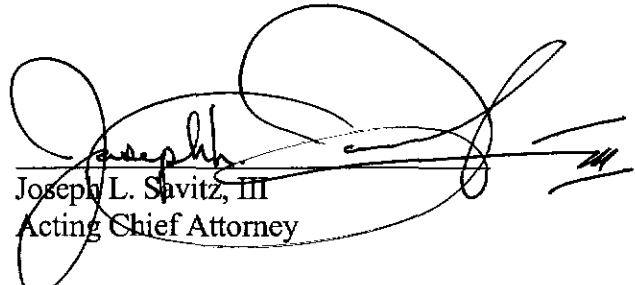
Under Ring v. Arizona, 536 U.S. 584 (2002), capital murder in South Carolina now consists of common-law murder plus at least one statutory aggravating circumstance. (State v. Butler, 277 S.C. 452, 290 S.E.2d (1982), is no longer viable.) In other words, an aggravating circumstance is now one of the elements of capital murder. “Ring... fundamentally altered the constitutional significance of aggravating factors that expose a defendant to the death penalty.” State v. Fortin, 178 N.J. 540, 843 A.2d 974, 1033 (2004). Under Ring and Apprendi v. New Jersey, 530 U.S. 466 (2000), the lower court was without jurisdiction to sentence Sapp to death, since the indictment charging him with murder did not contain the two statutory aggravators upon which the State relied in seeking the death penalty.

For this reason, the Court should vacate Sapp’s death sentence and remand for non-capital resentencing.

CONCLUSION

Based on the foregoing arguments, Jessie Waylon Sapp asks the Court to reverse his death sentence and remand for resentencing.

Respectfully submitted,



Joseph L. Savitz, III
Acting Chief Attorney
ATTORNEY FOR APPELLANT

This 10th day of September, 2004.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JESSIE WAYLON SAPP,

APPELLANT

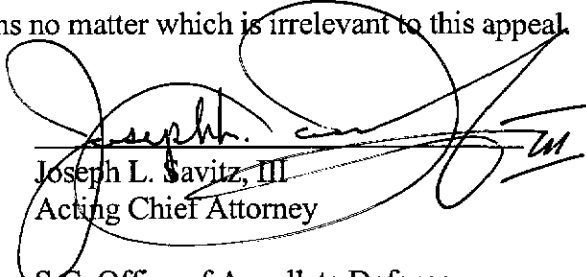
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Trial transcript
- (2) Pre-trial hearing transcripts
- (3) Indictments
- (4) Notice of Intention to Seek Death Penalty
- (5) Notice of Evidence in Aggravation
- (6) Statutory Instructions
- (7) Finding of Aggravating Circumstances
- (8) Recommendation of Death Sentence
- (9) Affirmation of Death Sentence
- (10) Sentence

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

September 10th, 2004


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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

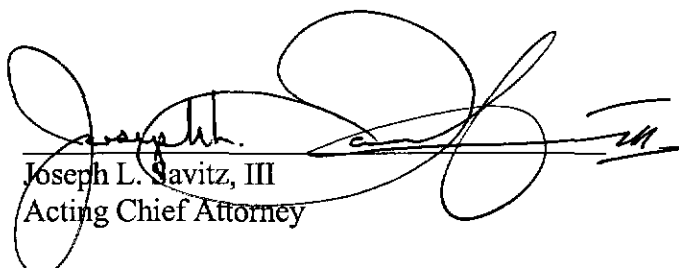
V.

JESSIE WAYLON SAPP,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 10th day of September, 2004.


Joseph L. Savitz, III
Acting Chief Attorney
ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 10th day of September, 2004.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007.

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge**

THE STATE,

Respondent,

v.

JESSIE WAYLON SAPP,

Appellant

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S.C. SUPREME COURT

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IV. The trial court did not err in failing to <i>sua sponte</i> instruct the jury on the statutory mitigating circumstance set out in S.C. Code §16-3-20 (C)(b)(8): "the defendant was provoked by the victim into committing the murder" where no request was made by defense counsel and it was not warranted by the evidence where under the defendant's version he was "provoked" by the anticipation of a lawful arrest on being a fugitive.	24
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Ann. § 16-3-26 and notice of evidence in aggravation pursuant to § 16-3-20 which specifically designated the aggravating factors. Contrary to Appellant’s claim, *Ring v. Arizona* does not create a new state law subject matter jurisdictional requirement that statutory aggravating factors be placed in the murder indictment, in addition to the elements of murder. Further, this Court’s intervening decisions in State v. Downs, State v. Wood and State v. Crisp resolve this same issue adversely to the Appellant. 30

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. The judge erred by excusing potential juror Kathleen McNair for cause, since her religious beliefs regarding capital punishment would not have prevented nor substantially impaired the performance of her duties as a juror in accordance with her instructions and her oath.
2. The judge erred by allowing the solicitor to argue at the start of the sentencing phase that Sapp had shown "[n]o sorrow" after the jury found him guilty of murder.
3. The judge erred by forbidding Sapp's girlfriend, who was called as a State's witness at sentencing, to testify that she did not want to see Sapp "put to death."
4. The judge erred by failing to obtain a waiver of, or instruct the jury on, the statutory mitigator provided by S.C. Code § 16-3-20(C)(b)(8): "The defendant was provoked by the victim into committing the murder."
5. The lower court was without subject-matter jurisdiction to sentence Sapp to death, since the indictment charging him with murder did not contain the two statutory aggravating circumstances upon which the State relied in seeking the death penalty.

RESPONDENTS STATEMENT OF THE CASE

This matter comes before this Court on appeal from numerous convictions on May 17, 2003 for:

Receiving stolen goods	(2002-GS-08-1691)
Possession of Xanax - 3 rd offense	(2002-GS-08-85)
Possession with intent to distribute cocaine	(2002-GS-08-1684)
Possession with intent to distribute morphine sulfate	(2002-GS-08-1687)
Possession with intent to distribute Ecstasy- 3 rd offense	(2002-GS-08-1683)
Unlawful carrying of a pistol	(2002-GS-08-1146)
Murder	(2003-GS-08-686)

Tr. 1574-86. Jessie Waylon Sapp, after a penalty phase hearing before the Honorable R. Markley Dennis, Presiding Judge, and a jury pursuant to S.C. Code Ann. § 16-3-20 found beyond a reasonable doubt the existence of the following statutory aggravating factors:

1. The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and
2. The murder of a federal, state, or local law enforcement officer or former federal, state or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county detention facility employee, or fireman or former fireman during or because of the performance of his official duties.

S.C. Code § 16-3-20(C)(a)(3) and (7). Tr. 1895-96. The jury recommended the sentence of death. Tr. 1895-99. Judge Dennis sentenced Sapp on May 19, 2003 to death for murder, twenty (20) years concurrent for PWID Ecstasy 3rd offense, twenty (20) years concurrent for PWID

cocaine, twenty (20) years concurrent for PWID morphine sulfate, one (1) year for unlawful possession of a weapon, and two (2) years concurrent for possession of Xanax 3rd offense. Tr. 1903-04.

The Appellant was indicted on October 16, 2002 for each of the drug related offense. On July 17, 2002, he was indicted for the unlawful carrying of a pistol. On April 9, 2003, Sapp was re-indicted for murder. 2003-GS-08-686. Tr. 42-43.

The charges arose from a July 7, 2002 incident which resulted in the murder of South Carolina Highway Patrolman Kenneth J. "Jeff" Johnson, a thirteen (13) year member of the Patrol. At approximately 2:30 a.m. on the morning of July 7, 2002, Trooper Johnson was working a license check point on College Park Road with three fellow troopers, Patrick Sigwald, Steve Grainger, and Roy Barwick. At the checkpoint, a green Dodge Dakota approached which, unknown to the officers was stolen and contained illegal drugs. Similarly unknown to them, Jessie Sapp was armed with a loaded 40 caliber Smith and Wesson handgun.

As the officers dealt with the driver, Kathryn Boles, Trooper Johnson had Sapp's drivers license and re-approached the car to return it to him. Tr. 1087. Sapp got out of the vehicle and shot Trooper Johnson one time below his bulletproof vest. He bled to death at the scene. Tr. 1089-91. Sapp was injured as a result of the shootings by the troopers. Tr. 1088-89.

The state made notice of intent to seek the death penalty on July 29, 2002 and April 9, 2003. R.p. ___. Prior to trial, the prosecution made notice of evidence in aggravation on July 29, 2002 and April 9, 2003. R.p. ___.

At trial, the Appellant was represented by court appointed counsel, Paul C. Archer and Robert Johnston. The prosecution was handled by Ralph E. Hoisington, Solicitor, and Blair C.

Jennings, Deputy Solicitor of the Ninth Judicial Circuit. Pretrial hearings were held October 18, 2002, March 26, 2003, and May 2, 2003. On May 9, 2003, the matter began before the Honorable R. Markley Dennis, Jr. The guilt phase verdicts were entered on May 17, 2003.

The penalty phase began on May 18, 2003. In addition to the statutory aggravating factors found set out above, the following statutory mitigating circumstances were given:

1. The defendant has no significant history of prior criminal conviction involving the use of violence against another person;
2. The murder was committed while the defendant was under the influence of mental or emotional disturbance;
3. The capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
4. The age or mentality of the defendant at the time of the crime.

§ 16-3-20(C)(b)(1), (2), (6) and (7). Tr. 1888-89. The jury was also instructed to consider non-statutory circumstances. Tr. 1889.

After the sentences were imposed, a notice of appeal was served on May 27, 2003. This appeal follows.

ARGUMENT

- I. When a potential juror becomes emotionally distraught and unable to answer questions about her ability to consider death due to her deep-seeded religious beliefs, the trial court properly held that those beliefs prevented or substantially impaired the performance of her duties as a juror.**

In his initial argument, Sapp contends the trial judge erred in excusing potential juror Kathleen McNair, #247 for cause. He apparently contends that she was able to put her religious beliefs aside. The trial judge disagreed. As set forth below, the record provides support for the trial judge's disqualification of the juror.

A. What the Trial Judge Ruled

After argument on the state's motion to disqualify juror #247 for cause, Judge Dennis made the following findings and conclusions:

THE COURT: Considering the answers given by Ms. McNair, observing also her demeanor in the courtroom during the examination and the questions propounded by the solicitor, which she never answered, became so emotionally distraught by the question, would that affect your ability to deliberate on a jury, and she never answered the question. Given her answers and her inconsistency or the inconsistency of her answers, given the feelings that she articulated to my questions and to the solicitor's questions that her religious beliefs were very sincere and deep seeded with her in her life, I would conclude that her inability to answer the question affecting her ability to deliberate and constantly apologizing is a human reaction to suggest that she couldn't consider it. And therefore, she felt inadequate because she couldn't. And that would be the only justification for somebody becoming emotionally distraught and apologizing. So given that and given her demeanor and considering the totality and completeness of all of her answers, I

would agree that she's not qualified.

And the record is clear that Mr. Sapp finds and would argue that she is qualified and has state – clearly, I don't argue with position that she indicated at one point that, yes, she could invoke – award the death penalty. But I believe it would substantially affect her ability to consider both sentences, that is her religious belief.

Tr. p. 576, l. 15 - p. 577, l. 17.

B. What Ms. McNair's Voir Dire Revealed

During the voir dire proceedings, Ms. Kathleen L. McNair, a black female potential juror, was questioned for qualification. Tr. 566-576. During the general voir dire of the jurors, she had revealed that she had a health concern because she had lost 95% vision in her right eye and had to use eye drops during the day and her foot was just broken. Tr. 207-08. She also revealed that she had learned some information about the incident on television and her son-in-law was a policeman. Tr. p. 242, l. 4 - p. 243, l. 4.

During the individual voir dire, Ms. McNair revealed the following when asked by the trial judge whether she was Type 1 (always vote for death), Type 2 (always vote for life), or Type 3 (depend on facts and circumstances):

- A. Well, as a matter of fact, I don't believe in the death penalty because of my religion.

Tr. p. 568, ll. 19-20. The judge then questioned her as follows:

- Q. ... But the law of south Carolina would be, and I would instruct you, that the death penalty may be warranted in some cases.
- A. I understand...

- Q. But you're saying, as a juror, you couldn't consider that law?
- A. No, I couldn't just because of my belief. That's all.
- Q. Your belief would prevent you?
- A. It is my religion, that's it. But otherwise, you know, ... it should be that way. But to me, I can't.
- Q. You could never do that?
- A. I can't decide on that because of my religion. I'm sorry, but...

Tr. p. 569, ll. 1-17.

Solicitor Hoisington then asked the next series of questions:

- Q. The beliefs that you hold are strongly held, is that correct?
- A. It is.
- Q. Okay. And it would do a disservice to you to ask you to go against those beliefs, would it not?
- A. Well, I think so because of my deep roots, religion from childhood...I was taught even as a child, you know, that we shouldn't take someone's life because we cannot make life and we should not take it. And it was like that in our household and always has been so...
- Q. Would it then be impossible, if you sat on a jury, for you to consider the death penalty based on your beliefs? And let me take it one step further: if you are sitting on a jury with the other eleven jurors and they all said the death penalty and you sort of believed, well, maybe the death penalty if it ever is appropriate might be appropriate here, could you sign your name on the death penalty verdict saying, "I'm calling for the death of the defendant?"

- A. Oh, this is hard.
- Q. You are not required to.
- A. I probably will, but because of my beliefs - - what I'm telling you, I probably would because of the type of crime.
- Q. You are saying you probably would call for the death penalty if you thought it was appropriate?
- A. Yes, because of the crime.
- Q. Okay. So, depending on the circumstances of the crime, you would set aside your religion?
- A. Oh - -
- Q. Again, we're not trying to put you in a position you can't be in.
- A. I understand...
- Q. So, that's why we ask you up front. So tell me about it again, just tell me what your feelings are about the death penalty.
- A. If I put my religion aside, if it wasn't my religion, I believe i it, I will go for the death penalty.
- Q. Yes, ma'am. But do you understand you don't have to put your religion aside?
- A. I understand.
- Q. When you go back there, you are who you are.
- A. I am who I am, uh-huh.
- Q. Now, knowing you do not have to put your religion aside, would that put you in a position that you couldn't deal with by being on the jury and having to determine the death penalty?

A. I could deal with it. I know I can deal with it because I believe in God. So I could deal with it.

Q. Could you do it if you thought it were appropriate?
Could you return a death penalty verdict and sign your name on a death penalty warrant?

A. If it was appropriate, yes.

Q. Appropriate is a term that you would have to make a determination after you hear the facts. Are there - - have you had an opportunity to think about the death penalty other than in your - - in the sense of your religion?

A. I did thought about it.

MR. ARCHER: I'm sorry, I would object. I think she's answered all this.

THE COURT: I will allow some leeway, but let's move on, Solicitor. I will allow that one more question. She's basically answered that.

MR. HOISINGTON: Okay.

Q What religion are you?

A I'm a Methodist.

Q And what is the teaching of that religion regarding the death penalty?

A Thou shall not kill.

Q Would that affect your ability to deliberate on a jury?

MR. ARCHER: Your Honor, I think she's answered that.

THE COURT: I will allow this. This is a critical issue and I will allow it. Ms. McNair do you need a moment?
(WHEREUPON, the juror was crying.)

MR. HOISINGTON: Your Honor, I don't think I need to question her

anymore. If the record will just reflect - -

THE COURT: The record will reflect Ms. McNair is emotionally distraught at this point.

Ms. McNair, would you prefer me to take a brief break to give you an opportunity to collect yourself, ma'am?

THE POTENTIAL JUROR: (The juror shook her head.)

THE COURT: I need for you to answer, Ms. McNair.

THE POTENTIAL JUROR: I'll try and finish.

THE COURT: Solicitor, as I understand, you have no additional questions?

MR. HOISINGTON: No additional questions. Thank you.

THE COURT: Mr. Archer?

MR. ARCHER: I have o questions.

THE COURT: Ms. McNair, you may step down, please. We'll be with you in just a moment.

THE POTENTIAL JUROR: I'm sorry.

Tr. p. 570, l. 2 - p. 574, l. 15.

C. The Arguments Below

The prosecutor moved to have venireperson McNair removed for cause. He asserted that her deep-seeded religious beliefs would "substantially impair" her ability to sit on the jury. Tr. 575. He noted she was unable to address the issues and stated she was a type 2 juror initially and only equivocated slightly as to whether she could consider the death penalty which was not enough. He declared her beliefs would impair it and she could not give the state a fair trial. Tr.

p. 575, ll. 1-19.

Counsel Archer urged that although she became very emotional, he felt because she answered a number of times that she would impose the death penalty, she should be qualified because it was her last answer. Tr. 575.

The court noted she never declared she was a type 3 juror. He stated he wanted to review some cases concerning inconsistent responses. Importantly, he noted his concerns where that when she stated she could was going to require her to set aside her religious beliefs and whether she can truthfully follow the law and fairly consider the circumstances. Tr. 575-76.

D. Standard of Review

In a capital case, the proper standard in determining the qualification of a prospective juror is whether the juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Council, 335 S.C. 1, 515 S.E.2d 508, cert. denied, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999). See also State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993), cert. denied, 513 U.S. 831, 115 S.Ct. 105, 130 L.Ed.2d 53 (1994) (citing S.C. Code Ann. § 16-3-20(E) (2003)) (in capital case, juror may not be excluded for her attitude against capital punishment unless it would render juror unable to return a verdict according to law).

When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. *Id.* The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him. *Id.* The trial court, when determining if a particular venireperson is to be disqualified, is in the best position to view the juror's demeanor. See Wainwright v. Witt, 469

U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (there will be situations where trial court is left with definite impression that prospective juror would be unable to faithfully and impartially apply the law and this is why deference must be paid to trial court who sees and hears the juror). On review, the trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S.Ct. 229, 112 L.Ed.2d 183 (1990). Accord, State v. Wood, __ S.C. __, __ S.E.2d __, 2004 Westlaw 2851808 (S.C. Dec. 6, 2004). See State v. Council, supra (determination of whether juror is qualified to serve on death penalty case is within sole discretion of trial court and is not reviewable on appeal unless wholly unsupported by the evidence).

In Wood, this Court recently addressed a situation similarly to that presented here with inconsistent and ambiguous responses. There, the potential juror was initially adamant about the opposition to the death penalty, but then revised her opinion upon questioning by defense counsel which appealed to her to serve on the jury to make it demographically and racially balanced. In upholding the disqualification, the Supreme Court concluded that the trial court had a reasonable basis to conclude that the person could not faithfully carry out her duty under the law and the evidence supports the trial court's decision finding Smith disqualified from jury service.

E. Analysis

There is evidence in this record to support the trial court's conclusion that her beliefs founded in her religion substantially impaired her ability to perform as a juror in this matter. First, her initially response was that she did not believe in the death penalty because of her

religion. Tr. 568. Second, she initially declared based upon her religion she could not consider the law and “I can’t decide because of my religion.” Tr. p. 569, ll. 12-19. Third, she declared her religion was based upon deep roots from childhood and teachings “that we shouldn’t take someone’s life because we cannot make life and should not take it.” Tr. p. 570, ll. 12-17.

She subsequently declared though, “if I put my religion aside, if it wasn’t my religion, I believe in it, I will go for the death penalty.” She responded that she could deal with being on the jury “because I believe in God” and return a death penalty verdict “if it was appropriate.” Tr. p. 572, ll. 13-18.

However, the depth and influence of her religious belief was unalterably revealed when after she noted that she was a Methodist¹, she stated that the teaching of the religion was “thou shall not kill” and was then asked the essential question on whether it would effect her ability to

¹ The current policy of the United Methodist Church is found in its “Book of Discipline.” On the death penalty, it currently states:

The Death Penalty

We believe the death penalty denies the power of Christ to redeem, restore and transform all human beings. The United Methodist Church is deeply concerned about crime throughout the world and the value of any life taken by a murder or homicide. We believe all human life is sacred and created by God and therefore, we must see all human life as significant and valuable. When governments implement the death penalty (capital punishment), then the life of the convicted person is devalued and all possibility of change in that person’s life ends. We believe in the resurrection of Jesus Christ and that the possibility of reconciliation with Christ comes through repentance. This gift of reconciliation is offered to all individuals without exception and gives all life new dignity and sacredness. For this reason, we oppose the death penalty (capital punishment) and urge its elimination from all criminal codes.

From the Book of Discipline of The United Methodist Church - 2004.
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deliberate on a jury, Ms. McNair began crying and became “emotionally distraught” and unable to answer the question orally. Tr. p. 573, ll. 6-23. The impact and demeanor of her non-verbal response plainly answered the question.

The trial court conclusion that these religious beliefs were so deep-seeded and the emotional reaction as she attempted to separate herself from those beliefs which she was unable to is well-supported in this record. Simply put, her beliefs would (and did) substantially impair her ability to discharge her duties as a juror under law. The argument to the contrary ignores the reality of what occurred during the voir dire.

II. The prosecutor's comments about Sapp's crying during the verdict in his penalty phase opening do not require a new sentencing proceeding where (1) the matter was not preserved because there was no timely objection and motion for mistrial and (2) the comment was a proper response to the assertion of remorse made at the conclusion of the guilt phase. Further, a new sentencing proceeding would not be warranted where evidence of his remorse was presented as a factor in mitigation and a no adverse inference instruction was given concerning the right to remain silent.

In the Appellant's second argument, his contention is that the Solicitor's unobjected opening penalty phase comment about Sapp's crying when the verdict was read entitles him to a new sentencing proceeding because he characterized the crying as self-pity rather than remorse. For the reasons set forth below, this matter is not properly before this Court. Further, the brief comment, in light of the mitigation presentation of his remorse, Sapp's own apologies of sorrow to the victim's and a no adverse inference instruction, remove any error from the comments as asserted.

A. How the Issue was Raised

At the close of the guilt phase, Jessie Sapp made a personal closing statement to the jury.

Tr. 1545. In that statement he declared:

...I just wanted to say before you leave this courtroom that I'm not some kind of monster or madman. I really don't know what happened that night. And I just wish that we weren't all here today in this situation. I just hope you consider the facts.

Tr. p. 1545, ll. 6-12.

Apparently, when the jury reached its verdict in the guilt phase, Sapp began crying. See

Tr. p. 1606, ll. 23-24.

During the opening statement in the penalty phase, Solicitor Hoisington stated the following:

....You may have noticed that when Mr. Sapp was convicted, he cried. Ladies and gentlemen, there are all types of tears of sorrow and there are tears of self-pity. "Why me? Why does this have to happen to me?" No sorrow, that's what that was....

Tr. p. 1606, l. 24 - p. 1507, l. 4. The prosecutor went on to describe the fact that the person seen in court was not the person that was there that night. Tr. p. 1607, ll. 5-20. He stated it was his intent to give an overview in the next day or two "of who Jesse Sapp really is." Tr. 1607. No objection was made by the defense to the prosecution comments about "crying" before or after the argument. Tr. 1604-1616.²

B. The Issue is Not Preserved

As noted in the Appellant's brief, there was no timely objection to the opening statement of the prosecutor. In addition, he failed to move for a mistrial based upon the comment. The failure to timely object to comments made during closing argument precludes appellate review of the particular issue. State v. Wiggins, 330 S.C. 538, 550, 500 S.E.2d 489, 496 (1998). In addition, the failure to move for a mistrial on the grounds of improper argument constitutes a waiver of the issue on appeal. State v. Richardson, 358 S.C. 586, 595 S.E.2d 858 (C.A. 2004);

² In Sapp's penalty phase argument, he made another personal statement wherein he stated:

...I'm sorry. There's nothing I can do to change it and I'm sorry...
I'm sorry. I'm not a bad person....

Tr. p. 1870, ll. 1-14.

State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981). The proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object and to have a record made of the precise language complained of and for the court to have a distinct ruling thereon. State v. Richardson, *supra*.

Since the issue was not preserved, the issue must be denied.

**C. New Sentencing is Not Warranted Where He Cried
and said He was Sorry**

It must be noted that every trial is unique and circumstances arise which must be addressed by either party. Such a circumstance occurred when Sapp began crying when the guilty verdicts were read. It cannot be seriously questioned that crying may reflect both sorrow and remorse evident to the jurors. However, it must also be evident that crying may also and equally suggest other viable emotions - self-pity and fear of the punishment among them.

In his brief before this Court, the Appellant ignores that he was presenting at the conclusion of the guilt phase in his statement and later crying, evidence which could suggest sorrow and remorse. Similarly, he ignores that underlying the defense presentation in mitigation was his theme of sorrow and remorse for the victims as a non-statutory mitigating factor. See, Tr. 1829 ("Jesse knew what he did was wrong"), Tr. 1869-70 (Sapp's comments about being sorry).

In the cases relied upon by Appellant, three themes are presented (1) the defendant has no duty to prove remorse to avoid the death penalty and (2) the defendant has the right to remain silent and therefore does not have to say he is sorry. See, State v. Sloan, 278 S.C. 435, 298 S.E.2d 92, 95 (1982); State v. Arther, 290 S.C. 291, 350 S.E.2d 187, 191 (1986); State v.

Cockerham, 294 S.C. 380, 365 S.E.2d 22, 23 (1988). Compare Six v. Delo, 94 F.3d 469 (8th Cir.1996) (courtroom demeanor comments) with State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000). Unlike any of these cases, the prosecutor was addressing and commenting on what had occurred in the jury's view. As such it was permissible to challenge the suggestion of his remorse as a mitigating factor.

It should be noted that a defendant's remorse for a capital crime has been held to be a non-statutory mitigating circumstance entitled to consideration by a jury. See; McConnell v. State, 102 P.3d 606 (Nev. 2004)(evidence of remorse is mitigation and evidence of lack of remorse can be used to rebut); People v. Combs, 101 P. 3d 1007 (Cal. 2004)(prosecutor may comment on capital defendant's lack of remorse as relevant to question of whether remorse exists as a mitigating circumstance, so long as he does not suggest the lack of remorse is an aggravating factor); State v. Gapen, 819 N.E.2d 1047 (Ohio 1994)(capital defendant's remorse and apology to victims are entitled to weight in mitigation); State v. Thompson, 604 S.,E.2d 850, 864 (N.C. 2004)(submission of mitigating factor that defendant had expressed remorse proper).

In Smith v. State, 756 So. 2d 892, at 911 (Ala. 1998), the court held prosecutorial comment about lack of remorse in argument was presented only to show the existence or lack thereof of a mitigating circumstance was not reversible error. In a related matter, in State v. Simmons, 944 S.W.2d 165 (Mo. Banc 1997), the Court found no error in asking a detective if the capital defendant ever said he was sorry in an interview to rebut "the possible inference of remorse the jury might have made from the fact that Simmons was crying." Simmons, at 176.

In Commonwealth v. Fletcher, 861 A.2d 898 (Pa. 2004), the Pennsylvania court held that a prosecutor's comment in closing that there had been no remorse by the defendant did not

constitute an impermissible reference on his right to remain silent, but was made in response to the defendant introduction of mitigation evidence concerning his character. The court found it was intended to mean the jury should consider his lack of remorse and did not imply any duty to testify. The Pennsylvania prosecutor explicitly limited his remarks to the defendant's non-verbal demeanor and behavior during trial and the morning of the murders. In addition, like in Sapp's case, the jury was instructed on no adverse inference instructions. See Tr. 1877-78. Also, Kandies v. Polk, 385 F.3d 457 (4th Cir. 2004)(remorse as mitigation).

However, in State v. Robinson, 146 S.W.3d 469 (Tenn. 2004), the Court held a prosecutor's argument asserting a lack of remorse as a factor was error, but harmless in view of a cautionary instruction that "it is not proper rebuttal because the defendant did not argue his remorse as a mitigating factor." Id. at 527.

This Court must recognize the power that expressions by a defendant of remorse and sorrow to the jury may have to the outcome. The assertions suggested by the Appellant in his brief suggests that a capital defendant's expressions of sorrow or remorse must go unchallenged by the prosecution. The law, however, makes no such demand, where, as here, the comments were ameliorated by the no adverse inference instruction (Tr. P. 1877, l. 23 - p. 1878, l. 11) and the clear burden of proof instructions for aggravating factors placed upon the state (Tr. 1878-79, 1884-86) and the fact that the existence of mitigating circumstances need not be found beyond a reasonable doubt. Tr. 1889. Contrary to the claim, the state did not argue a lack of remorse as a reason to impose the death penalty. Rather, it merely challenged the fact that the existence of his tears equated with the existence of remorse and sorrow for the crimes. New sentencing is not required under the facts of this case.

III. The trial judge did not err in sustaining the state's objection to the defense counsel's question of co-defendant/accomplice Kathryn Boles "would she like to see Jesse put to death" where it was inappropriate. Further, any alleged error was harmless in light of family members testimony concerning their request not to take Sapp's life.

In his brief, he contends that the trial court erred in disallowing a response by co-defendant Kathryn Boles on the question of "would she like to see Jesse put to death" (Tr. P. 1716, l. 11), based upon the precedent of this Court in State v. Wise, 359 S.C. 14, 27, 596 S.E.2d 475, 481 (2004) and State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, 524 (2000). Respondents submit that the judge did not abuse his discretion in sustaining the state's objection to the potential testimony. Further, any alleged error was harmless in light of relative's testimony making a plea for mercy on his behalf.

How the Issue was Raised

During the penalty phase, the State called Kathryn Boles to testify. During her testimony, she revealed that she was now 21 and had known Sapp since she was 15. Tr. 1689. She described the events of July 6-7, which resulted in the death of Trooper Johnson. Tr. 1690-99. She noted that as a result, she had been arrested and then released on bond after four months in jail with certain conditions including drug treatment. Tr. 1700. Further, on that date, she had pled to "harboring a fugitive" and "possession of Xanax" arising from the incident. Tr. 1700.

In her testimony she also described meeting Sapp when she was 15 working at an escort service and then described their relationship and problems with drugs and the law. Tr. 1703-13. She described Sapp's prior arrest for five (5) pounds of marijuana (Tr. 1704-05) and two (2)

incidents when he had pulled a gun on other men who had shown an interest in her. Tr. 1706-11.

On cross-examination, the defense tried to develop that upon Sapp's arrest, he sought to take responsibility for the drugs in the truck. Tr. 1713. He also tried to show that Sapp had tried to get her off her drug habit. Tr. 1714. However, she denied knowing that he was on drugs that night and had not told her he was on morphine, but she assumed it. Tr. 1715-16.

Pertinent to this issue, the following occurred:

DEFENSE COUNSEL: Do you think Jesse was in love with you?

BOLES: Yes, I do.

Q Were you in love with Jesse?

A No, I was not.

Q But you did like him, obviously. You hung around with him.

A I love him, but I do not want to be with him.

Q Okay. Would you like to see Jesse put to death?

SOLICITOR: That's inappropriate, you honor.

THE COURT: Sustained. Don't answer the question. That's an inappropriate question.

Tr. p. 1716, ll. 4-16. Defense counsel asked Boles no further questions. Tr. p. 1716, l. 17.

During the penalty phase his mother, Cathy Catchings, testified: "I'm begging you, please don't take my son's life... Please if you kill my son, you're going to devastate the community again and more families. Please don't do it. Please don't kill him." Tr. p. 1843, ll. 6-12.³

³ At the conclusion of the testimony, the solicitor asked the court to admonish the defense that "they're not supposed to plead not no [sic] execute, but simply to ask for mercy..." The court stated he would make that comment. Tr. 1844.

James Catchings, the Appellant's nine (9) year old brother testified that he was like a father to him. Tr. 1846. He stated: "if he was gone from me... that would be the worst thing ever if he just was gone." Tr. 1847-48.

LAW/ANALYSIS

Respondents have not been able to locate any case in the U.S. to hold that it is reversible error to preclude or require a co-defendant-accomplice to express to a jury whether he wants his co-defendant to die or to make a general plea of mercy on his behalf. The Appellant seeks to enter this thicket because in addition to being an accomplice with him in the crimes that resulted in Trooper Johnson's death, she had a six (6) year relationship with him and had been his girlfriend during that period.

A capital defendant is prohibited from directly eliciting the opinion of family members or other penalty-phase witnesses about the appropriate penalty. State v. Wise, 359 S.C. 14, 596 S.E.2d 8 (2004). In Wise, the Court stated as follows:

Such questions go to the ultimate issue to be decided by the jury-- life in prison versus the death penalty--and are properly reserved for determination by the jury. State v. Matthews, 296 S.C. 379, 393, 373 S.E.2d 587, 595 (1988) (affirming exclusion of family members' opinion about appropriate penalty and what effect the death penalty would have on them, although defendant could show no prejudice because his mother expressed her opinion to jury despite judge's ruling); State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981) (whether death penalty should be imposed is an ultimate issue reserved for jury's determination), overruled on other grounds by Torrence, supra.

Similarly, a capital defendant may not present a penalty-phase witness to testify explicitly what verdict the jury "ought" to reach. Torrence, 305 S.C. at 51, 406 S.E.2d at 319. A capital defendant may not present witnesses merely to testify of their religious or philosophical attitudes about the death penalty. *Id.*

On the other hand, a capital defendant may present witnesses who know and care for him, and who are willing on that basis to plead with the jury for mercy on his behalf. Thus, a close relative of a defendant, such as his mother, may make a general plea for mercy for the life of her son. Torrence, 305 S.C. at 51,

406 S.E.2d at 319. A close relative of a defendant, such as his sister, may be asked whether she wants the defendant to die, which is akin to asking her to make a general plea for mercy and not explicitly directed toward eliciting her opinion of what verdict the jury should reach. State v. Johnson, 338 S.C. 114, 125-127, 525 S.E.2d 519, 524-525 (2000) (while trial court erred in limiting sister's testimony, defendant was not prejudiced because sister was able to make a general plea for mercy on his behalf and clearly expressed her love and affection for him).

Wise, supra.

The problem with the Appellant's approach is that Boles was not merely a witness who may know and care for him according to her own testimony, but an accomplice in the criminal deeds which may lead to his ultimate execution and in comparison her own ultimate sentence. Stated another way, by lowering the bar on him, she would necessarily lower the proportional bar on her own fate. Similarly, in contrast, by shifting all the responsibility to him and suggesting death (she wants him to die) rather than life, she may assist in her own fate. The lack of relevance in this setting leads back to the reasonableness of the dicta in Matthews when similar questions were not approved. In its discretion, the trial judge did not err in allowing a co-defendant to express whether she wanted her co-defendant to live or die.

Alternately, assuming the question could be asked there was no prejudice arising from the court's actions. Johnson is persuasively on point. In Johnson, 338 S.C. 114, 125-127, 525 S.E.2d 519, 524-525 (2000), the Court held that while trial court erred in limiting sister's testimony, defendant was not prejudiced because sister was able to make a general plea for mercy on his behalf and clearly expressed her love and affection for him. As the court stated: "However, despite the trial court's ruling which limited her testimony, Johnson's sister was able to make a general plea for mercy on her brother's behalf. In addition to her testimony concerning their abusive family life, she clearly expressed her love and affection for Johnson at trial. Therefore,

we conclude Johnson has failed to demonstrate that he was prejudiced by the trial court's ruling.”

Similarly, Kathryn Boles was able to state that she felt that Sapp loved her and although she stated at one point she was not in love with him, she stated “I love him, but I do not want to be with him.” Tr.p. 1716. Like Johnson, Sapp has failed to prove prejudice.

Further, prejudice cannot be shown because “mercy” testimony was presented from his aunt Susan Lantz, his mother Cathy Catchings and his brother James. In particular his mother expressed to the jury her love and request “please don’t kill him.” Tr.p. 1843. Any error was removed by this testimony. A new trial is not warranted.

IV. The trial court did not err in failing to *sua sponte* instruct the jury on the statutory mitigating circumstance set out in S.C. Code §16-3-20 (C)(b)(8): “the defendant was provoked by the victim into committing the murder” where no request was made by defense counsel and it was not warranted by the evidence where under the defendant’s version he was “provoked” by the anticipation of a lawful arrest on being a fugitive.

In his fourth assertion, Sapp makes another unpreserved claim that the trial judge erred in failing to instruct on the statutory mitigating circumstance: “the defendant was provoked by the victim into committing the murder” provided in S.C. Code §16-3-20 (C)(b)(8). As set out below, the defense counsel never requested this particular circumstance and did not object to the failure to charge it. State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996) (contemporaneous objection required to preserve issue for appellate review); See, e.g., State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993) (failure to request jury instruction acts as waiver of right to complain about issue on appeal). For this initial reason, relief must now be denied.

Section 16-3-20(C)(b)(6) authorizes the trial judge to instruct the jury on certain statutory mitigating circumstances that may be supported by evidence. The trial judge has a duty to review all statutory mitigating circumstances and instruct the jury as to any circumstances which may be supported by the evidence and not merely those requested by the defendant. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990) (citing State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987)). In deciding which statutory mitigating circumstances may be supported, the trial judge is concerned only with the existence of the evidence, not its weight. *Id.*

At the conclusion of the sentencing phase, the trial court held a conference with counsel concerning the presentation of instructions and mitigating circumstance. Tr.p. 18489-1851. In the conference he determine that there was evidence existing to give the following statutory

mitigating circumstances:

1. The defendant has no significant history of prior criminal conviction involving the use of violence against another person;
2. The murder was committed while the defendant was under the influence of mental or emotional disturbance;
3. The capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
4. The age or mentality of the defendant at the time of the crime.

§ 16-3-20(C)(b)(1), (2), (6) and (7). Tr. 1850-1851. The court then specifically asked defense counsel if there were any additional requests from Mr. Sapp by way of instruction. Tr.p. 1851, l. 15-20. Defense counsel Archer advised the court: "no, sir." Tr.p. 1851, l. 22-25.

The record reveals that the jury was instructed on these factors. Tr. p.1888-89. The jury was also instructed to consider non-statutory circumstances. Tr. 1889. There were no exceptions or objections to the jury charge as given by the defense. Tr.p. 1892-1893.

The judge's procedure was in full compliance with State v. Victor, 300 S.C. 220, 387 S.E.2d 248 (1989) and State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816, 823 (1990), which requires the judge to make an initial determination of which statutory mitigating circumstances have evidentiary support and then to allow the defendant to request any additional statutory mitigating circumstances supported in the record. Here, the judge gave defense counsel an opportunity to request additional statutory mitigating circumstances. Defense counsel did not do

so. Accordingly, Victor and Caldwell were satisfied. Moreover, defense counsel never requested charge on the statutory mitigating circumstances pertaining to provocation. Absent such a request, the issue is not preserved. See, e.g., State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993) (failure to request jury instruction acts as waiver of right to complain about issue on appeal), cert. denied, 513 U.S. 831, 115 S.Ct. 105, 130 L.Ed.2d 53 (1994).

There was no evidence to support the mitigating factor.

Further, the claim that some evidence of the particular factor is present is not borne out by his own brief where he relies upon a redacted portion of his statement that “Sapp stated . . . that he saw the trooper come up with his gun out and that he, Mr. Sapp, pulled out his gun and shot and the trooper shot,” citing Tr.p. 1654, 1.2 - 1657, 1. 15. ⁴ What the Appellant ignored is the predicate sentences in the same paragraph:

“Mr. Sapp continued that since the trooper had his ID, had his drivers license, **Mr. Sapp figured that he had found out that he was wanted for escape from Charleston County.** *Sapp stated then that he saw the trooper come up with his gun out and that he, Mr. Sapp, pulled out his gun and shot and the trooper shot.* Mr. Sapp then stated that he got out and ran, got shot...”

Tr.p. 1656, 1. 22 - p. 1657, 1. 6. (Emphasis added). It is beyond reasonableness to suggest that a mitigating factor for a trooper being shot is because he is “provoked” because he knows he is going to be arrested by him for being a fugitive. Simply put, the provocation intended in this

⁴ It must be noted that no witness testified that Trooper Johnson had his weapon drawn prior to being shot. Witness Bryan DeWitt testified that he watched the entire incident. He stated that no guns were drawn by the troopers. Particularly, he could see the trooper’s hand with no gun out as he approached the passenger side. Tr.p. 1148-49. He saw the passenger (Sapp) get out of the car, pull his gun out and shoot. Tr.p. 1149, 1158. He stated that he saw the trooper walk around to the passenger side of the truck and when the passenger stepped out of the truck, he pulled his gun and shot before his feet hit the ground. Tr.p. 1149, 1160. In fact, Kathryn Boles, the driver of the stolen vehicle stated she did not believe he had anything in his hand. Tr.p. 1697.

statutory mitigator can never be the anticipation of a lawful arrest.

The Appellant appears to be correct that a similar issue has not been expressly presented to this court. The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence. State v. Norris, 253 S.C. 31, 168 S.E.2d 564 (1969); State v. Ivey 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997) (manslaughter not proper where he claims to have shot Officer as the latter was going for his gun: "... and the officer jumped back, and he was going for his gun, and I just panicked and I pulled it out and started shooting...." Ivey also said that he shot Officer because he "was scared." He maintains that because he was in a state of fear and acting in response to Officer going for his gun.) More specifically, State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), states that a lawful arrest or detention in a lawful manner by an officer will not constitute an adequate provocation for heat of passion reducing the grade of the homicide to manslaughter; nor will other lawful acts of officers while in the discharge of their duties constitute adequate provocation. This is precisely the situation we have in the present case. The issue of the existence of mitigation as provocation can not be presented as a matter of law in this setting of a lawful arrest. See, State v. Green, 66 Ohio St.3d 141, 609 N.E.2d 1253 (Ohio 1993) (A defendant does not act under "duress, coercion, or strong provocation" when she repeatedly stabs a victim who pulls a knife on her as she was robbing him); State v. Coleman 85 Ohio St.3d 129, 707 N.E.2d 476, (Ohio 1999) (Legal problems resulting from defendant's voluntary choice to sell drugs did not qualify as "duress, coercion, or strong provocation," for purposes of weighing aggravating and mitigating circumstances in aggravated murder prosecution arising from defendant's execution of witness in

order to escape prosecution on drug charges).⁵ For this additional reason he has failed to show entitlement to the instruction on mitigation as a matter of law.

⁵Related to this issue is the existence of provocation in the manslaughter setting. See State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984), cert. denied, 471 U.S. 1006, 105 S.Ct. 1873, 85 L.Ed.2d 165 (1985) (evidence that victim was defending himself from armed robbery and got killed in the process not sufficient legal provocation to warrant voluntary manslaughter charge). Furthermore, in State v. Tucker, 324 S.C. 155, 171, 478 S.E.2d 260, 268 (1996), the court held Appellant's financial problems, even if they did lead him to commit crimes, cannot serve as sufficient legal provocation to reduce a murder charge. The provocation must come from some act of or related to the victim in order to constitute sufficient legal provocation. See State v. Franklin, 310 S.C. 122, 125, 425 S.E.2d 758, (Ct.App.1993) ("The provocation of the deceased must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection") (emphasis added); State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985) (need of money does not constitute legal provocation).

V. **The Court had subject matter jurisdiction to sentence the Appellant to death since the Appellant was indicted for murder and the State made statutory notice of intent to seek the death penalty pursuant to S.C.Code Ann. § 16-3-26 and notice of evidence in aggravation pursuant to § 16-3-20 which specifically designated the aggravating factors. Contrary to Appellant's claim, *Ring v. Arizona* does not create a new state law subject matter jurisdictional requirement that statutory aggravating factors be placed in the murder indictment, in addition to the elements of murder. Further, this Court's intervening decisions in *State v. Downs*, *State v. Wood* and *State v. Crisp* resolve this same issue adversely to the Appellant.**

In his final argument, Sapp raises a claim, for the first time, that the plea court lacked subject matter jurisdiction to sentence the Appellant to death under South Carolina law because his April 9, 2003 indictment for murder did not include and list the statutory aggravating factors. He basis this claim on the decision of *Ring v. Arizona*, 536 U.S. 584 (2002). Respondents submit that the *Ring* decision which established a constitutional requirement that juries make factual determinations of aggravating factors in capital cases did not establish any requirement for South Carolina grand juries to pass upon the existence of aggravating factors in an indictment. This same claim has recently been rejected by this Court in *State v. Downs*, 361 S.C.141, 604 S.E.2d 377 (2004); *State v. Wood*, __ S.C. __, __ S.E.2d __, 2004 Westlaw 2851808 (S.C. 2004), and *State v. Crisp*, __ S.C. __, __ S.E. 2d __, 2005 Westlaw 3127977 (S.C. Jan. 24, 2005). His complaint to the contrary must be rejected.⁶

⁶In his argument, the Appellant relies solely on state law but then relies upon *Apprendi v. U. S.*, 530 U.S. 466 (2000) and *Ring* to make a due process type argument rather than one which lies in subject matter jurisdiction. The "Fifth Amendment Indictment Clause", however, this is not applicable to the states. See *Hurtado v. California*, 110 U.S. 516, 534-35, 4 S.Ct. 111, 120-21, 28 L.Ed. 232 (1884) (due process clause of the Fourteenth Amendment does not incorporate Fifth Amendment right to be charged by a grand jury indictment). The United States Supreme Court has never applied the Fifth Amendment's guarantee to indictment by a grand jury to state prosecutions. *Alexander v. Louisiana*, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226-27, 31 L.Ed.2d 536, 543-44 (1972); see also *Hodgson v. Vermont*, 168 U.S. 262, 272, 18 S.Ct. 80, 83, 42 L.Ed. 461, 464 (1897) ("[T]he words 'due process of law' in the Fourteenth Amendment of the Constitution of the United States do not necessarily require an indictment by a grand jury in a

1. The Plea Court had subject matter jurisdiction as a matter of state law.

The record reveals that the Appellant was indicted for murder on April 9, 2003. *State v. Sapp, 2003-GS-08-0686*. R. _____. In the indictment, he was charged "that Jesse W. Sapp did in Berkeley County on or about the 7th day of July 2002 feloniously, wilfully and unlawfully of his malice aforethought, kill and murder South Carolina Highway Patrol Trooper Kenneth J. Johnson by means of a gunshot wound, and that Trooper Johnson did die in Berkeley County as a proximate result of that gunshot wound on or about the 7th day of July, 2002. This action being in violation of Section 16-3-10 of the South Carolina Code of Laws (1976)(as amended)." R. _____ 473.

On April 9, 2003 the prosecution re-served both the notice of intent to seek the death penalty and notice of evidence in aggravation in light of this intervening indictment consistent with S.C.Code Ann. § 16-3-26 (1973)⁷ R. _____.⁸ R. _____. In those notices the following pertinent matters were set out:

Notice of Intention to Seek the Death Penalty

prosecution by a State for murder."); *Hurtado v. California*, 110 U.S. 516, 538, 4 S.Ct. 111, 122, 28 L.Ed. 232, 239 (1884) (same). In observing that it had never applied the above-noted Fifth Amendment guarantee to states, the Supreme Court expressly stated that "the Due Process Clause ... does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury." *Alexander*, 405 U.S. at 633, 92 S.Ct. at 1226-27, 31 L.Ed.2d at 543.

⁷ § 16-3-26. *Punishment for murder: notice to defense attorney of solicitor's intention to seek death penalty; appointment of attorneys for indigent; investigative, expert or other services.*

(A) Whenever the solicitor seeks the death penalty he shall notify the defense attorney of his intention to seek such penalty at least thirty days prior to the trial of the case...

⁸ § 16-3-26 states in pertinent part: "...Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible..."

FURTHERMORE, PLEASE TAKE NOTICE that the State of South Carolina, pursuant to Section 16-3-20(B) and (C) of the South Carolina Code of Laws, hereby gives notice of the following aggravating circumstances:

1. The offender by his act of murder knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person. Section 16-3-20(C)(a)(3), South Carolina Code of Laws.
2. The murder of a state or local law enforcement officer during or because of the performance of his official duties. Section 16-3-20(C)(a)(7), South Carolina Code of Laws.

R. ____ .

Notice of Evidence in Aggravation.

Pursuant to § 16-3-20(B) of the South Carolina Code of Laws, the following evidence in aggravation will be offered by the State during the sentencing phase of the death penalty trial of Jesse W. Sapp: . . .

2. All testimony and evidence adduced at the guilt phase that is probative to the issue of the Murder of a State or local law enforcement officer during or because of the performance of his official duties.
3. Any and all evidence relating to the Defendant knowingly creating a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person, and all other admissible non-statutory aggravating circumstances.

R.p ____.

In *State v. Butler*, 277 S.C. 452, 290 S.E.2d 1, 3-4 (1982), the South Carolina Supreme Court held that listing the statutory aggravating circumstances was not required in an indictment. Respondents submit that the court had subject -matter jurisdiction over the murder charge to sentence the Appellant to death. This analysis need not go further on a claim of subject matter

jurisdiction.

At no time during the sentencing hearing or before did the Appellant or his counsel make either a Due Process or “subject-matter jurisdiction” argument based upon any alleged failure to allege the statutory aggravating factors in the indictment or present the matters to the grand jury.

As in Downs, Wood and Crisp, the Appellant’s argument is not one of “subject matter jurisdiction,” but appears instead to be a Due Process argument. He appears to be attempting to avoid the procedural bar which exists to a free-standing unobjected constitutional claim, by asserting the matter as a “subject matter jurisdiction ” argument. However, as stated below, the valid indictment and jurisdictional condition precedent were met, as a matter of state law by the murder indictment and the state’s notices of intent to seek the death penalty. His implicit Due Process assertions do not rise to a subject matter jurisdiction claim. Therefore, those arguments are barred. See State v. Perez, 334 S.C. 563, 514 S.E.2d 754 (1999) (issues not raised to and ruled upon by the trial court will not be considered on appeal).

In seeking relief from his sentence of death, petitioner cites to a series of United States Supreme Court cases that, he contends, dictate a conclusion that he was improperly sentenced to death because the aggravating factors supporting his death sentence were not alleged in his indictment for murder. The thrust of each of these cases--generally based on the reasoning espoused in *Apprendi* and developed in *Ring*--is that for a defendant to be subjected to a punishment exceeding that established for the offense of conviction, the jury also must find beyond a reasonable doubt the additional facts subjecting the defendant to the greater punishment. As applied to cases in which a sentence of death is sought, these cases require that the jury find beyond a reasonable doubt the aggravating factors that subject the defendant to the

greater penalty. See *Ring*, 122 S. Ct. at 2432, 2443.

At the time petitioner was indicted and pled guilty, this State followed the process that an indictment for murder afforded the trial court jurisdiction to try and sentence a defendant to death if that penalty were sought by the State.⁹ While notice to the defendant certainly was required, that notice was sufficient if provided in a Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation, as contemplated by South Carolina Code Section 16-3-20(B). See *State v. Butler*, 277 S.C. 452, 290 S.E.2d 1, 3-4 (1982).

Petitioner argues that under the holding of *Ring*, this process was insufficient to vest the trial court with jurisdiction to sentence him to death. Although petitioner contends that the trial court was in fact without jurisdiction to impose a capital sentence because the aggravating factors were not set forth in the indictment, the trial court in fact properly exercised jurisdiction over petitioner's sentence because *Ring* does not impact the exercise of jurisdiction over a capital defendant in this State.

2. Because *Ring v. Arizona* nowhere considers or holds that the aggravating factors be set forth in a state court indictment, *State v. Butler* remains the applicable law of this State and the sentence of death comported with due process because the jury considered and found beyond a reasonable doubt certain aggravating factors.

In *State v. Crisp*, the Court conclusively rejected relief on this ground. Therein, the Court most recently stated the following:

III. SUFFICIENCY OF INDICTMENT AFTER RING V. ARIZONA

[4] Appellant contends the circuit court lacked subject matter jurisdiction in his case because the indictment did not identify any aggravating factor which exposed

⁹ The pertinent sentencing statute for murder, §16-3-20, sets forth: "(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years...." Therefore the crime of murder carries these statutory sentences, including death.

him to the death penalty. Appellant relies primarily on Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Jones v. U.S., 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); and Ring, *supra*. Under those cases, Appellant argues, aggravating circumstances necessary to impose the death penalty are considered elements of the crime of murder in a capital case. A jury must find the presence of aggravating circumstances beyond a reasonable doubt before the death penalty may be imposed. Concomitantly, Appellant contends, the defendant is entitled to an indictment which gives him pretrial notice of which aggravating circumstances the State intends to rely on at sentencing.

We recently addressed this issue in Downs, 361 S.C. 141, 604 S.E.2d 377. In that case, we stated that :

[t]he [United States Supreme] Court expressly noted in both Apprendi and Ring that the cases did not involve challenges to state indictments. More important, the Fourteenth Amendment has not been construed to incorporate the Fifth Amendments Presentment or Indictment Clause. State law governs indictments for state-law crimes. Under South Carolina law, aggravating circumstances need not be alleged in an indictment for murder. The aggravating circumstances listed in S.C.Code Ann. § 16-3-20(C)(a) (2003) are sentencing factors, not elements of murder. The circuit court had subject matter jurisdiction to sentence Appellant to death.

Downs, 361 S.C. at ----, 604 S.E.2d at 380-81 (citations omitted).

Appellant argues his case is factually distinguishable from Downs, as previously explained. We do not find persuasive Appellant's effort to distinguish his case from Downs. We also note the State, as required by statute, timely notified Appellant of its intention to seek the death penalty and identified the aggravating circumstances and related evidence the State intended to use at trial. See S.C.Code Ann. §§ 16-3-20(B) and 16-3-26 (2003). Accordingly, we adhere to our opinion in Downs and reject Appellant's arguments for the reasons expressed in that case. The circuit court had jurisdiction in Appellant's case.

State v. Crisp, *supra*.

Thus, the constitutional protection to ensure that state defendants sentenced to death have the aggravating factors found by a jury beyond a reasonable doubt lies not in the State's Presentment Clause but in the state and federal Due Process Clauses. Viewed in this light,

petitioner received all the protection and process that he was due because--consistent with *State v. Butler* and South Carolina Code §§ 16-3-20(B), 16-3-26 and --he received notice of the prosecution's intent to seek the death penalty and notice of evidence in aggravation that the State would present to the jury and the jury thereafter considered those factors and found them beyond a reasonable doubt. Accordingly, the process followed in this case--and followed in all death penalty cases in this State to date--complies with all relevant constitutional requirements.

His claim of subject matter jurisdiction must be denied.

CONCLUSION

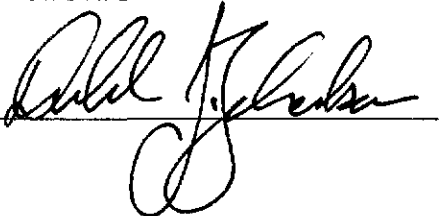
For all the foregoing reasons, the appeal must be dismissed and judgement affirmed.

Respectfully submitted,
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ATTORNEYS FOR RESPONDENT

By: 

Columbia, South Carolina
January 27, 2005

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge**

THE STATE,

Respondent,

v.

JESSIE WAYLON SAPP,

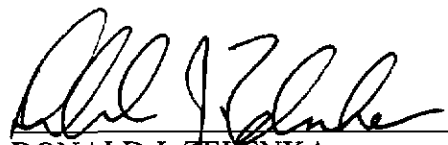
Appellant

RESPONDENTS DESIGNATION OF MATTER

Respondent proposes the following to be included in the Record on Appeal:

1. Respondents have no additions to the Appellants Designation of matter.

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



DONALD J. ZELENKA
Assistant Deputy Attorney General

January 27, 2005