

**Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001**

**William K. Suter**  
Clerk of the Court  
(202) 479-3011

March 7, 2006

**RECEIVED**

**MAR 14 2006**

**S.C. SUPREME COURT**

Clerk  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

Re: **Jessie Waylon Sapp**  
**v. South Carolina**  
**No. 05-9548**  
**(Your No. 26051)**

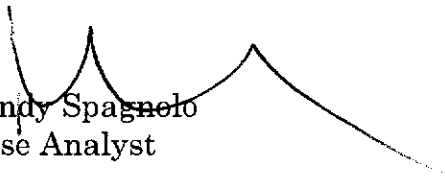
Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on March 1, 2005 and placed on the docket March 7, 2006 as No. 05-9548.

Sincerely,

**William K. Suter, Clerk**

by

  
**Sandy Spagnolo**  
Case Analyst

## South Carolina Office of Appellate Defense

Joseph L. Savitz, III  
Chief Attorney

Wanda H. Carter  
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1205 Pendleton Street, Room 306  
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Assistant Appellate Defenders

March 1, 2006

RECEIVED

MAR - 1 2006

S.C. SUPREME COURT

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

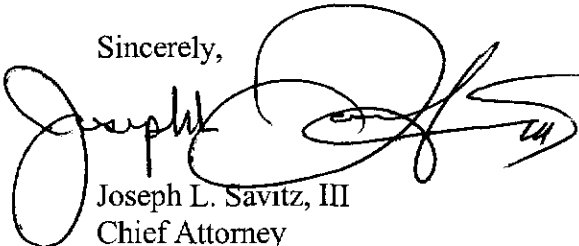
Re: Jessie Waylon Sapp v. State of South Carolina

Dear Mr. Shearouse:

Please be advised that I have filed a petition for writ of certiorari, appendix, motion for leave to proceed in forma pauperis in this case with the United States Supreme Court today. I have attached a copy of that petition.

Please contact me if you have any questions.

Sincerely,



Joseph L. Savitz, III  
Chief Attorney

JLS,III/kde  
Enclosure

cc: Donald J. Zelenka, Esquire

## South Carolina Office of Appellate Defense

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Chief Attorney

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S.C. SUPREME COURT

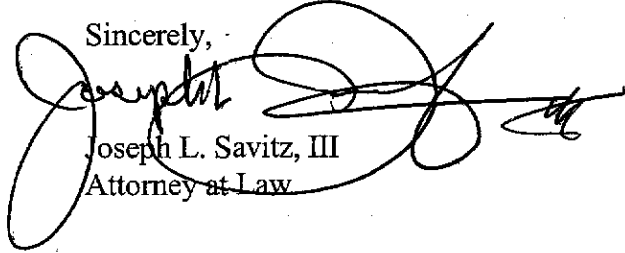
Honorable William K. Suter  
Clerk  
Supreme Court of the United States  
1 First Street, N.E.  
Washington, DC 20543

Re: Jessie Waylon Sapp v. State of South Carolina

Dear Mr. Suter:

Enclosed is the petition for writ of certiorari and the motion for leave to proceed in forma pauperis in the above-captioned case. The certificate of service is attached to the original petition. Representing the State of South Carolina is Donald J. Zelenka, Esquire, of the Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549. His phone number is (803) 734-3727. I represent petitioner Jessie Waylon Sapp. The other information required by Rule 29.5 is contained above. If additional information is desired, please contact me.

Sincerely,

  
Joseph L. Savitz, III  
Attorney at Law

JLS,III\kde

Enclosure

cc: Honorable Daniel E. Shearouse  
Donald J. Zelenka, Esquire

## South Carolina Office of Appellate Defense

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March 1, 2006

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S.C. SUPREME COURT

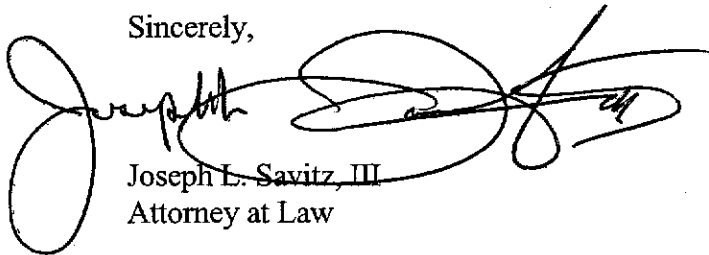
Honorable William K. Suter  
Clerk  
Supreme Court of the United States  
Washington, DC 20543

Re: Jessie Waylon Sapp v. State of South Carolina

Dear Mr. Suter:

Enclosed is petitioner's Certificate of Filing by Mail in the above-referenced case.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joseph L. Savitz, III', with a large, stylized flourish extending to the right.

Joseph L. Savitz, III  
Attorney at Law

JLS,IIIkde

Enclosure

cc: Donald J. Zelenka, Esquire  
Honorable Daniel E. Shearouse, Clerk

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 2005

No. 2005-\_\_\_\_\_

RECEIVED

MAR - 1 2006

S.C. SUPREME COURT

JESSIE WAYLON SAPP,

PETITIONER,

versus

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI TO THE  
SOUTH CAROLINA SUPREME COURT  
\_\_\_\_\_

JOSEPH L. SAVITZ, III  
Attorney at Law

South Carolina Office  
Of Appellate Defense  
1205 Pendleton St., Room 306  
Columbia, SC 29201  
(803) 734-1330

ATTORNEY FOR PETITIONER

## **QUESTION PRESENTED**

May the judge in a capital case excuse a potential juror for cause solely because she belongs to a religious denomination opposed to the death penalty, but where her personal beliefs would neither prevent nor substantially impair her ability to perform her duties as a juror in accordance with her oath and the judge's instructions?

TABLE OF CONTENTS

QUESTION PRESENTED.....1

TABLE OF CONTENTS.....2

APPENDIX INDEX.....3

TABLE OF AUTHORITIES .....4

CITATION TO OPINION BELOW.....5

JURISDICTION.....6

CONSTITUTIONAL PROVISIONS INVOLVED.....6

STATEMENT OF FACTS .....7

HOW THE FEDERAL ISSUE WAS RAISED BELOW.....8

HOW THE FEDERAL ISSUE WAS DECIDED ON DIRECT APPEAL.....11

WHY THE WRIT SHOULD BE GRANTED .....12

CONCLUSION .....15

**APPENDIX**

1. OPINION OF SOUTH CAROLINA SUPREME COURT .....A1

2. PETITION FOR REHEARING.....A7

3. ORDER OF THE SUPREME COURT OF SOUTH CAROLINA  
DENYING PETITION FOR REHEARING .....A9

## TABLE OF AUTHORITIES

### CASES

<u>Adams v. Texas</u> , 448 U.S. 38 (1980).....	12
<u>Darden v. Wainwright</u> , 477 U.S. 168 (1986).....	13
<u>Gray v. Mississippi</u> , 481 U.S. 648 (1987).....	13
<u>Lockhart v. McCree</u> , 476 U.S. 162 (1986).....	12
<u>State v. Jessie Waylon Sapp</u> , 366 S.C. 283, 621 S.E.2d 883 (2005).....	5
<u>Wainwright v. Witt</u> , 469 U.S. 412 (1985).....	11, 12, 13
<u>Witherspoon v. Illinois</u> , 391 U.S. 510 (1968).....	12, 13

### STATUTES

28 U.S.C §1257(a).....	6
------------------------	---

### CONSTITUTIONAL PROVISIONS

United States Constitution, Sixth Amendment.....	6, 12
United States Constitution, Fourteenth Amendment.....	6, 12

**SUPREME COURT OF THE UNITED STATES**

**October Term, 2005**

\_\_\_\_\_  
No. 05-\_\_\_\_\_  
\_\_\_\_\_

**JESSIE WAYLON SAPP,**

PETITIONER,

**versus**

**STATE OF SOUTH CAROLINA,**

RESPONDENT

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI TO THE  
SOUTH CAROLINA SUPREME COURT  
\_\_\_\_\_

Counsel for Jessie Waylon Sapp petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Court Supreme Court affirming his death sentence for the murder of a South Carolina Highway Patrolman.

**CITATION TO OPINION BELOW**

The South Carolina Supreme Court's opinion is reported as State v. Jessie Waylon Sapp, 366 S.C. 283, 621 S.E.2d 883 (2005), and is printed in the Appendix to this petition at pages A1–A6.

## **JURISDICTION**

The final judgment of the South Carolina Supreme Court in this case was entered October 24, 2005. The Supreme Court denied rehearing December 1, 2005. (The petition for rehearing and order denying rehearing are printed at pages A7–A10 in the Appendix to this petition.)

The Court's jurisdiction is invoked pursuant to 28 U.S.C §1257(a), since Sapp is asserting the deprivation of rights secured by the United States Constitution.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

This case involves the Sixth Amendment to the United States Constitution, which provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to ... trial by an impartial jury ..."

It also involves the Fourteenth Amendment, which provides that "no state shall... deprive any person of life, liberty, or property without due process of law."

## STATEMENT OF FACTS

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.

**How the federal issue was raised below**

The twelfth potential juror was Kathleen McNair, a black female. ROA p. 566, lines 17 & 18. She stated, "I don't believe in the death penalty because of my religion." ROA 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.

ROA 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?

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

line 25 – p. 575, line 9. Defense counsel disagreed. ROA p. 575, lines 11–16; ROA p. 577, lines 11–17. The judge granted the State’s motion, based on McNair’s answers and demeanor. ROA p. 576, line 15 – p. 577, line 10. Accordingly, he excused her from further service. ROA p. 577, line 19 – p. 578, line 2.

**How the federal issue was decided on direct appeal**

On direct appeal to the South Carolina Supreme Court, Sapp argued:

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

The Court affirmed the trial judge’s disqualification of McNair for cause, citing Wainwright v. Witt, 469 U.S. 412 (1985). 621 S.E.2d at 886.

## WHY THE WRIT SHOULD BE GRANTED

A judge in a capital case may not excuse a potential juror for cause solely because she belongs to a religious denomination opposed to the death penalty, but where her personal beliefs would neither prevent nor substantially impair her ability to perform her duties as a juror in accordance with her oath and the judge's instructions.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the 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 U.S. 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).

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 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.

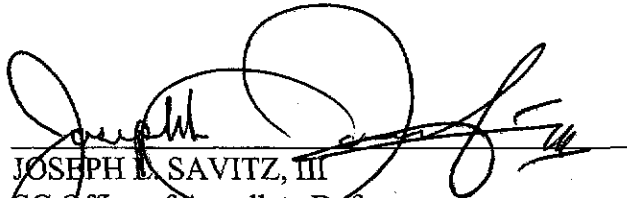
The fact that McNair believed her religion was opposed to the death penalty is, in the final analysis, irrelevant. The real issue is whether she was willing to temporarily set aside that belief in deference to the rule of law. (In this regard, the Solicitor’s statement to McNair that “You don’t have 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.”

CONCLUSION

The Court should issue a writ of certiorari and reverse the death sentence of Jessie Waylon

Sapp.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph M. Savitz, III", is written over a horizontal line. The signature is stylized and cursive.

JOSEPH M. SAVITZ, III  
SC Office of Appellate Defense  
1205 Pendleton St., Room 306  
Columbia, South Carolina 29201  
(803) 734-1330

ATTORNEY FOR PETITIONER

March 1, 2006

**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term, 2005**

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**No. 05 -**

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**JESSIE WAYLON SAPP,**

**PETITIONER,**

**v.**

**STATE OF SOUTH CAROLINA,**

**RESPONDENT**

---

**A P P E N D I X**

---

**JOSEPH L. SAVITZ, III**  
Attorney at Law

South Carolina Office  
Of Appellate Defense  
1205 Pendleton St., Room 306  
Columbia, S.C. 29201  
(803) 734-1330

**ATTORNEY FOR PETITIONER.**

H

Supreme Court of South Carolina.  
The STATE, Respondent,  
v.  
Jesse Waylon SAPP, Appellant.  
No. 26051.

Heard Sept. 21, 2005.  
Decided Oct. 24, 2005.  
Rehearing Denied Dec. 1, 2005.

Background: Defendant was convicted in the Circuit Court, Berkeley County, R. Markley Dennis, Jr., J., of murder and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court, Waller, J., held that:

- (1) trial court properly excused prospective juror for cause;
  - (2) defense counsel was entitled to question defendant's former girlfriend in sentencing phase as to whether she would like to see defendant put to death;
  - (3) erroneous refusal to permit defense counsel to question defendant's former girlfriend was harmless; and
  - (4) death sentence was not disproportionate.
- Affirmed.

West Headnotes

[1] Jury ⚡ 108  
230k108

Trial court properly excused prospective juror for cause in death penalty case, where prospective juror unequivocally stated, at the outset of voir dire, that she could not consider the law regarding imposing the death penalty because of her religious beliefs, and even though after further questioning prospective juror stated she could put aside her religion, prospective juror subsequently broke down in tears when questioned as to whether the teaching of her Methodist religion that "Thou shalt not kill" would affect her ability to deliberate on the jury, and was unable to answer the question. Code 1976, § 16-3-20(E).

[2] Jury ⚡ 33(2.15)  
230k33(2.15)

The exclusion of venire persons in capital prosecution simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction is unconstitutional.

[3] Jury ⚡ 108  
230k108

A prospective juror may be excluded for cause in capital prosecution 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. Code 1976, § 16-3-20(E).

[4] Criminal Law ⚡ 1134(5)  
110k1134(5)

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.

[5] Criminal Law ⚡ 1158(3)  
110k1158(3)

[5] Jury ⚡ 108  
230k108

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.

[6] Jury ⚡ 97(1)  
230k97(1)

The ultimate consideration in determining whether a juror is qualified to serve on a death penalty case is that the juror be unbiased, impartial, and able to carry out the law as explained to him. Code 1976, § 16-3-20(E).

[7] Criminal Law ⚡ 1158(3)  
110k1158(3)

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.

[8] Sentencing and Punishment ⚡ 1768  
350Hk1768

Defense counsel was entitled to question defendant's former girlfriend in sentencing phase of capital murder prosecution as to whether she would like to see defendant put to death, as such questioning did not elicit her opinion as to what verdict she thought jury "ought" to reach.

[9] Sentencing and Punishment ⚡ 1789(9)  
350Hk1789(9)

Erroneous refusal to permit defense counsel to question defendant's former girlfriend in sentencing phase of capital murder prosecution as to whether she would like to see defendant put to death was harmless; it was implicit from former girlfriend's testimony that she would have answered that she did not wish to see defendant put to death, and defendant's mother and nephew had testified at sentencing that they did not want defendant to be put to death.

[10] Sentencing and Punishment ⚡ 1679  
350Hk1679

[10] Sentencing and Punishment ⚡ 1731  
350Hk1731

Death sentence was not disproportionate in capital murder prosecution in which aggravating factors were that defendant had created a great risk of death to more than one person, and that victim was a police officer. Code 1976, § 16-3-25(C).

**\*\*884** Joseph L. Savitz, III, Acting Chief Attorney, South Carolina Office of Appellate Defense, of Columbia, for Appellant.

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:

**\*286** Appellant, Jessie Waylon Sapp, was convicted of the murder of a South Carolina Highway Patrolman in Berkeley County and was sentenced to death. [FN1] We affirm.

FN1. 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 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.

#### 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." **\*287** 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.

#### ISSUES

1. Did the trial court err in excusing a potential juror for cause due to her religious beliefs concerning the death penalty?

**\*\*885** 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

[1] 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.

\*288 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.

\*289 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.

\*\*886 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 \*290 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

(Cite as: 366 S.C. 283, \*290, 621 S.E.2d 883, \*\*886)

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.

[2][3][4][5][6][7] 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, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). However, a prospective juror may be excluded for cause when his views on capital \*291 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, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). See also *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004), cert. denied -- U.S. ---, 125 S.Ct. 2942, 162 L.Ed.2d 873 (2005); *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); 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), \*\*887 cert. denied, 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (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, 111 S.Ct. 229, 112 L.Ed.2d 183 (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 \*292 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. Duffey*, 579 Pa. 186, 855 A.2d 764 (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

(Cite as: 366 S.C. 283, \*292, 621 S.E.2d 883, \*\*887)

[8][9] 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, 121 S.Ct. 104, 148 L.Ed.2d 62 (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 \*293 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.

\*\*888 More recently, in *State v. Wise*, 359 S.C. 14, 596 S.E.2d 475, 481-482, cert. denied 543 U.S. 948, 125 S.Ct. 355, 160 L.Ed.2d 263 (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.

[FN2]

FN2. 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.

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 \*294 *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, 543 U.S. 980, 125 S.Ct. 485, 160 L.Ed.2d 359 (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, 105 S.Ct. 2368, 86 L.Ed.2d 266 (1985), overruled in part on other grounds *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

#### PROPORTIONALITY REVIEW

[10] We have conducted a proportionality review

(Cite as: 366 S.C. 283, \*294, 621 S.E.2d 883, \*\*888)

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, 120 S.Ct. 1434, 146 L.Ed.2d 323 (2000); *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991), cert. denied, 503 U.S. 993, 112 S.Ct. 1691, 118 L.Ed.2d 404, (1992); *State v. South*, 285 S.C. 529, 331 S.E.2d 775, cert. denied 474 U.S. 888, 106 S.Ct. 209, 88 L.Ed.2d 178 (1985).

AFFIRMED. [FN3]

FN3. 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, 117 S.Ct. 2441, 138 L.Ed.2d 201 (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).

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

366 S.C. 283, 621 S.E.2d 883

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THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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THE STATE,

RESPONDENT,

V.

JESSIE WAYLON SAPP,

APPELLANT

SC SUPREME COURT

2005 NOV -7 PM 4: 13

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Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

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Opinion No. 26051

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PETITION FOR REHEARING

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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.

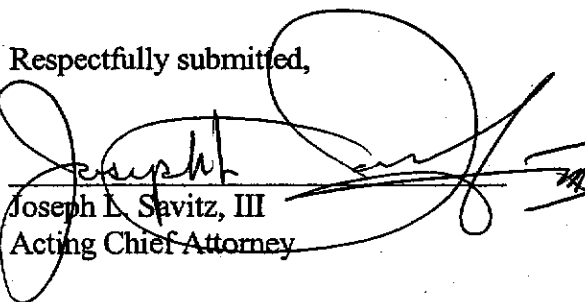
The Court wrote, "Although we agree that [Sapp's girlfriend] should have been allowed to testify as to whether she wished to see Sapp put to death, her failure to respond to this question was

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. ROAp. 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).

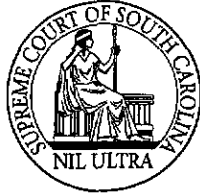
For these reasons, the Court should grant rehearing and reverse Jessie Waylon Sapp’s death sentence.

Respectfully submitted,



Joseph L. Savitz, III  
Acting Chief Attorney

This 7th day of November, 2005.



# 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.

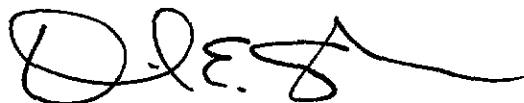
s/ Costa M. Pleicones J.

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.

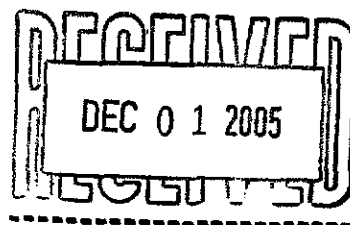
Very truly yours,



CLERK

DES/dmh

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



IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 2005

No. 05 - \_\_\_\_\_

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MAR - 1 2006

S.C. SUPREME COURT

JESSIE WAYLON SAPP,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS  
\_\_\_\_\_

Jessie Waylon Sapp requests leave to proceed in forma pauperis, in accordance with the provisions of Title 28 U.S.C. §1915. The affidavit of petitioner in support of this motion is attached, along with the petition for writ of certiorari.

Respectfully submitted,

  
\_\_\_\_\_  
JOSEPH L. SAVITZ, III  
Chief Attorney

1205 Pendleton St., Room 306  
Columbia, South Carolina 29201  
(803) 734-1330

ATTORNEY FOR PETITIONER.

This 1st day of March, 2006

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 2005

RECEIVED

MAR - 1 2006

No. 05 - \_\_\_\_\_

S.C. SUPREME COURT

JESSIE WAYLON SAPP,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
AFFIDAVIT OF JESSIE WAYLON SAPP  
IN SUPPORT OF MOTION TO  
PROCEED IN FORMA PAUPERIS  
\_\_\_\_\_

I, Jessie Waylon Sapp, being duly sworn, state that I am the petitioner in this case; that because of my poverty I am unable to pay the costs of or give security for this proceeding; that I believe I am entitled to redress.

The responses to the questions and instructions below relating to my ability to pay costs or give security are true.

1. Are you presently employed? No \_\_\_\_\_

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

\_\_\_\_\_

b. If the answer is no, state the date of your last employment and the amount of the

salary and wages per month which you received.

N/A

---

2. Have you received within the past twelve months any income from a business, progression or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

No

---

- a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

---

---

---

3. Do you own any cash or checking or savings account?

No

---

- a. If the answer is yes, state the total value of the items owned. \_\_\_\_\_

---

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

- a. If the answer is yes, describe the property and state its approximate value.

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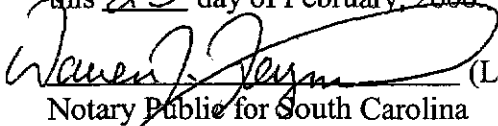
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5. List the persons who are dependent upon you for support and state your relationship to those persons. N/A

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

  
JESSIE WAYLON SAPP

SWORN to and subscribed before me  
this 23 day of February, 2006.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: Sept. 22 2008.

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STATE OF SOUTH CAROLINA

MAR - 1 2006

IN THE SUPREME COURT OF THE UNITED STATES SUPREME COURT

October Term, 2005

No. 05-\_\_\_\_\_

JESSIE WAYLON SAPP,

PETITIONER,

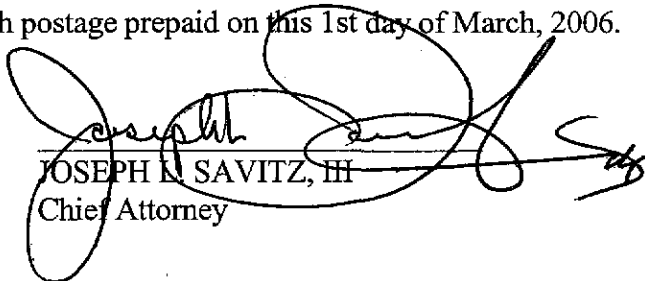
v.

STATE OF SOUTH CAROLINA,


RESPONDENT

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari, appendix, and the motion for leave to proceed in forma pauperis in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 1st day of March, 2006.

  
JOSEPH M. SAVITZ, III  
Chief Attorney

SWORN TO BEFORE me this 1st day of March, 2006.

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