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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

v.

FREDRICK ANTONIO EVINS,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the court erred by denying appellant's motion for a change of venue when the majority potential jurors had been exposed to extensive pretrial publicity, and where the news media had linked appellant's current murder charges to another, unrelated murder?

2. Whether the court erred by ruling that the state's preemptory strike against African-American potential juror Annie Davis was racially neutral, and did not violate Batson v. Kentucky, since Davis was a death penalty qualified juror, and the solicitor's purported explanation that she would be adversely affected and unable to be impartial because two of her sons were killed in a DUI traffic accident was not supported by the record?

3. Whether the court erred by ruling the solicitor's preemptory challenge against African-American potential juror Johnny Young was racially neutral, and did not violate Batson v. Kentucky, where the solicitor explanation that Young was a "life-prone juror" was not supported by the record?

4. Whether the court erred by excusing African-American potential juror Patricia Murphy for cause where Murphy strongly testified that she could impose the death penalty upon a murderer, since she was a qualified juror under the Wainwright v. Witt standard?

5. Whether the court erred by disqualifying African-American potential juror Sabrina Jenkins for cause under the Wainwright v. Witt standard where solicitor even acknowledged it appeared Jenkins had strong pro-death penalty views, since defense counsel correctly noted a pattern of striking African-American jurors had developed, and the solicitor's "concern" that Jenkins may be too strongly in favor of the death penalty was an apparent subterfuge?

6. Whether the court erred by disqualifying potential African-American juror Aaron Gray for cause where Gray testified he could impose the death penalty and sign the verdict form, where that he did not have any bias against the police, the state or for attorneys from the Public Defender's Office that he did not know, since Gray was a death qualified juror under the Wainwright v. Witt standard, and he was otherwise a qualified juror against any allegation of bias?

7. Whether the court erred by admitting highly inflammatory crime scene photographs, 70, 71, 72, 74, 75, 76, 77 and 80, particularly the photographs showing the nude victim had defecated on herself since this strongly invited a verdict based upon passion?

RESPONDENT'S STATEMENT OF THE CASE

a. Court Proceedings

The Appellant, Fredrick Antonio Evins, was indicted at the July 14th, 2003 term of the Spartanburg County Court of General Sessions for murder; kidnapping; criminal sexual conduct, first degree; and grand larceny. The charges arose from the February 13th, 2003 abduction and death of Rhonda Marie Ward. The state served a notice of intent to seek the death penalty.

Thomas A.M. Boggs, Karen M. Quimby and Christopher Brough, were appointed to represent Appellant. The case began at trial on November 8th, 2004 before the Honorable Edward W. Miller, Presiding Judge. The matter was prosecuted by Seventh Circuit Solicitor Harold W. Gowdy, III, Deputy Solicitors Barry J. Barnette and J. Donald Willingham, and Assistant Solcitor John C. Anthony. On November 15th, 2004, the jury found Appellant guilty of each offense.

The penalty phase began on November 16th, 2004. After hearing evidence in aggravation and mitigation, the jury was instructed on determining the existence of the following statutory aggravating circumstances:

1. The murder was committed while in the commission of a kidnapping.
2. The murder was committed while in the commission of criminal sexual conduct, first degree.
3. The murder was committed while in the commission of larceny with the use of a deadly weapon.
4. The defendant committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

The jury was advised to consider the following statutory mitigating circumstances:

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

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

3. The mentality of the defendant at the time of the crime.

The jury found the existence of each aggravating factor. The jury unanimously recommended a sentence of death. On that date, Judge Miller sentenced Evins to death for murder, thirty (30) years for criminal sexual conduct, first degree, and five (5) years for grand larceny.

b. Factual Summary

On February 13th, 2003, at approximately 7:00 am Rhonda Ward reported to work as manager of a Cigarettes 4 Less store. Surveillance tapes showed a man walked up to Ward, while still in the parking lot of the store. After talking for forty-five seconds, the man walked Ward backed to her car. After Ward got in the driver's side of the car, the man got in the passenger's side and Ward drove away. (R.; Tr. pp. 1392-1403). Friends and family never saw Ward again.

Later than morning, a car fitting the description of Ward's was seen by various people on the side of the road in front of an old apple orchard. (R.; Tr. pp 1424-1429; pp. 1440-1444). After reports of Ward's disappearance began, a father and son who saw what appeared to be Ward's car by the apple orchard on the morning of the 13th, decided to investigate that area themselves. On February 15th, 2003, her body was found faced in the orchard, nude and face down. (R.; Tr. pp. 1450-1465). Ward had been sexually assaulted and stabbed to death.

ARGUMENT

I. The trial court did not abuse his discretion by denying Appellant's motion for a change of venue based upon pre-trial publicity linking Appellant to an additional, prior murder.

Appellant's first contention is the trial judge erroneously denied his motion for a change of venue based upon pre-trial publicity. He claims that the newspaper articles and television news features which reported his connection to the unrelated murder of Demaris Huff prejudiced him to the point that he could not receive a fair trial in Spartanburg County. Specifically, Appellant alleges the "sheer pervasiveness of the coverage, together with the public connection to an unrelated murder, is sufficient . . . to create a presumption of prejudice." (Brief of Appellant at p. 15). The State disagrees and submits the trial judge did not abuse his discretion, which was supported by the thorough *voir dire* examination of the qualified jurors, and because Appellant has failed to demonstrate any actual prejudice.

During Appellant's first motion for a change of venue prior to voir dire the trial judge noted that the constant media coverage in the case amounted to "irresponsible journalism." However, the court also found that Appellant had not made a sufficient showing that it would be impossible to obtain an untainted jury. (R.; Tr. pp. 118-124).

After the *venire* had been sworn the trial judge made his opening remarks to the *venire* in which he explained the procedure followed in a death penalty trial, as well as the nature and purpose of individual *voir dire*. He assured the jurors there was no need to worry about having been exposed to media coverage of the case, but he needed to know what each juror recalled and whether they had formed an opinion of the case based on the coverage. He further instructed the jurors not to discuss

the case with anyone under any circumstances, including other jurors or family members; and, he instructed them not to read any newspaper, watch any television news or listen to any radio news. (R.; Tr. pp. 98-105). He then conducted individual *voir dire* of sixty-two members of the *venire* panel before qualifying forty-one jurors. (R.; Tr. pp. 132-1298).

In the course of qualifying these jurors, thirty-six *venire* members indicated on individual *voir dire* that they had either seen, read, heard or discussed the case in some manner. Four venire members could not recall if they knew something about the case. However, only one of these jurors indicated that they had formed an inalterable opinion as to Appellant's guilt or innocence, or the punishment to be imposed, based upon their exposure to extrajudicial information[1]. (R.; Tr. pp. 311-315). Twenty other jurors were excused because of their views on capital punishment or for some reason unrelated to exposure to media coverage.

Each juror who was qualified first stated that he or she could set aside any information which they may have received and base a decision solely on the evidence presented and the law as charged. Each qualified juror further stated that he or she was not aware of any bias or prejudice for or against either the State or Appellant; that the juror could give both parties a fair and impartial trial; and, that he or she would be open-minded as to the punishment to be imposed. Further, none of the twelve seated jurors in this case had knowledge of Appellant's connection in the murder of Demaris Huff.[2]

The change of venue motion was again discussed following voir dire, after which the trial

---

[1]This juror, Michael McGrath, informed the Court that he was related to James Huff. Huff was the husband of Demaris Huff, the victim of the unrelated murder for which Appellant was convicted. Huff testified briefly in the penalty phase of trial. (R.; Tr. pp. 2225-2227).

[2]Betty Kirby indicated knowledge of the Huff murder, but believed a suspect had not yet been arrested for the murder. (R.; Tr. pp. 933-934).

judge indicated:

> I don't think, based on the extensive questioning and the interviewing of prospective jurors, that any juror was allowed on the panel who could not set aside their views. And there was a fairly limited number of people who could, actually, give details about . . . I would have expected more people to know more about it is the way I would put it.

(R.; Tr. pp. 1322-1326; p. 1325, lines 11-19).

There was no error. A motion for a change of venue is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998); *State v. Manning*, 329 S.C. 1, 495 S.E.2d 191 (1997). When trial judge bases ruling denying motion for change of venue upon adequate voir dire of jurors who have been exposed to pretrial publicity, conclusion that objectivity of jury panel has not been polluted by outside influence will not be disturbed absent extraordinary circumstances. *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760 (1997).

Here, the trial judge and the parties engaged in extensive individual *voir dire* of the jury pool. As noted, each qualified juror stated that he or she could set aside any extrajudicial information the juror may have acquired, either through media exposure or otherwise, and render a decision based solely upon the evidence presented at trial and the trial judge's charge on the law. Each qualified juror also indicated he or she was not biased for or prejudiced against either party. Thus, there was no abuse of discretion under *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639 (1961); *Kelsey* and *Patterson, supra*.

Moreover, and assuming without conceding that Appellant is correct in his claim that the *venire* was "saturated with" media coverage of this case, his motion was still properly denied because

he failed to demonstrate *actual* prejudice. His naked assertion that pre-trial publicity in this case was so extensive that the concept of "presumed prejudice" required a change of venue has been rejected by this Court in *State v. Patterson*, supra; and *State v. Truesdale*, 278 S.C. 368, 296 S.E.2d 528 (1982). Mere exposure to pre-trial publicity does not automatically disqualify a prospective juror. *See Sheppard v. State*, 357 S.C. 646, 594 S.E.2d 462 (2004).

Here, twenty-two of the sixty-two *venire* members had no knowledge of this case. This alone undermines Appellant's claim concerning the extraordinary volume and saturation of media coverage. Of the remaining forty *venire* members, the vast majority had at most a cursory familiarity with some of the locations and fact of the case. Fewer still had any knowledge of Appellant's connection to the Huff murder, and as noted earlier, no member of the seated jury was aware of any connection between the two murders.

When jurors have been exposed to pre-trial publicity, a denial of a change of venue motion is not error when jurors are found to have the ability to lay aside any impressions or opinions and render a verdict based on the evidence presented at trial. *Irvin v. Dowd, supra*; *State v. Fowler*, 266 S.C. 203, 222 S.E.2d 497 (1976). It is the defendant's burden to demonstrate *actual* juror prejudice as a result of such publicity. *Sheppard v. State*; *supra.*; *State v. Longworth*, 313 S.C. 360, 438 S.E.2d 219 (1993). Here, Appellant has not met that burden.

The present case simply does not involve a massive "wave of public passion" caused by prejudicial pre-trial publicity, such as that presented in *Irvin v. Dowd, supra*. Unlike the present case, the trial court in *Dowd* excused over one-half of a panel of 430 *venire* members because their opinions of the defendant's guilt were so fixed that they could not be impartial and two-thirds of the petit jurors (8 of 12) had formed an opinion as to guilt. 366 U.S. at 728, 81 S.Ct. at 1645.

Here, some potential jurors knew some of the facts of this case – the unavoidable consequence of media coverage of murders and murder trials. However, jurors need not be ignorant of the case. It is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Dowd,* 366 U.S. at 723, 81 S.Ct. at 1642-1643. This Court has noted in numerous cases that jurors with extensive knowledge of the facts of a case, or even a prior death sentence imposed upon a defendant, may be properly qualified if they can lay aside this knowledge and be fair and impartial. *See, e.g., Sheppard supra.*; *Patterson, supra*; *State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990); *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990); *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985).

The State submits that the trial judge properly denied Appellant's motion for change of venue.

II. The trial judge did not err in finding no *Batson* error occurred in the solicitor's use of peremptory strikes against venire members Annie Davis and Johnny Young.

Appellant next contends that the trial court erred by finding that peremptory strikes used against black venire members Annie Davis and Johnny Young were not racially and did not violate *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). Respondents submit that the trial court did not err and reasonably applied the precedent of the United States Supreme Court in *Batson*.

A. Events at Trial

Appellant, was sentenced to death by a Spartanburg County jury that consisted of eleven (11) white jurors, one black juror, and one white and black alternate. The record reveals that the solicitor exercised seven peremptory challenges during the jury selection process to strike three black and four white jurors from consideration. (R.; Tr. p. 1314). After the strikes, Appellant's counsel objected, stating simply "we'd like to know race neutral reasons for #78 [Annie Davis], #399 [Johnny Young], and #154 [Rosetta Higgins]; the three black *venire* members struck by the state[3]. The trial court, while not finding that a *prima facie* case had been made, asked the solicitor to present a neutral explanation for his exclusion of the three black jurors. The solicitor advised the court:

> #78, Juror Annie Davis, we struck her. Mr. Barnette prosecuted a felony DUI in which her two sons were killed. Mr. Boggs, actually defended the Defendant. Ms. Davis didn't remember either one of those facts. What she did remember is the person that killed her two sons – and she used the word "killed" – received six years in prison.
>
> My concern is, why should a mother who lost two sons to somebody that got six years be asked to give death to Ms. Tessier's daughter who lost one life. That is our concern with Ms. Davis. The fact that she didn't remember meeting or talking to Barry Barnette who

[3]On appeal, Appellant does not challenge the strike of juror #154, Rosetta Higgins.

> prosecuted the case, doesn't remember the fact that Mr. Boggs defended the guy who got six years, and the fact that she used the words, I have two son that were killed. I don't want her weighing and balancing why my son's life was worth six years and the State is trying to put Fredrick Evins to death. . . .
>
> With respect to #399 [Young] . . . I'm not disputing he was qualified, but we may not have qualified more of a life pro juror that Mr. Young. He was – this morning, he initially began the *voir dire* process by saying, death is death. It's just killing somebody. We, as the Court remembers, argued that he was unqualified. We respect and accept the Judge's finding that he was, but he is beyond vacillation on death penalty. He is clearly life prone. And that's why we struck him.

(R.; Tr. p. 1315, lines 9-25; p. 1316, line 20 - p. 1317, line 4).

The trial court ruled that the solicitor had offered a non-discriminatory neutral reason for excusing Davis and Young. As to Young, the trial judge stated:

> I do agree with [the solicitor's] assessment that Mr. Young did appear to have – was one of the jurors with one of the largest problems with finding – would have one of the hardest times finding death. So I do agree with that.

(R.; Tr. p. 1317, line 22 - p. 1318, line 1).

the State to state for the record the reasons for striking two black jurors. I found that they have offered a neutral explanation, a non-discriminatory reason for excusing those two jurors particularly taking into consideration the responses given by the jurors with respect to imposition of capital punishment.

In summary, the defense struck twelve (12) white *venire* members and no black *venire* members. The State struck four (4) white *venire* members and three (3) black *venire* members. Further, the State seated one black *venire* member, Lizzie Frawley[4], and seated another black *venire*

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[4]Ms. Frawley was chosen foreperson of the jury.

member, Linda Means, as an alternate.

In *Batson v. Kentucky*, the Court held that a defendant has no right to a petit jury composed in whole or in part of persons of his own race. However, the Court held that the equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees a defendant that the State will not exclude members of his race from the jury *venire* solely on account of race or on the false assumption that members of his race as a group are not qualified to serve as jurors, *Id.* Under *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. *Id.*; *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.*

Here, no *prima facie* case of racial discrimination was made at trial. On appeal, Appellant compares Ms. Davis with *venire* member #137, Charley Gwinn. Upon questioning by the State, Gwinn, a white male, testified that two years before trial he had been "beat up" by a drunk. Gwinn further stated he showed up for court, and found out the case had been disposed of the previous day.[5] (R.; Tr. p. 1007). Defense counsel did not question Gwinn about the incident.

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[5]Gwinn was unsure if this was a magistrate court or circuit court offense.

Clearly, the incident involving Gwinn is dissimilar to Davis' experience. Davis had two sons killed as a result of a felony DUI. The perpetrator was represented by lead counsel Boggs and Assistant Solicitor Barnette, who participated in this trial, prosecuted. (R.; Tr. p. 1315). Although Davis eventually responded to questioning in a manner which qualified her as a potential juror, her initial colloquy with the court indicated the profound impact her sons deaths could have on her service as a juror:

The Court	. . . Would you serve as a fair and impartial juror and reach a verdict based on the facts presented at trial in accordance with my instructions on the law?
Davis	Well, your Honor, I done been through this before, so it would be kind of hard for me . . .
The Court	When have you been through this before?
Davis	Well, I had two sons to get killed at one time. . . back in 2001. . .
The Court	. . [K]eeping in mind the legal principles I've talked to you about, the presumption of innocence and the State's obligation to prove guilt beyond a reasonable doubt, could you, depending on the facts and the evidence presented at trial and the law that I would give you, could you find a defendant either guilty or not guilty depending on what you heard?
Davis	Well, to be truthful, I don't know
The Court	Okay, Well, what would your inclination be? What are you thinking? That's all we want to find out.
Davis	Well, right now, I don't have no idea.
The Court	Okay, would you have to hear the facts and the evidence before you made a decision about this case?
Davis	Your Honor, I still – I can't make up my mind. I don't know what happened to my two sons, and I haven't got over it yet.

(R.; Tr. p. 274, line 13 - p. 276, line 12).

The comparison of Gwinn and Davis indicates far different situations. Davis' emotions concerning the deaths of her sons were still raw. It would be impossible to know how these emotions could manifest themselves during the course of a death penalty trial. Particularly when the attorney's involved in her sons' case were active in this case.

Clearly, an inference of discriminatory exclusion was not raised under *Batson* where there was obviously no showing of a pattern of strikes. Further, no showing was alleged or presented that the solicitor's questions or statements during *voir dire* raised this inference. There was therefore no inference of purposeful discrimination on the basis of race because it did not establish a pattern of strikes against black jurors. His bare assertion to the contrary is without merit.

Assuming *arguendo* that this Court should find that a *prima facie* case existed, the trial court properly concluded that the State had come forward with racially neutral reasons for striking the black *venire* members. In *Batson*, the Supreme Court stated that the prosecutor's obligation is to articulate a "clear and reasonably specific" non-discriminatory explanation of why he struck the black jurors. *Id.* 106 S.Ct. at 1723-24 n.20. When that has been done, the ultimate question is one of credibility, *Id.* at 1724. The Supreme Court has made it clear that "unless a discriminatory intent is inherent in the explanation offered to defend the peremptory challenge, the reason offered will be race neutral." *Matthews v. Evatt*, 105 F.3d at 917.

In this case, the trial court contemporaneously found the State had offered neutral, non-discriminatory explanations for excusing the two jurors. While the disparate treatment of similarly situated prospective jurors of different races can be used to establish pretext, *Miller-El v. Cockrell*, 537 U.S. 322, 343-44, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), Appellant's trial counsel did not

point to any jurors similarly situated to those struck by the state that the State accepted, until the appeal.

Appellant notes on appeal that several white *venire* members were equivocal when initially asked whether they could render a death verdict. Young, however, equivocated throughout the entirety of his testimony:

-On whether he could be a fair and impartial juror:

> "Possibly I could, but I don't know." (R.; Tr. p. 1273, line 25 - p. 1274, line 8).

-On whether he could put aside anything he may have read or heard regarding the case:

> "I probably could." (R.; Tr. p. 1274, line 9 - p. 1275, line 13).

-On whether he could consider the evidence and return a sentence of life without parole:

> "I probably could." (R.; Tr. p. 1277, lines 5-21).

-On whether he could consider the evidence and return a sentence of death:

> That's a tough one. . . I'm not sure about that one. . . I really don't know. I don't know if I could or not. . . It's possible that I could, but I don't know." (R.; Tr. p. 1278, lines 5-20).
>
> ". . . I never really thought about it, but that would still be just like killing somebody. I mean, that's basically, the same to me . . . So, I mean, death is death. . . I like life better than death. . . (R.; Tr. p. 1279, lines 5-20)."
>
> "I probably could. But then again, I hear this little voice saying, you know, it's not right, but I probably could." (R.; Tr. p. 1280, lines 13-15).
>
> "Could I go ahead and give them the death penalty knowing I could give them life? . . . Yeah, probably. If all the evidence was there to prove it, yeah." (R.; Tr. p. 1292, lines 6-10).
>
> "I probably could do it if I had to, yeah. But you still have to think about it." (R.; Tr. p. 1293, lines 13-14).

> "I mean, the death penalty means killing somebody; right? Sooner or later, somebody is going to die. Well, death is death. I mean, that's the way I look at it, death is death. (R.; Tr. p. 1295, lines 21-24).

-On whether he could sign a death sentence verdict form:

> "Yeah. I mean, if I said it, I guess I could, yeah." (R.; Tr. p. 1280, lines 24-25).

> "I suppose, yeah. I mean, yeah." (R.; Tr. p. 1297, line 23).

Appellant's responses exhibited the potential ability to serve fairly and impartially in the case to be tried so as to deny exclusion for cause pursuant to *Wainwright v. Witt*, 469 U.S. 412 (1985). However, juror Young was extremely unsure and hesitant about his ability to give the death penalty from beginning to end of *voir dire*. The neutral reason of being a life prone juror is supported by the record. The trial court also noted that Young would have "one of the hardest times finding death." The record plainly contradicts then position espoused by Appellant that Davis and Young were struck merely because of their race.

The trial court did not abuse its discretion in finding no *Batson* error.

III. The trial judge did not abuse his discretion isn disqualifying venire members Patricia Murphy and Sabrina Jenkins where there responses indicated an inability to perform their duties as jurors in accordance with the law.

In his next argument, Petitioner asserts the trial court erred in excusing *venire* members Patricia Murphy and Sabrina Jenkins based upon their views of the death penalty. Respondents submit the trial court did not abuse its discretion in granting the state's motion to disqualify either juror.

STANDARD OF REVIEW

In a capital case, the proper standard in determining the qualification of a prospective juror is whether the jurors' 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. Wood,* 362 S.C. 135, 140, 607 S.E.2d 57, 59 (2005); S.C. Code Ann. § 16-3-20(E)(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.* On appellate 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 law. *Id., citing State v. Green,* 301 S.C. 347, 392 S.E.2d 157 (1990). *See Wainwright v. Witt,* 469 U.S. 412 (1985)(there will be situations where the trial court is left with the definite impression that a 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).

Patricia Murphy

HOW THE ISSUE WAS RAISED BELOW

A. The Voir Dire

During the voir dire of Patricia Murphy the following occurred:

The Court	. . . Could you, depending on the particular facts and circumstances of the case and considering all the mitigating factors and all the aggravating factors and the law as I instruct it, could you return a sentence of death?
Murphy	No.
The Court	How firm are you in that belief?
Murphy	Well, I just don't think . . . that a man should be punished for his crime, but it's just not up to me as and individual to give a man death. . .
The Court	Okay. Is there any circumstance at all where you think you could give the death penalty?
Murphy	It depends on what the severity of the case is, it depends on it.
The Court	. . . Are you telling me that there are cases where you could return a verdict of death?
Murphy	Yes, there are.
The Court	Okay, now, I'll tell you this, in the event of a death sentence or the verdict of death, South Carolina law requires every juror to sign their name to the verdict form. . . Could you sign your name to the verdict form?
Murphy	No. . . The reason for that is because I didn't know that occurred until you told me about your name being signed to that. I work with the public and I could be a target for anybody with the job that I have. So on that note, I would say, no.

The Court	. . . There may be cameras in the courtroom during all this, but they're not allowed to take pictures of the jury. Your name is not allowed to appear in print. . .
Murphy	My name and address – is my name and address allowed to be given to anyone.
The Court	No, ma'am. We're going to protect the jurors. . . Could you sign your name to the verdict form?
Murphy	If I'm protected as a juror, yes.

(R.; Tr. p. 372, line 7 - p. 376, line 24).

Murphy then identified herself as a type three juror (R.; Tr. p. 377). Despite Murphy's vacillation regarding the death penalty, defense counsel never broached the issue in its very brief examination (R.; Tr. p. 379). During the voir dire questioning of Murphy by the solicitor, her view of the death penalty was further developed:

Solicitor	. . . When the Judge first asked you about the death penalty, you seemed very clear and very resolute that you do not believe in the death penalty. And then he asked again and you said, yes, and then you said maybe. Whatever your position is, nobody is going to challenge it. . . But we just have to know what they are. So what are your views on the death penalty?
Murphy	Well, I fell like to me – and this might be a bad choice of words, but if you've got a psycho running around here killing people, I don't think they deserve to live. I mean, of course, I'm not supposed to be judgmental, but that's just my feeling. You know, you don't kill a lot of people and then expect to live.
Solicitor	Do you believe that the death penalty is appropriate in all cases where there's premeditated murder?
Murphy	Not all cases, no.
Solicitor	What made you tell the Judge initially that you did not believe in the death penalty?

Murphy	I guess, basically, my religion, thinking – you know, weighing the pro's and con's of it, I guess.
Solicitor	What made you change your answer the second time he asked?
Murphy	I don't know. I guess with the information he told me about being protected and all that... Sometimes things are scary, you hear a lot of things and you think people are going to maybe come after you because you're a juror.
Solicitor	Would that be in the back of your mind if your served on this jury?
Murphy	I think it would be.
Solicitor	Do you think that it being in the back of your mind would impact your service as a juror?
Murphy	No. It wouldn't impact my service. But it would have some thought to the back of my mind as to, you know, this is a small town and people can find you quickly.
Solicitor	If I were to tell you that you always have a choice of life in prison, never get out, spend the rest of your life in prison or death, would you pick life in prison?
Murphy	Uh-huh.
Solicitor	Always?
Murphy	Uh-huh.
Solicitor	If you've always got that, you'll always pick life in prison?
Murphy	Uh-huh.

(R.; Tr. p. 380 line 24 - p. 383, line 8).

B. The Motion to Exclude

Solicitor Gowdy asserted that Murphy's vacillation should disqualify her for service in a death penalty trial. Trial counsel stated Murphy did vacillate, but her main concern was whether she

would be protected as a juror, not her concerns about the death penalty. (R.; Tr. pp. 383-384).

The trial judge noted that after Murphy's fears of her identity becoming public if she served were assuaged, he felt she would be qualified. However because she affirmatively stated to the solicitor that she would always choose life imprisonment over the death penalty, the judge disqualified Murphy. (R.; Tr. p. 384).

Sabrina Jenkins

HOW THE ISSUE WAS RAISED BELOW

A. The Voir Dire

Upon *voir dire* by the court, Sabrina Jenkins unequivocally stated she could render either a sentence of life imprisonment or a sentence of death. She also indicated she was a type three juror who would listen to the facts and circumstances before reaching a verdict. (R.; Tr. pp. 512-513). During the voir dire of Jenkins by the solicitor, the following occurred:

Solicitor — . . . What are your beliefs and views on capital punishment?

Jenkins — Well, what I believe is to give someone the death penalty, if you purposely kill somebody – you know, it could have been another situation that they could have handled it. Then I see it as if – I could see the death penalty. But for life, I say that if there wasn't no way out, you had to do what you had to do, you know. You had to kill – you had to murder someone right then . . . if you had to do it right then. And then you had to do what you had to do. There wasn't no way out of it, you know.

Solicitor — Like self-defense or something?

Jenkins — Like self-defense, that's what I say, life. But I say death penalty, if you purposely did it and you know what you was doing and could have avoided it, then I think you deserve the death penalty.

Solicitor — Let me ask you this, lawyers have a way of sometimes complicating things. Let's assume that murder – when we hear the term murder,

the legal definition is the intentional killing of another person with malice aforethought. So it's not an accident. It's not self-defense. You intentionally killed somebody.

Jenkins	Yeah.
Solicitor	Let me ask you, understanding that murder is intentionally killing another person, do you think that the death penalty should always be imposed in that case?
Jenkins	Yeah.
Solicitor	So laying aside the self-defense or involuntary manslaughter or voluntary manslaughter, if you intentionally killed somebody with malice aforethought, which is an evil or depraved or wicked spirit, the death penalty should be the punishment?
Jenkins	Yeah.

(R.; Tr. p. 517, line 19 - p. 519, line 5).

The trial court then further questioned Jenkins:

The Court	. . . Not every case in South Carolina that is a murder is a capital case. . . The State may not pursue the death penalty in every murder case. Do you understand that?
Jenkins	Uh-huh.
The Court	. . . You told the Solicitor that you thought that every time somebody committed murder, they should get the death penalty.
Jenkins	. . . Let me rephrase that. See, I told him what I thought about intentionally doing it and defending yourself.
The Court	. . . Well, let me explain just a little something to you . . . If you act in self defense, you are not guilty of murder. Okay.
Jenkins	Yeah, you're right.
The Court	And there are cases where there can be the intentional and wrongful killing of another person with malice aforethought, which is murder, but doesn't have an aggravating circumstance attached to it. So they

cannot seek the death penalty. And then there's a capital case where there must be an aggravating circumstance attached to the murder conviction. . . And then and only then can the State seek the death penalty. Now what I'm getting at is, I want to – because after what you had told me, it sounded a little different than what you had said later. So is it – are there instances in cases where . . . as I asked you before, I'm going to re-ask the same question, basically, where you've committed – where you are on the jury in the second phase, which means you've already convicted a person of murder, you're on the jury and that same jury convicts, okay, and then decides the appropriate sentence. Do you mean to tell me now . . . you told me before that you could consider all the aggravating and mitigating circumstances and return a verdict of life in prison. . . I'm not trying to persuade you one way or the other. I just need to know the accurate answer, what you really feel. And don't be intimidated by me or anyone else. There's no consequences to the answer, we just need the truth. In that circumstance, after considering all of the evidence, could you return a verdict of life in prison or do you think that you had – or could you only give the death sentence?

Jenkins	I could give life in prison.
The Court	. . . Just tell me briefly a little bit about that so I know – understand. And it's a complicated issue, no question about it.
Jenkins	I don't understand the answer you're looking for.
The Court	I'm not looking for an answer. I want to know how you feel. And the reason I'm curious about that, you told me when I was questioning you that you could give a life sentence and then later, you said that you would always give death.
Jenkins	I'd always give death?
The Court	Yes. So I'm just trying to clear that up and find out which is true.
Jenkins	. . . It depends on life or death in the situation of self-defense or intentionally – you know, if you intentionally kill somebody, you know what you were doing, death penalty, but self-defense, life sentence.
The Court	All right. So every time, if you intentionally kill somebody, the death sentence? I'm just asking.

Jenkins ... Yes.

(R.; Tr. p. 521 line 5 - p. 524, line 7).

B. The Motion to Exclude

After Solicitor Gowdy's objection to the qualification of Murphy, Counsel Boggs asserted that she answered the court's questions satisfactorily and was "boxed" in to a self-defense or murder scenario by the solicitor. Solicitor Gowdy noted that "Once Ms. Jenkins understood what murder was, she was unequivocal both to Your Honor and to me that death is automatic." (R.; Tr. pp. 525-526).

The trial judge found Murphy disqualified as a juror, finding:

> Well, I had thought originally that she was qualified after I finished questioning her. When Mr. Gowdy got her in his – and he was masterful, in his fair seeking of the qualified juror here, I requestioned her to find out. *And I think I gave her every opportunity to change her mind, but I'm afraid she did not do it.* And I'm going to find that she's not qualified. (Emphasis added).

(R.; Tr. p. 526, line 20 - p. 527, line 1).

After jury selection was completed, Judge Miller inquired of the State and defense if there was any objections or exceptions to the composition or manner of selection of the jury. The State had no objections while defense counsel objected, pursuant to *Batson v. Kentucky*, to three jurors other than Patricia Murphy or Sabrina Jenkins. (R.; Tr. p. 1315).

LAW/ANALYSIS

Initially, the disqualification of *venire* members Murphy and Jenkins is not properly before this Court because defense counsel did not object to the disqualification.

A view of the entire *voir dire* process surrounding Murphy and Jenkins reveals that no

objection was raised by defense counsel to either the disqualification of either *venire* member or the process of jury selection. (R.; Tr. p. 384; p. 527; p. 1315). Although trial counsel stated his opinion that the solicitor had unfairly "boxed in" both Murphy and Jenkins through his questioning (R.; Tr. p. 527), the record is silent concerning any defense objection.

Respondents submit that the issue raised herein is barred from appellate consideration since the defense never objected to the disqualification of either *venire* member. *See*, *State v. Speights*, 263 S.C. 127, 208 S.E.2d. 43 (1974) (Court would not consider argument that trial court improperly disqualified a member of the panel as a result of *voir dire* interrogation, where such an objection was not submitted to the trial court). For this reason, Petitioner is procedurally barred from raising this claim at this time.

However, if not procedurally barred, the exclusion of Murphy and Jenkins was appropriate where their responses indicated an inability to perform their duties as jurors in accordance with the instructions and oath.

In her *voir dire* Patricia Murphy immediately stated she could not return a sentence of death because "it's just not up to me as and individual to give a man death." Although she eventually answered the trial court's questions in a manner to qualify as a juror in a death penalty case, she came full circle during *voir dire* by the solicitor. Murphy clearly indicated to the solicitor that when given an option between life imprisonment or the death penalty, she would always choose life imprisonment.

Appellant contends the solicitor exploited Murphy's fears for her safety. However, those fears arose from signing a verdict form. Whatever concerns she had were seemingly allayed by the trial court's explanation of protection jurors would receive. Upon questioning by the solicitor,

Murphy stated she initially told the judge she did not believe in the death penalty base upon her religious principles. Further, she indicated her fears would not impact her service as a juror. There is no evidence to support Appellant's allegation that "the solicitor exploited Murphy's fears in order to remove her from the jury because of her race." (Appellant's brief at 29). Murphy clearly and unambiguously indicated if given an option between life imprisonment and the death penalty, she would ***always*** choose life imprisonment. Based on this response, there was a reasonable basis for the trial court to conclude that Murphy could not faithfully discharge his responsibilities as a juror under the law. The court's decision to disqualify her from service was not an abuse of discretion.

In her *voir dire,* Sabrina Jenkins was headed for qualification as a juror until she was simply asked by the solicitor "what are your views on capital punishment." When given the opportunity to fully expound her view of capital punishment, it became clear Jenkins had an "intentional vs. non-intentional" view of the subject matter. No attempt was made to box her into this view. Also, the solicitor attempting to turn her attention away from unintentional killings. Still, Jenkins maintained the death penalty should be the punishment for any murder.

Additionally, the trial judge's *voir dire* following the solicitor's questioning, showed that Jenkins was firmly anchored into her position. As he had in his initial *voir dire*, the trial judge extensively explained that every murder is not a death penalty case, and the consideration of aggravating an mitigating circumstances in the penalty phase. Still, ultimately, Jenkins maintained that the death penalty is the only appropriate punishment for an intentional killing.

Upon a proper motion, a juror should be excused based on his or her views on the death penalty, life imprisonment without parole, or life imprisonment with the possibility of parole if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in

accordance with his instructions and his oath." *Wainwright v. Witt, supra. See also Andrews v. Collins*, 810 F. Supp. 759, 769 (E.D. Tex. 1992) (trial court is in the best position to rule on prospective juror's qualification because the court views the juror's demeanor and credibility, and as here, participates in the *voir dire* examination to clarify any ambiguities.") (citing *Wainwright v. Witt, supra.* (noting that the judge's qualification decision is finding of fact subject to the presumption of correctness, because such a finding "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province")). This Court reviews a trial court's decision regarding a juror's qualification with deference to the trial court's application of these standards to the juror's voir dire responses.

Appellant alleges Jenkins views only appeared to change after the solicitor purposefully confused her. As stated above, the evidence does not support this conclusion. The trial court cannot ignore Jenkins' clear assertions. Here, it is evident that her view that an intentional killing should always be punished by a death sentence " would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." The *vernire* member was properly disqualified. The trial judge's decision to exclude must be upheld.

IV. The trial court did not abuse its discretion in disqualifying a juror where pending charges can support disqualification for cause, and the juror strongly disfavored the death penalty.

Appellant next contends the trial court erred in disqualifying venire member Aaron Gray during capital *voir dire* because his pending charges created an overwhelming potential for bias. Appellant contends that pending charges might be appropriate for use of a peremptory challenge, but is not enough to disqualify a juror under *Wainwright v. Witt, supra*. Inasmuch as Appellant contends the trial court applied the wrong standard, this argument is not preserved for appeal because it was not made at trial. In any event, pending charges can be appropriate bases for disqualification in capital *voir dire*. Here, Gray's answers on his ability to consider a death sentence, when combined with his pending charges to be prosecuted by the Seventh circuit solicitor's office, were sufficient to support the trial court's disqualification decision under the highly deferential standard of review.

A. Events at trial

Upon *voir dire* by the trial court, Gray revealed an immediate and consistent predisposition against the death penalty:

The Court . . . Guilt of murder is already established, could you, depending on the particular facts and circumstances of that case, including considering all the aggravating and all of the mitigating circumstances, could you return a sentence of death?

Aaron Gray I really would have to be persuaded, you know, because I'm really not for the death penalty. I really don't think is should be up to a citizen to decide if a person should live or die, but maybe by the facts I could be persuaded an I maybe could.

The Court So what you're telling me is that depending on the particular facts and circumstances of the case and the law after considering the aggravating circumstances . . . and the mitigating circumstances. . . you could return a verdict of death; is that right?

Aaron Gray	Yes.
The Court	. . . Could you sign you name to a death verdict.
Aaron Gray	I really don't know, sir. . . It would have to be the facts. Because right now, I would probably say no. Just without hearing the facts, I would say, no, I couldn't sign it.
The Court	So assume for this next question that that's where you are, that you have listened to all the facts and circumstances and the mitigating and aggravating circumstances and the law and you . . . felt that it . . . was a case where you could return a sentence of death. . . Could you sign your name to a death verdict form.
Aaron Gray	Yes.
The Court	. . . Do you recall the sheet that had . . . the three types of jurors on it?
Aaron Gray	Yes, sir.
The Court	How would you classify yourself? Where would you put yourself on that list?
Aaron Gray	Right now, I would probably be Number 2..
The Court	Number 2. Okay. And that is the juror who would not give the death penalty?
Aaron Gray	Not – you know, no, I wouldn't

(R.; Tr. p. 775, line 3 - p. 777, line 8).

Upon questioning by the solicitor, Gray reaffirmed he was a type two juror whose opposition to the death penalty was based upon his religious views. Gray further stated he could return a death verdict but would have to be "really persuaded to go against what I believe." Gray also noted he had never seen a case where he believed the death penalty was appropriate. (R.; Tr. pp. 778-783).

The solicitor also developed that Gray had a pending charge in the Seventh Circuit and would be represented by the Public Defender's Office. Gray stated he would have no bias or prejudice

against the Sheriff's Department. (R.; Tr. pp. 784-785).

Upon questioning by the defense, Gray once again affirmed he was against the death penalty, but indicated he could vote for death in certain heinous situations. Gray added he had no animosity towards anyone regarding his pending charges. (R.; Tr. p. 788).

The state argued Gray was disqualified under *Wainwright v. Witt*, and because of his pending charges. Defense counsel argued Gray indicated he could support a death verdict if the facts warranted and also stated he could be fair. (R.; Tr. pp. 789-790).

The trial court noted that Gray was "very pleasant," but was in an awkward situation because of the pending charges. The court then found:

> I am going to find that the potentials for him – for his bias is too overwhelming to put him on the jury. And I find he is disqualified. He is represented by the same law office that represents Mr. Evins in this case. And I think that – I hadn't thought it all the way through, but if there's not a conflict there, it's dancing on the line. And it certainly has the appearance of an impropriety. I am going to disqualify him.

(R.; Tr. p. 790, line 25 - p. 791, line 8).

<u>B. The issue is not preserved.</u>

Inasmuch as Appellant contends on appeal that pending charges for a juror also represented by the public defender's office is an improper standard for determining disqualification for cause in capital *voir dire*, this argument is not preserved for appeal because it was not made to the trial court. While counsel argued to the trial court that Gray should be qualified, he did not object to the court's ruling. *See generally State v. Silver*, 314 S.C. 483, 431 S.E.2d 250 (1993) (ground asserted on appeal must be supported by objection raised at trial).

<u>C. Pending Charges.</u>

It is permissible to excuse potential jurors if circumstances would "prevent or substantially impair" the performance of their duties as a juror. *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) (citing *Wainwright v. Witt, supra*). The determination of whether a juror is qualified to serve in a death penalty case is within the sole discretion of the trial judge and is not reviewable on appeal unless wholly unsupported by the evidence. *George, supra.* When reviewing the trial court's decision as to qualification, the responses must be considered in light of the entire voir dire. *Id.*

Although Gray indicated he could be unbiased despite his pending charges, the trial court felt the "awkward" situation could substantially impair his service on the jury. This provided the court a "reasonable basis to conclude that a prospective juror would be unable to faithfully discharge his responsibilities as a juror under the law." *See State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985). This decision should not be disturbed on appeal.

D. Disfavoring death penalty.

The solicitor's motion to disqualify was two fold. He asserted Gray was disqualified under *Wainwright v. Witt* and because of his pending charges. The trial court disqualified Gray without commenting upon his *Wainwright* standing. However, this Court has repeatedly affirmed disqualification of a juror based on difficulty in considering the death penalty, even where that difficulty was not absolute. *See, e.g. State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) (rejecting allegation that juror should have been qualified because she was not "emphatically opposed" to the death penalty, where juror said she did not "think" she could vote for death or sign the form, and it was apparent that imposing death would "extremely difficult" for the juror); *State v. Riddle*, 314 S.C. 1, 443 S.E.2d 557 (1994) (no error in disqualifying Reverend who said her Christian beliefs would "hinder" her, who said she could not give death, and who was unable to say otherwise); *State v.*

Green, 301 S.C. 347, 392 S.E.2d 157 (1990) (no error in disqualifying juror who said his bias might affect his partiality, even though juror said he would try not to be prejudiced); *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985) (trial court had reasonable basis for excluding juror where he consistently maintained his opposition to the death penalty and did not believe he could consider it); *State v. Chaffee*, 285 S.C. 21, 328 S.E.2d 464 (1984) (considering questioning in entirety, reasonable basis existed for trial court to exclude juror for cause).

Here, Gray's responses indicated he could not impose the death penalty, but was open enough to never say never. Gray was clear about being a type two juror who was against the death penalty. Absent some extraordinary circumstances which he had never seen, it is apparent Gray would not impose a sentence of death. There is support in the record for a determination that the totality of Gray's answers indicated he would be "substantially impaired" in fairly considering a death sentence.

There was no abuse of discretion.

V. The trial court did not abuse its discretion by allowing the State to introduce photographs of the victim in the sentencing phase of Appellant's trial.

In the sentencing phase the trial judge allowed the prosecution to introduce a series of photographs of the victim at the crime scene, as well as a photograph depicting the black knife handle, over Appellant's objection. The State withdrew three photographs (State's Exhibits 73, 78, and 79) because they were duplicative. (R.; Tr. pp. 2328-2330). On appeal, Appellant claims the trial judge erred by allowing the State to introduce State's Exhibits 70[6], 71, 72, 74, 75, 76, 77, which he characterizes as "gruesome," "nauseating," "sickening," "inflammatory," and "grotesque." The State submits the trial judge did not abuse his discretion.

There was no error. The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender. *State v. Matthews*, 296 S.C. 379, 390, 373 S.E.2d 587, 594 (1988), *cert. denied*, 489 U.S. 1091, 109 S.Ct. 1559, 103 L.Ed.2d 861 (1989). In *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 185-186 (1986), this Court held that:

> In determining whether to recommend a sentence of death, the jury may be permitted to see photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them. . . . The trial judge is still required to balance the prejudicial effect of the photographs against their probative value. However, in the sentencing phase, the scope of the probative value is much broader.

(Citations omitted). *See also State v. Powers*, 331 S.C. 37, 501 S.E.2d 116 (1998); *State v. Shaw*, 277 S.C. 194, 255 S.E.2d 799 (1979). As the Court has more recently made clear, the criteria for admissibility is not

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[6]It appears trial counsel did not object to State's Exhibit 70. (R.; Tr. p. 2330).

> that the photographs become inadmissible because they graphically depict a gruesome scene. Rather, the question is whether the photographs are unfairly prejudicial so as to outweigh the probative value. . . . To constitute unfair prejudice, the photographs must create a 'tenancy to suggest a decision on an improper basis, commonly, though not necessarily an emotional one.'

State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995).

In the verdict phase, the pathologist, Dr. John Wren testified that the victim had "12 either stab or incised wounds" on her body. Wren testified in detail about multiple stab wounds on the victim's upper torso as well as defensive wounds. He opined the fatal wound was in the left chest area. This wound penetrated the victim's lungs and forced her to bleed to death (R.; Tr. pp. 1794-1798). Dr. Wren's testimony was also incorporated into the penalty phase. (R.; Tr. p. 2261). Randy Eugene Bogan of the Spartanburg County Sheriff's Office testified in the penalty phase as to the locations and settings in which the photographs of the victim were taken. The photos were then admitted into evidence. (R.; Tr. pp. 2331-2336).

As with the photographs in *Powers*, *Kornahrens* and *Shaw*, *supra*, these photographs were probative of the circumstances of the crime and Appellant's character. Moreover, it was used to corroborate and illustrate previous testimony concerning autopsy findings. Therefore, the photographs were admissible. *Id.* *See State v. Haselden*, 353 S.C. 190, 577 S.E.2d 445 (2003)(if photograph offered for admission during sentencing phase of capital prosecution serves to corroborate testimony, there is no abuse of discretion in admitting photograph).

Further, the probative value of the photographs were not substantially outweighed by their prejudicial value. *Franklin*, *supra*. State's Exhibits 70, 71 and 72 depict the victim in substantially the same condition as Appellant left her: nude and lifeless from being sexually assaulted and stabbed

multiple times. State's Exhibits 74,75, 76 and 77 depict various stab wounds to the left and right sides of the victim's torso, as well as defensive wounds to her hands. Therefore, these photographs depict what Appellant did and nothing more. *Powers, supra.*

While it is true that Appellant left the victim in a horrible and tragic condition, it ***IS*** how he left her. The prosecution is not required to sanitize a senseless and brutally malicious crime scene which a defendant has chosen to create, so as to make the crime appear less than what it was. This is precisely the type of evidence which is appropriate in the sentencing phase of a bifurcated capital trial. *Kornahrens* and *Powers, supra.* Significantly, under Appellant's analysis, no post mortem pictures should have been admitted into evidence in the penalty phase of trial.

This Court has rejected the suggestion that photographs of the victim, depicting her in substantially the same condition as the defendant left her, were inadmissible where their relevance and probative value outweigh their prejudicial impact. *State* v. *Weik*, 356 S.C. 76, 587 S.E.2d 683, (2002). Therefore, Appellant's argument is without merit and the trial judge's ruling must be affirmed.

CONCLUSION

For all the foregoing reasons, the appeal should be dismissed and judgment of conviction affirmed.

Respectfully submitted,

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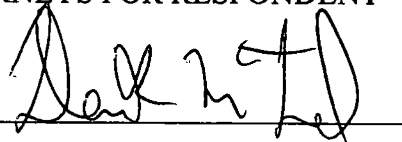
By: 

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November 30, 2006

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

v.

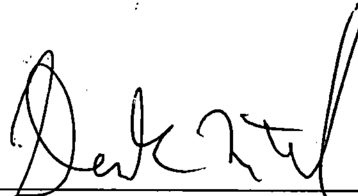
FREDRICK ANTONIO EVINS,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with SCACR 211(b).

This 30th day of November, 2006.

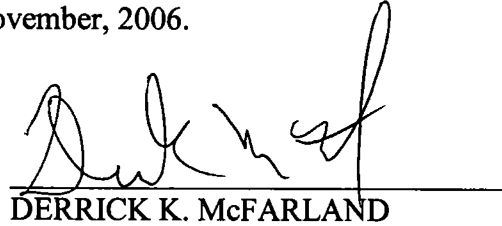


DERRICK K. McFARLAND
Assistant Attorney General

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Derrick K. McFarland, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing by depositing two (2) copies in the Interagency Mail to Robert M. Dudek, Assistant Appellate Defender, South Carolina Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, South Carolina 29201 this 30th day of November, 2006.



DERRICK K. McFARLAND