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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FREDDIE EUGENE OWENS,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Chief Appellate Defender

LANELLE C. DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

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STATEMENT OF FACTS

Halloween 1997 was over, but during the early morning hours of November 1 two men robbed a Speedway convenience store in Greenville and fatally shot the clerk, Irene Graves, once in the head when she was unable to open the safe. See *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001). The grand jury indicted Freddie Owens and Steven Golden for Grave's murder, armed robbery and two related but lesser offenses.

In February 1999 the State sought the death penalty against both Owens and Golden at a joint trial. Judge Alexander S. Macaulay presided. The second day of jury selection Golden pleaded guilty and avoided a possible death sentence in return for his testimony against Owens. Owens' defense was alibi. The jury found him guilty as charged. That night one of Owens' cellmates at the Greenville County Detention Center, Christopher Lee, who was in jail for a traffic offense, was brutally murdered. The following morning Owens gave SLED agents a statement in which he claimed sole responsibility for the homicide. This statement became the centerpiece of the State's case at sentencing. Owens was sentenced to death.

On direct appeal Owens argued that defense counsel had not been afforded an adequate opportunity to investigate the circumstances surrounding Lee's death. The Court agreed and remanded for resentencing. *Id.*

In January 2003 Judge John W. Kittredge presided at the resentencing hearing. Owens waived his right to a jury. The State relied primarily upon Owens' purported bad

conduct while in prison since his initial trial and, once again, his statement regarding Lee's murder. The judge sentenced Owens to death in a written order dated February 14, 2003.*

The notice of intent to appeal was untimely. The Court construed the letter which accompanied the late notice as a petition for a common law writ of certiorari in its original jurisdiction and granted the petition. Owens then argued:

> The judge erred during the jury waiver colloquy by informing Owens that his best hope for a life sentence might ultimately depend on lying jurors who would "claim to support the death penalty in hopes of getting on the jury" when "in reality such a juror is opposed to the death penalty and ... when they're selected and the time comes, they refuse to vote for the death penalty and will only vote for life."

Brief of Appellant, p. 3. The Court agreed and again remanded for resentencing. *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004).

On November 6 through 11, 2006, Judge Larry R. Patterson presided at Owens' jury resentencing. The State relied on Owens' alleged poor behavior while incarcerated as before, and a forensic pathologist attempted to correlate his own findings with Owens' statement describing the manner of Lee's death. The judge charged the jury on two statutory aggravators:

> (1) The murder was committed while in the commission of robbery while armed with a deadly weapon; and
>
> (2) The murder was committed while in the commission of larceny with use of a deadly weapon

S.C. Code Section 16-3-20 (C)(a)(1)(d and *(e)*. He also charged five mitigators:

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* The judge specifically afforded "no consideration" to Owens' "alleged involvement" in the homicide of his cellmate. The accuracy of Owens' statement remains in doubt and he has never been prosecuted for that incident.

(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 defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(5) The age or mentality of the defendant at the time of the crime

Section 16-3-20(C)(b)(1), (2), (4), (6) and *(7).* The jury found both aggravators and recommended death. The judge sentenced Owens accordingly.

ARGUMENT

1.

The trial judge abused his discretion when he summarily disqualified a potential juror, Sonya Ables (Juror Number 1), solely because she "went to [her] pastor and talked to him about [the death penalty]," as he incorrectly believed "there is a case right on point, that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law."

In response to the judge's leading question on voir dire, potential juror Sonya Ables (Juror Number 1) stated that she was probably most like the hypothetical juror who could never give the death penalty under any circumstances. ROA p. 526, lines 12-17. The judge followed up with only two additional questions exploring Ables' personal feelings about capital punishment:

> Understanding [the] process, and if you heard evidence in aggravation and mitigation, do you feel that you could seriously give meaningful consideration to aggravating circumstances, mitigating circumstances, and write a sentence of death?

ROA p. 528, lines 11-15. And:

> If that were to be the determination of the jury, based on evidence and testimony in mitigation and aggravating evidence, you would be called upon to sign your name to the death verdict. Could you do that?

ROA p. 528, lines 20-23. Her answer:

> I thought about it a lot since October [2006]. I really have. I lost a lot of sleep over it. I really don't believe that I could. ... I don't think I can do it. I have – it's that thing of for me personally just believing that, yes, he should get the death penalty, but being the one to write that sentence, personally I just don't think that I can do it. ... I just don't believe that I

> could do it, you know, and just be able to go forward with my life then, and then – I just don't think that I can do it and live okay. It's just too deep within me. I have battled it since you told us that in October. I thought about it a lot. I went to my pastor and talked to him about it. I really don't think that I could do it.

ROA p. 526, lines 19-22; ROA p. 528, lines 16-19; ROA p. 528, line 24 – p. 529, line 5. At this point the judge excused Ables from the courtroom and summarily disqualified her from serving on Owens' jury for the following reason:

> Ladies and gentlemen, there's a case right on point, that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law.

ROA p. 529, lines 10-14. He afforded defense counsel no opportunity to rehabilitate Ables. ROA p. 529, line 15 – p. 484, line 2.

Witherspoon v. Illinois, 391 U.S. 510 (1968), holds that a capital defendant's right to an impartial jury under the Sixth and Fourteenth Amendments is violated by a jury selection procedure which automatically removes for cause those members of the venire who express conscientious objections to the death penalty. *Wainwright v. Witt*, 469 U.S. 412 (1985), provides 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 instructions and his oath'." 469 U.S. at 424, quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980). See, also, *State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007). *S.C. Code Section 16-3-20(E)* similarly provides:

> In a criminal act in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment

> unless such beliefs or attitudes would render him unable to return a verdict according to law.

Lockhart v. McCray, 476 U.S. 162, 176 (1986), emphasizes:

> 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.

The bottom line:

> 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 *Witt*, 469 U.S. at 423.

The disqualification of even a single juror in violation of *Witherspoon* and *Witt* can never be harmless error. *Id.*

The Court has held that *S.C. Code Section 14-7-1010* "requires the judge [to] determine whether a juror is disqualified or exempted by law, a determination that may be made before [the] parties are given an opportunity to examine the juror in a death penalty case." *State v. Wise*, 359 S.C. 14, 596 S.E.2d 475, 479 (2004).

> When the record reveals a juror plainly is not qualified, after thorough examination by the trial judge, to serve and it does not reasonably appear further examination would likely reveal the juror could subordinate his views and apply the law of the state, a reasonable basis exists for excusal for cause of the juror without further examination by defense counsel.

596 S.E.2d at 481. See, also, *State v. Tucker*, 334 S.C. 1, 512 S.E.2d 99 (1999).

The undersigned have been unable to identify any case, state or federal, which supports the proposition that, "if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law." More about this shortly.**

In *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996), an already-qualified juror was excused after he subsequently concluded that his religious beliefs would prevent him from sentencing anyone to death under any circumstances. In *State v. Tucker*, S.E.2d at 104, a prospective juror was disqualified when he indicated that "his religious beliefs would not allow him to sit as a juror and that the special circumstances which might allow him to serve would require four days of counseling." Similarly, in *State v. Wise*, 596 S.E.2d at 479, a prospective juror was excused after she testified that "her beliefs were personal and she was unaware of any pastoral counseling or similar program she could undergo in order to sit in judgment of another person." The religious convictions of the two jurors in *Tucker* and *Wise* precluded them from finding a defendant guilty, much less sentencing someone to death. Finally, in *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883, 887 (2005), the disqualified juror "unequivocally stated ... that she could not consider the law regarding imposing the death penalty because of her religious beliefs," then apologized and began sobbing.

As noted, the judge asked Ables exactly three questions, the first of them leading, to ascertain her opinion about capital punishment. She never unequivocally indicated she could not impose the death penalty because of her religious beliefs. Any reservations about capital punishment she tentatively expressed were not sufficient to disqualify her for cause under *Witherspoon* and *Witt*. In *Darden v. Wainwright*, 477 U.S. 168, 178 (1986), for

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** At this point it should be observed that such a "rule" would appear to violate the Equal Protection Clause of the Fourteenth Amendment. See, for example, *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994).

example, a prospective juror answered "yes" 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 to recommend a death penalty regardless of the facts?" The Supreme Court observed, "The precise wording of the question asked of [the juror], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty." *Id.* The same holds true here.

In any case, the judge did not disqualify Ables because of her religious uncertainty about capital punishment. He removed her because of his erroneous belief that "there's a case right on point that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law." Automatically disqualifying Ables for this (non)reason constituted an abuse of discretion. See, also, *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002).

A comparison of the truncated voir dire and removal of Ables with the treatment of other potential jurors, both for and against the death penalty, underscores this point. Keith Faust (Juror Number 133) initially told the judge that he would always sentence a defendant guilty of murder to death and could not even consider life imprisonment, regardless of the circumstances. ROA p. 650, line 22 – p. 651, line 12. He was quite emphatic about his beliefs. ROA p. 651, lines 13 and 14. The Solicitor nevertheless requested and received an opportunity to rehabilitate Faust. ROA p. 651, lines 18-25. Faust eventually agreed that he could "meaningfully consider imposing either a life imprisonment sentence or a death sentence." ROA p. 660, lines 10-16. The judge found him qualified to sit on Owens' resentencing jury. ROA p. 667, lines 10 and 11. (The defense wisely used a peremptory

challenge to preclude Faust from sitting as an alternate. ROA p. 1069, line 25 – p. 1070, line 5.) Nor did the judge summarily disqualify a trio of jurors who initially expressed religious reservations against capital punishment. See Margaret Payne (Juror Number 324), Patsy Barton (Juror Number 22) and John Adams (Juror Number 2). ROA p. 301, line 3 – p. 304, line 13 (Payne); ROA p. 593, line 15 – p. 597, line 1 (Barton); ROA p. 925, line 21 – p. 927, line 15 (Adams). Another juror, Rebecca Hunter (Juror Number 211), was rehabilitated by defense counsel and qualified over the Solicitor's objection after initially indicating that she could never give the death penalty "[b]ecause of my moral convictions." ROA p. 630, line 22 – p. 645, line 17.

A comparison of Ables' answers with these other jurors' demonstrates that the judge's removal of Ables resulted not from her religious doubts about the death penalty, which were left relatively unexplored, but because she was a woman who had talked to her priest about capital punishment after learning she might have to sit on a death penalty case. The judge automatically removed Ables without determining if her beliefs would have substantially impaired her ability to perform the duties required of a capital juror.

The inflexible application of a general rule excluding women who seek religious guidance to clarify their feelings and beliefs about capital punishment violates the Sixth and Fourteenth Amendments. *Wainwright* and *Witt*. It constitutes an abuse of discretion and reversible error as a matter of law. *Gray*.

The Court should reverse Freddie Owens' death sentence and remand for resentencing.

2.

The trial judge committed reversible error by admitting Owens' prison disciplinary records, as they violated the rule against hearsay, as well as the Sixth and Fourteenth Amendments.

FACTS

During the sentencing phase, the State called Major Thierry Nettles, who was the custodian of records for the Department of Corrections at Lieber Correctional Facility, where records pertaining to Owens were kept. ROA p. 1406, line 2; ROA p. 1411, lines 22-23; ROA p. 1413, lines 3-9. The defense immediately objected and the judge held an *in camera* hearing related to Owens' records being admitted. ROA p. 1406, lines 3-7.

The defense stated their objection to the court:

> Your Honor, the defense would object to the testimony of Mr. Nettles to the extent that he intends to talk about records, any SCDC records regarding incidents or behavior. Our understanding of the law is that - and I'm looking at this case, is *Ex parte Department of Health and Environmental Control v. the State*, or *State v. John Doe*, and I can give you the cite of it - but they have to prove in order to get business records in, which I assume that's what they are trying to get them into, or the venue they are trying to get into, they have to prove the record in themselves trustworthy. My problem with these records are I do not believe they are trustworthy.

ROA p. 1406, Lines 10-22. And:

> In a lot of these occasions, Your Honor, they are talking about attacks on guards. So the person filling out the record would be the victim. It would be extremely difficult for me to think that a victim's testimony, without any other inquiry whatsoever, would be trustworthy.

ROA p. 1406, line 23 – p. 1407, line 2.

The State argued that these records were admissible as a business record under *Rule 803(6), SCRE*:

> Your Honor, I do believe that these records do fall - do come into evidence under the Business Record Act, that we must show - I'm getting to the rule real quick, Your Honor. According to the *Rule 803(6)*, records of regularly conducted activity. A memorandum, report, or record compiled at or near the time of the incident, and if it is shown that that is compiled at the time of the incident, and the custodian of records can testify to that. Then it is admitted into evidence under the Business Record Act, Your Honor.

ROA p. 1407, line 19 – p. 1408, line 4. The defense responded that trying to enter these prison records "would be the same as the police trying to enter an incident report in a regular general sessions trial." ROA p. 1407, lines 10-12.

During the *in camera* testimony of Major Nettles, the State asked a series of questions related to record-keeping at SCDC.

> Q. And as part of the business of housing inmates, is it the ---- is it the normal course of business to record incidents of infractions or rule violations or assaults by the inmate?
>
> A. Yes, ma'am.
>
> Q. And are those records kept in the normal course of business of the corrections department?
>
> A. Yes, ma'am.
>
> Q. And the records which are kept, are they made at or near the time of the incident involved?
>
> A. Yes, ma'am.
>
> Q. And are they made by persons who have personal knowledge of the events which occurred?

A. Yes, ma'am.

ROA p. 1412, lines 10 – 23. On cross-examination, Nettles acknowledged the subjectivity of the records:

> Q. Now let me ask you this about these incidents reports. Are there ever incidents which occur which are not reported incidents, incident reports; violations of the rules which are not----an incident report is not made from?
>
> A. Sure there is.
>
> Q. So there is a subjective component as to what comes - what an incident report—Let me back up. So there is some subjective component to determining what events caused the creation of an incident report, is that correct?
>
> A. It's the degree of severity.
>
> Q. Okay. So basically somebody when they make an incident report in the first case, they are making some kind of judgment as to the severity of the situation?
>
> A. You are correct. Normally, that's the correctional officer on the scene.

ROA p. 1417, lines 5-21.

After the proffer of Major Nettles' testimony, the judge said that it appeared that the SCDC would be in the nature of a business which keeps regular records of incidents in the ordinary course of business. However, the judge ruled that subjective statements or opinions and judgments and hearsay within hearsay could not come in. He ruled that a record of an incident could come in but that the specific facts and circumstances surrounding the incident could not come in as they would be subjective. Nevertheless, the judge said that it was absolutely hearsay not subject to cross-examination. ROA p.

1413, line 16 – p. 1414, line 25; ROA p. 1419, lines 20-25. The judge decided to go through each incident separately to determine which ones could come in.

Ultimately, the State prepared a list if incidents which they believed met the judge's ruling and gave this list to the judge and defense for review. The defense renewed their objection to the records in their entirety but agreed to review the list. ROA p. 1431, lines 11-17; ROA p. 1427, lines 5-6. After some changes, the defense said, "[s]ubject to our earlier objections, given the court's ruling, this exhibit as proposed now is fine with us." ROA p. 1436, lines 8-11.

Major Nettles testified before the jury as to the incidents in the SCDC report:

1. April 13, 2001, breaks toilet, sink and sprinkler
2. May 26, 2001, throws hot water on another inmate
3. May 27, 2001, had six and half inch shank
4. June 14, 2002, spat on correctional officer
5. February 8, 2002, a fourteen inch solid brass shank
6. March 29, 2002, stabs correctional officer with shank
7. June 12, 2002, stabs Andra Golden in shower
8. June 15, 2002, kicks inmate restrained in chair
9. August 5, 2002, slaps male nurse
10. August 17, 2002, hits officer in head with food tray
11. August 23, 2002, hits officer in face with his fist
12. October 22, 2002, hits officer Eaton in face with his fist
13. October 23, 2002, sets fire to cell
14. December 22, 2002, shank made from fencing
15. December 30, 2002, a ten inch made from a push rod of sink
16. July 17, 2005, spits in face of officer Jones
17. August 26, 2005, slaps officer Henley in face
18. August 31, 2005, sets fire to cell
19. September 11, 2005, threatens officer Jones
20. January 1, 2006, a 12 inch homemade knife
21. January 3, 2006, breaks cell door with broom
22. January 13, 2006, Throws feces on officer Williams hitting him in face
23. February 3, 2006, spits in face of inmate
24. February 4, 2006, orally threatens officer Jones

25. February 28, 2006, a 12 inch weapon hidden in mattress
26. April4, 2006, a eight and half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage
27. May 1, 2006, sets fire to mattress
28. May 20, 2006, throws coffee on Officer Smith.

ROA p. 1441, line 22 – p. 1443, line 13.

The Judge's ruling was reversible error. The records were hearsay and did not fall under an exception to the rule against hearsay and also violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. The admission of these prison records additionally violated due process under the Fourteenth Amendment to the United States Constitution.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *Rule 801(C), SCRE.* The business records exception states that even though the declarant is available to testify as a witness:

> A memorandum, report, record or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(6), SCRE.

The Supreme Court ruled in *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996), that disciplinary records from capital defendant's incarceration were admissible at sentencing under business records exception because they were relevant to defendant's future adaptability in prison. The prison records in *Whipple* included "various minor infractions" and a drawing by another inmate depicting a bottle of "Cold Filter Whipple" captioned, "If you want to be a woman killer, drink some cold filtered Whipple and get yourself fried." The Court held that the issue was not preserved for review but went on to say that, in any event, the records were admissible under the business records exception.

The Uniform Business Records as Evidence Act, *S.C. Code Section 19-5-510*, was enacted before the South Carolina Rules of Evidence became effective. *Rule 1103, SCRE. Section 19-5-510* states:

> The term business shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.
>
> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The Rules of Evidence, which became effective after Business Records Act, include a requirement that the records must be trustworthy with no subjectiveness. The prison disciplinary records in Owens' case were admitted as business records under *Rule 803(6), SCRE.*

The United States Supreme Court focused on the matter of trustworthiness in *Crawford v. Washington,* 541 U.S. 36 (2004), where it ruled that out-of-court statements that are testimonial are barred under the Confrontation Clause unless witnesses are unavailable and defendants had a prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable abrogating *Ohio v. Roberts,* 448 U.S. 56 (1980).

The Court reached this conclusion after an in depth review of the history of the hearsay rule and the Confrontation Clause. During the historical review, the Court cited the South Carolina case of *State v. Campbell*, 1 S.C. 124, 125 (1844), which stated : "One of the 'indispensable conditions' of the South Carolina Constitution is that prosecutions be carried on ....by witnesses confronted by [the accused], and subjected to his personal examination."

The Court in *Crawford* declined to offer a comprehensive definition of testimonial and nontestimonial evidence, but did define these terms to some extent. It explained that an accuser who makes a formal statement to government officers is testimonial in a sense that a person who makes a casual remark to an acquaintance does not. The involvement of government officers in the production of testimonial evidence presents the risks for prosecutorial abuse. The Court also ruled that "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" would be considered testimonial. Materials such as affidavits, where the defendant was unable to cross-examine and would reasonably be expected to be used prosecutorially, were included in the various formulations of testimonial statements.

The *Crawford* Court went on to say that the ultimate goal of the Confrontation Clause is to ensure reliability of evidence, but that it is a procedural rather than substantive guarantee, in that it commands not that evidence be reliable but that reliability be assessed in a particular manner, i.e., by testing in crucible of cross-examination.

Freddie Owens was being accused by the people paid to guard him and watch over him for almost ten years of numerous and serious disciplinary infractions and violations of the rules without having, nor without ever having had in the past, the opportunity to question and cross-examine these witnesses. This was a direct violation of the Confrontation Clause of the Sixth Amendment, as it involved the unreliable testimonial evidence that *Crawford* meant to exclude. These were not business records but were accusatory testimonial statements and affidavits made by witnesses and victims who were not in court simply disguised as business records.

First, the records were hearsay because they were out-of-court statements made by officers who were not in court to testify. They did not meet the business records exception under *Rule 803(6)* because the statements contained subjective opinions and judgments. *Rule 803(6)* states clearly that subjective opinions and judgments contained in the records should not come in. Major Nettles testified that the correctional officers decided which incidents went into the incident report based on the severity of the event. This clearly made even the inclusion of an event a subjective judgment whether the details were described or not.

In the case of *In re Harvey*, 355 S.C. 53, 584 S.E.2d 893 (2003), the Supreme Court ruled that the log book of the treatment center where the defendant had resided, which contained summaries of "critical incidents" in which the defendant had been

involved, were not admissible under the business records exception because of the subjective opinions and judgments included in the log. The staff reported any behaviors that the staff decided were significant in the log book. The Court ruled that improper admission of the log book was not harmless.

Owens' case is similar to *In re Harvey* in that just the entry of an event into the disciplinary record was a subjective judgment and opinion. The officers had a personal stake in the disciplinary records because they were the victims of the incidents. Owens actually threw feces into the face of an officer, an act which would invoke the personal emotions and anger of anyone as is the nature of human beings. The officers had every incentive to distort the records against Owens whether it was intentional or not. Of the twenty-eight incidents included in Major Nettles' testimony to the court, thirteen of them involved direct assaults of various nature against correctional officers; five involved the finding of a shank in Owens' cell, and three involved setting fires in his cell and only four involved assaults against other inmates. ROA p. 1441, line 16 – p. 1443, line 14.

The statements were made under circumstances which would lead an objective witness to believe that the statement would be available for use at a trial later. These officers were guards on death row. They knew that a person's prison disciplinary records could be admitted at the sentencing phase. Owens had already been resentenced to death two previous times. The States' case had relied heavily on Owens' conduct in prison during his last resentencing trial. The officers made these entries into the disciplinary records with the full understanding - indeed, the expectation - that this information would be used in a future sentencing trial.

Carter v. Florida, 951 So.2d 939, 32 Fla.L. Weekly D651 (2007), held that the officer's police report which contained victim's sworn statement concerning incident, did not fit within business or public records exception to hearsay rule and that the error in admitting the officer's police report was not harmless.

Commonwealth v. Trapp, 396 Mass. 202, 485 N.E.2d 162 (1985), held that the officer's disciplinary reports describing incidents involving defendant when he was detained at house of corrections awaiting trial were hearsay and were not admissible as business records. The court said that the common law exceptions to the rule excluding hearsay depended on two elements: a necessity for evidence that would otherwise be excluded and a guarantee of trustworthiness in the circumstances surrounding the making of the hearsay declarations. The opinion points out that when the State has custody and control of the accused, a dispute or controversy has already begun. During the defendant's trial for murder the trial judge admitted disciplinary records from his period of incarceration awaiting trial. The court said the dispute had already begun and that these records were so prejudicial as to require reversal of the judgments.

Brown v. State, 274 Ga. 31, 549 S.E.2d 107 (2001), held that the narrative portion of police report was not admissible under the business records hearsay exception. "Police work is often heavily influenced by the beliefs, impressions, and at times, hunches of the investigating officer. It is because of these difficulties that police report narratives do not fit easily within the business records exception to the hearsay rule". 549 S.E.2d at 109.

In *California v. Green*, 399 U.S. 149, 158 (1970), the Supreme Court held that untrustworthy evidence should not be presented to the triers of fact and that out-of court

statements are usually excluded because they lack trustworthiness. Included in the Court's reasons for untrustworthiness were two issues: (1) the witness not being available for the jury to asses his demeanor and credibility and (2) the witness not being subject to cross-examination.

The admission of these incidents also violated due process under the Fourteenth Amendment to the United States Constitution. The sentencing process must satisfy requirements of the due process clause. *Gardner v. Florida*, 430 U.S. 349 (1977). A capital defendant is denied due process when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain. 430 U.S. at 362, *State v. Riddle*, 291 S.C. 232, 353 S.E.2d 138 (1987).

For these reasons, the trial judge erred in admitting Owens' prison disciplinary records under the business records exception to the rule against hearsay. This Court should reverse his death sentence and remand for resentencing.

3.

The trial judge committed reversible error by allowing the Solicitor to argue in closing that the conditions of life imprisonment in general justified a death sentence for Owens, as this argument injected an arbitrary factor into the jury sentencing considerations in violation of *S.C. Code Section 16-3-25(C)(1).*

One year before Owens' resentencing the Supreme Court decided *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005). The opinion gave fair warning to all:

> We take this opportunity ... to caution the State and the defense that the evidence presented in the penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

623 S.E.2d at 385.

Neither the State nor the defense introduced evidence regarding general prison conditions at Owens' resentencing. But the Solicitor was not deterred. He simply made the following argument without evidentiary support:

> Sure, you and I may think going to prison would be a serious thing and it would be, but what about Freddie Owens? Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, but he will still have food to eat. They will provide him clothes. He will have books to read. He will be able to recreate and exercise. He will have doctors to take care of him. He will have the clothing that they provide, and he will have contact with his

> family and loved ones and TV at times, and he will have family business. Not much more than a change of address for Freddie Owens. So don't think putting Freddie Owens in prison for the rest of his life is going to be a significant punishment for him. The death penalty is the appropriate punishment.

ROA p. 1615, lines 3-16.

Two months later the Court decided *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007). During the sentencing phase of that case the State presented testimony "regarding the privileges available to an inmate who receives a sentence of life without parole," which included "access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors." 640 S.E.2d at 452-3. The Court reversed Burkhart's death sentence, holding that "this entire subject matter injected an arbitrary factor into the jury sentencing considerations" in violation of *S.C. Code Section 16-3-25(C)(1),* which requires the Court to reverse any death sentence "imposed under the influence of passion, prejudice, or any other arbitrary factor." *Id.*

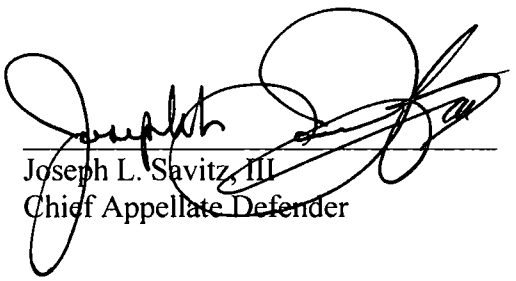
Burkhart leaves open the question of whether this error can ever be harmless. Regardless of how that issue is ultimately resolved by the Court, the error could not possibly have been harmless in Owens' case. The Solicitor specifically contrasted Owens' evidence in mitigation with his own evidence-free depiction of life imprisonment as nothing less than an extended free vacation. In *State v. McClure*, 342 S.C. 403, 537 S.E.2d 273, 275 (2000), which also involved an improper sentencing phase argument, the Court noted that "the evaluation of the consequences of an error in the sentencing phase of a capital trial are more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all."

The Court should reverse Freddie Owens' death Sentence and remand for resentencing.

CONCLUSION

The trial judge committed three reversible errors during Freddie Owens' capital resentencing. This Court should reverse his death sentence and remand for resentencing.

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender

LaNelle C. DuRant
Appellate Defender

ATTORNEYS FOR APPELLANT

This 25th day of March, 2008.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

March 25, 2008

Joseph L. Savitz, III
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, SC 29211-1589
803) 734-1343
Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FREDDIE EUGENE OWENS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Anthony Mabry, Esquire, this 25th day of March, 2008.

Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of March, 2008.

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

My Commission Expires: March 19, 2017 .